

Delegated Rulemaking in EU Energy Law: Commission's Expansive Use of Delegated Acts in Regulation of RFNBOs

Re-Examining the Foundations of EU Law

Master's thesis

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This thesis examines the use of delegated acts by the European Commission within the European Union's legislative framework, focusing on the regulation of renewable fuels of non-biological origin (RFNBOs).

The thesis aims to determine the legal requirements set for the adoption of delegated acts by the Commission. It then examines whether the Commission has adhered to these legal requirements in the adoption of Article 11, a grandfather clause, of the Delegated Act on the methodology for renewable fuels of non-biological origin (EU/2023/1184). It also explores the broader implications of the extensive use of delegation for democratic accountability within the EU.

The research employs a doctrinal methodology, analysing relevant Treaty provisions, legislation such as the Renewable Energy Directive (EU) 2018/2001, and jurisprudence from the Court of Justice of the European Union. A critical legal perspective is adopted to assess potential democratic implications arising from the Commission's use of delegated acts.

The findings indicate that while the Commission generally operates within its legal boundaries, specific instances-such as the inclusion of the grandfather clause - suggest potential overreach of delegated powers. The thesis highlights that current mechanisms for legislative oversight may be insufficient and that there exists an imbalance between the European Parliament and the Council, which raises concerns about democratic accountability.

The thesis concludes that the broad use of delegation, particularly in rapidly evolving fields like energy and climate law, necessitates enhanced oversight and stricter adherence to legal requirements.

Key words: delegated acts, RFNBOs, European Commission, democratic accountability, European Union law.

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Tämä tutkielma tutkii Euroopan komission delegoitujen asetusten käyttöä Euroopan unionin lainsäädäntökehyksessä keskittyen muuta kuin biologista alkuperää olevien uusiutuvien polttoaineiden (RFNBO) sääntelyyn.

Tutkielman tavoitteena on selvittää komission delegoitujen asetusten antamiselle asetettuja oikeudellisia vaatimuksia ja tutkia onko komissio noudattanut näitä vaatimuksia säätäessään komission delegoidun asetuksen EU/2023/1184. Tutkielmassa tutkitaan myös laajempia vaikutuksia, joita laajalla delegoitujen asetusten käytöllä on demokraattiseen vastuuseen Euroopan unionissa.

Tutkimuksessa käytetään oikeusdogmaattista tutkimusmetodia, jossa analysoidaan Euroopan unionin perussopimuksia ja asiaankuuluvaa lainsäädäntöä, kuten direktiiviä (EU) 2018/2001 uusiutuvista lähteistä peräisin olevan energian käytön edistämisestä, sekä Euroopan unionin tuomioistuimen oikeuskäytäntöä. Komission delegoitujen asetusten käytöstä johtuvia demokraattisia vaikutuksia tarkastellaan kriittisestä näkökulmasta.

Havainnot osoittavat, että vaikka komissio yleensä toimii oikeudellisten rajojensa puitteissa, tietyt tapaukset, kuten RFNBO-sääntely osoittaa, viittaavat toimivallan mahdolliseen ylittämiseen. Tutkielmassa korostetaan, että nykyiset lainsäädännölliset valvontamekanismit saattavat olla riittämättömiä ja että Euroopan parlamentin ja neuvoston välillä on epäsuhtaa valtuutuksen valvomisessa, mikä herättää huolta demokraattisesta vastuusta Euroopan unionissa.

Tutkielman johtopäätöksenä on, että laaja valtuuttamisen käyttö, erityisesti nopeasti kehittyvillä aloilla kuten energia- ja ilmasto-oikeudessa, edellyttää tehokkaampia valvontamekanismeja ja tiukempaa oikeudellisten vaatimusten noudattamista.

Avainsanat: delegoidut asetukset, RFNBO, Euroopan komissio, demokraattinen vastuu, Euroopan unionin oikeus.

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List of Abbreviations

Comitology Regulation	Regulation (EU) 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. Adopted 28.02.2011
Constitutional Treaty	Treaty establishing a Constitution for Europe (EU) OJ 310. Adopted 16.12.2004.
Court	Court of Justice of the European Union
EEC Treaty	Treaty establishing the European Economic Community. Adopted 25.03.1957
EU	European Union
First Comitology Decision	Council Decision (EEC) 87/373 laying down the procedures for the exercise of implementing powers conferred on the Commission. Adopted 18.07.1987
GHG Delegated Act	Commission Delegated Regulation (EU) 2023/1185 establishing a minimum threshold for greenhouse gas emissions savings of recycled carbon fuels and by specifying a methodology for assessing greenhouse gas emissions savings from renewable liquid and gaseous transport fuels of non-biological origin and from recycled carbon fuels. Adopted 20.06.2023
OLP	Ordinary legislative procedure
PPA	Power purchase agreement
RED I	Directive (EC) 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Adopted 23.04.2009
RED II	Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources. Adopted 21.12.2018
RED III	Directive (EU) 2023/2413 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy

	from renewable sources, and repealing Council Directive (EU) 2015/652. Adopted 18.10.2023
RFNBO	Renewable fuels of non-biological origin
RFNBO Delegated Act	Commission Delegated Regulation (EU) 2023/1184 establishing a Union methodology setting out detailed rules for the production of renewable liquid and gaseous transport fuels of non-biological origin. Adopted 20.06.2023
SEA	The Single European Act OJ L 169. Adopted 29.06.1987
Second Comitology Decision	Council Decision (EC) 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission
TEU	Treaty on European Union OJ C 326. Adopted 26.10.2012
TFEU	Treaty on the Functioning of the European Union OJ C 326. Adopted 26.10.2012

1 Introduction

1.1 Context

Anyone with even a basic understanding of European Union (EU) law may be aware of the vast number of acts issued by Union institutions across increasingly broad fields. This is neither unexpected nor unwarranted, given the extensive policy areas in which the Union is authorized to legislate based on the Treaties, and the necessity for the Union to keep pace with rapidly changing societies. As the Union has expanded its legislative reach over the past decade, it is crucial to ensure that adopted legislation and subsequent acts, along with their adoption processes, comply with the law and hold Union institutions accountable when they do not. Delegated acts, in particular, play a significant role in this legislative framework, impacting democratic accountability within the EU.

Two fields have seen a considerable amount of legislation from the Union in recent years, namely energy and climate. This move towards intense regulation began in December 2019 when the Commission presented the European Green Deal, which provided a roadmap with actions to boost the efficient use of resources in the EU to, among other things, combat climate change and set the ambition for Europe to become the world's first climate-neutral continent by 2050.¹ Since then, the energy sector has seen an acceleration of legislation from the Union, driven by the Commission's REPowerEU Plan launched in May 2022 to phase out Russian fossil fuel imports due to Russia's invasion of Ukraine.²

In the areas of energy and climate law, particularly regarding the regulation of renewable fuels of non-biological origin (RFNBOs), the Commission has been granted extensive powers to adopt non-legislative acts in the form of delegated acts based on Article 290 of the Treaty on the Functioning of the European Union (TFEU).³ The exercise of delegation is not entirely free from political controversy, especially concerning democratic accountability.⁴ By examining the number of delegated acts adopted in recent years by the Commission, which increased from an average of 45 new and 41 amending acts in the 2010s to an average of 65

¹ Commission Communication COM/2019/640, p.2.

² Commission Communication COM/2022/108.

³ Treaty on the Functioning of the European Union OJ C 326. Adopted 26.10.2012.

⁴ Hancher 2022, p. 176.

new and 116 amending acts in the 2020s, one can clearly observe a broadening in the use of delegated acts.⁵

In this thesis, the focus is on the assessment of the use of the institution of delegation in the EU. Although the broadened use of delegation itself raises issues regarding democratic accountability in the EU, since its use may bypass essential legislative scrutiny from the European Parliament, this thesis questions whether the Commission has adhered to the requirements for the adoption of delegated acts. It also questions whether the legislators have fulfilled their role of oversight over the adoption of delegated acts, for which RFNBO legislation is used as a case in point. This is an important point since delegation could be used as a ‘tactic to deflect and ‘de-politicise’ controversy by framing their adoption as a process dealing with technical or ‘non-essential’ elements’.⁶

1.2 Research questions

This thesis aims to answer three research questions.

The first question that this thesis aims to answer is what the requirements for the use of delegated acts by the Commission are. The second question is whether the Commission has adhered to the legal requirements for adopting delegated acts and whether the European Parliament and the Council have provided sufficient legislative oversight in the regulation of renewable fuels of non-biological origin (RFNBOs). The last question that this thesis aims to answer is what the broader implications of the expansive use of delegation mean for democratic accountability in the EU.

1.3 Thesis structure & research methods

In the first part of the thesis (chapter 2), the legislative powers of the Commission granted by the Treaties are assessed, with a focus on delegated acts and the requirements for their adoption. Reference is made to the relevant Treaty articles, as well as jurisprudence by the Court of Justice of the European Union (Court) in interpreting the relevant Treaty articles. The second part of the thesis (chapter 3) assesses the use of delegated acts in regulating RFNBOs. The focus is on providing an overview of RFNBO legislation and critically

⁵ Legal acts – statistics.

⁶ Hancher 2022, p. 176.

assessing one particular provision, namely Article 11 of the Commission Delegated Regulation (EU) 2023/1184 (RFNBO Delegated Act),⁷ in contrast to the requirements laid out in the first part of this thesis. Reference is made to the Renewable Energy Directive (EU) 2018/2001 (RED II)⁸ and the delegated acts adopted subsequently, namely the RFNBO Delegated Act and the Commission Delegated Regulation (EU) 2023/1185 (GHG Delegated Act).⁹ The third and last part of the thesis (chapter 4) examines the implications that the expansive use of delegated acts may have for democratic accountability in the EU. The focus is on the imbalance between the European Parliament and the Council as well as the potential lack of clear oversight by the legislators, which may have the effect of diminishing democratic accountability in the EU. Each chapter builds upon the previous one, providing a comprehensive analysis of the legislative framework, specific case studies, and broader implications.

The research in this thesis primarily utilizes the doctrinal research method. Here, doctrinal research is not merely normative or theoretical, rather, it is employed to draw specific inferences from the text itself and its application, alongside normative research.¹⁰ The aim is to demonstrate to the reader that the application of the law, particularly the use of delegated acts, is potentially contentious. Through this observation, the thesis seeks to explore the implications of their use. RFNBO legislation will serve as a case study to illustrate and exemplify the general analysis, i.e., how the law is applied in practice. In addition to doctrinal research, the reader will find elements of critical legal theory, especially in the final part of the thesis, where the current use of delegated acts is critiqued from the perspective of democratic accountability.

⁷ Commission Delegated Regulation (EU) 2023/1184 establishing a Union methodology setting out detailed rules for the production of renewable liquid and gaseous transport fuels of non-biological origin. Adopted 20.06.2023.

⁸ Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources. Adopted 21.12.2018.

⁹ Commission Delegated Regulation (EU) 2023/1185 establishing a minimum threshold for greenhouse gas emissions savings of recycled carbon fuels and by specifying a methodology for assessing greenhouse gas emissions savings from renewable liquid and gaseous transport fuels of non-biological origin and from recycled carbon fuels. Adopted 20.06.2023.

¹⁰ McConville – Hong Chui 2017, p. 21.

2 Commission as a rule-maker: delegated acts

Although primarily regarded as an executive body in the Union, the Commission has for a long time been vested with legislative tasks as well.¹¹ This is by no means peculiar only to the Union, as constitutional states worldwide are familiar with rulemaking by executive bodies, which, in the national context, entails rulemaking by the government. The national authorities are commonly vested with their own standard instruments, which carry different names and are framed differently from the acts of the Parliament, i.e., the legislature.¹²

In the Union, the primary method for the enactment of legislative acts is the ordinary legislative procedure (OLP), with the special legislative procedure used in limited instances, as provided in Article 289 TFEU. Therefore, the primary legislative rule-makers in the EU are the European Parliament and the Council. However, a similar system to that developed in constitutional states regarding rulemaking by the executive has been developed in the Union through the notion of implementing acts, which after the adoption of the Lisbon Treaty have been divided into implementing and delegated acts. Accordingly, certain acts find their legal basis in acts that accord certain institutions the power to adopt certain measures, instead of having their legal basis directly in the Treaties.¹³ Today, among these measures, are the delegated and implementing acts, which the Commission may be empowered to enact on behalf of the legislature.

Indeed, in the Union, the legislature, i.e., the European Parliament and the Council, has been found to be the author of only a small percentage of the acts adopted each year regulating areas in which the Union has competence. Most acts have been found to have been adopted by the Commission, through delegated and implementing acts, which are secondary acts complementing or operationalising the primary legislative acts.¹⁴ There are many compelling reasons to transfer legislative powers from the legislature to the Commission, such as their ability to often deliver more effective and technically sound responses to many of the challenges that the Union faces.¹⁵

¹¹ For more information on the composition, tasks and decision-making process of the Commission see Craig – de Búrca 2020, pp. 64-66.

¹² Bast 2016, p. 159.

¹³ Ibid.

¹⁴ Volpato 2022, p. 1.

¹⁵ Volpato 2022, p. 233.

In this chapter we will assess the role of the Commission as a rule-maker, through the use of non-legislative acts, i.e., delegated and implementing acts, with a focus on the former. First, the rationale behind the delegation of rulemaking powers in general is presented. Second, an introduction to the role of the Commission as a rule-maker is provided. Then the history and current state of delegated and implementing acts is explored. Lastly, closer scrutiny is provided on delegated acts, with the aim to familiarise the reader with the requirements for the adoption of delegated acts and the ways in which the Court has assessed them. These assessments are then used as a basis for the evaluation of the legality of a provision of a delegated act in the next chapter.

2.1 Rationale behind the delegation of rulemaking powers

The leading theory concerning delegation in general is the principal-agent theory, which is derived from rational choice theory. From the perspective of the principal-agent theory delegation has a functional logic behind it – it explains delegation decisions from the point of view of functions that are performed by agents. One of the most common way that delegation is used is by political principals delegating power to agents in order to lower the transaction costs that occur in policy-making. This emphasis on the functional logic of delegation is deeply rooted in economics as it emphasizes the possibility that delegation gives for agents to maximize their gains and minimize their losses through the use of delegation. In addition to the cost efficiency of delegation the principal-agent theory also emphasizes the importance of the various control mechanisms that principals have to have in order to tailor the discretion of their agents, which in the political sphere refer to ex ante administrative and ex post oversight procedures.¹⁶

The rationale behind delegation of rule-making powers finds its basis also in Rousseau's social contract – people delegate their power to politicians who then will contribute to the goals of the people by making rules, this authority is then subsequently passed on by the legislature to the government. Public authority is thereby derived directly from a successive chain of delegation as there exists a principal who grants defined powers to its agent in order to realize the former's objectives. Viewing the institution of delegation from this point of view emphasizes the democratic aspects of the institution, which are not by any means

¹⁶ Hawkins et al. 2009, pp. 166 and 169.

without issues – indeed the delegation of rulemaking powers from the legislature to the executive is one of the most debated issues in comparative constitutional law.¹⁷ The questions on the democratic aspects of the use of delegated acts – one form on delegation of rule-making powers is assessed in chapter 4 of this thesis.

2.2 Delegated and implementing acts

2.2.1 Pre Lisbon

The creation of comitology

The transfer of rulemaking power to the Commission to enact secondary norms has existed since the establishment of the European Economic Community (EEC). The rationale behind the transfer of powers stemmed from the need to enact legislation quickly in policy areas that require vast amounts of regulations to cope with rapidly changing circumstances.¹⁸ This became evident in the establishment of the common agricultural policy. The Council did not have the administrative structure or technical knowledge to monitor the agricultural markets effectively. Nor did the procedures laid out in the Treaty for the adoption of acts by the Council in that area allow for the necessary flexibility and speed required to manage the organisations that were to be established for agricultural products. This led the Council to allow the Commission to manage these organisations in close cooperation with newly established ‘management committees’, which eventually became the first version of what is now considered as comitology.¹⁹ Through the establishment of these management committees, the Council wanted to keep a tight grip on the Commission whenever it was exercising these transferred powers and thereby made the exercise of the transfer subject to institutional constraints.²⁰ Later on, the practice of comitology spread to policy areas beyond that of the common agricultural policy.²¹

The use of the comitology procedure emanated therefore not from EEC Treaty²² itself but instead was created by the Council in practice. Since the process did not have its basis in the

¹⁷ Jenart 2022, pp. 7-8, 10 and 25.

¹⁸ Craig – de Búrca 2020, p. 168.

¹⁹ Volpato 2022, p. 36.

²⁰ Craig – de Búrca 2020, p. 168.

²¹ Volpato 2022, p. 38.

²² Treaty establishing the European Economic Community. Adopted 25.03.1957.

primary law, it was just a matter of time for a case to come before Court in order to assess the legality of the procedure. This happened eventually in 1970 in *Köster*.²³ The Court's reasoning for the establishment of the doctrine of implementing powers, i.e., the transfer of rulemaking powers, is provided here in full due to its significance. According to the Court:

*'Both the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155, and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognised in all the Member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. It cannot therefore be a requirement that all the details of the regulation [...] be drawn up by the Council according to the procedure laid down in [the] Article [...]. It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision. On the other hand, the provisions implementing the basic regulations may be adopted according to a procedure different from that in [the] Article [...], either by the Council itself or by the Commission by virtue of an authorisation complying with Article 155'.*²⁴

A few remarks on the reasoning of the Court ought to be made. First of all, the basis for the creation of the doctrine of implementing powers was found by the Court to lie first, in Article 155 EEC Treaty (renumbered 211), according to which the Commission exercises powers conferred on it by the Council for the implementation of the rules laid down by the Council, secondly, in the consistent practice of the institutions, indeed, the use of comitology had already been in place for a decade, and lastly, in the fact that the legal concept was already recognised in all of the Member States. The Court made in its reasoning a distinction between on the one hand, measures that were directly based on the Treaty itself, which had to lay down the basic elements of the matter, and on the other hand, measures that were intended to implement the measures directly based on the Treaty, which could be conferred to the Commission. Additionally, the Court held that the Council had the power to determine the requirements that it wanted the Commission to be subjected to in using its implementing powers.²⁵

²³ Judgment 17.12.1970, *Köster*, C-25/70, EU:C:1970:115.

²⁴ *Köster*, para 6.

²⁵ *Köster*, para 9.

The notion of ‘basic elements’ introduced in *Köster*, a notion that has had many different names in the Court’s caselaw, such as ‘essential elements’, which is the term used in this thesis going forward, as it is used in post Lisbon case law, lies still at the very core of the doctrine of transfer of rulemaking powers. This notion will be fully explored in sub-chapter 2.3, but for now, it suffices to say that the Court held that the essential elements of the legislation have to be laid down by the legislator itself, whereas those elements that are not considered as essential may be conferred to the Commission.²⁶ The doctrine of essential elements established by the Court in *Köster* has been upheld by the Court all the way until the adoption of the Lisbon Treaty, where the doctrine was codified in Article 290 TFEU which provides for the adoption of those secondary measures that are of legislative character.²⁷

The transfer of rulemaking powers found therefore its basis in the Court’s case law, since the EEC Treaty did not contain any provision conferring rulemaking powers to the Commission.²⁸ It was not until the adoption of the Single European Act (SEA)²⁹ in 1986 that conferral of rulemaking powers to the Commission was codified in primary law. According to the amended Article 145 EEC Treaty the Council had the power to confer on the Commission, in the acts which the Council adopted, powers for the implementation of the rules which the Council laid down.

Process of comitology

The use of the comitology procedure meant that whenever such procedure was to be used the same regulation that conferred to the Commission the powers to adopt acts in the area, committees composed of Member State representatives were established. In management committees, the first form of comitology, the Commission was required to consult the committees before adopting any decisions in the area concerned. In case the committee gave a positive opinion on the decision or when it failed to issue an opinion voting by a qualified majority, the decision would be adopted. In case the committee gave a negative opinion on the decision, the proposed decision would be notified to the Council, which by acting within a month from the time of the notification, could adopt a differing decision.³⁰ In this way the

²⁶ Köster, para 6.

²⁷ Bergström 2016, p. 6.

²⁸ Volpato 2022, p. 35.

²⁹ The Single European Act OJ L 169. Adopted 29.06.1987.

³⁰ Volpato 2022, pp. 36-37.

Member States were able to scrutinise the way in which the Commission sought to use its rulemaking powers.³¹

The adoption of the SEA brought with it a change to the comitology procedure, since Article 145 EC Treaty required the Council to lay down in advance a framework decision containing the principles and rules for the use of comitology. Until the adoption of the SEA the particular procedure that was to be followed was to be found in the legislation that conferred rulemaking powers to the Commission, meaning that the committee procedures presented therein often differed in content since they arose from political compromises, which contributed to the complexity of the system.³² This led to the adoption of Council Decision 83/373/EEC, the First Comitology Decision, which codified the process of comitology for the first time.³³

As laid out above, the use of management committees meant that in cases where the committee failed to issue an opinion by qualified majority, the decision in question would be adopted. However, there were some policy areas in which the Member States considered it unacceptable for Commission proposals to enter into force without the consent of the committee. Therefore, the Council created an alternative committee procedure, the regulatory committees, in which the Commission was prevented from adopting a decision without a positive opinion from the committee. This process was used particularly in the area of common commercial policy.³⁴

Overall, the use of the comitology procedure has been considered as having been effective since it has made it possible for Member State representatives to be involved in the adoption of thousands of secondary acts adopted by the Commission annually, which were necessary for Union law to function properly.³⁵

Issues with comitology

Although regarded overall as efficient, not all institutions were satisfied with the use of the comitology procedure.

³¹ Christiansen – Dobbels 2013, p. 42.

³² Volpato 2022, p. 43.

³³ Council Decision (EEC) 87/373 laying down the procedures for the exercise of implementing powers conferred on the Commission. Adopted 18.07.1987.

³⁴ Volpato 2022, p. 38.

³⁵ Christiansen – Dobbels 2013, p. 42.

One such institution was the European Parliament. Especially since the creation of the co-decision procedure in the Treaty on the European Union (TEU),³⁶ whereby the European Parliament was put on an equal footing with the Council in the legislative process, the European Parliament was not satisfied with the way comitology was used, since it was not included in the process. Several intermediate reforms to provide the European Parliament with limited rights over the comitology procedure were provided in the 1990s and 2000s, which will be assessed next.³⁷

Firstly, the Council Decision 99/468/EC,³⁸ also known as the Second Comitology Decision, provided the European Parliament a right of scrutiny over measures which were *ultra vires* i.e., the Commission having acted outside of its powers, a right to supervise compliance with the principle of legality, as well as the possibility to defend its interests against possible infringements by the Commission.³⁹ It is safe to say that such powers did not accord the European Parliament powers anywhere near being equal with the Council in this procedure.

Secondly, the Council Decision (EC) 2006/512,⁴⁰ also known as the Second Comitology Decision, introduced a new procedure, namely the regulatory committee procedure with scrutiny, which gave the European Parliament, voting by absolute majority, the right to oppose the adoption of implementing measures where it considered that the draft measures proposed by the Commission exceeded the powers provided for in the basic instrument, or in cases where it considered that the draft was not compatible with the aim or content of the basic instruments, or that it did not respect the principles of subsidiarity and proportionality. Although at first hand the changes made through these amendments seem to grant the Parliament substantial oversight over the comitology procedure, it is important to note that this novel regulatory committee procedure could only be used in regards to implementing acts adopted under co-decision, which constituted only a fraction of the measures adopted under comitology.⁴¹

³⁶ Treaty on European Union OJ C 326. Adopted 26.10.2012.

³⁷ Christiansen – Dobbels 2013, p. 42.

³⁸ Council Decision (EC) 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission.

³⁹ Volpato 2022, p. 47.

⁴⁰ Council Decision (EC) 2006/512 laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁴¹ Volpato 2022, pp. 51–52.

It was not until the adoption of the Lisbon Treaty⁴² that the Parliament found itself in a truly equal position with the Council in regards to the process of the Commission adopting delegated acts, which is the process by which the Commission is transferred the powers to adopt acts of legislative character.

In addition to the European Parliament, the Commission was itself also not satisfied with the comitology procedure. The Commission viewed the procedure as placing unwarranted constraints on its executive autonomy. The drafters of the Lisbon Treaty did take into consideration the issues of the Commission in this regard since in the Lisbon Treaty the Commission was granted broader autonomy in the adoption of delegated acts, which was advocated by the Commission.⁴³

2.2.2 Post Lisbon

The Lisbon Treaty brought major changes, at least theoretically, to the sphere of conferral of rulemaking powers in the Union. Some authors have found the changes made therein to constitute a sort of ‘revolutionary re-ordering of the regulatory process’. However, most authors, especially those who have written on the topic semi-recently, have been of the opinion that in practice no such revolutionization of the regulatory process has taken place, instead, steps have been taken to go back towards the way the comitology was previously used even in regards to the procedure for the adoption of delegated acts.⁴⁴ However, although in practice much might not have changed after all, the Lisbon Treaty did bring with it at least in theory novel changes in the area of Commission’s rulemaking powers which are examined next.

Distinction between legislative and non-legislative acts

Firstly, the Lisbon Treaty made a distinction between legislative and non-legislative acts. Article 289(3) TFEU provides that legal acts, referring to the acts laid down in Article 288 TFEU, adopted by the legislative procedure, i.e., the ordinary or special legislative procedure, are considered as ‘legislative acts’. On the other hand, all other acts coming from the Union institutions are considered to be ‘non-legislative acts’, a term which appears in Articles 290(1)

⁴² Refers to both TFEU and TEU together.

⁴³ Craig – de Búrca 2020, p. 170.

⁴⁴ Tauschinsky – Weiss 2018, pp. 3 and 12.

and 297(2) TFEU.⁴⁵ Delegated and implementing acts, which are not adopted by the legislative procedure, fall therefore in the category of non-legislative acts, and they may take the form of regulations, directives, and decisions. Their legal basis is not found in primary law, but instead in secondary law, such as a directive or a regulation. It is to be noted that this distinction is not entirely novel in the Union, since a somewhat similar type of distinction was already made by the Court in *Köster* whereby a distinction was made between legislative and implementing acts, where the difference lied in whether measures were based directly on primary law, i.e., legislative acts, or whether the measure intended to ensure the implementation of the legislative measure and had its basis in the legislative measure itself, i.e., implementing acts.⁴⁶

A practical implication on the classification of legal acts as either legislative or non-legislative is that the conditions laid down in the Treaties for national parliaments' subsidiarity control over draft legislative acts, provided for in Article 5(3) TEU is not extended to non-legislative acts.⁴⁷ This means that national parliaments are not included in the process of adoption of delegated acts, albeit they are indirectly involved through their control over national governments, which sit in the Council.

Distinction between delegated and implementing acts

Secondly, the Lisbon Treaty provided for a new categorisation inside of the previously held implementing acts. Accordingly, the Lisbon Treaty differentiates between on the one hand delegated acts regulated under Article 290 TFEU and on the other hand implementing acts regulated under Article 291 TFEU.⁴⁸

Article 290 TFEU provides for the possibility for a legislative act to delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. In essence, the Article 290 TFEU codified *Köster* in primary law, since the essential element doctrine was now to be found directly in the Treaties.⁴⁹ It also provides for ex post control mechanisms exercised by the

⁴⁵ Bast 2016, p. 158.

⁴⁶ Chamon 2016, p. 1510.

⁴⁷ Bergström 2016, p. 2.

⁴⁸ Note to reader: going forwards, the term implementing acts refers only to acts adopted under Article 291 TFEU unless stated otherwise.

⁴⁹ Chamon 2016, p. 1510.

Council and the Parliament, namely the right of revocation and/or objection, which are examined in detail below. The measures adopted under Article 290 TFEU are considered as legislative in character, which explains why both legislators have been involved in the control over their use. These measures are considered as non-legislative only in the sense that they cannot be legislative since they have not been adopted via the ordinary or special legislative procedures, i.e., they do not fulfil the formal criteria for legislative measures.⁵⁰ Although the notion of delegated acts was a novelty brought by the Lisbon Treaty, it is clear that the institutions regard delegated acts as being a successor of a particular group of the implementing acts adopted under the previous regime.⁵¹

Article 291 TFEU provides for a right for Member States to adopt all measures of national law necessary to implement legally binding Union acts. However, in cases where uniform conditions for implementing legally binding Union acts are needed, the power to adopt such implementing measures are in principle conferred upon the Commission, except for in duly justified cases. Neither of the legislators have any substantial authority over Commission's exercise of these implementing powers, since these implementing acts and their oversight are considered as the sphere reserved to Member States. Therefore, since the adoption of the Lisbon Treaty, the Council has lost its possibility to make implementing decisions in cases where the committees did not meet certain thresholds, a procedure which was used under the pre Lisbon comitology regime.⁵² Otherwise Article 291 TFEU is considered more or less as a continuation of the previous comitology procedure. Measures provided for under Article 291 TFEU are considered as executive in character, which explains the powers granted to the Member States and the lack of powers granted to the legislators in their adoption and oversight.⁵³

The procedures for the making of delegated and implementing acts are very different, which is why the choice between which type of act to use in a specific instance needs to be made at an early stage in the process, since delegated acts are subject to ex ante and ex post controls exercised by the legislators whereas implementing acts are subject to an updated version of the comitology procedure.⁵⁴ In *Biocides*, the Court held that the Union legislature has

⁵⁰ Craig – de Búrca 2020, p. 146.

⁵¹ Bast 2016, p. 163.

⁵² Christiansen – Dobbels 2013, pp. 43-44.

⁵³ Craig – de Búrca 2020, p. 146.

⁵⁴ Craig – de Búrca 2020, p. 150.

discretion to decide whether to confer a delegated power on the Commission pursuant to Article 290 TFEU or an implementing power pursuant to Article 291 TFEU and that judicial review regarding this choice is limited to only manifest errors of assessment.⁵⁵ This means that the legislators are left with broad powers over the decision of whether to confer delegated or implementing power to the Commission at a case in hand.

The dividing line between delegated and implementing acts might seem at first glance reasonably clear, since the former refers to acts containing legislative measures whereas the latter refers to acts containing implementing measures and since delegated acts enable for the creation of new rule, while implementing acts are supposed to merely give effect to the rules that already exist.⁵⁶ However, thinking such would be an illusion. Indeed, a vast amount of literature can be found on the topic and still there is no clearcut line differentiating between these two types of acts.⁵⁷ Unfortunately for the lack of space this issue will not be further assessed in this thesis, but luckily the reader may find vast amounts of literature on the topic elsewhere.

The procedures for the making of delegated and implementing acts have been further defined in agreements concluded between the European Parliament, the Council and the Commission. The rules and general principles concerning mechanisms for control regarding implementing acts, which Article 291(3) TFEU required to be laid down in advance can be found in Regulation (EU) 182/2011,⁵⁸ the Comitology Regulation, since as previously mentioned, implementing acts under Article 291 TFEU follow largely the comitology procedure applied under the pre Lisbon regime.⁵⁹ The rules and general principles concerning mechanisms for control regarding delegated acts were first regulated in 2011 in an interinstitutional agreement, which has been revised in 2016 and can now be found as an annex to the Interinstitutional Agreement on Better Law-making.⁶⁰ It is interesting to note that Article 290 TFEU did not require the adoption of a framework decision laying down the rules and principles applied for delegated acts, as was done in Article 291 TFEU, which could be viewed as assuming extensive autonomy for the Commission in this regard, but the

⁵⁵ Judgment 18.03.2014, *Biocides*, C-427/12, EU:C:2014:170, para 40.

⁵⁶ Zdobnõh 2018, pp. 42-43.

⁵⁷ See for more information e.g., Bellenghi – Vos 2024; Mendes 2013; Bradley 2016.

⁵⁸ Regulation (EU) 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. Adopted 28.02.2011.

⁵⁹ Volpato 2022, p. 54.

⁶⁰ Bast 2016, p. 163; Revised Common Understanding.

institutions have anyways laid out such a framework through the above mentioned agreement, thereby having proceduralised the use of the delegated powers under Article 290 TFEU, eroding the initial autonomy granted to the Commission.⁶¹

Hierarchy of legal acts

There are some writers, such as Carl Frederik Bergström, that consider the Lisbon Treaty to have provided for a three-level system of hierarchy for legal acts. In that system, legislative acts rank the highest, delegated acts second, and implementing acts last.⁶² In contrast, other writers, such as Jürgen Bast, consider such a view as false and instead argue for the existence of a merely two-level system, in which delegated and implementing are considered to have the same level of legal hierarchy.⁶³ The travaux préparatoire of the Constitutional Treaty,⁶⁴ which is where the category of delegated acts and the hierarchy of legal norms were established, clearly lays out for the establishment of a three-level system of hierarchy of legal acts in the Union.⁶⁵ Bast has in his reasoning completely ignored the existence of such travaux since he refers only to the ‘presumed’ hierarchy between delegated and implementing acts.⁶⁶ Although the hierarchy of legal norms is not explicitly laid out in the Treaties, the views of the working group ought to be considered and contrary to Bast’s views, it supports a presumption for the existence of a three-level system of hierarchy of legal acts.

2.3 Closer scrutiny of delegated acts

2.3.1 Requirements for delegated acts

Non-legislative act of general application

The non-legislative requirement laid down in Article 290 TFEU refers to the non-legislative character of the act only in the formal sense, in that the act is not a legislative act, as it has not been adopted pursuant to the ordinary or special legislative procedure. The act may, however, often be legislative in nature, as observed in the previous sub-chapter.⁶⁷

⁶¹ Volpato 2022, p. 153.

⁶² Bergström 2016, p. 10.

⁶³ Bast 2016, p. 158.

⁶⁴ Treaty establishing a Constitution for Europe (EU) OJ C 310. Adopted 16.12.2004.

⁶⁵ Final report of working group IX ‘Simplification’, p. 10.

⁶⁶ Bast 2016, p. 170.

⁶⁷ Craig – de Búrca 2020, p. 146.

The requirement of general application in Article 290 TFEU refers to the legal nature of the act and means that delegated acts cannot be of individual application. In comparison, implementing acts under Article 291 TFEU can be either regulatory acts or individual administrative decisions, i.e., they need not be of general application.⁶⁸

Supplementing or amending the basic act

The meaning of supplementing or amending is central to the system of transfer of rulemaking powers to the Commission, since it determines whether Article 290 or 291 TFEU applies.⁶⁹ Accordingly, if the Commission supplements or amends the legislative act, it must do so under Article 290 TFEU, and if no such supplementing or amending takes place, and the act merely gives effect to the rules already set by the legislator, i.e., implements the legislative act, then the Commission must act under Article 291 TFEU. It is, however, up to the legislators to make the decision of whether to grant the Commission powers under Article 290 TFEU or Article 291 TFEU, and as presented in the previous sub-chapter, the Court's judicial review of the correctness of that choice is limited to manifest errors of assessment.⁷⁰

The Court has provided clarification in *Connecting Europe Facility* as to the notions of supplementing and amending referred to in Article 290 TFEU.⁷¹ In the case, the European Parliament sought to annul the Commission Delegated Regulation (EU) 275/2014,⁷² which amended Annex I of Regulation (EU) No 1316/2013 (the enabling act),⁷³ which provided EU financial assistance to trans-European networks in order to support projects of common interest in the transport, telecommunications and energy sectors.⁷⁴ According to the European Parliament, the Commission had exceeded its powers conferred on it in the enabling act since it added a new part to the annex instead of adopting a separate act.⁷⁵ The article in the enabling act, which was under scrutiny in the case, was Article 21(3) which reads as follows:

⁶⁸ Craig 2016, p. 176.

⁶⁹ Craig – de Búrca 2020, p. 147.

⁷⁰ *Biocides*, para 40.

⁷¹ Judgment 17.03.2016, *Connecting Europe Facility*, C-286/14, EU:C:2016:183.

⁷² Commission Delegated Regulation (EU) 275/2014 establishing the Connecting Europe Facility. Adopted 07.01.2014.

⁷³ Regulation (EU) 1316/2013 establishing the Connecting Europe Facility.

⁷⁴ *Connecting Europe Facility*, paras 1-2.

⁷⁵ *Connecting Europe Facility*, para 14.

‘the Commission shall be empowered to adopt delegated acts in accordance with Article 26 detailing the funding priorities’.

According to the European Parliament, the above provision conferred the Commission the power to supplement the regulation by measures detailing funding priorities.⁷⁶ According to the Commission, since the legislature did not use either of the terms ‘supplementing’ or ‘amending’, but instead the term ‘detailing’, the provision did not specify how the Commission had to detail the funding priorities, which is why the provision would not have precluded the addition of a new part to the annex of that regulation, i.e., in the Commission’s it allowed it discretion as to the legislative technique.⁷⁷

In its reasoning, the Court first held that the term ‘detailing’ used in the provision did not refer to an independent category of delegated powers outside the scope of Article 290(1) TFEU, but instead to delegation of powers within the meaning of Article 290(1) TFEU, which is why the conferral is assessed based on it.⁷⁸

Secondly, since the Court then had to assess whether empowerment to ‘detail’ certain elements referred to in the delegating provision was to be interpreted as conferring the Commission a delegated power to ‘amend’ that regulation, or the power to ‘supplement’ it within the meaning of Article 290(1) TFEU, or whether it allowed the Commission to exercise either of those powers as it sees fit.⁷⁹ As the Court had not previously elaborated on the difference between the terms ‘amending’ and ‘supplementing’ within the meaning of Article 290(1) TFEU, it had to do so in its reasoning in this case.

Accordingly, the Court held that ‘supplementing’ or ‘amending’ indicate two categories of delegation, which are clearly distinguished.⁸⁰ As for the term ‘supplementing’, the Court held that it authorised the Commission to ‘flesh out’ the legislative act, i.e., to develop in detail the non-essential elements of the legislation that the legislature had not specified but that in doing so the exercise of its authority was limited, since it had to comply with the entirety of the legislative act in question. As for the term ‘amending’, the Court held that it authorised the Commission to modify or repeal non-essential elements laid down in the legislative act and

⁷⁶ Connecting Europe Facility, para 20.

⁷⁷ Connecting Europe Facility, paras 24 and 27.

⁷⁸ Connecting Europe Facility, paras 33 and 34.

⁷⁹ Connecting Europe Facility, para 39.

⁸⁰ Connecting Europe Facility, para 40.

that in the exercise of its power the Commission is not required to act in compliance with the elements that the authority conferred on it the power to ‘amend’.⁸¹

According to the Court, since there was a clear distinction between the two categories of delegated powers referred to in Article 290(1) TFEU, it prevented the Commission from being granted the power to determine the nature of the delegated power conferred on it. Therefore, and for reasons of ensuring transparency of the legislative process, Article 290 TFEU requires the legislature to determine the power that it intends to confer on the Commission.⁸² The Court therefore had to assess in the case at hand, whether the delegating provision, Article 21(3) of the enabling act, granted the Commission the power to supplement or amend the act. The Court interpreted ‘detailing’ as authorising the Commission to ‘supplement’ the regulation, which is in line with the interpretation that the Court gave to the term ‘supplementing’ as in that it meant ‘fleshing out’ the legislative act.⁸³

As to whether the delegating provision, Article 21(3), required the Commission to adopt a separate act from that regulation, the Court held that, first, it was clear that the Commission could not, by supplementing the legislative act, add elements to the actual text of the act for reasons of regulatory clarity and transparency of the legislative process, and that, second, when the Commission exercises a power to supplement the legislative act, it must adopt a separate act, since otherwise the Commission could not amend the act it had adopted as in order to do so it would have to be conferred the power to amend the legislative act, an issue which would not occur if it wanted to amend the delegated act it adopted pursuant to a power to supplement the legislative act.⁸⁴

According to the Court, the Commission had infringed Article 21(3) of the enabling act, which is why the contested Commission regulation was annulled.⁸⁵

What the above assessed case taught us, is that (1) there exists a clear distinction between the power to supplement or amend the legislative act referred to in Article 290(1) TFEU, (2) such categories are the only existing categories under which delegated powers may be conferred on the Commission, (3) the legislators need to state in the delegating act under which of the two

⁸¹ Connecting Europe Facility, paras 41-42.

⁸² Connecting Europe Facility, para 46.

⁸³ Connecting Europe Facility, paras 47 and 50.

⁸⁴ Connecting Europe Facility, paras 55-57.

⁸⁵ Connecting Europe Facility, para 61.

categories the Commission is conferred the delegated powers, (4) the assessment on whether the Commission is empowered to amend or supplement the legislative act is thoroughly assessed by the Court, and (5) when the Commission exercises the power to supplement, it may only develop in detail certain non-essential elements of the legislative act, and that when it exercises the power to amend, it may modify or repeal certain non-essential elements of the legislative act.

Notion of essential elements

As presented in the previous sub-chapter, the notion of essential elements, which marks the demarcation line between legislative and non-legislative acts, was first introduced by the Court in *Köster*, where the Court held that the legislator has to lay down the essential elements of legislation, whereas the adoption of non-essential elements may be conferred on another institution.⁸⁶

The case is a preliminary ruling which was referred to the Court by the Higher Administrative Court of the Land of Hesse concerning the validity of Commission Regulation (EEC) 102/64.⁸⁷ The case questioned whether Articles 1 and 7 of the contested regulation were valid in so far as they relate to export licenses and deposits lodged for the purpose of obtaining export licenses.⁸⁸ The question was raised in the context of an appeal by Köster, a German company, against a judgment of the Administrative Court of Frankfurt annulling a decision of the Einfuhr und Vorratsstelle für Getreide und Futtermittel (the German authority responsible for imports and storage of cereals and feeding-stuffs) which had declared a deposit forfeited due to Köster's failure to effect, within the prescribed period, an export covered by a license issued under Article 7 of the contested regulation.⁸⁹

Firstly, Köster alleged that the Commission lacked the power to adopt the contested regulation and that it should have been adopted by the Council instead in accordance with Article 43(2) of the EEC Treaty.⁹⁰ According to the Court, the Commission was validly

⁸⁶ Köster, para 6.

⁸⁷ Commission Regulation (EEC) 102/64 on import and export licenses for cereals and processed cereal products, rice, broken rice and processed rice products. Adopted 28.07.1964.

⁸⁸ Köster, para 1.

⁸⁹ Köster, para 2.

⁹⁰ Köster, para 5.

authorized by the Council Regulation 19⁹¹ (enabling act) to adopt the implementing measure in question.⁹²

Secondly, Köster alleged that the Commission lacked the authority to extend the system of deposits both to exports of cereals and to imports or exports of processed cereal products – i.e., to adopt Articles 1 (obligation to export involved by the export license), 7(1) (necessity to lodge a deposit in order to obtain that license) and 7(2) (forfeiture of the deposit should the obligation to export not be fulfilled) of the contested regulation.⁹³

The provision empowering the Commission to adopt the implementing regulation is Article 16 of the enabling act. According to Article 16(1) any importation or exportation of the products referred to in Article 1 of the same regulation is conditioned on the presentation of an import or export license. Article 16(2) adds various details with regard to the duration of the import license for cereals and adds that the issue of a license is to be conditional on the lodging of a deposit. According to Article 16(3) the detailed rules for the application of Article 16 are to be adopted in accordance with the procedures laid down in Article 26, which specifies that the provision applies ‘in particular’ to the fixing of the duration of the validity of the import license for processed cereal products. Due to the wording of Article 16(3), the question of whether the Commission was legitimately able to extend the system of deposits through the contested regulation also to exports and processed products was assessed by the Court.⁹⁴

The Court first considered that the provisions in question must be interpreted in the light of the scheme and objectives of both Article 16 and the enabling act itself. It held that Article 16(1) revealed the intention to establish a system intended to govern indiscriminately imports and exports of all the products subjected to the enabling act and that Article 16(2) constituted merely a special measure of application which was intended to implement a part of the provisions envisaged in paragraph 1. According to the Court, an interpretation which restricted the guarantees of effectiveness provided by the enabling act to only import licenses

⁹¹ Council Regulation 19 on the progressive establishment of a common organization of the market in cereals. Adopted 04.04.1962.

⁹² Köster, para 7.

⁹³ Köster, paras 13-14.

⁹⁴ Köster, para 15.

and to a part of only the products subject to the organization of the market would have the effect of disturbing the harmonious functioning of the system.⁹⁵

Accordingly, the Court held that the Commission was authorized to include in the contested regulation the provisions relating to the obligation to export and to the deposit, i.e., Article 1 and 7 thereof, as well as those which concern processed food, which include the goods whose non-exportation is at the origin of the dispute.⁹⁶ This means that according to the Court, those provisions did not include essential elements of the legislation, since it was possible for them to have been adopted by the Commission.

Another case where the Court aimed to clarify the interpretation of the notion of essential elements was *Germany v Commission*. In this case, the German government sought the annulment of Article 6(6) of Commission Regulation No 3007/84⁹⁷ and Article 13(3)(b) and (c) of Commission Regulation No 3813/89.⁹⁸ These provisions lay down penalties, consisting of either the payment of a surcharge or the exclusion of the producer from the benefit of the aid the following year, to be imposed by the national authorities on producers who have committed irregularities when making an application for the financial aid provided for by Council regulations.⁹⁹

Article 6(6) of Regulation No 3007/84 relates to Council Regulation No 3013/89.¹⁰⁰ Article 5 of Council Regulation No 3013/89 provides for the grant of a premium to sheep meat producers on certain terms and in paragraph 9 empowers the Commission ‘*to adopt implementing rules for this article covering, in particular, the submission of premium applications and payment of the premium*’. Based on that provision the Commission adopted the contested regulation. Article 6(1) of the contested regulation provides that if the actual number of eligible animals recorded during the check is less than that in respect of which the application for premium has been submitted, no premium is in principle to be paid. Article 6(5) states that premiums improperly paid are to be recovered, together with interest.

⁹⁵ Köster, paras 16-17.

⁹⁶ Köster, para 19.

⁹⁷ Commission Regulation 3007/84 laying down detailed rules for the application of the premium for producers of sheep. Adopted 26.10.1984.

⁹⁸ Commission Regulation 3813/89 laying down detailed rules for the application of the system of transitional aids to agricultural income. Adopted 19.12.1989.

⁹⁹ Judgment 27.10.1992, *Germany v Commission*, C-240/90, EU:C:1992:408, paras 1-2.

¹⁰⁰ Council Regulation (EEC) 3013/89 on the common organization of the market in sheepmeat and goatmeat. Adopted 07.10.1989.

According to Article 6(6), which is the contested provision, producers shall also be excluded from the entitlement under the premium arrangements for the subsequent year in respect of which the false declaration is established if the discrepancy is found to be due to a false declaration made deliberately or as a result of serious negligence.¹⁰¹

The other contested provisions, i.e., Article 13(3)(b) and (c) of Commission Regulation No 3813/89 relate to the system of transitional aids to agricultural income established by Council Regulation No 768/89,¹⁰² which created the possibility of granting transitional aid to farmers satisfying certain conditions. Article 12 of Council Regulation No 768/89 provides that the rules for the application of the regulation are to be adopted in accordance with the management committee procedure, i.e., by the Commission.¹⁰³ Based on that provision, the Commission adopted the other contested regulation. Article 13(3)(b), of the contested regulation, requires the defaulting farmers to pay an amount in addition to reimburse, with interest, the premium already paid, i.e., surcharges. In addition, Article 13(3)(c) requires the national authorities to exclude farmers for one year from the benefit of the aid or system of aid concerned, i.e., it provides for the same rule as laid in Article 6(6) of the first contested regulation assessed above.¹⁰⁴

According to the German government, the Commission lacked the competence to impose penalties such as surcharges and provide for exclusion, asserting that only the Council could adopt the contested provisions, which according to the German government constituted essential elements, since they went beyond the mere reimbursement of a due benefit improperly paid, thus affecting the fundamental rights of individuals.¹⁰⁵ According to the Court, the challenged provisions could not be classified as essential to the common organization of the market established by Council Regulation No 3013/89 and the scheme of aid established by the Council Regulation No 768/89. As such, the Court held that the classification must be reserved for provisions ‘*which are intended to give concrete shape to the fundamental guidelines of Community policy*’. In the Court's view, penalties, such as

¹⁰¹ Germany v Commission, paras 4-5.

¹⁰² Council Regulation (EEC) 768/89 establishing a system of transitional aids to agricultural income. Adopted 29.03.1989.

¹⁰³ Germany v Commission, para 6.

¹⁰⁴ Germany v Commission, para 8.

¹⁰⁵ Note that the German government contested the overall competence of the Community to adopt such measures, but only the assessment of Commission's competence is relevant here; Germany v Commission, paras 30 and 32.

surcharges or exclusions, which intend to underpin the options chosen by ensuring the proper financial management of the Community funds designated for their attainment, could not be considered as such.¹⁰⁶

The Court has further elaborated on the notion of essential elements in the *Schengen Borders Code*.¹⁰⁷ In the case, the European Parliament sought the annulment of Council Decision (EU) 2010/252.¹⁰⁸ According to the European Parliament, that decision exceeded the limits of the implementing powers laid down in Article 12(5) of Regulation (EC) No 562/2006 (enabling act)¹⁰⁹ and should have been adopted by the ordinary legislative procedure instead of the comitology procedure.¹¹⁰

The contested decision was adopted on the basis of Article 12(5) of the enabling act, according to which ‘*Additional measures governing surveillance may be adopted. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny*’. The regulatory procedure with scrutiny is based on Article 5a of the Second Comitology Decision. Since the Committee had not delivered an opinion on the Commission’s initial proposal, the Commission submitted in accordance with the Second Comitology Decision, a proposal relating to the measures to be taken to the Council and forwarded it to the European Parliament, which did not oppose the proposal and was then eventually adopted by the Council.¹¹¹

In assessing whether the Council was empowered to adopt the contested decision as a measure implementing Article 12 of the enabling act on border surveillance, on the basis of Article 12(5) therein, the Court made reference to the purpose of the enabling provision, which according to its paragraphs 1 and 4 is to ‘*prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally and to apprehend such persons*’ to which recital 6 of the enabling act adds

¹⁰⁶ Germany v Commission, para 37.

¹⁰⁷ Judgment 05.09.2012, Schengen Borders Code, C-355/10, EU:C:2012:516.

¹⁰⁸ Council Decision (EU) 2010/252 supplementing the Schengen Borders Code as regards the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. Adopted 04.05.2010.

¹⁰⁹ Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders. Adopted 15.03.2006.

¹¹⁰ Schengen Borders Code, paras 1-2.

¹¹¹ Schengen Borders Code, para 22.

‘combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations’. As to border surveillance operations, the Court notes that Article 12(2) to (4) of the enabling act merely describe in an abstract manner the duties of border controls – Article 12(2) provides that surveillance is to be *‘carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points’* and Article 12(3) provides that *‘[s]urveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats’*.¹¹²

The Court notes that Article 12(4) does not contain any rules concerning the measures which border guards are authorised to apply against persons or ships when they are apprehended, or to use force or conduct the persons apprehended to a specific location. The contested decision, on the other hand, in Part I of its Annex, lays down measures which border guards may take against ships detected and persons on board. In addition, the contested decision, in Part II of its Annex, lays down the obligation of the units participating in external sea border operations to provide assistance to any vessel or person in distress at sea as well as rules on the disembarkation of the persons intercepted or rescued.¹¹³

According to the Court, the conferral of enforcement powers on border guards referred to above, entails political choices falling within the responsibilities of the legislature as it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments. As such, depending on the political choices upon which those rules are adopted, the powers of the border guards may vary significantly, and the exercise of those powers requires authorization. Additionally, where those powers concern the taking of measures against ships, their exercise is liable, depending on the scope of the powers, to interfere with the sovereign rights of third countries according to the flag flown by the ship - constituting therefore a major development in the system.¹¹⁴

Moreover, in the Court’s view, provisions conferring powers of public authority on border guards, such as those in the contested decision, mean that the fundamental rights of the

¹¹² Schengen Borders Code, paras 70-71.

¹¹³ Schengen Borders Code, paras 74-75.

¹¹⁴ Schengen Borders Code, para 76.

persons concerned may be interfered with to such an extent that the involvement of the legislature is required.¹¹⁵

Therefore, the Court concluded that the contested decision must be annulled in its entirety because it contains essential elements of the surveillance of the external sea borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the enabling act.¹¹⁶

The main key takeaway from the *Schengen Borders Code* case is that the Court held that whether an element is to be classified as essential or not is not a task entrusted to the legislator alone, instead, the categorisation needs to be based on objective factors amenable to judicial review, whereby account is taken of the characteristics and particularities of the domain concerned. Moreover, the Court held that essential elements refer to ‘*provisions, which, in order to be adopted, require political choices*’ – or to provisions which interfere with fundamental rights of the persons concerned to such an extent that the involvement of the EU legislature is required.¹¹⁷ The political aspect in the assessment is admittedly vague, but the fact that the Court has subjected such assessment for judicial review shows the willingness of the Court to ensure the correct application of Article 290 TFEU through a case-by-case analysis.¹¹⁸

In holding that the notion of essential elements is determined based on whether or not it entails political considerations, the Court can be seen as having intended to protect the legislator’s own responsibility over political choices that need to be made in a democratic society, thereby protecting democratic accountability in the Union. That is why the notion has to be interpreted on a case-by-case basis based on objective criteria, instead of leaving the matter solely to the legislator’s political will.¹¹⁹ The case-by-case analysis based on objective factors is the same test that the Court applies when assessing the choice of the legal basis for primary legislation.¹²⁰

¹¹⁵ Schengen Borders Code, para 77.

¹¹⁶ Schengen Borders Code, para 84.

¹¹⁷ Schengen Borders Code, paras 67, 68, 65, 76 and 77.

¹¹⁸ Chamon 2018, p. 178; Volpato 2022, p. 131.

¹¹⁹ Jacqué 2016, p. 32.

¹²⁰ Bradley 2016, p. 60.

It is to be noted that in holding that the determination of essential elements is amenable to full judicial review was by no means an obvious position, since regarding whether to confer powers to the Commission under Article 290 TFEU or Article 291 TFEU was left by the Court in *Biocides* to the discretion of the legislature, save for cases where there has been manifest error, although the mechanisms provided in these articles differ greatly and thereby the choice between which article to use has democratic implications, which are no less important than the assessment of whether or not an element is essential or not.¹²¹

The notion of essential elements has now been codified in Article 290(1) TFEU, according to which the power of the Commission to adopt acts under said provision is only possible in regard to non-essential elements of the legislative act. Although the notion of essential elements is now codified, the Court's case law provides important clarification as to its interpretation.

The Court elaborated on the notion of essential elements in reference to Article 290 TFEU in *Dyson*.¹²² In the case, Dyson alleged that in adopting Commission Delegated Regulation (EU) 665/2013,¹²³ the Commission had disregarded an essential element of Directive 2010/30/EU¹²⁴ (enabling act) with regard to energy labelling of vacuum cleaners by taking as the method of calculating the energy performance of vacuum cleaners a method based on tests with an empty receptacle, whereas Article 10 of the enabling act required the method to reflect normal conditions of use.¹²⁵

In essence, the Court had to assess whether the requirement that the information supplied to consumers must reflect energy consumption while the machine is in use, as follows from Article 1 and Article 10(1) of the enabling act, is an essential element of the act. Based on the legal rules established by the Court in its case-law assessed above, the Court answered that question in the affirmative. The Court made reference to recitals 5 and 8 of the enabling act according to which the '*provision of accurate, relevant and comparable information on the [...] energy consumption*' of products '*plays a key role in the operation of market forces*' and hence in the guiding of consumption towards products which '*consume [...] less energy [...]*

¹²¹ Bradley 2016, p. 60.

¹²² Judgment 11.05.2017, *Dyson*, C-44/16 P, EU:C:2017:357, paras 1 and 50.

¹²³ Commission Delegated Regulation (EU) No 665/2013 supplementing Directive 2010/30/EU of the European Parliament and the Council with regard to energy labelling of vacuum cleaners. Adopted 03.05.2013.

¹²⁴ Directive (EU) 2010/30 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products. Adopted 19.05.2010.

¹²⁵ *Dyson*, paras 1 and 50.

during use'. Moreover, the Court took into consideration that Article 1(1) of the enabling act provides that its aim is to harmonise national measures on information for end users on energy consumption 'during use', so that they can choose 'more efficient' products. Therefore, information for consumers on the energy efficiency of products during use is one of the essential objectives of the act reflecting a political choice falling within the responsibilities of the EU legislature.¹²⁶ The key takeaway from this case is that the Court, in assessing whether an element laid out in a delegated act could be considered as essential, made reference to the overall objectives of the enabling act.

Soon after *Dyson*, the Court further clarified the notion of essential elements in the *Czech Republic*. In the case, the Czech Republic sought the annulment of Commission Delegated Regulation (EU) No 885/2013¹²⁷ and Commission Delegated Regulation (EU) 886/2013¹²⁸ or in the alternative the annulment of certain specific provisions contained in both contested regulations.¹²⁹

Based on Article 7 of Directive 2010/40 (enabling act), the Commission required the Member States to establish the supervisory body provided for in Article 8(1) of Delegated Regulation No 885/2013 and Article 9(1) of Delegated Regulation No 886/2013, under which provisions the Member States are to designate a national body competent to assess whether the requirements set out for those regulations are fulfilled by the various operators concerned.¹³⁰ As one of the grounds of appeal, the Czech Republic argued the supervisory body is an essential element of the enabling act within the meaning of Article 290 TFEU, which cannot be subject to delegation of power.¹³¹

According to the Court, the establishment of the supervisory body was not an essential element of the act within the meaning of Article 290(1) TFEU. In reference to the legal rule established in the *Schengen Borders Code*, the Court took the view that the establishment of

¹²⁶ *Dyson*, paras 60 and 63-64.

¹²⁷ Commission Delegated Regulation (EU) 885/2013 supplementing ITS Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of information services for safe and secure parking places for trucks and commercial vehicles. Adopted 15.05.2013.

¹²⁸ Commission Delegated Regulation (EU) 886/2013 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to data and procedures for the provision, where possible, of road safety-related minimum universal traffic information free of charge to users. Adopted 15.05.2013.

¹²⁹ Judgment 26.07.2017, *Czech Republic*, C-696/15 P, EU:C:2017:595, para 1.

¹³⁰ *Czech Republic*, para 36.

¹³¹ *Czech Republic*, para 69.

the supervisory body did not involve political choices, nor did it interfere with the fundamental rights of operators to such an extent that the involvement of the EU legislature would have been required. The Court took into consideration that the powers of that body remained essentially limited to the collection of information and the submission of assessment reports and that the consequences of its establishment for the operators concerned were limited to an obligation to provide the body with their identification details, a description of the information service that they provide, and declarations of compliance.¹³²

Requirement of specificity

As early as 1988, the Court held in *Central-Import Münster* that for a provision transferring rulemaking powers to the Commission to be valid, it must be sufficiently specific, i.e., the legislature must have clearly specified the bounds of power conferred on the Commission.¹³³ This rule has subsequently been included in Article 290(1) TFEU, according to which the objectives, scope and duration of the delegation of power have to be explicitly defined in the enabling act. The rationale behind this requirement, referred to in the literature as the ‘requirement of specificity’, was to emphasise the exceptional character of delegation, in that the norm should be for legislation to be enacted via the ‘normal’ legislative decision-making procedures, but that in certain cases decision-making by the Commission is required for reasons of efficiency.¹³⁴ The requirement of specificity therefore aims to protect the principle of democracy, as it requires the legislator to make the important political decisions itself.¹³⁵

In *Central-Import Münster*, the question that the Court had to answer was whether Article 14 of Regulation (EEC) 516/77¹³⁶ in conjunction with Articles 1 and 2 of Regulation (EEC) 521/77¹³⁷ contained a sufficiently specific enabling provision establishing the essential criteria for protective measures adopted by the Commission Regulation 2742/82.¹³⁸ According to Article 14 of Regulation (EEC) 516/77 ‘*protective measures may be taken where the market*

¹³² Czech Republic, paras 86-87.

¹³³ Judgment 05.07.1988, *Central-Import Münster*, C-291/86, EU:C:1988:361, para 13.

¹³⁴ Chamon 2016, pp. 1517-1518.

¹³⁵ Craig 2016, p. 187.

¹³⁶ Council Regulation (EEC) 516/77 on the common organization of the market in products processed from fruit and vegetables. Adopted 14.03.1977.

¹³⁷ Council Regulation (EEC) 521/77 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables. Adopted 14.03.1977.

¹³⁸ Commission Regulation (EEC) 2742/82 on protective measures applicable to imports of dried grapes. Adopted 13.10.1982; *Central-Import Münster*, para 8.

is or is likely to be exposed to serious disturbances as a result of imports or exports' and 'those measures must cease when the situation which gives rise to their application comes to an end'. Article 1 of Regulation 521/77 lays down the criteria for assessing whether the Community market is experiencing or is threatened with serious disturbances, whereas Article 2 (1) of said regulation lists a series of protective measures which may be taken in order to deal with such a situation. Article 2(2) moreover states that protective measures 'may be taken only to such extent and for such length of time as is strictly necessary'.¹³⁹

According to the Court, the above assessed provisions contain a sufficiently precise enabling provision allowing the Commission to take protective measures concerning imports of dried grapes, i.e., to adopt the contested regulation. The Court based its conclusion on the fact that the provisions determined: 1) the situations in which protective measures may be taken, 2) the criteria for assessing whether such a situation exists, 3) the kind of measures to be adopted, and 4) the period of their validity.¹⁴⁰

In *Germany v Commission*, the case discussed in reference to the notion of essential elements, the German government also alleged that the requirement of specificity was not met.

Accordingly, the German government alleged that Article 5(9) of Council Regulation No 3013/80 and Article 12 of Council Regulation No 768/89 were too general in terms for the purpose of transferring rulemaking powers to the Commission.¹⁴¹ According to Article 5(9) of Council Regulation No 3013/80 the Commission is empowered to act '*in accordance with the Management Committee procedure provided for in Article 30, to adopt implementing rules for this article covering, in particular, the submission of premium applications and payment of the premium*'. According to Article 12 of Council Regulation No 768/89 the '*rules for the application of the regulation are to be adopted in accordance with the Management Committee procedure provided for in Article 13*'.¹⁴² According to the Court, the assessed provisions did fulfil the requirement of specificity, but did not provide elaborate reasoning as to why that was the case – the Court merely held that '*a provision drafted in general terms provides a sufficient basis for the authority to act*'.¹⁴³

¹³⁹ Central-Import Münster, para 14.

¹⁴⁰ Central-Import Münster, paras 15-16.

¹⁴¹ *Germany v Commission*, para 40.

¹⁴² *Germany v Commission*, paras 4 and 6.

¹⁴³ *Germany v Commission*, para 41.

In addition to the assessment of the requirement of non-essentiality, the Court also assessed the requirement of specificity in *Czech Republic*. As one of the grounds of appeal, the Czech Republic alleged that the requirement of specificity in Article 290(1) TFEU was not abided by in the delegation of power in Article 7 of Directive 2010/40 (enabling act), based on which Commission required Member States to establish a supervisory body. Article 7(1) of the enabling act empowers the Commission to adopt delegated acts in accordance with Article 290 TFEU ‘as regards specifications’ and ‘in accordance with the relevant provisions of [the] Directive, in particular Article 6 and Annex II’. The term ‘specification’ is defined in Article 4(17) of the enabling act as ‘binding measure laying down provisions containing requirements, procedures or any other relevant rules’.¹⁴⁴ According to Article 6(1) the Commission shall adopt the specifications necessary to ensure the compatibility, interoperability and continuity of the deployment, operation and use of ITS for the priority actions.¹⁴⁵

Based on Article 7 of the enabling act, the Commission adopted two delegated regulations, namely Delegated Regulation No 885/2013 and Delegated Regulation No 886/2013 requiring Member States to establish a supervisory body.¹⁴⁶ According to the Court, Article 6 of the enabling act explicitly defined in paragraph 1, assessed above, the objective of the specification and in paragraph 4 the content and scope of the delegation as it laid out the measures that may be subject to the specifications.¹⁴⁷

In *Czech Republic*, the Court links the requirement of specificity with the need to be able to objectively assess the limits of the delegation. Accordingly, the definition of the powers conferred must be sufficiently precise, ‘in that it must enable the Commission’s use of the power to be reviewed by reference to objective criteria fixed by the EU legislature’.¹⁴⁸ Moreover, the Court emphasized that in the assessment of the limits of the delegation, the delegating provision(s) must define not only the objective of delegation but also the content and scope – which should all be assessed by the judiciary.¹⁴⁹

¹⁴⁴ Czech Republic, paras 40-42.

¹⁴⁵ Czech Republic, para 43.

¹⁴⁶ Czech Republic, para 36.

¹⁴⁷ Czech Republic, para 47.

¹⁴⁸ Czech Republic, para 49.

¹⁴⁹ Czech Republic, paras 58-59.

2.3.2 Ex ante control of delegated acts

The requirements laid down in the previous sub-chapter, especially the requirement that the legislative act must lay down the essential elements of the act and the requirement that the objectives, content, scope and duration of the delegation of power are laid down in the enabling act, work as ex ante controls for the delegation of powers to the Commission and they are amendable to judicial review ex post.

However, the adoption of the Revised Common Understanding has provided for an additional ex ante control mechanism through the inclusion of the Member State experts in the process of drafting delegated acts. Accordingly, in the preparation of all draft delegated acts, the Commission is required to consult the experts in a timely manner. The draft delegated acts, the draft agenda and any other relevant documents have to be shared with the experts in sufficient time to prepare.¹⁵⁰ Additionally, at the end of any meeting with the experts or in the follow-up of such meetings, the Commission has to state the conclusions that it has drawn from the discussions, including how it will take the experts' views into consideration and how it intends to proceed based on the given views.¹⁵¹ Whenever the material content of the draft delegated act is changed in any way, the Commission has to give the experts the opportunity to react to the amended version of the draft delegated act.¹⁵² This control mechanism introduced in the Revised Common Understanding, i.e., the quite strong inclusion of experts in the process of adoption of delegated acts, has been referred to in the literature as 'weak comitology', since it brings with it to Article 290 TFEU aspects of the mechanism that existed under the old comitology regime.¹⁵³

2.3.3 Ex post control of delegated acts

There are four mechanisms for ex post control of delegated acts. The first two are directly found in Article 290(2) TFEU, which provides for the right of revocation and objection for the legislators. The other two mechanisms concern judicial review by the Court either through direct action via Article 263 TFEU annulment proceedings or indirect action via Article 267 TFEU preliminary ruling proceedings.

¹⁵⁰ Revised Common Understanding, art. 4.

¹⁵¹ Revised Common Understanding, art. 5.

¹⁵² Revised Common Understanding, art. 7.

¹⁵³ Chamon 2016, p. 1541.

Art 290(2) TFEU mechanisms

Article 290(2) TFEU lays down two mechanisms for ex post control of delegated acts.

The first is the right of revocation by the legislators. Accordingly, the European Parliament or the Council can revoke the delegation, which is considered as a ‘nuclear option’, whereby the Commission would no longer have the competence to adopt delegated acts on the basis of the specific legislative act granting such delegation.¹⁵⁴ It is to be noted that revoking the delegation does not have an effect on the validity of the delegated acts which have been adopted on the basis of the revoked delegation that are already in force.¹⁵⁵ The second ex post control mechanism found in Article 290(2) TFEU is the right of objection by the legislators. Accordingly, the European Parliament or the Council can object to the delegated act within a period set by the enabling act, which is essentially a right of veto. The delegated act would then not enter into force and therefore it would not have any effects. In regard to both control mechanisms the European Parliament votes by a majority of its component members and the Council by qualified majority.

It is important to note that the Treaties do not grant the European Parliament nor the Council any formal right to amend a delegated act, which leaves the legislators only the right of veto when the delegated act is already drafted. The efficiency of the veto power has been criticised in the literature, since its use has been viewed as depending largely on understanding the proposed measure. Neither the Member State representatives in the Council nor the members of the European Parliament have the time or the expertise to perform extensive assessments of the proposed measure. This issue has been seen as being at the core of the Common Understandings concluded between the institutions under which the Commission is required to consult Member State experts in the preparation of draft delegated acts, to provide the legislators with necessary background information, and which provides for the right of experts from the Council and the European Parliament to have access to the meetings that the Commission holds with Member State expert groups.¹⁵⁶ In practice however, the European Parliament seems to have rarely used its right of participation in these meetings.¹⁵⁷

¹⁵⁴ Volpato 2022, p. 163.

¹⁵⁵ Bast 2016, p. 164.

¹⁵⁶ Revised Common Understanding, arts 4, 10 and 11; Craig – de Búrca 2020, p. 172.

¹⁵⁷ Bellenghi – Vos 2024, p. 12.

Another issue found with the right of veto is that the legislators have to raise their objections within a short period of time. The Common Understanding lays down that the period for objection should in principle be two months, extendable for each institution by two months at its initiative, but that the period is defined on a case-by-case basis in each enabling act.¹⁵⁸

Both the European Parliament and the Council have used their right of veto, but the number of objections has been very low. The low number of objections by the Council may not be surprising since the involvement of Member State experts in the preparation of delegated acts has enabled its interests being protected early on, but the low number of objections by the European Parliament may be explained through reasons such as the technicality of the acts, the institution's high workload as well as the high threshold (majority of its component members) required for the adoption of the veto, in comparison to its regular absolute majority requirement.¹⁵⁹ However, it should be also considered that perhaps the delegated acts have been largely aligned with the preferences of the European Parliament.

Although there are some issues with the ex post control of delegated acts via the veto-power mechanism, it is important to remind the reader here that the technicality and speed in which these delegated acts often need to be drafted, as well as the lack of time and resources by the legislators to enact them themselves, are exactly why 'legislative power' has been delegated to the Commission in the first place. However, these issues will be of greater importance, if and as this thesis and other research papers have shown, at least some delegated acts have included elements which are essential, the enactment of which should have been given full legislative attention.

Judicial review

The judicial review of the legality of delegated acts by the Court can take place directly via Article 263 TFEU or indirectly via Article 267 TFEU.

Under Article 263 TFEU the Court has the power to review the legality of Commission's delegated acts. According to Article 264 TFEU, if the action is well founded, the Court will declare the delegated act void. An action for the legality of the delegated act may be brought by a privileged applicant, i.e., a Member State, the European Parliament, the Council or the

¹⁵⁸ Revised Common Understanding, art 18; Craig – de Búrca 2020, p. 172.

¹⁵⁹ Bellenghi – Vos 2024, p. 13.

Commission, a semi-privileged applicant, i.e., the Court of Auditors, the European Central Bank, or the Committee of the Regions, or a non-privileged applicant, i.e., a natural or legal person under certain, albeit strict, conditions. Action through this avenue is considered as direct, since it allows the parties to directly demand for a review of the validity of the delegated act concerned.¹⁶⁰ The Court has according to Article 263(3) TFEU jurisdiction ‘*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*’.

Another avenue for the Court to be able to review the legality of a delegated act is through the preliminary ruling procedure. According to Article 267 TFEU the Court can give preliminary rulings concerning the validity of acts by the Commission, which includes delegated acts. The only way to give a preliminary ruling concerning the validity of a delegated act is when a national court or tribunal makes a request to the Court to give a preliminary ruling on the validity of a provision of a delegated act, which is why these actions are considered as indirect.¹⁶¹ The use of this avenue is therefore dependent on a court or tribunal of a Member State requesting for such preliminary ruling, which the national court or tribunal is not required to do only at the request of the parties in the case.

The method for the assessment of the validity of delegated acts found in the Court’s case law assessed in the previous sub-chapter, a method used as a basis for the assessment of the legality of the delegated acts in the next chapter, is as follows. First, the Court assesses whether the Commission was authorised in the enabling act to adopt the delegated act in question, i.e., if there is a legal basis for its adoption. Second, if a legal basis for its authorisation is found, the Court assesses whether the Commission respected the essential objectives of the enabling act granting the delegation, in particular, the objectives, scope and duration of the delegation, an assessment which concerns the evaluation of whether the requirement of specificity assessed above has been abided by. Lastly, the Court assesses whether the delegated act supplemented or amended essential elements of the matter, thereby assessing whether the requirement of non-essentiality assessed above has been abided by.¹⁶²

¹⁶⁰ Schippers 2024, pp. 401-402.

¹⁶¹ Schippers 2024, p. 402.

¹⁶² Schippers 2024, p 402.

3 Case study: Regulation of RFNBOs

In this chapter, the regulation of renewable fuels of non-biological origin (RFNBOs) is used as a case study in order to assess in practice the delegation of rule-making powers to the Commission in the form of adoption of non-legislative acts.

The regulation of energy related matters at the Community level properly began in the 1990s when the first directives were adopted governing the energy sector, the adoption of which was needed in the aftermath of the opening of the national energy markets to competition in Member States all over the Union. Since then, directives and regulations in the energy sector have been adopted in vast amounts, with environmental aspects taking more and more space in their content.¹⁶³

According to Article 4(2) TFEU the Union exercises shared competence together with the Member States in the areas of environment and energy, which are both relevant when adopting legislation governing renewable energy. Article 194(1) TFEU provides a legal basis for acts aimed to regulate the energy sector. In the context of legislative measures concerning renewable energy, the favoured legal basis has however been Article 191 TFEU, which provides a legal basis for environmental protection. Article 191 TFEU has indeed been the chosen legal basis for the renewable energy directives adopted after the entry into force of the Lisbon Treaty, i.e., RED II and Directive (EU) 2023/2413 (RED III),¹⁶⁴ which regulate RFNBOs.¹⁶⁵

This chapter begins by presenting the legislative framework of RFNBOs. Here, the reader is provided with short background information on recent renewable energy regulation in the EU and how that has led to the regulation of RFNBOs, then an overview of RFNBOs is presented, and lastly, the legislative and non-legislative acts that establish the RFNBO legislative framework are provided.

In the second part of this chapter, a specific provision, Article 11 of the RFNBO Delegated Act, is closely scrutinised from the perspective of whether or not the Commission has overstepped the limits set out in Article 290 TFEU for its adoption, i.e., whether there has

¹⁶³ Talus 2016, pp. 3-5.

¹⁶⁴ Directive (EU) 2023/2413 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. Adopted 18.10.2023.

¹⁶⁵ Talus 2016, pp. 12-13.

been a legal basis for its adoption and whether the requirements of specificity and non-essentiality have been complied with.

3.1 RFNBO legislative framework

3.1.1 Background

The 2010s and especially the 2020s can be seen as eras where the Union has made strides to move away and lessen the use of fossil-based energy. This has been done via adopting vast amounts of climate and energy policies. This is by no means a trend concerning only the Union but can also be witnessed elsewhere in the world, although, one might have seen a shift during the past few years or so towards less importance being put on emissions reductions and other measures required to fight climate change in many countries around the world. Energy regulation in the Union has however been going towards focusing on furthering the decarbonisation of the Union.

The first Renewable Energy Directive 2009/28/EC (RED I)¹⁶⁶ adopted in 2009 laid out for the first time a legal framework for the development of clean energy across all sectors of the Union economy and provided support mechanisms for cooperation between all Member States towards the fulfilment of this goal. A recast to RED I was provided in 2018, through the adoption of RED II.

An acceleration point in the Union's decarbonisation goals can be witnessed from the end of the 2010s and beginning of the 2020s, which was led by the Commission via its Communication, the European Green Deal, adopted at the end of 2019. The Communication provided for '*a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use*'.¹⁶⁷ In essence, the Green Deal set an ambitious goal for the EU to achieve climate neutrality by 2050 and was accompanied by a package of legislative proposals aimed at achieving that ambitious goal.¹⁶⁸

¹⁶⁶ Directive (EC) 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Adopted 23.04.2009.

¹⁶⁷ Commission Communication COM/2019/640, p. 2.

¹⁶⁸ Commission Communication COM/2019/640, p. 4.

In 2021 the Commission presented its ‘Fit for 55’ legislative package, which aimed at responding to the requirements laid down in EU climate law that provided for a reduction of EU’s net GHG emissions by at least 55 % by 2030. Shortly after, the Commission proposed the REPowerEU Plan, where the Commission increased its ambitions concerning renewable energy and energy efficiency in the Union in response to Russia’s invasion of Ukraine.¹⁶⁹ This led also to the adoption of the Renewable Energy Directive (EU) 2023/2413 (RED III).

It is not an exaggeration to say that the Commission has in the past decade or so set very ambitious and extensive climate and energy policy initiatives, which have led to the adoption of a considerable amount of legislation in the field. The Commission has through each policy initiative set more and more ambitious targets and timetables to achieve measures to tackle not only issues around global warming but also more recently, the issues around the dependence on energy supply from Russia.¹⁷⁰

3.1.2 RFNBOs

The Hydrogen Strategy, released in 2020, paved the way for hydrogen to steadily become an essential part of the pathway to decarbonise the EU. Since hydrogen is a secondary energy carrier, meaning that it needs to be produced, there are many different methods of producing hydrogen which vary in their carbon dioxide intensities. This is why the production method and its greenhouse gas footprint are of great importance.¹⁷¹

The type of hydrogen that has been favoured in the EU’s hydrogen agenda is known as ‘renewable’ hydrogen, which has been classified in RED III as ‘*renewable fuels of non-biological origin*’ (RFNBOs), which refer to all liquid and gaseous fuels the energy content of which is derived from renewable sources other than biomass.¹⁷² The primary technology used to create these RFNBOs is utilising electrolysis using renewable energy sources, such as wind or solar power. In order for a fuel to qualify as an RFNBO it needs to fulfil certain requirements concerning additionality and geographical and temporal correlation, which will be assessed below.¹⁷³

¹⁶⁹ Commission Communication COM/2022/108.

¹⁷⁰ Hancher 2022, p. 164.

¹⁷¹ Talus – Pinto – Gallegos 2024, p. 217.

¹⁷² RED III, art 2(36).

¹⁷³ Talus – Pinto – Gallegos 2024, p. 218.

The EU is essentially aiming to build a market for hydrogen by creating a demand-side market through setting legally binding targets for the use of RFNBOs.¹⁷⁴ The Union has set out both overall targets for RFNBOs in addition to sectoral targets. In the Hydrogen Strategy the Commission set out the target of producing up to 10 million tonnes of renewable hydrogen in the Union by 2030.¹⁷⁵ On top of that, the Commission provided for a further target in the RePower EU plan of 10 million tonnes of renewable hydrogen imports into the Union by 2030.¹⁷⁶ Sectoral targets for the use of RFNBOs are set for industry, transport, maritime and aviation, laid down in RED III, Regulation (EU) 2023/1805¹⁷⁷ and Regulation (EU) 2023/2405.¹⁷⁸

The idea behind creating a hydrogen economy, known as Power-to-X economy, is to allow for flexibility in the energy system needed when the system is getting closer to producing emission-free electricity. This is because hydrogen can provide for long-term and large-scale storage helping to stabilise the grid, which is needed in order to decarbonise hard-to-abate sectors, which include sectors such as aviation, shipping and heavy transportation, as well as some industries such as steel manufacturing, in which other renewable alternatives might be unfeasible and/or more expensive.¹⁷⁹

The basic rule set out in RED II for the production of ‘renewable’ hydrogen, i.e., RFNBOs, is that it must be produced by splitting water in an electrolysis process powered by renewable electricity.¹⁸⁰ However, additional requirements, detailing how ‘renewable’ hydrogen should be produced to qualify as RFNBO are detailed in two delegated acts, namely the RFNBO Delegated Act and GHG Delegated Act. These requirements are assessed below.

In essence, the legislative framework regulating RFNBOs in the Union consists of RED II, its amending RED III, as well as the RFNBO Delegated Act and GHG Delegated Act.

¹⁷⁴ Talus – Pinto – Gallegos 2024, p. 218.

¹⁷⁵ Commission Communication COM/2020/301, p. 6.

¹⁷⁶ Commission Communication COM/2022/108, p.7.

¹⁷⁷ Regulation (EU) 2023/1805 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC. Adopted 13.09.2023.

¹⁷⁸ Regulation (EU) 2023/2405 on ensuring a level playing field for sustainable air transport. Adopted 18.10.2023.

¹⁷⁹ Majanne – Vilhonen – Repo – Viikko 2024, p. 745.

¹⁸⁰ Ibid.

3.1.3 Renewable Energy Directives

The RED I adopted in 2009 laid out the legal framework for the development of clean energy across all sectors of the Union economy, with support mechanisms provided for cooperation between all Member States towards the fulfilment of this goal.¹⁸¹ After many amendments to the first RED, a recast of the directive, the RED II, was adopted in 2018. RED II introduced provisions for the promotion of the use of ‘renewable liquid and gaseous transport fuels of non-biological origin’, which was defined by the legislature to refer to liquid or gaseous fuels used in the transport sector other than biofuels or biogas, the energy content of which is derived from sources other than biomass.¹⁸²

Fairly soon after the adoption of RED II the preparatory works for amending it began, which eventually led to the adoption of the RED III. RED III amended the definition given in RED II to ‘renewable hydrogen’ and instead defined it as ‘renewable fuels of non-biological origin’, RFNBOs for short, with which the legislature referred to liquid and gaseous fuels the energy content of which is derived from renewable sources other than biomass.¹⁸³ The only essential change was that the definition of RFNBOs in RED III reflected the amendments made in the directive to include all sectors instead of just the transportation sector into the scope of RFNBOs.

3.1.4 Delegated acts

RED II provided for the adoption of two delegated acts in order to clarify and further define the legislative framework governing RFNBOs in the Union.

Article 27 of RED II provided for the calculation rules with regard to the minimum shares of renewable energy in the transport sector, which RED III amended to cover all sectors. Article 27(3) RED II provides for a legal basis for the Commission to adopt by 31 December 2021 a delegated act to supplement RED II by establishing a Union methodology setting out detailed rules for accounting hydrogen as RFNBO, in order to ensure that all RFNBOs would be produced from fully renewable electricity.¹⁸⁴ Based on this legal basis the Commission adopted on 10 February 2023 the RFNBO Delegated Act, which lays out the conditions

¹⁸¹ Renewable Energy Directive.

¹⁸² RED II, art 2(36).

¹⁸³ RED III, art 3(36).

¹⁸⁴ Talus – Pinto – Gallegos 2024, p. 219.

according to which the hydrogen produced from electricity is qualified as being renewable, which is one of the requirements for hydrogen to be considered as RFNBO.¹⁸⁵

Although a particular lot of hydrogen could still technically be qualified as renewable hydrogen even if it did not meet the GHG emissions savings set out in the RFNBO Delegated Act, it would not count towards the targets set out for Member States in Article 27 of RED II for renewable energy production. This means that it would be very doubtful that such production process would receive any financial support at a national or Union level, which hydrogen qualifying as ‘renewable’ in the sense of RED II would be able to receive through different kinds of tax exemptions, direct and indirect subsidies and such.¹⁸⁶ The significance of the content of the RFNBO Delegated Act to economic actors is also clear, which is evidenced by an open letter sent to the Commission President Von der Leyen by a coalition of actors active in the prospective hydrogen sector. This coalition viewed the RFNBO Delegated Act as a ‘*decisive factor determining whether the EU will achieve its Hydrogen Strategy*’ and that the delegated act plays a pivotal part in maintaining electrolysers as a European industry and in preventing the dislocation of manufacturing capacities to other countries.¹⁸⁷

In addition to the RFNBO Delegated Act, RED II required the Commission to adopt another delegated act to further define the legislative framework governing RFNBOs. Accordingly, Article 28(5) RED II required the Commission to adopt by 31 December 2021 a delegated act to supplement RED II by specifying the methodology for assessing greenhouse gas emissions savings from renewable liquid and gaseous transport fuels of non-biological origin and from recycled carbon fuels. Based on this legal basis the Commission adopted on 10 February the GHG Delegated Act. The GHG Delegated Act specifies the calculation method of greenhouse gas emissions for the RFNBOs, with account taken of the greenhouse gas savings and emissions throughout the entire production value chain. Accordingly, in order for the renewable hydrogen to be classified as an RFNBO it has to comply with the requirements set out in the GHG Delegated Act, which provides the rules for how to calculate whether the RFNBO fulfils the requirement set in RED II of achieving 70 % of greenhouse gas emissions savings compared to fuels that they are replacing.¹⁸⁸

¹⁸⁵ Hancher 2022, p. 182.

¹⁸⁶ Hancher 2022, p. 182.

¹⁸⁷ Open Letter raising concern on the Delegated Act on Art 27.3.

¹⁸⁸ Talus – Pinto – Gallegos 2024, p. 220.

The regulatory framework applicable to RFNBOs was developed after the adoption of RED II, but before the adoption of RED III. Although the delegated acts have been adopted on the basis of RED II and not RED III the Commission has in its Q&A published in March 2024 held indirectly via reference to voluntary schemes that the Commission delegated acts adopted under the previous directive, which provided for the use of RFNBOs only in the transport sector, should be read and applied in light of the amendments made in RED III to all sectors. The delegated acts, although making reference to the transport sector, should therefore be read in light of RED III, to apply to all sectors.¹⁸⁹ A similar conclusion may be drawn from Recital 80 of RED III and seems to be the intention of the institutions.

3.2 Article 11 of the RFNBO Delegated Act scrutinised

As was presented in the previous chapter, the powers of the Commission in the adoption of delegated acts are limited, and rightly so, since in their adoption the Commission is acting as a legislator. Therefore, the Commission must abide by the rules set out for the adoption of delegated acts in the Treaties. On the other hand, the legislators must fulfil their role of oversight over the adoption of delegated acts and lay out the essential elements of the legislation themselves.

With that in mind, the RFNBO Delegated Act has been chosen for closer scrutiny as it lays down the defining criteria for when hydrogen can be considered as RFNBO, thereby determining whether it may be eligible for grants, subsidies, etc., whether it will count towards the renewable energy production targets set for Member States, as well as the implications it entails for achieving the Union's decarbonisation targets.

A specific provision of the RFNBO Delegated Act, namely Article 11, is analysed from the viewpoint of whether in its adoption the Commission as well as the legislators have been acting within the limits set out in the Treaties for the delegation of powers.

3.2.1 The RFNBO Delegated Act

Article 27 of RED II lays out the rules to calculate the share of renewable electricity in the electricity supplied to road and rail vehicles for the purposes of calculating the minimum

¹⁸⁹ Q&A implementation of hydrogen delegated acts, p. 5.

shares of renewable energy in the transport sector provided in Article 25 of RED II. Article 27(3) of RED II provides the following requirements concerning RFNBOs:

1. Where electricity is used for the production of RFNBOs, either directly or for the production of intermediate products, the average share of electricity from renewable sources in the country of production, as measured two years before the year in question, is used to determine the share of renewable energy.
2. Electricity obtained from direct connection to an installation generating renewable electricity may be fully counted as renewable electricity where it is used for the production of RFNBOs, provided that the installation: (a) comes into operation after, or at the same time as, the installation producing the RFNBO and (b) is not connected to the grid or is connected to the grid but evidence can be provided that the electricity concerned has been supplied without taking electricity from the grid.
3. Electricity taken from the grid may be counted as fully renewable provided that it is produced exclusively from renewable sources and the renewable properties and other appropriate criteria have been demonstrated, ensuring that the renewable properties of that electricity are claimed only once and only in one end-use sector.

Article 27(3) of RED II requires the Commission to adopt a delegated act to supplement the directive by establishing the Union methodology setting out detailed rules by which economic operators are to comply with in regards to the requirements laid out in numbers two (2) and three (3) above, which essentially refer to the requirements of when electricity used for the production of hydrogen can be considered as fully renewable, i.e., when hydrogen can be considered as RFNBO. Therefore, the Commission adopted the RFNBO Delegated Act to provide for such detailed rules. Accordingly, the RFNBO Delegated Act specifies five ways in which electricity used for the production of RFNBOs can be considered as fully renewable. The first and most clear way of producing RFNBOs is through electricity obtained from direct connection to an installation generating renewable energy.¹⁹⁰ The ways in which electricity taken from the grid can be used for the production of RFNBO is a bit more complex, and for this the Commission has provided four alternative ways of doing so. These are the following:

¹⁹⁰ RFNBO Delegated Act, art 3.

1. The installation producing the RFNBO is located in a bidding zone where the average proportion of renewable electricity exceeds 90 % in the previous calendar year and the production of RFNBO does not exceed a maximum number of hours set in relation to the proportion of renewable electricity in the bidding zone;¹⁹¹ or
2. The installation producing RFNBO is located in a bidding zone where the emission intensity of electricity is lower than 18 gCO₂eq/MJ, provided that:
 - i. The fuel producers have concluded directly, or via intermediaries one or more renewables power purchase agreements (PPAs) with economic operators producing the renewable electricity in one or more installations generating renewable electricity for an amount that is at least equivalent to the amount of electricity that is claimed as fully renewable and the electricity claimed is effectively produced in this or these installations; and
 - ii. The conditions on temporal and geographical correlations are met (these will be assessed below);¹⁹² or
3. The electricity used to produce RFNBOs is consumed during an imbalance settlement period during which the fuel producer can demonstrate, based on evidence from the national transmission system operator that the power-generating installations using renewable energy sources were redispatched downwards in accordance with Article 13 of Regulation (EU) 2019/943 and the electricity consumed for the production of RFNBOs reduced the need for redispatching by a corresponding amount;¹⁹³ or
4. The fuel producer complies with the conditions on additionality, temporal correlation and geographic correlation:
 - a. Additionality:
 - Fuel producers must produce an amount of renewable electricity in their own installations that is at least equivalent to the amount of electricity claimed as fully renewable or have concluded either directly or via intermediaries one or more renewables PPAs with economic operators

¹⁹¹ RFNBO Delegated Act, art 4(1).

¹⁹² RFNBO Delegated Act, art 4(2).

¹⁹³ RFNBO Delegated Act, art 4(3).

producing renewable electricity in one or more installations for an amount of renewable electricity that is at least equivalent to the amount of electricity that is claimed as fully renewable and the electricity claimed is effectively produced in this or these installations, provided that:

- i. the installation generating renewable electricity came into operation not earlier than 36 months before the installation producing the RFNBO; and
 - ii. the installation generating renewable electricity has not received support in the form of operating aid or investment aid.¹⁹⁴
- According to Article 11 of the RFNBO Delegated Act, which is the chosen provision to be scrutinised in this thesis, the requirement of compliance with additionality in regards to points i and ii presented above do not apply until 1 January 2038 to installations producing RFNBOs that come into operation before 1 January 2028.

b. Temporal correlation:¹⁹⁵

- Until 2030: Complied with if the RFNBO is produced during the same calendar month as the renewable electricity produced under the renewable PPAs or from renewable electricity from a new storage asset that is located behind the same network connection point as the electrolyser or the installation generating renewable electricity, that has been charged during the same calendar month in which the electricity under the renewables PPA has been produced.
- From 2030: Same rule as above, but instead of assessing temporal correlation on the basis of the same calendar month, the production is assessed based on the same one-hour period.
- Always considered to be complied with if the RFNBO is produced during a one-hour period where the clearing price of electricity resulting from single day-ahead market coupling in the bidding zone, as referred to in

¹⁹⁴ RFNBO Delegated Act, art 5.

¹⁹⁵ RFNBO Delegated Act, art 6.

Article 39(2) point (a) of Commission Regulation (EU) 2015/1222, is lower or equal to EUR 20/MWh or lower than 0,36 times the price of an allowance to emit 1 tonne of carbon dioxide equivalent during the relevant period for the purpose of meeting the requirements of Directive (EC) 2003/87.

c. Geographical correlation:¹⁹⁶

- At least one of the following criteria is fulfilled:
 - i. the installation generating renewable electricity under the renewables PPA is located or was located at the time when it came into operation in the same bidding zone as the electrolyser;
 - ii. the installation generating renewable electricity is located in an interconnected bidding zone, including in another Member State, and the electricity prices in the relevant time period on the day-ahead market referred to in reference to temporal correlation in the interconnected bidding zone is equal or higher than in the bidding zone where the RFNBO is produced; or
 - iii. the installation generating renewable electricity under the renewables PPA is located in an offshore bidding zone that is interconnected with the bidding zone where the electrolyser is located.

The fourth way of producing RFNBOs from electricity taken from the grid provided above, namely the process whereby the fuel producer complies with the conditions of additionality, temporal correlation and geographical correlation, is considered as the most important and feasible avenue for producing RFNBOs at the current state, other than in situations where the electricity grid fulfils the requirement of 90 % share of renewable electricity in the bidding zone, which most countries are unable to fulfil as of yet.¹⁹⁷ Therefore, the exception from compliance with the requirement of additionality provided by the Commission is chosen for further scrutiny since its legality does raise certain concerns, as will be shown in the upcoming sub-chapter.

¹⁹⁶ RFNBO Delegated Act, art 7.

¹⁹⁷ Majanne – Vilhonen – Repo – Vilkkko 2024, p. 746.

3.2.2 Assessment of the legality of the grandfather clause

The grandfather clause

There are different ways of defining a ‘grandfather clause’. According to the Merriam-Webster dictionary the term refers to ‘*a clause creating an exemption based on circumstances previously existing*’.¹⁹⁸ According to the Cambridge Dictionary the term refers to ‘*a part of a new law or rule that allows someone to continue something, to do or to have something that a new law or rule makes illegal*’.¹⁹⁹ In essence, a grandfather clause, by allowing certain activity to continue, usually only for a specified time period, although that activity is aimed to be not be continued by law, can be used to ease the transition of changing laws for those who are subjected to the law in question and is often used in the context of legislating the energy transition. The term originates from voting laws in the southern United States after the civil war, which provided an exception from the additional strict requirements laid out for voting. Accordingly, if a person’s grandfather voted before the war, they did not need to fulfil the additional requirements, an exception which African Americans were unable to fulfil since African Americans did not have the right to vote prior to the civil war.²⁰⁰

The term ‘grandfather clause’ has been also vastly used in the context of EU law. The grandfather clause that will be scrutinised in here is that provided in Article 11 of the RFNBO Delegated Act, which provides for an exception for fuel producers from compliance with the requirement of additionality, according to which installations generating renewable electricity must come into operation not earlier than 36 months before the installation producing the RFNBO and the installation generating renewable electricity has not received support in the form of operating aid or investment aid.²⁰¹ The exception laid out in Article 11 applies until 1 January 2038 and may be applied in regards to installations that come into operation before 1 January 2028. Therefore, installations producing RFNBOs that come into operation before 2028 are exempted from the requirements that the electricity generation installation is ‘new’ and unsubsidized. The grandfather clause essentially exempts entire parts of the industry from being required to comply with the requirement of additionality for over a decade.²⁰²

¹⁹⁸ Grandfather clause, Merriam-Webster.

¹⁹⁹ Grandfather clause, Cambridge.

²⁰⁰ Grandfather clause, Cornell Law School.

²⁰¹ RFNBO Delegated Act, art 5.

²⁰² Hancher 2022, p. 183.

It is to be noted, that grandfather clauses are commonly used in EU law as it protects legitimate expectations, in this case of the industry. The principle of protection of legitimate expectations does not find its basis in the Treaties but instead in the case law of the Court, which has been inspired by the German administrative and constitutional law. In essence, the principle protects individuals against changes in law – which grandfather clauses essentially aim to do.²⁰³ Expectations can be considered to play an important role in the way that persons plan and execute their projects – they are a belief about the future which creates the basis against which a specific action is chosen from several potential avenues. However, as will be shown in the assessment of the case below – not all expectations are legitimate.²⁰⁴

This part of the thesis begs the question whether the grandfather clause in Article 11 of the RFNBO Delegated Act should have been adopted by the legislators via the formal legislative procedure instead of having been adopted by the Commission. With that in mind, in the subsequent sub-chapters, the legal validity of this grandfather clause is assessed based on the criteria presented in chapter 2 of this thesis and on the other hand, the need to comply with the principle of protection of legitimate expectations of existing (or as in the case of RFNBOs – most likely new) operators.

Legal basis

Since the Commission is an EU institution, it may adopt an act only when there exists a legal basis providing for its adoption.²⁰⁵ Delegated acts do not find their basis in primary law as legislative acts do, but instead their basis is found in secondary law, most commonly directives. In order for a delegated act to be valid there must therefore exist a legal basis providing for its adoption in a legislative act, i.e., an enabling act.

The legal basis for the adoption of the RFNBO Delegated Act is provided in Article 27(3) of RED II, which provides as follows, ‘*By 31 December 2021, the Commission shall adopt a delegated act in accordance with Article 35 to supplement this Directive by establishing a Union methodology setting out detailed rules by which economic operators are to comply with the requirements laid down in the fifth and sixth subparagraphs of this paragraph.*’. The requirements laid down in the fifth and sixth subparagraphs of Article 27(3) RED II refer to

²⁰³ von Arnould, p. 46.

²⁰⁴ Meyer – Truccone-Borgogno 2022, p. 703.

²⁰⁵ TEU, art 5(1).

the requirements of when electricity used for the production of hydrogen can be considered as fully renewable. Article 35 of RED II provides for the rules for the exercise of the delegation, which are assessed in the context of the requirement of specificity.

Based on Article 27(3) of RED II the Commission adopted on 10 February 2023 the RFNBO Delegated Act, in which the Commission establishes a Union methodology setting out detailed rules on the production of RFNBOs.

Whenever the Court assesses the validity of a provision or the entirety of a delegated act it always first assesses whether there existed a legal basis for its adoption, unless its basis is undisputed. As was held by the Court in *Connecting Europe Facility*, there are two distinct categories of delegated powers in Article 290(1) TFEU and that the legislature needs to determine under which one to confer powers to the Commission.²⁰⁶ In the assessment of whether there existed a legal basis for the adoption of the provision/act by the Commission the provision/act in question needs to be in line with the categorization given by the legislature, i.e., to either supplement or amend the legislative act.

Although the assessment in *Connecting Europe Facility* surrounded the question of whether the Commission was required to adopt a separate delegated act or whether it could add a new part to the annex of the enabling act, the Court in its reasoning provided important clarification to the interpretation of the notions of supplementing and amending. Accordingly, the Court held that a delegation of power to ‘supplement’ a legislative act means that the Commission is only authorised to ‘flesh out’ the act in question and that while exercising such supplementing powers, the Commission’s authority is limited to develop in detail non-essential elements of the legislation that the legislators have not specified, in full compliance with the entirety of the legislative act.²⁰⁷ In comparison, when the Commission is granted the power to amend the legislative act, it is empowered to make formal changes to the text by adding certain non-essential elements to it.²⁰⁸

The delegation of power laid out in Article 27(3) RED II, based on which the RFNBO Delegated Act and thereby the grandfather clause (Article 11) was adopted, is limited to a power to supplement the rules laid down in Article 27(3) RED II sub-paragraphs five and six, as explicitly stated in the delegating provision, which concern the rules on when electricity

²⁰⁶ *Connecting Europe Facility*, para. 46.

²⁰⁷ *Connecting Europe Facility*, para. 41.

²⁰⁸ *Connecting Europe Facility*, para. 45.

obtained from a direct connection or taken from the grid can be considered as fully renewable. The sub-paragraph delegating the power does therefore not allow the Commission to amend the rules in question, but only to supplement them, i.e., ‘flesh out’ the rules.

The requirement of additionality is not laid out in neither of the two sub-paragraphs which the Commission is allowed to supplement, but in Recital 90 of RED II the legislators have provided further criteria on how the Commission is supposed to develop the methodology to be applied when electricity used for the production of RFNBOs is taken from the grid. In that context, the legislators have stated that the methodology should contain an element of additionality, meaning that the fuel producer is adding to the increase of renewable electricity instead of using already existing renewable electricity. There therefore exists a legal basis in RED II for the Commission to provide more detailed rules concerning the requirement of additionality.

In Article 11 of the RFNBO Delegated Act, the Commission provided for an exception for installations that have come into operation before 2028 from having to comply with the requirement of additionality until 2038. The provision could be considered as amending RED II instead of supplementing it since it exempts entire parts of the industry from having to comply with the requirement of additionality for over a decade. There is nowhere to be found in RED II that entire industries should or could be exempted from complying with the requirement of additionality and in deciding to include such a rule in the RFNBO legislative framework the Commission could be perceived as having amended that framework, thereby possibly acting *ultra vires*.

On the other hand, it is possible to argue that adding transitional provisions would be supplementing the enabling directive since it merely lays out the detailed date from which the additionality requirement enters into force for a certain category of operators instead of exempting existing operators. This could be viewed as ‘fleshing out’ the starting date of their obligation.

Another interesting argument in support for the validity of the grandfather clause is the potential infringement of the principle of legitimate expectations of operators if such transitional period would not be provided. The connection between transitional arrangements, which a grandfather clause is, and the principle of protection of legitimate expectations has been assessed by the Court in *Atlanta*. In the case, *Atlanta AG*, a German company, alleged that Regulation No 404/93 in so far as it does not lay down appropriate transitional

arrangements, infringed the principle of protection of legitimate expectations.²⁰⁹ According to the Court, although ‘*the principle of protection of legitimate expectations is one of the fundamental principles of Community*’, ‘*traders are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained, particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances*’.²¹⁰ Moreover, in reference to its earlier case law, the Court held that ‘*a trader could not claim an acquired right or even a legitimate expectation regarding maintenance of an existing situation which was capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power*’.²¹¹

In essence, the Court assessed in *Atlanta* the existence of legitimate expectations from the viewpoint of whether the conduct of the competent authority had given rise to a legitimate expectation on the part of the parties concerned in that a particular situation would be maintained or that particular measures would be adopted. In order to show the existence of such legitimate expectations, the alleging party would have to advance evidence on the basis of which it could be concluded that the conduct of the legislature could have given rise in its mind to reasonable expectations that a particular situation would be maintained or that particular transitional arrangements would be adopted – which according to the Court was not fulfilled in the case at hand.²¹²

What is important therefore in regard to the assessment of the grandfather clause from the perspective of protection of legitimate expectations, is whether the conduct of the EU legislature or Commission, the competent authorities in this matter, have given rise to a legitimate expectation on the part of the operators that transitional arrangements would be adopted with regards to the applicability of the additionality requirement. Even after extensive research on the matter, it is difficult to completely rule out that the mentioned institutions would not have given any indication as to the adoption of transitional arrangements to the

²⁰⁹ Judgment 14.10.1999, *Atlanta*, C-104/97 P, EU:C:1999:498, para 49.

²¹⁰ *Atlanta*, para 52.

²¹¹ *Atlanta*, para 33.

²¹² *Atlanta*, paras 54-56.

applicability of the rule on additionality. However, no such transitional arrangements were discussed in the Commission's Proposal for RED II²¹³ or in the RED II itself.

The assessment of the legal validity of the grandfather clause contained in Article 11 of the RFNBO Delegated Act from the viewpoint of whether or not there existed a legal basis for its adoption does potentially raise some concerns as to its legal validity, although the protection of the principle of legitimate expectations, if those existed, would alleviate the problem. Next, we move to assessing other criteria laid down for its adoption and see that legal basis is not necessarily the only requirement raising questions as to the legal validity of the provision in question.

Requirement of specificity

The requirement of specificity, assessed in the previous chapter, refers to the requirement set out in Article 290(1) TFEU for the adoption of delegated acts, according to which the objectives, scope and duration of the delegated power must have been explicitly defined in the legislative act granting the delegation of power, which the Commission must abide by in the adoption of the delegated act. In *Czech Republic*, the Court has held that the definition of the delegation of power conferred to the Commission must be sufficiently precise, in that the limits of the power must be clearly indicated in order to be able to review the Commission's use of powers by reference to the objective criteria laid down by the legislators.²¹⁴ In the same ruling, the Court also emphasized that all of the criteria set out in Article 290(1) TFEU, i.e., that the objective, scope and duration is defined, need to be fulfilled since in that case the General Court had only assessed the objective of the delegation.²¹⁵

With that in mind, we assess next the criteria laid down by the legislators in RED II that guide the exercise of the delegated power by the Commission specifically in the adoption of the additionality requirement and the exception made to it and whether the Commission has followed such criteria.

As to the objective behind the delegation of power, the legislators held it to be the aim of ensuring that RFNBOs contribute to greenhouse gas emissions reduction, i.e. ensuring that the

²¹³ Proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources COM/2016/0767 final.

²¹⁴ Czech Republic, para 49.

²¹⁵ Czech Republic, paras 58-59.

electricity used for the production of RFNBOs is of renewable origin and that the renewable electricity used is ‘additional’ in the sense that it is not taken from somewhere else in use, where the renewable energy would be replaced by non-renewable electricity.²¹⁶ Indeed greenhouse gas emissions reduction is one of the main goals behind the adoption of RED II itself.²¹⁷

Allowing installations producing RFNBOs that have come into operation before the beginning of 2028 to derogate from the requirement of additionality can be seen as possibly going against the objectives behind the delegation of power and the overall objectives of RED II, since these installations can use in their production renewable electricity that is not new, meaning that it leads to fossil based electricity to be used elsewhere instead to fill the gap that is left. As assessed in the part assessing the legal basis of the adoption of the grandfather clause, the protection of the principle of legitimate expectations, if these indeed existed, would alleviate this issue as it is unlikely that the legislature would have as their aim the trampling of general principles of law in order to reduce greenhouse gas emissions.

As to the scope of the delegation of powers in regards to the requirement of additionality, the legislators have held that the methodology should include an element of additionality, meaning that the fuel producer must be adding to the renewable deployment or to the financing of renewable energy.²¹⁸ This, according to the legislators is required in order to *‘ensure that the expected increase in demand for electricity [...] beyond the current baseline is met with additional renewable energy generation capacity’*.²¹⁹ The more precise rules regarding additionality laid out in Article 5 of the RFNBO Delegated Act do fall under the scope laid out by the legislators, but the same cannot necessarily be said about the grandfather clause provided in Article 11 as no derogation has been provided for in RED II. The derogation therefore does not seem to fall within the scope of the delegation of power, unless the principle of protection of legitimate expectations would demand this.

As to the duration of the delegation, the legislators have specified these in Article 35 of RED II. Accordingly, the power to adopt the delegated act has been conferred for a period of five years from 24 December 2018. The delegation of power is tacitly extended for periods of identical duration unless either of the legislators opposes such extension no later than three

²¹⁶ RED II, recital 90.

²¹⁷ RED II, recital 2.

²¹⁸ RED II, recital 90.

²¹⁹ RED II, art 27(3).

months before the end of each period. The delegation of power may be revoked at any time by either of the legislators. The adopted delegated act enters into force if no objection has been expressed by either of the legislators within a period of two months of notification of that act to the legislators, a period which may be extended by two months at the initiative of either of the legislators, or if, before the expiry of that period, the legislators have both informed the Commission that they will not object to the delegated act. It is unclear why the delegating provision in Article 27(3) RED II states that the delegated act should be adopted by 31 December 2021 when Article 35 RED II provides for the above-stated rules regarding the duration of the delegation of power. The RFNBO Delegated Act has been adopted in accordance with the rules regarding the duration of the delegation of power provided in Article 35 RED II as the RFNBO Delegated Act was adopted on 10 February 2023.

Requirement of non-essentiality

The requirement of non-essentiality, assessed in the previous chapter, refers to the requirement set out in Article 290(1) TFEU for the adoption of delegated acts, according to which the power of the Commission to adopt delegated acts is possible only in regards to certain non-essential elements of the legislative act. The Court has not yet assessed the requirement of non-essentiality of a transitional provision – therefore guidance must be searched from more general interpretative methods that the Court has used in the assessment of the requirement of non-essentiality.

As we saw in the previous chapter, the Court has indicated in *Czech Republic* that the defining feature of whether an element is essential or not is whether it is subject to political decisions which require a balancing of conflicting interests, or if it interferes with fundamental rights to a certain extent.²²⁰ It is safe to say that the grandfather clause provided in Article 11 of the RFNBO Delegated Act does not interfere with fundamental rights (although protection of the environment could be considered as such, but this reasoning is unlikely to be followed by the Court).

Whether or not to allow for an exception to the additionality, or if the findings in the assessment of legal basis would have led to considering the provision as supplementing RED II, whether or not to allow the specifying of the exact starting date for the application of additionality, which could be justifiable based on economic reasons and other reasons alike, is

²²⁰ Czech Republic, para 78.

a decision that should possibly have been taken in the political sphere, i.e., by the legislators via the ordinary legislative procedure. This is because making the decision could be seen as requiring the balancing of conflicting interests, which are the reduction of greenhouse gas emissions versus the needs of the industry and the economy. The principle of protection of legitimate expectations, if such legitimate expectations indeed existed, would have obviously made the balancing of political choices irrelevant, as the legislature would not have been able in such case to not respect a general principle of EU law.

In *Dyson*, the Court, in assessing whether the element laid out in a delegated act could be considered as essential made reference to the overall objectives of the enabling act.²²¹ This aspect was shortly discussed in reference to whether the RFNBO Delegated Act was within the scope of the limits set out by the legislators in the previous sub-chapter, but this ought to be assessed more thoroughly here. According to RED II, the goal of the directive is to promote renewable forms of energy in order to reduce greenhouse gas emissions and comply with the Union's commitments under the 2015 Paris Agreement on Climate Change as well as with the overall Union energy and climate framework, which contains a binding target to cut emissions by at least 40 % below 1990 levels by 2030 (target has been increased in RED III to 55 %).²²² As laid out previously, the goal of reducing greenhouse gas emissions is also the goal behind the delegation of power.

In the RFNBO Delegated Act the Commission has through a derogation to the requirement of additionality, a requirement that was provided in RED II, excluded installations producing RFNBOs that come into operation before 2028 from applying such requirement for over a decade. This derogation or anything that could be interpreted as the legislators having had the intention of excluding certain installations from its applicability, cannot be found anywhere in RED II or its preparatory work. Since this derogation would mean that these installations do not need to use in their production 'new' renewable electricity, the renewable electricity used in the production of RFNBOs in these installations means that the renewable electricity could be taken from somewhere where it was previously used, which would potentially be replaced by fossil-based electricity. The derogation to the additionality would therefore potentially go against the goals of RED II, which is to reduce greenhouse gas emissions and abiding to international and EU wide requirements for cutting emissions.

²²¹ *Dyson*, para. 64.

²²² RED II, recital 2; RED III, recital 1.

Based on the assessments provided above, there are potential issues with the legal validity of Article 11 of the RFNBO Delegated Act. However, since the provision has been in force for a while now it could be expected that the protection of the principle of legitimate expectations, would require the Court to uphold the validity of the provision as operators have now had a legitimate expectation that such transitional provision would be applied.

4 Democratic implications of delegation of powers

Concerns over the legitimacy of the European Union have been increasing over the years. This is due to the responsibility of decision-making at the national level shifting towards decision-making at the supranational level, one policy area, or perhaps more accurately put, several, at a time. Through this shift of decision-making from the national to the supranational level, the European integration project has increased the authority of Union institutions, which some have perceived as having been done at the expense of national decision-making institutions.²²³

This writer takes no such strong stance, especially considering that complex societies would anyway require matters to be dealt with at a ‘global’ non-national level, through free trade agreements and such. However, there are aspects of the system that have come in lieu of these national decision-making institutions, that raise concerns from the perspective of democracy. One such institution is the delegation of rule-making powers from the legislature to the Commission. The aspects of said institution that raise concerns from the perspective of democracy are assessed in this chapter.

The principle of democracy, which is one of the core elements of the European Union, requires that legislation be adopted by the parliament composed of elected representatives of the people.²²⁴ Such representative democracy is provided for in the Treaties, in Article 10(1) TEU, according to which the functioning of the Union is founded on representative democracy. In its purest form, the principle of democracy would not allow for the delegation of legislative power to any entity other than the parliament. Thereby all rules of general application, i.e. legislation, would have to be enacted by the legislature, which would be the parliament, and in areas where the Union has either exclusive or shared competence, the European Parliament and the Council (normally with the support of national parliaments). This pure form of democracy, however, is not a reality and has never existed, in the Union, or in any country for that matter. The legislature lacks the time, resources and/or expertise to be able to adopt highly technical details of legislation and to adapt with sufficient speed to changing environments. This is why most countries, as well as the European Union, resort to

²²³ Schmidt 2019, p. 127.

²²⁴ Rittleng 2016, p. 133.

delegating power to legislate to the executive, which in the context of countries is the role taken by the government, and in the Union context it is the role taken by the Commission.²²⁵

In order to preserve the principle of democracy in the practice of transfer of rule-making powers to the Commission, several limits have been set to its use, which were assessed in chapter 2. One of the most important limits set for the use of delegation of rule-making powers is provided by the notion of essential elements. Accordingly, the essential elements of the legislation are to be left to the sphere of the legislature and cannot be transferred to the executive. The notion of essential elements therefore provides an important restriction on the possibility to delegate legislative powers from the legislature to the executive, thereby protecting democracy. The legislature must therefore exhaust its exclusive jurisdiction and define itself the essential elements of an area and thereby take accountability for its content. The constitutional importance of the doctrine of essential elements can also be perceived in the jurisprudence of the Court since it held in *Biocides* that the assessment of whether an element is essential or not is not up for the legislature alone to decide, but is instead assessed based on objective factors amenable to judicial review, i.e., its correct application is protected by the judiciary.²²⁶

4.1 Unbalance between the European Parliament and the Council

One of the main issues from the perspective of the preservation of the principle of democracy in the delegation of powers is the imbalance between the European Parliament and the Council in the process of adoption of delegated acts.

The Lisbon Treaty aimed in principle to provide for an equal role for the European Parliament and the Council regarding delegated acts. This aim was subsequently undermined through the adoption of interinstitutional agreements in which Member State experts were included in the process of the adoption of delegated acts, which is a procedural aspect derived from the comitology procedure. However, unlike the expert groups in comitology, called comitology committees, the expert groups in the context of delegated acts are not subject to any transparency or accountability requirements, which are important elements of democracy.²²⁷

²²⁵ Ritleng 2016, pp. 133-134.

²²⁶ Ritleng 2016, pp. 142-143.

²²⁷ Curtin 2018, p. 20.

According to the Common Understanding, which provides for the procedural rules regarding the adoption of delegated acts, expert groups are to be consulted in the preparation of draft delegated acts in a timely manner and that it is up for the Member States to decide which experts are to participate.²²⁸ The Common Understanding thereby envisions an important role for expert groups in the preparation of delegated acts, which does not seem to be what the drafters of the Lisbon Treaty had in mind, since in the preparatory works the use of member state experts is explicitly mentioned in regards to implementing acts whereas no such explicit or even implicit mention can be found for delegated acts.²²⁹

An aspect that does seem to alleviate the issues of lack of transparency and accountability regarding the use of expert groups in the adoption of delegated acts is that the Commission has an online register of expert groups, which, based on an inspection conducted by the writer in March 2025, seems to be regularly updated and at least seemingly complete.²³⁰ It is also worth mentioning the advantages in consulting expert groups in the adoption of delegated acts, some of which include the possibility to take advantage of technical expertise of national experts and to obtain political feedback right from the start of the process, all of which provide for efficiency, which in itself is one source of legitimacy in a well-functioning (and realistic) democracy. This also allows the Council to be indirectly involved from the start, and although indirectly elected, the Council through its presence further legitimizes the adoption of delegated acts.²³¹ However, this might slightly imbalance the power of control over the adoption of delegated acts in favour of the Council, going against the dual democratic representation projected by the Treaties, but this might be unavoidable given the lack of resources of the European Parliament compared to the Council, a problem which also exists in the national sphere as governments are often better resourced than parliaments.

One aspect in which the Lisbon Treaty itself did not follow the equality of the legislators regarding delegated acts is the voting rules required for triggering the controls provided in Article 290(2) TFEU, i.e., revocation and veto. Accordingly, in triggering the controls in Article 290(2) TFEU the Council is required to act by a qualified majority, which is the usual voting requirement in the Council, whereas the European Parliament must act by a majority of

²²⁸ Revised Common Understanding, art 4.

²²⁹ Final report of working group IX 'Simplification', pp. 10-12.

²³⁰ Curtin 2018, p. 28; the online register may be accessed from the following site:

<https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups?lang=en>.

²³¹ Volpato 2022, p. 155.

its component members, which is stricter than the requirement by which the European Parliament normally adopts legislation, i.e., by simple majority of votes. This means that the European Parliament has to, in order to trigger one (or both) of the control mechanisms provided in the Treaties over delegated acts, fulfil a voting requirement that is higher than what is required when adopting the primary act via the OLP, which is the legislative procedure used in the adoption of the vast majority of legislative acts in the Union. Some authors have found this to have affected negatively in practice the possibility of the Parliament to fulfil effectively its role of oversight.²³²

However, when assessed more closely, the voting rule for the Council in triggering the control mechanisms in Article 290(2) TFEU is more rigid than the habitual voting requirement that it has to follow in the adoption of legislative acts. Indeed the objection or revocation of the delegated act represents a case of reverse qualified majority, in that the delegated act enters into force unless a qualified majority opposes it, whereas the opposite is the case when adopting legislation via the OLP, thereby reducing the ‘upper hand’ the Council may be perceived to have, or possibly even flipping it completely, since reversed qualified majority voting might in practice be harder to achieve than the majority of members of the European Parliament.²³³

4.2 Lack of capacity for clear oversight over the Commission

Another main issue in the delegation of powers to the Commission is the potential lack of capacity by both legislators to control the Commission’s delegated powers effectively, due to lack of sufficient administrative resources, the required political will to engage with matters over delegated rulemaking on a regular basis, as well as the necessary time to do so even when the will to do so exists.²³⁴ One important finding in this regard is that although the European Parliament has been granted access to the meetings of the expert groups in the context of drafting delegated acts, in practice the Parliament has rarely used this possibility, and that even in the rare cases that the Parliament has participated, the participating person has not been a member of the Parliament but instead a staff member.²³⁵

²³² Bellenghi – Vos 2024, p. 12.

²³³ Volpato 2022, p. 163.

²³⁴ Christiansen – Dobbels 2016, p. 103.

²³⁵ Bellenghi – Vos 2024, p. 12.

The main controls of the oversight role of the legislature over the Commission are the controls laid out in Article 290 TFEU, i.e., that the objective, content, scope and duration of the delegation of power is laid out beforehand by the legislature, and more importantly the legislators' right of revocation and objection. These are the controls that provide for democratic legitimacy for the use of delegation of powers. Both legislators are equal guardians of these controls, which is in line with the requirement of dual representative democracy laid down in Article 10(2) TEU.²³⁶

However, these controls have weaknesses. The power to revoke or object to the delegated act can be considered very radical. They do not allow for modifications to be made and instead provide a 'nuclear option' i.e., the process needs to be started from the beginning, nullifying everything that has been previously achieved. The radical aspect of these powers could explain why they have not been used much, although the framework for their use has been in force already for over a decade.²³⁷ Alternatively, it could also be the case that the possibility of the 'nuclear option' has a deterrent effect in that due to its existence the Commission has been very careful in the adoption of delegated acts by ensuring beforehand that it aligns with the wishes of the majority of Council members and members of the European Parliament.

4.3 Democratic implications of the adoption of the grandfather clause in Article 11 of the RFNBO Delegated Act

The democratic legitimacy of delegation of powers is derived from the enabling act, which is adopted by the legislature via the legislative process, and which grants the delegation of power. This enabling act sets the essential elements of the legislation and importantly, sets out the range of public interests that the enabling act and the subsequent delegated act aim to achieve and protect. This is important to ensure that the requirements of representative democracy are abided by.²³⁸ It is therefore of great importance that the Commission when adopting delegated acts, acts within the parameters of the goals set out by the legislature in the enabling act and that the legislature properly fulfils its role of oversight over the adoption of delegated acts.

²³⁶ Mendes 2016, p. 235.

²³⁷ Mendes 2016, p. 236.

²³⁸ Ponzano 2016, p. 49.

What has been shown in chapter 3 is that the Commission has perhaps acted beyond the limits set out by the legislature in the enabling act, namely RED II, when it enacted Article 11 of the RFNBO Delegated Act. The legislature laid out in RED II, clearly and in several instances, that the primary aim of the directive is the lowering of greenhouse gas emissions in the Union. Article 11 of the RFNBO Delegated Act however goes against such goal.

The use of a grandfather clause is not in itself necessarily an issue and is often used in EU and Member State context. Another important element to consider is the principle of legitimate expectations. Therefore, if such legitimate expectations could be shown to have existed, there would be no issues with its adoption since neither the legislature nor the Commission could be thought as having had as its intention to achieve lower greenhouse gas emission by trampling on a general principle of EU law. However, if such legitimate expectations did not exist, as possibly was the case, the application of Article 11 of the RFNBO Delegated Act would mean lower greenhouse gas emissions savings, going directly against the primary goal of RED II. If that was the case, the provision might have needed to be adopted in the legislative act instead, since political considerations would have to have been considered in its adoption, i.e., the balancing of the protection of the environment against the needs of the industry, and to then make a decision on which interest should be given more weight in the case at hand.

On the other hand, the adoption of legislation on RFNBOs is a good example to show the expertise, technical nature and speed which is required in the adoption of rules governing energy law. It could be said quite certainly that such would only be possible via the delegation of powers to the Commission. Effectiveness is indeed in itself a source of legitimacy.²³⁹ Also, it should be noted that in the course of conducting research for this paper, other provisions in the RFNBO Delegated Act were assessed and that there seemed to be no provisions adopted which would have raised concerns as to their validity. It seems clear that the Commission does for the most part abide by the rules set out in the Treaties and set out by the legislature, however, that does not mean that less importance should be given to when certain, albeit not necessarily grave, violations might be perceived.

²³⁹ Craig – de Búrca 2020, p. 187.

4.4 Protection of democracy through the creation of the category of delegated acts

Although some democratic deficiencies, assessed above, still exist in the use of the delegation of powers by the Commission, the adoption of the Lisbon Treaty had furthered the democratic legitimacy of the system by making a distinction between delegated ('legislative') and implementing ('executive') acts and by providing for an equal role in the oversight of the category of delegated acts to the European Parliament.²⁴⁰ A different issue, which, for the purpose of this thesis, is only mentioned here briefly, is the difficulty in drawing a clear distinction between delegated and implementing acts, as the adoption of implementing acts is left to be governed by the rules of the old comitology procedure, where the European Parliament does not have any role. The risk that some acts, which are legislative in nature, but which have been regarded as implementing acts is not to be disregarded. An additional aspect which makes this issue even more concerning is the fact that the Court has left it for the legislature to decide whether or not an act should be considered as a delegated or implementing act, i.e., which procedures are used for their adoption, save for manifest errors of assessment.²⁴¹

In essence, the delegation of powers requires the balancing of effectiveness and democracy, which are both important for a well-functioning society. When balancing said interests, which should be done by the legislature and as a last resort by the Court, it is important to keep in mind the (perceived) democratic deficit in the Union, and that technocratic procedures inevitably widen the gap between Union institutions and its citizens, a gap that does not need to be widened any further.²⁴²

²⁴⁰ Bast 2016, pp. 164-165.

²⁴¹ See for more information e.g., Bellenghi – Vos 2024; Mendes 2013; Bradley 2016.

²⁴² Volpato 2022, p. 163.

5 Conclusions

This thesis began with an introduction to the topic at hand, focusing on the growing volume of legislation issued by the Union institutions, particularly in the fields of energy and climate. It emphasized the importance of ensuring that adopted legislation and subsequent acts follow the law and hold Union institutions accountable. Delegated acts, in particular, play a significant role in this legislative framework.

In the second chapter, the historical context of transferring rule-making powers to the Commission within the Union was explored. The chapter outlined the requirements for adopting delegated acts and the control mechanisms surrounding their adoption. Key legal requirements for adopting delegated acts include that they are non-legislative, generally applicable, supplement or amend the legislative act without concerning essential elements of the act and adhere to the requirement of specificity – that is, aligning with the legislature's requirements set in the enabling act. The main control mechanisms by the legislature over the delegation of powers are the right of revocation and veto, which both legislators can use, and the possibility of judicial review by the Court.

In the third chapter, this thesis assessed the regulation of RFNBOs, particularly whether the Commission might have overstepped the requirements presented in the earlier chapter in adopting the delegated act pursuant to the RED II, regulating the specificities governing the production and use of RFNBOs. One potential provision found in the RFNBO Delegated Act is the grandfather clause in Article 11, which potentially conflicts with the requirements of non-essentiality, specificity, and merely supplementing the legislative act, which was the limit of the power set out by the legislators for adopting the specific act in question. However, if prior to its adoption, operators had legitimate expectations of its inclusion in the legislative framework, no conflicts in its adoption would exist.

In the fourth and final chapter, the democratic implications of delegation of rule-making power were assessed. The primary issues from a democratic perspective include the imbalance between the European Parliament and the Council due to the inclusion of national expert groups in drafting of delegated acts, the European Parliament's limited capacity to oversee the Commission, and the potential insufficiency of control mechanisms provided in Article 290(2) TFEU. Compelling counterarguments were presented for these concerns, alleviating the weight of these negative implications. However, considering the democratic

concerns and the vast use of delegation of powers, along with growing democratic deficit perceptions in the Union, these issues should not be overlooked.

This thesis concludes that while the Commission generally adheres to the legal requirements for adopting delegated acts, there are instances, such as the grandfather clause in Article 11 of the RFNBO Delegated Act, where it may have overstepped its powers. The extensive use of delegation raises concerns for democratic accountability within the EU. It is crucial for the Commission to strictly adhere to legal requirements to maintain democratic accountability. Future policymaking should consider enhancing oversight and addressing these identified concerns.