DELEGATION OF POWER AND COMMITTEE PROCEDURE (CHAPTER XI) *

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1. *Delegation of powers. Delegated and implementing acts*

As the preceding chapters have shown, the EU has sought to establish a clear and robust legal framework for the development and implementation of AI, protecting the fundamental rights of individuals and promoting trust in this technology. In this context, this contribution is devoted to the analysis of the possibility provided for in the Artificial Intelligence Regulation to adopt *delegated acts*. These are specific decisions to be adopted specifically by the European Commission to supplement or amend certain aspects of the main regulatory text. These delegated acts provide additional details on how the general provisions of the Regulation will be applied in specific situations, allowing for regular adjustments or updates to keep up with developments in technology and market needs. For example, delegated acts could address technical issues and more detailed definitions or specifications on compliance requirements. The aim is to provide more detailed and concrete guidance on applying the AI Regulation in practice.

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However, the Treaty of Lisbon, which amended the Treaty on the Functioning of the European Union, introduced a not entirely clear distinction between delegated acts and implementing acts, which can also be of a normative nature in relation to the Commission's power to implement EU legislation. The Artificial Intelligence Regulation devotes several of its articles to this issue, relating to specific questions that we will unravel in these pages, in addition to a generic regulation in Article 97 itself.

Delegated acts of the European Commission are technical decisions adopted by the Commission to supplement or amend some aspects of a legislative act of the European Union, such as a Regulation or a Directive. The legislative act delegating powers defines the objectives, content, scope, and duration of the delegation of powers, as well as, where appropriate, the urgency procedures. In addition, the legislator lays down the conditions to which the delegation is subject, which may include the power to revoke the delegation and the power to raise objections. Delegated acts are used to specify technical or procedural details that are not directly contained in the main act and which are necessary for its effective implementation.

In the context of AI regulation, the European Commission should propose delegated acts as part of its approach to establish a clear and coherent regulatory framework for the development and ethical use of AI in the European Union. These delegated acts may include detailed provisions on specific aspects of AI regulation and aim to provide operational details necessary to implement AI regulation across the European Union effectively. They also seek to ensure a consistent and harmonised approach to managing the risks associated with using AI while promoting innovation and responsible development of the technology.

For their part, *implementing acts* that may be issued by the EU Commission are decisions adopted by the Commission to ensure the uniform application of European Union (EU) legislation in all member countries. These acts are used to implement and enforce EU laws and regulations consistently and effectively.

Articles 290 and 291 of the Treaty on the Functioning of the European Union are devoted to these two forms of *delegated legislation*. They are two precepts introduced by the Treaty of Lisbon, although their origins date back to the 1960s with the creation of the so-called *comitology*. Delegation is made to the Commission by a legislative act (and the Regulation under discussion here is one) to issue non-legislative acts of general scope which may 'supplement' or 'amend' non-essential elements of the legislative act, which will also lay down the conditions or limitations of the delegation.

There will be a content 'reserved' to the legislative act which the delegated act may not regulate, and the delegation may be revoked by the European Parliament or the Council, which may also object to the entry into force of the delegated act. These two types of non-legislative acts must be described as 'delegated' or 'executive', as the case may be. [1]

This delegation allows the legislator to concentrate on policy orientation and objectives without engaging in excessively detailed and often technical discussions. However, the delegation of the power to adopt delegated acts is subject to strict limits, as outlined in the previous paragraphs. Only the Commission is empowered to adopt delegated acts. Moreover, the essential elements of an area cannot be the subject of a delegation of power. Moreover, the objectives, content, scope, and duration of the delegation of power must be defined in the legislative acts. Finally, the legislator must explicitly state the conditions for the exercise of such delegation in the legislative act. In this regard, as mentioned above, Parliament and the Council may provide for the right to revoke the delegation or to express objections to the delegated act.

The use of this procedure is widespread in many areas, for example: in the internal market, agriculture, environment, consumer protection, transport and the area of freedom, security and justice. Moreover, it is now also in the context of artificial intelligence.

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[1] Both are subject to the control procedures provided for in Regulation (EU) n° 182/2011 of the European Parliament and the Council of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

[2] In this respect, general works on the legal system of the European Union can be consulted, such as A. Mangas Martín and D.J. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea*, Tecnos, 10th edition, 2020, pp. 367 ff, especially, 387 ff.;

law,[3] but rather we are going to assess the cases for which the Artificial Intelligence Regulation provides for its application.

D. Sarmiento, *El Derecho de la Unión Europea,* 4th edition, Marcial Pons, 2022, pp. 178 ff.; J.M., Beneyto Pérez, *Tratado de Derecho y Políticas de la Unión Europea*, vol. IV, Aranzadi, Cizur Menor, 2011, pp. 111 ff.

In the specialised literature, the contributions of E. Vírgala Foruria, *Los actos no legislativos en la Constitución Europea*, in *Revista de Derecho Constitucional Europeo*, 6, 2006, pp. 279 ff.; J.A. Fuentetaja Pastor, *Actos delegados, actos de ejecución y distribución de competencias ejecutivas en la Unión Europea*, in *Revista Española de Derecho Administrativo*, 149, 2011, pp. 55 ff.; G. Garzón Clariana, *Los actos delegados en el sistema de fuentes de Derecho de la Unión Europea*, in *Revista de Derecho Comunitario Europeo*, 37, 2010, pp. 721 ff.; J.D. Janer Torrens, *Actos de ejecución y modalidades de control por parte de los Estados: la nueva regulación sobre la comitología*, in *Revista Española de Derecho Europeo*, 42, 2012, pp. 9 ff.; and A. Mangas Martín, *Algunos aspectos del Derecho derivado en el Tratado de Lisboa: categorización de los actos, indeterminación de los tipos de actos, bases jurídicas y jerarquía,* in *Revista General de Derecho Europeo*, 18, 2009.

Cf. also, more specifically, the commentary on the judgment of the Court of Justice of the European Union of 18 March 2014 in Case 427/12, EU:C:2014:170, by Professor J. García Luengo, *Normativa delegada, normativa de ejecución y el poder de libre configuración del legislador de la Unión Europea*, in *Revista Española de Derecho Europeo*, 52, 2014, pp. 141 ff.

[3] For example, in the CJEU of 17 March 2016, *EP v. Commission*, C-286/14, EU:C:2016:183, paragraphs 40-46. In the CJEU of 16 July 2015, *Commission v EP*, C-88/14, EU:C:2015:499, paragraph 31, the Court recalls that implementing acts may not amend or supplement the legislative act, even as regards its non-essential elements. A wide-ranging dispute has even arisen between the various Community institutions, in which the CJEU itself has given some interpretative guidelines, such as that the delegated act supplements, while the implementing act specifies the content of the act in order to ensure uniform application in all States (CJEU of 18 March 2014, *Commission v. Parliament and Council*, C-427/12, EU:C:2015:499). *Parliament and Council*, C-427/12, EU:C:2014:170, paragraphs 39 and 52: supplementing implies that there is a prior unregulated area, a vacuum which needs further regulation; specifying implies that there is no vacuum but that a specific supplementary regulation is necessary). The Court also specifies that although the legislator has a wide margin of discretion, it cannot freely choose one or the other and that its decision may be subject to judicial review (CJEU of 15 October 2014, *Parliament v.* Commission, C-65/13, EU :EU:2000). *Commission*, C-65/13, EU:C:2014:2289, paragraph 45, and 427/12, cited above, paragraph 40). The Court also considers that implementing acts may contain measures which are partly

Our analysis will begin with the study of the precept, which, in general terms, regulates the issue, i.e. Article 97 of the Artificial Intelligence Regulation, to address the articles and matters in which this delegation is made. The legislative act that carries out the delegation is here the Artificial Intelligence Regulation, specifically in each of the articles and sections mentioned in this precept, affecting said delegation to the matters they regulate in the terms we will see later, bearing in mind, as we know, that these precepts must regulate the essential elements of their respective fields, without these elements being the object of delegation.

The period for which the delegation is made is established (five years), tacitly extended for identical periods (bearing in mind that either of the two options would be equally valid, in accordance with the Annex to the Interinstitutional Agreement of 13 April 2016 [4]), unless Parliament or the Council objects to the extension within three months before the end of the original period or of each of the extensions. Within nine months before the end of the five-year period, the Commission shall draw up a report on the delegation.

It also establishes the possibility for Parliament or the Council to revoke the delegation 'at any time', with effect from publication in the OJEU (or on the date indicated in the act of revocation), but always with effect for the future and never in respect of delegated acts already in force.

When issuing these delegated acts, the Commission is obliged to consult experts designated by the Member States in accordance with the principles set out in the Interinstitutional Agreement of 13 April 2016 on Better Regulation. Among these principles, we will highlight the following.

Firstly, it is for the legislator to decide in which cases and to what extent

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novel and which are not contained in the basic legislative act, provided that they are explicitly or implicitly deduced from the will of the legislature. As well as the fact that the empowerment of the basic legislative act is for one-time use only and that any amendment of the delegated or implementing act will require a new empowerment (CJEU of 17 March 2016, *Parliament v. Commission*, C-286/14, EU:C:2016:183, paragraph 55).

[4] Interinstitutional Agreement of 13 April 2016 on Better Law-Making, available in: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016Q0512(01). In particular, paragraph V of the Agreement refers to delegated and implementing acts jointly and contains in its Annex the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts.

to use delegated or implementing acts within the limits set by the Treaties. In accordance with the Common Understanding annexed to the Institutional Agreement, and in order to improve transparency and consultation, the Commission undertakes to seek, prior to the adoption of delegated acts, all necessary technical advice, including by consulting Member States' experts as public consultations. These may be existing or ad hoc expert groups, and consultations will be carried out at the invitation of the Commission through the Permanent Representations of all Member States, with the Member States deciding which experts will participate.

Secondly, where more extensive technical advice is needed in the initial stages of preparation of draft implementing acts, the Commission will make use of expert groups,[5] consult specific stakeholders, and conduct public consultations, as appropriate.

Thirdly, it is established that the European Parliament and the Council will receive all documents at the same time as the Member States' experts. European Parliament and Council experts will systematically have access to meetings of Commission expert groups to which Member States' experts are invited and where the preparation of delegated acts is discussed. In relation to the exercise of implementing powers by the Commission, the three Institutions agree to refrain from adding procedural requirements in Union legislation that would alter the control mechanisms established by Regulation (EU) No 182/2011 of the European Parliament and of the Council.

Finally, delegations of power may be grouped together, provided that the Commission provides objective justifications based on the material link between two or more delegations of power included in the same legislative act unless otherwise stated in the legislative act. Consultations during the preparation of delegated acts also serve to indicate which delegations of power are considered to be materially linked.

Having made the above clarifications and returning at this point to the commentary on Article 97 AIA, it also provides for the possibility for both

[5] This is the comitology system referred to by J. García Luengo, op. cit, p. 142, which reaches its 'most intense manifestation' with the so-called *review procedure*, which 'can determine that the Commission proposal is not adopted and lead the Commission to formulate a new draft or to require the intervention of an Appeal Committee -with higher-ranking representatives- if it wants to maintain the original draft'; cfr. R. Alonso García, *Sistema Jurídico de la Unión Europea*, 4th edition, Civitas, Madrid, 2014, pp. 103 ff.

the European Parliament and the Council to raise objections within a period of three months of the Commission notifying these bodies that it has adopted a delegated act. Within this period, which may be extended by both the Parliament and the Council for a further three months, several possibilities are possible: objections may be raised, in which case they must be corrected for the delegated act to enter into force; or they may not be raised, either because the period has elapsed without either of the two institutions expressing any objections or because, before the end of the period, they inform the Commission that they will not raise any objections. In the latter case, the delegated act would enter into force.

2. *Specific cases*

In order to ensure that the regulatory framework can be adapted when necessary, in line with technological or market developments, the powers introduced in favour of the Commission to adopt delegated acts in accordance with Article 290 TFEU would allow the Commission to amend the conditions under which an AI system should not be considered as a high-risk system; the list of high-risk AI systems; the provisions on technical documentation; the content of the EU declaration of conformity; the provisions on conformity assessment procedures; the provisions setting out for which high-risk AI systems the conformity assessment procedure based on the assessment of the quality management system and on the assessment of the technical documentation, threshold, benchmarks and indicators should be applied, including the possibility to supplement these benchmarks and indicators; classification rules for general purpose AI models with systemic risk; criteria for classifying a model as a general purpose AI model with systemic risk; technical documentation for providers of general purpose AI models and transparency information for providers of general purpose AI models.

In particular, *the powers to adopt delegated acts* are those referred to in Articles 6 (6) and (7), 7 (1) and (3), 11 (3), 43 (5) and (6); 47 (5), 51 (3), 52 (4) and 53 (5) and (6).

Article 6, included in Section 1 of Chapter III, regulating high-risk AI systems,[6] allows the Commission to adopt delegated acts to amend

[6] On the delegation of powers to the Commission, in particular on the

(paragraph 6) or delete (paragraph 7) the conditions set out in the first subparagraph of paragraph 3, i.e., the conditions that determine that an AI system is not considered high-risk, namely: '(a) the AI system is intended to perform a narrow procedural task; (b) the AI system is intended to improve the result of a previously completed human activity; (c) the AI system is intended to detect decision-making patterns or deviations from prior decision-making patterns and is not meant to replace or influence the previously completed human assessment, without proper human review; or (d) the AI system is intended to perform a preparatory task to an assessment relevant for the purposes of the use cases listed in Annex III'. The Commission is empowered to '[add] new conditions to those laid down therein, or [to modify] them, where there is concrete and reliable evidence of the existence of AI systems that fall under the scope of Annex III, but do not pose a significant risk of harm to the health, safety or fundamental rights of natural persons'. The Commission shall also '[delete] any of the conditions laid down therein, where there is concrete and reliable evidence that this is necessary to maintain the level of protection of health, safety and fundamental rights provided for by' the AIA. Addition, modification, or deletion of conditions by the Commission by means of delegated acts which shall in no case lead to a reduction of the overall level of protection of health, safety, and fundamental rights in the Union, whereby technological and market developments shall generally be an element to be assessed and taken into account.

Pursuant to Article 7, the Commission may also adopt delegated acts to amend Annex III 'by adding or modifying use-cases of high-risk AI systems where both of the following conditions are fulfilled: (a) the AI systems are intended to be used in any of the areas listed in Annex III; (b) the AI systems pose a risk of harm to health and safety, or an adverse impact on fundamental rights, and that risk is equivalent to, or greater than, the risk of harm or of adverse impact posed by the high-risk AI systems already referred to in Annex III'. Likewise, the Commission is empowered to

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possibility of adding new high-risk systems by means of delegated acts, see T. de la Quadra-Salcedo Fernández del Castillo, *Inteligencia artificial, Administraciones Públicas y Derecho. Una visión comparada de un Derecho en construcción*, in *XVIII Congreso de la Asociación Española de Profesores de Derecho Administrativo*, on *El Derecho Administrativo en la era de la Inteligencia Artificial*: https://www.aepda.es/AEPDAEntrada-3987-XVIII-CONGRESO-DE-LA-ASOCIACION-ESPANOLA-DE-PROFESORES-DE-DERECHO-ADMINISTRATIVO.aspx.

'[remove] high-risk AI systems where both of the following conditions are fulfilled: (a) the high-risk AI system concerned no longer poses any significant risks to fundamental rights, health or safety, taking into account the criteria listed in paragraph 2; (b) the deletion does not decrease the overall level of protection of health, safety and fundamental rights under Union law'.

Article 11 AIA refers to '[t]he technical documentation of a high-risk AI system shall be drawn up before that system is placed on the market or put into service and shall be kept up-to date'. Under the terms of its paragraph 3, '[t]he Commission is empowered to adopt delegated acts in accordance with Article 97 in order to amend Annex IV, where necessary, to ensure that, in light of technical progress, the technical documentation provides all the information necessary to assess the compliance of the system with the requirements set out in' Section 2 of Chapter III of the Regulation.

Article 43 AIA, which provides the rules for the conformity assessment applicable to high-risk AI systems in order to demonstrate the compliance with the requirements set out in Section 2, empowers the Commission 'to adopt delegated acts in accordance with Article 97 in order to amend Annexes VI [7] and VII [8] by updating them in light of technical progress'. In addition, para. (6) empowers the Commission 'to adopt delegated acts in accordance with Article 97 in order to amend paragraphs 1 and 2 of this Article in order to subject high-risk AI systems referred to in points 2 to 8 of Annex III to the conformity assessment procedure referred to in Annex VII or parts thereof. The Commission shall adopt such delegated acts taking into account the effectiveness of the conformity assessment procedure based on internal control referred to in Annex VI in preventing or minimising the risks to health and safety and protection of fundamental rights posed by such systems, as well as the availability of adequate capacities and resources among notified bodies'.

According to Article 47 (5) AIA on EU declaration of conformity, '[t]he Commission is empowered to adopt delegated acts in accordance with Article 97 in order to amend Annex V by updating the content of the EU declaration of conformity set out in that Annex, in order to introduce elements that become necessary in light of technical progress'.

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[7] Annex VI: Conformity assessment procedure based on internal control.

[8] Annex VII: Conformity based on an assessment of the quality management system and an assessment of the technical documentation.

Article 51 AIA, which provides for the rules for the classification of general-purpose AI models as general-purpose AI models with systemic risk, empowers the Commission to 'adopt delegated acts in accordance with Article 97 to amend the thresholds listed in paragraphs 1 and 2 of this Article, as well as to supplement benchmarks and indicators in light of evolving technological developments, such as algorithmic improvements or increased hardware efficiency, when necessary, for these thresholds to reflect the state of the art'.

Article 52 AIA regulates the procedure to determine whether a general-purpose AI model is to be classified as a general-purpose AI model with systemic risk, and empowers the Commission to 'designate a general-purpose AI model as presenting systemic risks, ex officio or following a qualified alert from the scientific panel pursuant to Article 90(1), point (a), on the basis of criteria set out in Annex XIII' and 'to adopt delegated acts in accordance with Article 97 in order to amend Annex XIII by specifying and updating the criteria set out in that Annex' [para. (4)].

Finally, Article 53 AIA, while establishing the obligations for providers of general-purpose AI models, empowers the Commission, '[f]or the purpose of facilitating compliance with Annex XI, in particular points 2 (d) and (e) thereof... to adopt delegated acts in accordance with Article 97 to detail measurement and calculation methodologies with a view to allowing for comparable and verifiable documentation'. In addition, '[t]he Commission is empowered to adopt delegated acts in accordance with Article 97(2) to amend Annexes XI and XII in light of evolving technological developments' [para. (5) and (6)].

3. *Other possible delegations?*

The provisions laid down in the Regulation in relation to the delegation of powers to the Commission have so far been examined. However, there are other issues where the corresponding empowerment of the Commission has not been established, which raises doubts, in particular in relation to the possibility of amending the list of prohibited practices.

It is clear that one of the priority objectives of the AI Regulation is to prevent AI systems from posing a risk to health, safety, or fundamental rights; consequently, both Community and national authorities must avoid AI systems that may contravene the prohibited practices referred to in Article 5 of the AI Regulation.

We will now review the Commission's powers in this respect. As a general predicate, recital 174 provides for the possibility for the Commission to carry out an assessment of the need to amend the list of high-risk AI systems and the list of prohibited practices once a year. However, high-risk systems and prohibited practices are no longer regulated in the same way since, with regard to the list of high-risk areas, the Commission (by 2 August 2028 at the latest and every four years after that) must assess and inform the European Parliament and the Council of the need to amend this list, but nothing is said about prohibited practices. Moreover, with regard to this high-risk list, the Commission is authorised to draw up delegated acts, as we have analysed in previous paragraphs, but nothing is regulated concerning prohibited practices.

These are mentioned again in Article 74 (2) AIA for the purpose of implementing Regulation (EU) 2019/1020 of the European Parliament and the Council of 20 June 2019, on market surveillance and compliance of products, which requires market surveillance authorities to report annually to the Commission and national competition authorities on the use of prohibited practices that have occurred during that year and on the measures taken by those authorities.

A further step can be considered to be Article 96 of the Regulation, which provides for the possibility for the Commission to adopt Guidelines on the application of the Regulation, which may refer to prohibited practices but which do not have the same scope as a delegated act, as they have no normative value.

Finally, in a review of the provisions of the Regulation that are of interest to us in this respect, Article 112, on the evaluation and review of the Regulation, refers back to the Commission so that once a year (from the entry into force of the Regulation and until the end of the period of delegation of powers provided for in Article 97 -five years-) it evaluates the need to amend the list of prohibited practices in Article 5 and submits its conclusions to the European Parliament and the Council. This provision, however, does not empower the Commission to adopt delegated acts for this purpose. Thus, the revision of the list of prohibited practices will require a procedure for the reform of the Regulation, which could, if necessary, be temporarily delayed once the need to amend Article 5 AIA has become apparent.

Perhaps this is why the Regulation should have gone a step further and allowed the Commission to amend this list of prohibited practices employing delegated acts, significantly strengthening the legal protection

of the fundamental rights involved. This is why, together with some authors,[9] we advocate the need for this list to be open to future revisions, just like the high-risk systems in Annex III. To paraphrase these authors, '[f]uture uses of AI systems can be hard to predict, and it seems premature to permanently fix the list of prohibited AI practices'. It is also true that a modification of these or other aspects of the Regulation should be preceded by a broad public consultation to ensure that the public debate on the matter is duly reflected in the Regulation.

Technology is advancing very rapidly, so a regulation of this scope may become obsolete in some aspects and in a short time if it does not allow for an agile procedure to adapt the Regulation to these advances, such as the possibility analysed in this chapter of the Commission issuing delegated acts. In this regard, a final question could be asked: What liability can be claimed for damages caused by future AI practices that are potentially dangerous and harmful but not included or likely to be included quickly in the Regulation?

4. *Committee procedure*

According to Article 98, the Commission shall be assisted by a committee within the meaning of Regulation (EU) No 182/2011, referred to *above*. This committee shall be composed of representatives of the Member States and chaired by a representative of the Commission itself who shall not vote and to which draft implementing acts to be adopted by the Commission shall be submitted.

However, reference is made to this committee, and the committee procedure in the AI Regulation, Article 5 of Regulation (EU) 182/2011 shall apply. That Article refers to the *examination procedure*,[10] which should apply to

[9] N. Smuha, E. Ahmed-Rengers, A. Harkens, W. Li, J. MacLaren, R. Piselli and K. Yeung, *How the EU can achieve legally trustworthy AI: a response to the european Commission's proposal for an artificial intelligence Act,* 2021.

[10] A consultative procedure or an examination procedure could be used. The latter shall apply, in particular, to the adoption of implementing acts of general scope; or to those which are not implementing acts but relate to one of the following subjects: programmes with important implications; the common agricultural policy and the common fisheries policy; the environment, safety or

adopting acts of general scope designed to implement basic acts and specific implementing acts that may have a significant impact. The Commission may not adopt such implementing acts if they are not under the opinion of the committee, except in very exceptional circumstances where they could be applied for a limited period of time. Even in cases where the committee has not delivered an opinion, the Commission may revise the draft implementing acts, taking into account the views expressed in the committee's discussions.

If the committee delivers an unfavourable opinion, the Commission may not adopt the draft implementing act but must submit an amended version to the same committee within two months of the delivery of the opinion or submit the draft to the appeal committee for further deliberation within one month of the delivery of the opinion.

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G. Garzón Clariana, *Los actos delegados en el sistema de fuentes de Derecho de la Unión Europea*, in *Revista de Derecho Comunitario Europeo*, 37, 2010, pp. 721 ff.

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protection of health or safety of humans, animals, and plants; the common commercial policy; or taxation.

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