

Approaching EU Policy-Making

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This EIPA Briefing Note offers a concise summary of some fundamentals that third-country representatives need to bear in mind when thinking about how they may contribute to EU policy-making.

- 1. What powers does the EU have in the policy area of concern to you?**
- 2. Institutional actors**
- 3. EU law – instruments and procedures**

1. What powers does the EU have in the policy area of concern to you?

Very different powers (known as ‘competences’) have been ‘conferred’ on the EU by the Member States across the various policy areas. You need to know which powers apply in the policy of concern to you.

1.1 ‘Exclusive competences’

In a few policy areas, Member States have renounced their autonomy in order to benefit from the possibility of collective action. No independent national measures are possible even if there is no EU rule in place. Member States may only act if and as they are authorised to do by the EU. Decisions are taken on the basis of negotiations among the Member States and the institutions, and third countries can try to shape their content. However, the level at which action is taken is not open to question: it is the EU.

- customs union
- common commercial policy
- competition policy for the internal market
- monetary policy for the euro area
- protection of marine biological resources
- international agreements in areas of internal competence

1.2 ‘Shared competences’

The institutions may adopt EU laws in these areas, as well as other forms of cooperation, but these laws have to be justified in terms of subsidiarity (the added value of acting at the EU level) and negotiated among the institutions. Until there is an EU rule governing an issue, Member States may adopt their own measures, so long as these do not conflict with any other part of EU law. Once an EU rule is in effect, Member States cannot do anything that conflicts with this rule, following the principle of the ‘primacy’ of EU law over national law. This principle, known as ‘preemption’, concerns the following areas:

- internal market
- social policy
- economic, social, and territorial cohesion
- agriculture and fisheries
- environment
- consumer protection
- transport
- trans-European networks
- energy
- area of freedom, security and justice
- common safety concerns in public health

Note that some of the policy areas listed as shared competences are in fact not subject to preemption. These are informally known as '**parallel competences**', meaning that the initiation of an EU action does not prevent Member States from acting in the same field. This is understandable since the areas in question involve practical programmes rather than normative rules. These are:

- research
- technological development
- space
- development policy
- humanitarian aid

1.3 'Supporting competences'

In these areas the EU may provide incentive measures and frameworks for cooperation, but legislative competence remains with the Member States. The EU cannot harmonise national rules. Most of these policy areas have little or no direct impact on third countries, but it may be important to be aware of developments in the context of functional cooperation arrangements with the EU.

- protection and improvement of human health
- industry
- culture
- tourism
- education, vocational training, youth, and sport
- civil protection
- administrative cooperation

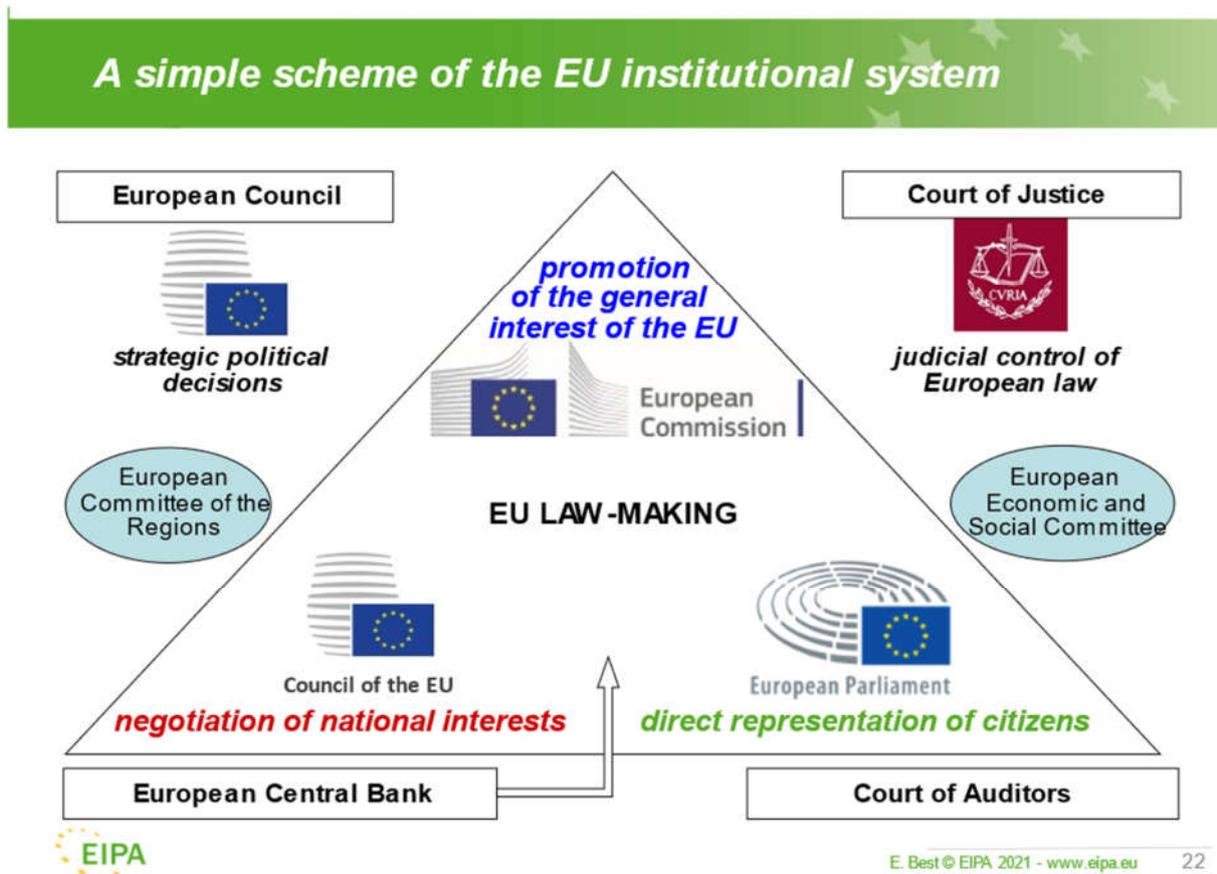
1.4 Policy coordination

Member States retain national legislative competence in economic policy. The EU has the role of coordinating national policies around common objectives and guidelines. The annual cycle of reporting, review and recommendations in economic governance is known as the European Semester. This does include some binding measures, and even the theoretical possibility of financial penalties. However, it mainly involves recommendations that are not legally binding. This process is under review. While this is of major importance for EU Member States, it has mainly contextual relevance for third countries.

1.5 Common Foreign and Security Policy (CFSP)

The EU's Common Foreign and Security Policy (CFSP) is decided in the EU Council of Ministers, supported by the High Representative and the European External Action Service (EEAS). Decisions are adopted among Member States by unanimity. There are no legislative acts. The Commission does not have powers of initiative or control, and the Court of Justice has only a very limited role. However, the European Parliament does play a role in shaping EU relations with third countries through its power of consent for most international agreements, and its budgetary powers.

2. Institutional actors



This simple scheme summarises the roles of the seven EU Institutions and the two Advisory Bodies.

Law-making takes place among the Council, Parliament and Commission under the political guidance of the European Council (chaired by its elected president and composed of the Heads of State or Government of the Member States as well as the President of the Commission), and under the judicial control of the Court of Justice.

In order to follow a law-making procedure in detail, you will need to identify at least:

- which Unit in the Commission is responsible, and which other actors are important;
- which committees are involved in the European Parliament, and which individuals from which political groups are playing key roles;
- the positions of the EU Member States.

Other institutional actors to bear in mind when it comes to policy management include the EU Agencies and the European Investment Bank.

3. EU law – instruments and procedures

EU laws take various forms and are adopted by different actors. You need to be able to distinguish them, and to understand the different ways in which they are prepared, in order to identify key actors and the moments in the policy process that may present opportunities to try to make contributions.

3.1 The different instruments

The EU uses three instruments that are legally binding. This means that they can be enforced by courts, and are part of the body of EU law that enjoys ‘primacy’ over national laws.

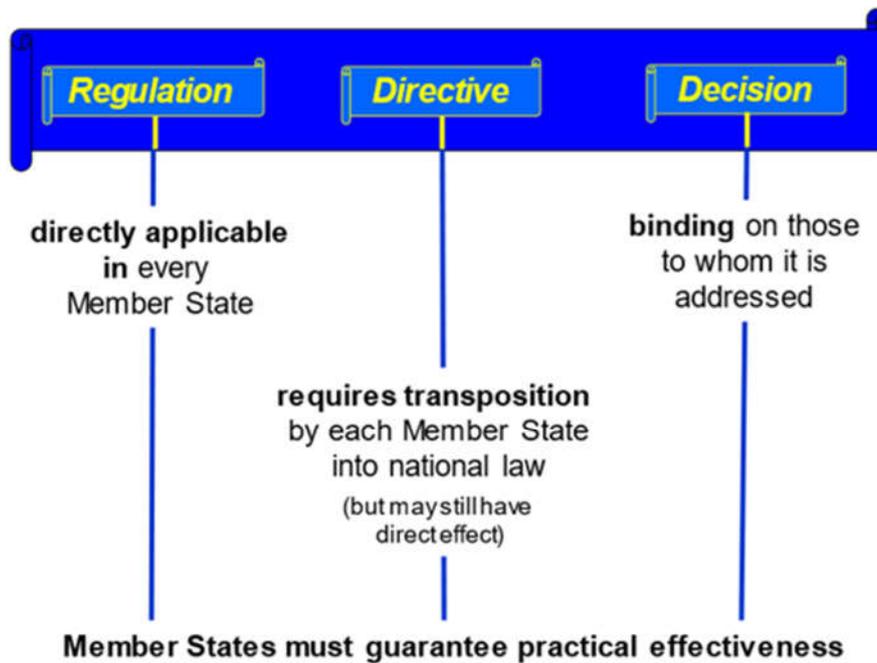
The three instruments differ in terms of their ‘legal effects’ – in other words, the specific kinds of obligations that they respectively create.

Regulations are general EU laws that must be respected by everyone operating in the territory of EU Member States. They are ‘directly applicable’ and national authorities are only expected to apply them.

Directives legally oblige the Member States to guarantee the practical achievement of the required results, but allow them to use whichever national instruments they prefer to use in order to do so

Decisions are individual instruments that are binding on those to whom they are addressed.

EU legally binding acts – instruments



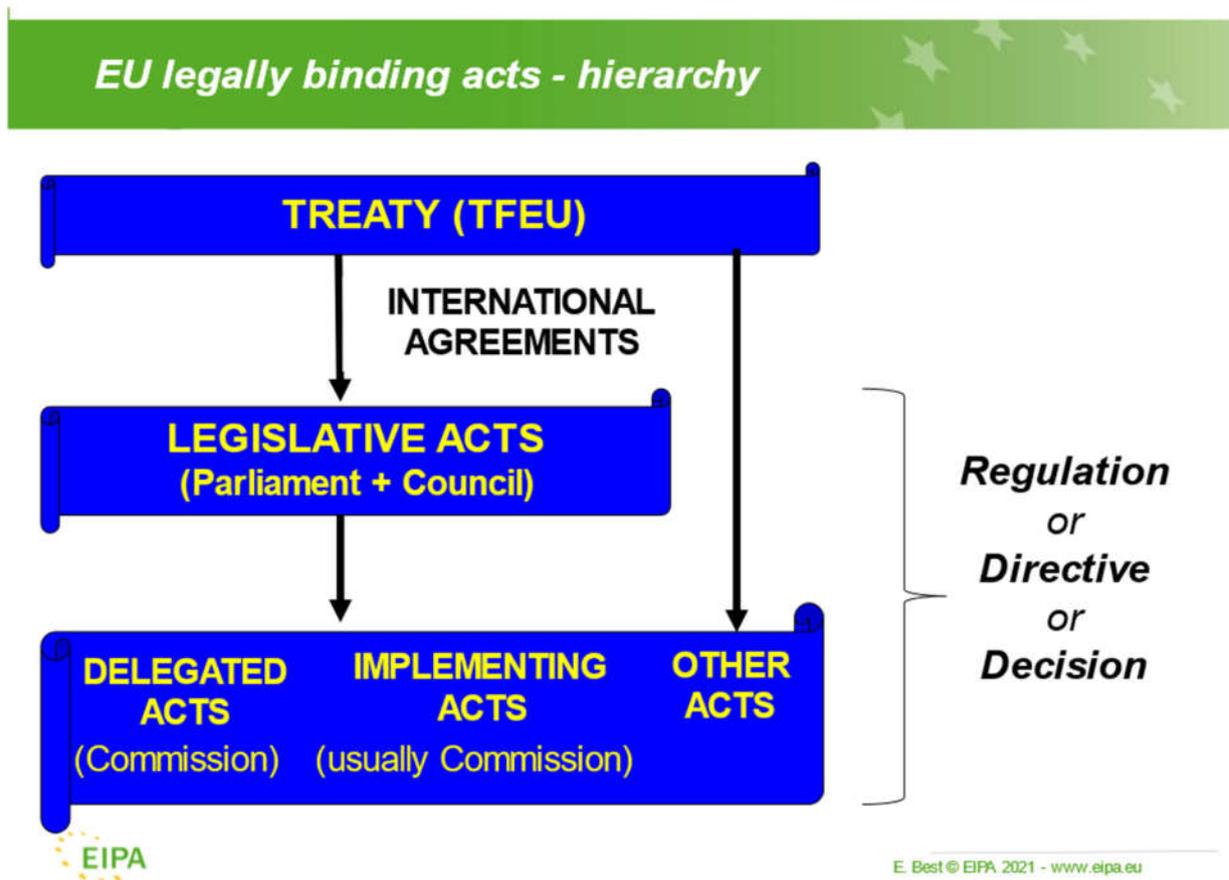
3.2 The hierarchy of EU law

The same three instruments are used at different levels within the hierarchy of EU law.

The treaties represent ‘primary law’ – the ‘constitutional’ basis of the EU.

‘Secondary legislation’ is adopted on the basis of articles in the Treaty on the Functioning of the European Union (TFEU – the Rome Treaty). These are now known as EU ‘legislative acts’ and can only be adopted by the Council and Parliament, usually acting jointly.

Articles of these legislative acts may serve as the basis for legally binding acts adopted by the European Commission, sometimes called ‘tertiary acts’. These now mostly take the form of delegated acts and implementing acts, but some other kinds of acts continue to be generated.



3.3 ‘Legislative acts’

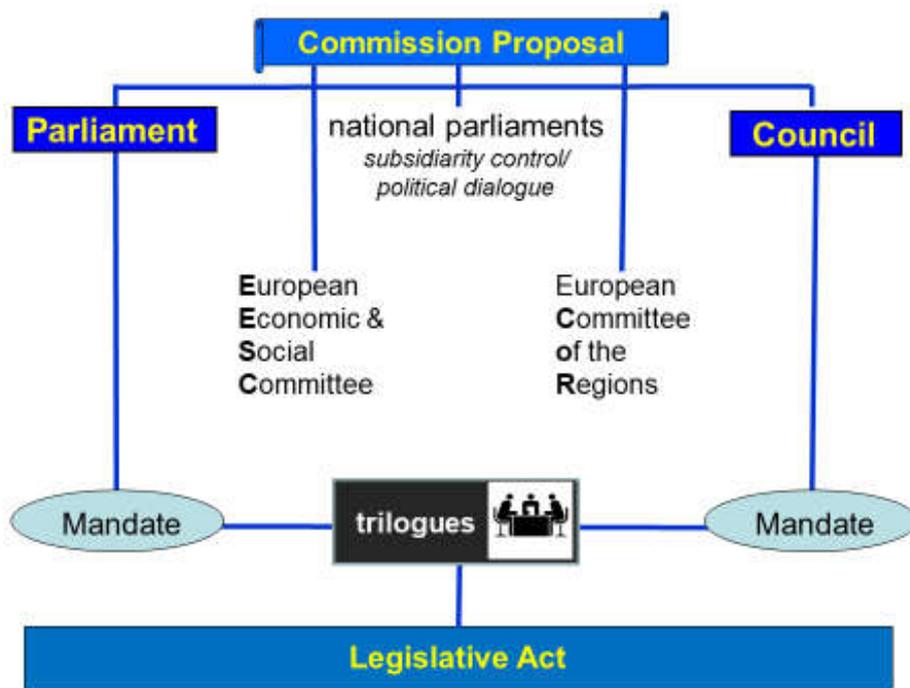
‘Legislative acts’ may be seen as the equivalent of the general ‘laws’ adopted by national legislatures following the respective provisions of their constitutions.

Almost all EU legislative procedures must start with a Proposal adopted by the European Commission, following its ‘right of initiative’.

Around 90% are adopted by the Ordinary Legislative Procedure (OLP), by which the European Parliament and the Council must agree. These two ‘co-legislators’ discuss the Commission Proposal internally, in parallel, and come up with their preferred versions of the Commission’s text. Usually these texts become the respective mandates for informal interinstitutional negotiation in meetings known as ‘trilogues’. The resulting compromise agreement is then formalised and adopted as a legislative act.

A total of 63 acts were adopted by OLP in 2020.

Ordinary legislative procedure: first readings



Some acts are adopted by one of the Special Legislative Procedures. Most of these result in Council acts following the ‘consultation procedure’, by which Parliament only gives a non-binding opinion, or the ‘consent procedure’, in which Parliament must give a yes-or-no agreement to the Council text.

3.4 Implementing acts

EU policies often require ‘uniform conditions’ of application across the EU in order to be effective: for example, they may require EU-wide authorizations, common financing decisions, or harmonized reporting formats. In such cases, the Commission is empowered in an individual legislative act to adopt binding decisions which apply the basic rules laid down in the legislative act (which is therefore often referred to



as the ‘basic act’). Since the Lisbon Treaty came into force in December 2009, these are known as ‘implementing acts’.

In terms of numbers, these represent the bulk of EU law. A total of 1,529 implementing acts were adopted by the Commission in 2020.

Implementing acts are often assumed to concern only technical details of mainly intra-EU interest. However, they may have major consequences for exporters to the EU of particular products or services, and may be used to apply important EU actions affecting third countries. For example:

Vaccine exports - Commission Implementing Regulation (EU) 2021/111 of 29 January 2021, establishes an obligation for companies to obtain authorisations for exports outside the EU of COVID-19 vaccines and of certain active substances. This scheme primarily applies to exports from vaccine manufacturers with whom the EU has concluded Advance Purchased Agreements. (based on Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports, and in particular Article 5 thereof)

The EU Air Safety List – e.g. Commission Implementing Regulation (EU) 2021/883 of 1 June 2021 amending Regulation (EC) No 474/2006 as regards the list of air carriers banned from operating or subject to operational restrictions within the Union

The Commission may first consult stakeholders and experts in different fora (including Commission Expert Groups), at which stage there may be opportunities for third-country contributions.

However, the Commission must then submit the draft implementing act for approval in a so-called ‘**comitology committee**’ composed exclusively of representatives of the EU Member States. In most cases, a vote is taken by qualified majority.

The European Parliament must be informed. It also has the right to express its concern about Commission implementing acts through Resolutions, but these are not binding on the Commission.

Note that the Council also adopts implementing acts (without, of course, going through a comitology committee). Most of these concern the Common Foreign and Security Policy (CFSP) and are adopted on the basis of a Council Decision (CFSP) in order to update individual restrictive measures.

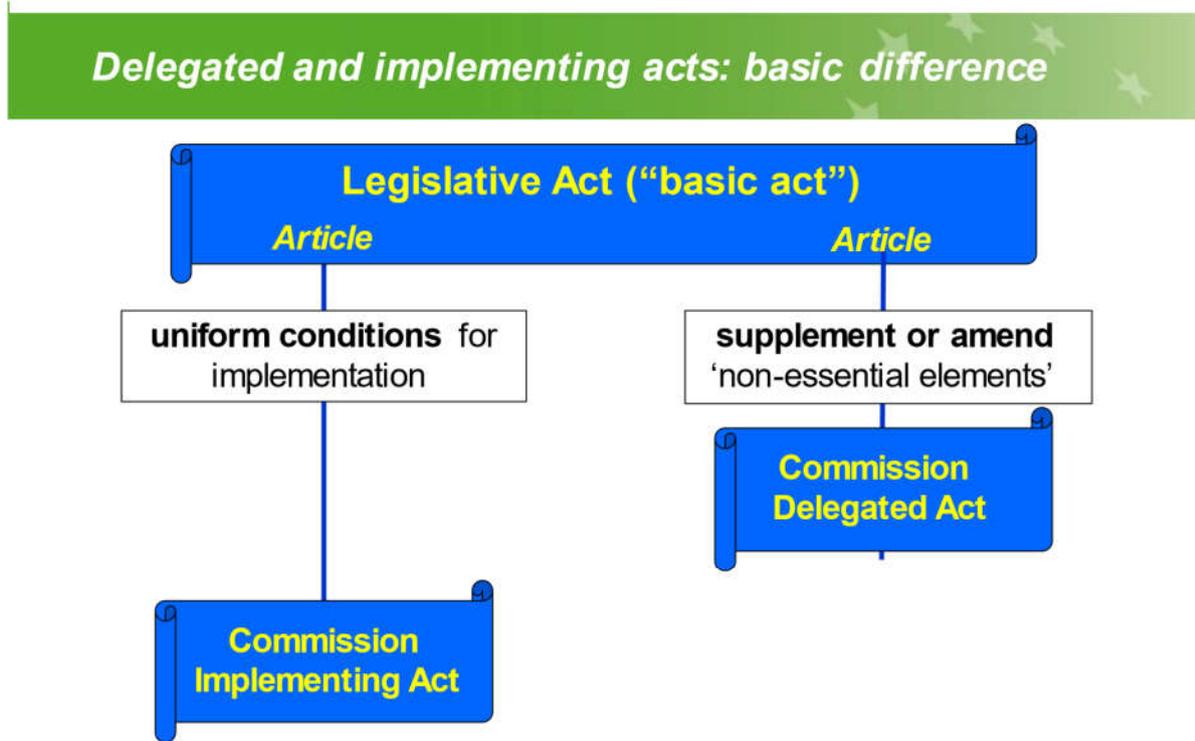
3.5 Delegated acts

EU delegated acts came into existence only in December 2009, after the Lisbon Treaty split the world of comitology into two new categories:

- Implementing acts should assure uniform conditions on the ground, but have no impact on the basic legislative act.
- Delegated acts would be used when the Commission was to be given the task of modifying details in the content of the basic law itself: to ‘supplement or amend certain non-essential elements’ of the legislative act.

For these cases, a new mechanism for consultation and accountability was created: when the Commission is asked to make minor changes to the law, it should be accountable to the actors responsible for adopting the law, namely the EP and Council, rather than to the actors responsible for implementing it, namely the member states. This new procedure would also make it possible to recognize the EP as a co-legislator

exercising oversight of the Commission’s executive rule-making, while maintaining the system of member state control over the Commission for implementing acts.



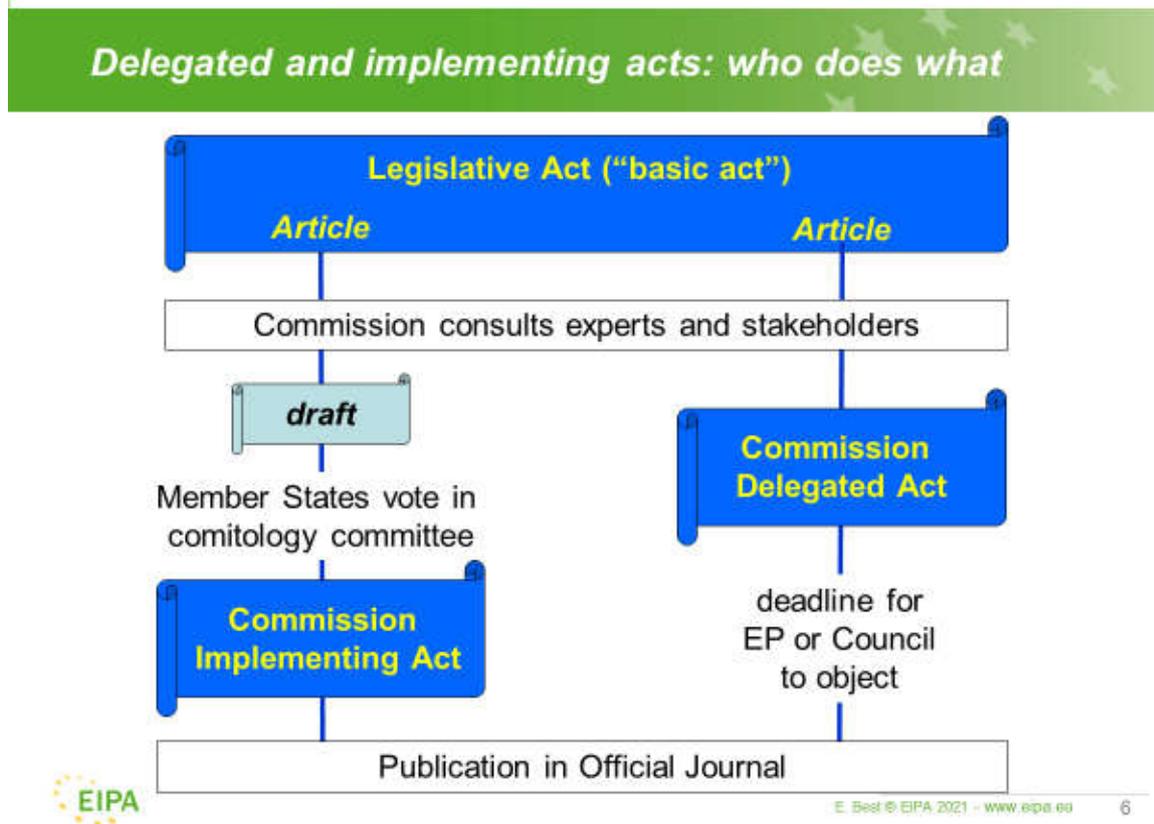
There is therefore no comitology procedure for delegated acts. The Commission is formally committed only to consulting experts from all Member States, which takes place mainly in Commission Expert Groups (where other actors may be present).

After consultation, the Commission adopts a delegated act and then notifies the European Parliament and the Council.

The deadline for scrutiny is fixed in the basic act itself, the minimum being two months extendable by two months. Within this period either the EP or the Council may ‘object’ to the Commission’s delegated act. This means that the Commission may not proceed to publish it in the Official Journal. As of November 2021, the EP had objected ten times and the Council six times.

A total of 121 delegated acts were published in 2020.

Delegated acts often introduce normative elements that, while ‘non-essential’, have a major impact, also for third countries. For example, delegated acts are adopted by the Commission to apply regulatory technical standards (RTS) in the area of financial services, or to lay down energy labelling requirements for specific groups of products marketed in the EU.



3.6 Regulatory Procedure with Scrutiny (RPS)

As of November 2021, one of the pre-Lisbon comitology procedures – the so-called Regulatory Procedure with Scrutiny (RPS) - was still generating Commission acts, since the Parliament and the Council had been unable to agree on how to align 104 basic legislative acts that provide for this procedure.

This is a two-stage procedure, providing first for a vote in a comitology committee, and then for either the EP or the Council to veto the act.

In 2020, a total of 55 acts were adopted by the Commission under the RPS. Four cases were vetoed by the EP.

You can identify an RPS procedure by the use of terms: if a Commission act does not have an adjective (e.g. ‘Commission Regulation’); if it is referred to as an ‘implementing measure’ as compared to an ‘implementing act’; or if the Parliament (or Council) were to ‘oppose’ it, rather than ‘object’ to it.

This procedure must eventually be phased out.