

THE DELEGATION OF POWERS TO THE EUROPEAN COMMISSION WITHIN THE CROWDFUNDING LEGAL FRAMEWORK (ART 44)

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Chapter VIII – Delegated acts

Article 44: Exercise of the delegation

- 1 The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
- 2 The power to adopt delegated acts referred to in Article 48(3) shall be conferred on the Commission for a period of 36 months from 9 November 2020.
- 3 The delegation of powers referred to in Article 48(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
- 4 Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
- 5 As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
- 6 A delegated act adopted pursuant to Article 48(3) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of three months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

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A. OVERVIEW OF THE CHAPTER

As mentioned in the previous pages, Regulation No 2020/1503 on European crowdfunding service providers for business (ECSPR) presents operators and scholars with considerable innovations regarding matters of substantial nature. With reference to the procedures, it is worth dwelling on the role assigned to the Commission and thus to Article 44 of the Regulation itself, entitled ‘Exercise of the delegation’. **30.01**

B. THE EXERCISE OF DELEGATION IN GENERAL

To understand the role of the Commission within the legal framework designed for crowdfunding by the European authorities (such as the European Parliament and Council), it is crucial to provide a brief and preliminary analysis of Article 290 of the Treaty on the Functioning of the European Union (Treaty or TFEU), which represents the main source of the matter. The above-mentioned provision in fact sets out the power that a legislative act may confer on the Commission, so to adopt non-legislative acts, which are of general application, to supplement or amend non-substantial elements thereof. In particular, the provision has considerable relevance in the process of European legislative formation, involving elements of a more technical and less political nature.¹ **30.02**

The ordinary legislative power under the Treaty (Article 289 TFEU) is vested in the Parliament and the Council on a proposal from the Commission. Therefore, the delegation of legislative powers under analysis is subject to certain limits. Indeed, the framework is stressed at the first point of Article 290 TFEU (which represents an exception to Article 289), which requires the act of delegation to specify its elements – for example, the objectives, content, implementation and duration. Such limitations provide legitimacy to the process under consideration, binding the delegation (which, moreover, refers to non-legislative acts) to specific parameters determined ex ante. Likewise, these requirements must be linked to all the principles set out in the various regulations – both at a European and a Member State level – so to guarantee their **30.03**

1 On this topic see Jean-Paul Jacqué, ‘The Principle of Institutional Balance’ (2004) 41(2) CMLR 383; Ellen Vos and Michelle Everson, ‘European Agencies: What About the Institutional Balance?’ (2014) Maastricht Faculty of Law Working Paper No 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467469 accessed 6 February 2022; Robert Schütze, ‘“Delegated” Legislation in the (New) European Union: A Constitutional Analysis’ (2011) 74(59) Mod Law Rev 661.

application and operation. Furthermore, the second section of Article 290 expressly allows the European Parliament or the Council (the European Parliament acting by a majority of its component members, and the Council by a qualified majority) to decide to revoke the delegation. It also clarifies that the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act. In the end, the adjective ‘delegated’ is attached to acts adopted by the Commission pursuant to the procedure related thereto. Reference made to the topic of delegation, the distinction between the legislative process relating to Article 290 TFEU and Article 291 TFEU should also be taken into account: in fact, secondary legislation is represented by both (i) delegated acts adopted by the Commission with the advice of the European Supervisory Authorities (ESAs) and (ii) delegated acts, enacted by the Commission on ESAs’ draft. Likewise, in relation to (ii) above, the difference between regulatory technical standards (RTS) and implementing technical standards (ITS) is worthy of mention.

- 30.04** For a better understanding of the European legislative (or ‘para-legislative’) mechanism,² it is necessary to relate the above to the discipline of Article 291 TFEU. The provision in particular specifies that ‘where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission’, given that ‘the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers’.
- 30.05** A joint examination of the two provisions leads to the need to clarify the boundaries of the ‘external’ involvement of the Commission. Nevertheless, a central aspect lies in the relationship between the Commission’s role and the support provided by the European Supervisory Authorities – referred to in the proceedings adopted from time to time. Reference having been made to the EBA, Article 15 of Regulation (EU) No 1093/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) must also be remembered, which clarifies that the Authority may develop implementing technical standards, by means of implementing acts pursuant to Article 291 TFEU, in the areas specifically set out in the legislative acts referred to in Article 1(2). Implementing technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be to determine the conditions of application of those acts. The Authority shall submit its draft implementing technical standards to the Commission for endorsement.
- 30.06** Such aspect implies an increasing re-evaluation of the influence of the ‘non-legislative’ factor on the legislative process, as well as a renewed appreciation for the role of the so-called soft law, progressively assumed as a reference benchmark in the supervised markets.³

2 In this regard it is important to underline that the classification does not depend on the qualification of the adopting entity, but on the type of procedure followed.

3 On this topic, Filippo Annunziata, ‘The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni’ (19 November 2021), EBI Working Paper Series No 106/2021, <https://ssrn.com/abstract=3966980> accessed 6 February 2022; Niamh Moloney and Pierre-Henri Conac, ‘EU Financial Market Governance and the Covid-19

The relationship between the Commission and ESAs is of particular importance: as recently pointed out, from a doctrinal point of view, the issue revolves around questioning ‘the unity of the (substantive) action of the European Institutions and Authorities’, as well as the need for a correct and timely coordination at European level of the sources, which, as well known, do not develop on a single level, layering in a multilevel body that sees its foundations in the freedoms and principles contained in the Treaties (TEU and TFEU), to develop heavily – from a quantitative and regulatory detail point of view – in first level derivative law (directives and regulations) and even more markedly in second level derivative law (for example, delegated and implementing regulations, including those aimed at the adoption of the regulatory or implementing technical standards, known as RTS and ITS, prepared by the European Supervisory Authorities at the request of the Commission and formally adopted by the latter pursuant to Art 290 TFEU), often in turn supplemented and detailed by third level acts, in some cases of non-binding nature (for example, guidelines and guidance of the European Supervisory Authorities).⁴ **30.07**

The pervasive role of the Commission is also highlighted in the ECSPR: as an example, see Articles 6, 7 and 8, where it is also stated that ‘ESMA shall develop draft regulatory technical standards’ and ‘shall submit those draft regulatory technical standards to the Commission by 10 November 2021’. **30.08**

C. THE DELEGATION OF POWER WITHIN THE ECSPR

The above-mentioned mechanism of delegation is confirmed in the ECSPR, as can be seen in Article 44 ‘Exercise of the delegation’. **30.09**

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It is worth noting that the provision does not have any particular features compared to other regulatory texts relevant to the regulated markets, for example: (i) Directive No 2011/61/EU of the European Parliament and of the Council dated 8 June 2011 on Alternative Investment Fund Managers (AIFM); (ii) Directive No 2013/36/EU of the European Parliament and of the Council dated 26 June 2013 on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD/IV); (iii) Regulation (EU) No 596/2014 of the European Parliament and of the Council dated 16 April 2014, on market abuse (Market Abuse Regulation) (MAR); (iv) Directive 2014/65/EU of the European Parliament and of the Council dated 15 May 2014 on markets in financial instruments (MIFID II); and, most recently, (v) Directive (EU) 2019/878 of the European Parliament and of the Council dated 20 May 2019 amending Directive 2013/36/EU regarding exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (CRDV). **30.10**

Crisis: ESMA’s Nimble, Responsive, and Speedy Response in Coordinating National Authorities through Soft-Law Instruments’ (2020) 17(3–4) ECFR 363–85.

4 Federico Urbani, ‘Rassegna dei principali interventi legislativi, istituzionali e di policy a livello europeo in ambito societario, bancario e dei mercati finanziari’ (2021) 66(1) Riv Soc V 196 (translation from Italian by the author).

- 30.11** The AIFM Directive, under Articles 56, 57, 58, 67 and 68, provides a detailed framework concerning the delegation (referring to other provisions contained in the Directive). It envisages not only a power of revocation but also, under Article 58, that ‘the European Parliament and the Council may object to a delegated act within a period of 3 months from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 3 months.’ CRD IV, under Article 148, provides the Commission with the power to adopt delegated acts equal in scope to that set out in the Crowdfunding Regulation; MAR, under Article 35, provides the Commission with the power to adopt delegated acts on the Commission equal in scope to that set out in the Crowdfunding Regulation. MIFID II, under Article 89, provides the Commission with the power to adopt delegated equal in scope to that set out in the Crowdfunding Regulation. Lastly, CRD V provides the Commission with the power to adopt delegated acts in several cases, including those named in Article 84 ‘Interest risk arising from non-trading book activities’, given that, as provided under Recital 18: in order to harmonise the calculation of the interest rate risk arising from non-trading book activities when the institutions’ internal systems for measuring that risk are not satisfactory, the Commission should be empowered to adopt regulatory technical standards developed by the European Supervisory Authority (European Banking Authority) (EBA), established by Regulation (EU) No. 1093/2010 of the European Parliament and of the Council in respect of developing a standardised methodology for the purpose of evaluating such risk. The Commission should adopt those regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No. 1093/2010.
- 30.12** In conclusion, the scope of Article 44 of the Crowdfunding Regulation is in line with previous pieces of legislation that allow the Commission certain delegated powers.

2. Notes on Article 44 of the ECSPR

- 30.13** The ECSPR disposes in a clear and concrete manner the elements of delegation, its conditions and contents and what its conditions and contents are. The discipline confirms (i) the delegation period; (ii) the eventual revocation by the Parliament or by the Council; (iii) the need of a prior consultation with experts from each Member State; (iv) the fact that the delegation must be in accordance with the below-mentioned Interinstitutional Agreement of 13 April 2016; (v) the need of notification of adoption of the act, and its entry into force (Article 44).
- 30.14** Before carrying out an analysis of Article 44 ECSPR, it is crucial to underline the importance of Recital 69, which affirms that to specify the requirements set out in the Regulation, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of extending the transitional period with respect to crowdfunding services provided in accordance with national law. Such a provision is strictly linked to Article 48, as pointed out below. Another Recital, namely Recital 71, seems to offer a broader approach, affirming that the Commission should be empowered to adopt regulatory technical standards developed by ESMA and EBA with regard to individual portfolio management of loans, complaints handling, conflicts of interest, authorisation as crowdfunding service provider, information to clients, default rate disclosure, the entry knowledge test and simulation of the ability to bear loss, the key investment information sheet and cooperation between competent authorities. The Commission should adopt those regulatory technical standards by means of delegated acts

pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010.

Going into the content of Article 44, this article lays down the approach to be taken, to be briefly summarised as follows: reference being made to a general point of view, a two-step procedure is confirmed, focused on (a) the request to the Commission, before adopting a delegated act, to consult experts designated by each Member State in accordance with the principles laid down in the below-mentioned Interinstitutional Agreement of 13 April 2016 on Better Law-Making; and (b) the obligation of the Commission to notify the adoption of a delegated act simultaneously to the European Parliament and to the Council. **30.15**

The second part of the provision instead refers expressly to Article 48(3) of the Regulation (grounded therefore in Recital 69), affirming that by⁵ **30.16**

10 May 2022, the Commission shall make an assessment, after consulting ESMA, on the application of this Regulation to crowdfunding service providers that provide crowdfunding services only on a national basis and on the impact of this Regulation on the development of national crowdfunding markets and on access to finance. On the basis of that assessment, the Commission shall be empowered to adopt delegated acts in accordance with Article 44 to extend the period referred to in paragraph 1 of this Article once by a 12-month period.

Article 44 confirms that the power to adopt delegated acts referred to in Article 48(3) shall be conferred on the Commission for a period of 36 months from 9 November 2020. Such a delegation of powers may be revoked at any time by the European Parliament or by the Council, provided that a decision to revoke shall put an end to the delegation of the power specified in that decision, however not affecting the validity of any delegated acts already in force. A delegated act adopted pursuant to Article 48(3) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of three months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object (period eventually to be extended by three months at the initiative of the European Parliament or of the Council). **30.17**

The provision has a strong impact from both a policy and a 'legislative balances' point of view. It seems worth noting that powers granted to the Commission on the matter at hand, as well as the provision of Recital 71, would lead to a possible hypothesis of a broader intervention by the Commission itself, supported by ESAs. In particular, the Regulation, as drafted, would therefore seem to pose some interpretative issues. In fact, it could be misleading to consider that the power to call back and revoke the delegation refers only to the hypothesis of Article 48(3). However, such a thesis seems in line with the general framework, as outlined above (for example, Articles 290 and 291 TFEU). Therefore, considering the provision's rationale, it might be argued that the above-mentioned powers are granted to the Commission with strict reference to acts to be adopted pursuant to Article 48(3) of the Regulation. **30.18**

5 See also Chapter 3, by Macchiavello.

3. The veto power of the Parliament and the Council

- 30.19** As mentioned, under the TFEU, the Parliament and the Council can include a veto provision in their legislation that allows them to stop subsequent secondary legislation drafted by the Commission. To maintain a measure of formal control over legislation produced by executives and administrative bodies, EU legislatures have admitted numerous rules that allow administrative acts to be overturned through a veto. These vetoes usually require a qualified majority of the legislature. This combination of delegation of legislative power with veto provisions exists with the intention of giving legislators greater control and time to oversee executive activity, ensuring that Regulations comply with the laws they are intended to implement and respond to the interests of constituents.
- 30.20** This is why, under Article 44(3) TFEU, the delegation in Article 48(3) may be revoked at any time by either of the other two institutions, for example by the European Parliament or by the Council, thereby terminating the delegation of powers and entering into force on the day after publication in the Journal of the European Union or as indicated therein.
- 30.21** Moreover, it must be underlined that implementing measures may be adopted by the Commission, submitted to committees composed of experts from the Member States and forwarded to the European Parliament for information or scrutiny. On a proposal from the responsible committee, Parliament may adopt a resolution opposing the measure, stating that the draft implementing measure exceeds the powers provided for in the legal act concerned, is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality, and calling on the Commission to withdraw or amend the draft measures or to submit a proposal under the appropriate legislative procedure.

D. THE PRINCIPLES OF THE INTERINSTITUTIONAL AGREEMENT OF 13 APRIL 2016 ON BETTER LAW-MAKING AS A BENCHMARK FOR THE EXERCISE OF DELEGATION

- 30.22** In the end, it must be underlined that Article 44 makes direct reference to the Interinstitutional Agreement on Better Law-Making (which replaces the previous version, dated 16 December 2003), which was created to improve the way the European legislators operate in order for them to better serve citizens and businesses (small and large). Such an agreement helps the European institutions and bodies to collaborate, and cooperate with each other to make the functioning of the EU clearer and smoother. Better (and hopefully cheaper) regulation is central to the EU's way of working, and makes an essential contribution to competitiveness, growth and jobs, by simplifying laws and making them better adapted to business and citizens. Accordingly, the Agreement aims to encourage the EU legislative process to be more transparent, clearer and more direct, and to invite all interested parties to participate. In addition, the impact on small and medium-sized enterprises (SMEs), local industry and ordinary citizens can be assessed.
- 30.23** As to the content of the Agreement, it is with a view to facilitating the negotiations in the framework of the ordinary legislative procedure and improving the application of Articles 290 and 291 of TFEU that it establishes the principles in accordance with which the Commission will gather all necessary expertise prior to adopting delegated acts. Under this light, the aim of

the Agreement is to: (i) adopt high-quality legislation and to ensure that EU legislation focuses on those areas where it has the greatest added value for European citizens; (ii) be as efficient and effective as possible in achieving the common objectives of EU policies; (iii) be as simple and clear as possible; (iv) avoid over-regulation and administrative burdens for citizens, administrations and business, especially SMEs; and (v) facilitate its transposition and practical application, and strengthen the competitiveness and sustainability of the European Union economy.

In exercising their powers and in compliance with the procedures laid down in the Treaties, and recalling the importance they attach to the Community method, the three institutions agree to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty. They further agree to promote simplicity, clarity and consistency in the drafting of Union legislation and to promote the utmost transparency of the legislative process. In other words, similarly, simplicity, clarity and consistency in the drafting of Union legislation are encouraged for the understanding of the recipient, as well as for greater compliance. To give an example: in accordance with the principles of loyal cooperation and institutional balance, where the Commission intends to withdraw a legislative proposal – whether or not such withdrawal is accompanied by a subsequent revised proposal – it will give its reasons and then provide an indication of the next steps envisaged together with a precise timetable and conduct appropriate inter-institutional consultations. Nevertheless, the Commission will consider the positions of the co-legislators. The three institutions therefore remain committed to continuing to improve the work carried out under the ordinary legislative procedure, in accordance with the principles of loyal cooperation, transparency, accountability and effectiveness. **30.24**

Finally, crowdfunding seems to be an elective ground for the Commission to exercise powers, following the advice of the ESAs, in order to implement norms inspired by and compliant with the Agreement, so as to adopt effective and transparent delegated acts. **30.25**