



Council of the
European Union

Brussels, 29 April 2019
(OR. en)

8213/19
ADD 1

LIMITE

TRANS 261
DELA CT 113

NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	7510/19 + ADD 1 - ADD 9
Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 13.3.2019 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the deployment and operational use of cooperative intelligent transport systems - Joint comments by Bulgaria, Denmark and Spain

Delegations will find attached joint written comments by the Bulgarian, Danish and Spanish delegations on the above-mentioned delegated act.

DELEGATED REGULATION ON C-ITS**REQUEST FOR A COUNCIL LEGAL SERVICE WRITTEN OPINION AND THE
REQUEST FOR AN EXTENSION FOR THE ADOPTION OF THE DECISION**

The Commission has recently adopted the Delegated Regulation supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the deployment and operational use of cooperative intelligent transport systems, under the mandate given by the “ITS Directive”, Directive 2010/40/EU (https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2592333_en).

During the meeting of the 5th April 2019 several delegations raised legal concerns about this Delegated Act (DA), and so did the Council Legal Service (CLS). Given the legal questions raised, the Presidency decided it was necessary to have another meeting on 3rd May to discuss the delegated act.

We believe a written opinion from the Council Legal service addressing all the legal concerns is necessary so that all delegations are fully informed on all the legal issues and the horizontal implications of the precedents the Commission is setting in this Delegated Regulation, before taking a formal position.

The delegations supporting this non-paper, Bulgaria, Denmark and Spain, **invite the Presidency to request a written opinion to the Council Legal Service concerning the legality of the delegated act. In order to give the Council legal Service enough time, we also suggest to invite the Council to decide the extension of two months to the objection period.**

The Council Legal Service opinion should at least address the following legal concerns:

1. Procedure followed prior to the adoption of the delegated act

- a) **The Impact Assessment should have been conducted “prior” to the adoption of the Delegated act, as required by the basic act.** Art. 6 (7) Directive 2010/40/EU sets out: *“The Commission shall conduct an impact assessment including a cost-benefit analysis prior to the adoption of the specifications”*. Both the delegated act and the Impact assessment were adopted on the same day, 13.3.19, thus not complying with that provision.

The legal provision in the basic act requiring an impact assessment “prior” to the adoption has no real effectiveness, if they are adopted at the same time.

- b) The impact assessment should have been provided to MS experts along with the draft delegated act, during the consultation period.**

According to the Interinstitutional Agreement on better law making (IIA), among the “Tools for better law making” (paragraph. 13 AII): *“The final results of the impact assessments will be made available to the European Parliament, the Council and national Parliaments, and will be made public along with the opinion(s) of the Regulatory Scrutiny Board at the time of adoption of the Commission initiative”*.

When dealing with delegated acts, the Commission considers “the Commission initiative” is the final adoption of the delegated act by the Commission, pending only of possible objection and publication.

We believe the “initiative” to be considered is the draft delegated act the Commission sends to the MS experts during the consultation period. Otherwise, Impact Assessment would not fulfil its role of a tool for better law making, and MS experts would be deprived of a “relevant document” for their assessment and discussions during the consultation period. The result would be circumventing paragraph 4 of the Common Understanding annexed to the IAA according to which; *“Member States' experts shall be provided with the draft delegated acts, the draft agenda and any other relevant documents in sufficient time to prepare”*.

- c) Access relevant documents: COM denied access to the draft impact assessment to a MS expert.**

The Commission explicitly denied access to the draft Impact Assessment when one MS expert specifically asked for it once it was submitted to the Regulatory Scrutiny Board (RSB). This denial seems contrary to the ECJ case law (C-57/16, p. 92) regarding access to the draft impact assessment: *“...the disclosure of those documents is likely to increase the transparency and openness of the legislative process as a whole, in particular the preparatory steps of that process, and, thus, to enhance the democratic nature of the European Union by enabling its citizens to scrutinise that information and to attempt to influence that process. ... In addition, that disclosure puts those citizens in a position effectively to make their views known regarding those choices before those choices have been definitively adopted ...”*

We believe MS experts, should have further, and not less, access than ordinary citizens. The Court has ruled that access to the draft impact assessment *“puts those citizens in a position effectively to make their views known regarding those choices before those choices have been definitively adopted”*, Read “MS expert” instead of “citizen” and that is precisely what MS experts consultation is about.

d) MS experts had no access to the full draft delegated act during the consultation period:

Though there was a number of expert group's meetings, in the last expert meeting Dec 5th there was no proper consultation. Neither the final draft of the delegated act, nor its annexes, nor the impact assessment or any other supplementary texts were provided "*in a timely manner*" before the meeting. Furthermore, the meeting was conducted explicitly denying full access to the draft delegated act. The COM even forbade taking pictures of the parts of the draft text which were shown on the screen.

We are concerned on whether that way of proceeding is a proper consultation to MS experts according to the IIA.

2. If the delegated act affects essential elements of the basic act: Since departing from the principle of technological neutrality seems a relevant policy choice, our concerns refer to whether:

- i. there is a principle of technological neutrality in this area of EU law;
- ii. this Delegated Act departs from that principle; and
- iii. this political choice among different technologies to better satisfy the general interest, should be considered an essential element in telecommunication and transport policy.

In this regard, it should be highlighted:

- a) **In the field of standardisation in electronic communications, technological neutrality is an essential policy choice.** According to Annex II f) of the ITS Directive, the Delegated act shall "*Respect coherence-take into account existing Union rules, policies and activities which are relevant in the field of ITS, in particular in the field of standardisation*".

Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, under the title "Policy objectives and regulatory principles" art. 8.4. states: "*Unless otherwise provided for in Article 9 regarding radio frequencies, Member States shall take the utmost account of the desirability of making regulations technologically neutral...*".

Lack of technological neutrality motivated various Commission decisions ordering aid recovery and it has been taken into account in the ECJ case law (C-544/09 P or C-114/17 P). In C-114/17 (p. 24) «*En troisième lieu, la Commission a estimé que la mesure en cause ne pouvait être considérée comme une aide d'État compatible ... Selon elle, dès lors que ladite mesure ne respectait pas le principe de neutralité technologique, elle n'était pas proportionnée et ne constituait pas un instrument approprié pour garantir la couverture des chaînes en clair aux résidents de la zone II de la Communauté autonome de Castille-La Manche*».

- b) **According to the Regulatory Scrutiny Board opinion:** *“The report should show why it is advisable to address interoperability now and deployment later. The analysis should take into account the risks of such a stepwise approach, in particular in terms of collusive behaviour of the car industry”.*
- c) **The Commission has considered technological neutrality a basic political principle,** which can have derogations based on well-defined general interests and MS public expense. Nevertheless, the Commission clearly assumed during the consultation process and in the Impact Assessment, that it was in her power to decide on the establishment of a EU wide regulation which might not be completely technologically neutral, and make a political choice that prevails over a “market choice” (pg. 50, point 7.1.4 Impact Assessment): *“In discussions with MS experts, some MS argued for a technological-neutral framework where the choice of technology is left to the market, but a strong majority agreed with the need for clear EU specifications to ensure interoperability”.*

3. If the self-conferral of implementing powers to the Commission complies with art. 5 (1) of ITS Directive, arts. 290 and 291 TFUE, and the IIA.

The Delegated act provides the Commission with implementing powers such as:

- Appointment as C-ITS Certificate Policy Authority, (article 24), Trust List Manager, (article 25); and C-ITS point of contact, (article 26)
- The implementation role of article 29 *“The Commission shall have the following tasks in the implementation of the C-ITS network:*
 - (a) governance tasks:*
 - (1) preparing updates to the C-ITS governance framework;*
 - (2) supporting the development of common principles for the lawful processing of personal data by data controllers and processors in the C-ITS network;*
 - (3) acting as contact point on the implementation of the C-ITS network for C-ITS station operators and manufacturers, ITS users groups and third country stakeholders;*
 - (4) reviewing the following: (a) C-ITS assessment criteria to be used by testing laboratories and other assessment organisations during the compliance assessment process; (b) C-ITS reference specifications, including basic and test standards to be used during the various steps of the assessment process. (b) supervision tasks: to supervise the management of large-scale and high-severity security incidents that impact the entire C-ITS network (including disaster recovery situations where the cryptographic algorithm is compromised). (c) the C-ITS certificate policy authority tasks: (1) certificate policy management; (2) PKI authorisation management.*
- Art. 30 Delegated act empowers the Commission to “*de facto*” suspend or supplement the Regulation with unspecified “*interim measures*” (which could be of general scope) in the event of an “*emergency situation*”. According to the provision, the emergency is to be assessed by the Commission alone, and the “*interim measures*” are to be applied until “*the Regulation is amended*”:

“In the event of an emergency situation jeopardising the proper functioning of the C-ITS network and having a severe direct impact on road safety, cyber security or the availability and integrity of C-ITS services, the Commission may adopt a decision introducing interim measures in order to remedy that situation. That decision shall be strictly limited to addressing the causes and consequences of that situation. It shall apply until this Regulation is amended to remedy that situation.”

More specifically, some legal concerns relate to:

- a) **The mentioned Commission’s “self-empowerments” to adopt implementing acts are contrary to art. 5 (1) C-ITS Directive:** *“Member States shall take the necessary measures to ensure that the specifications adopted by the Commission in accordance with Article 6 are applied to ITS applications and services, when these are deployed, in accordance with the principles in Annex II.”* These COM self-empowerments also seems contrary to art. 10 (2) and (4) which confer MS powers to ensure the protection of personal data, and also contrary to art. 11 ITS Directive: *“MS shall ensure that issues related to liabilities concerning the deployment and use of ITS applications and services set out in specifications adopted in accordance to art. 6, are addressed in accordance with Union law...”*

This Delegated act departs from the previous delegated acts implementing ITS Directive, where MS control compliance with the specifications, specifically:

- Art. 9.1 of COMMISSION DELEGATED REGULATION (EU) 2017/1926: *“Member States shall assess whether the requirements set out in Articles 3 to 8 are complied with by the transport authorities, transport operators, transport on demand service providers and travel information service providers”.*
- Art. 11.1 of COMMISSION DELEGATED REGULATION (EU) 2015/962: *“Member States shall assess whether the requirements set out in Articles 3 to 10 are complied with by the road authorities, road operators, digital map producers and service providers in accordance with paragraphs 2 to 3”.*

The Court founded its ruling in case T-696/15 (p. 30) in art 5 (1) of the directive explicitly stating: *“It thus follows unequivocally from the reference to Directive 2010/40 in each of the contested regulations that they do not require the Member States to deploy ITS applications and services in their territory, but only to take the necessary measures for the specifications in those regulations to be applied to ITS applications and services where they are deployed”.*

- Art. 31 of the Delegated Regulation imposes obligations to the MS, not to implement, but only to monitor.

- b) **Commission’s empowerment in the Delegated act to adopt legally binding acts “assisted by an expert group” does not comply with art. 291 TFUE or Regulation 182/2011 requirements,** and is incompatible with the IIA (p. 30) where the three institutions agreed not to *“...alter the mechanisms for control set out in Regulation (EU) No 182/2011”*

It should be noted that there are some cases, where Commission's implementing powers have directly been conferred by the Treaties (state aid, budget implementation, staff regulations), thus falling outside the control of MS.

Nonetheless, to empower the Commission to adopt implementing acts outside the MS control as envisaged in art. 291 (3) TFUE, even if it were legal, it would be out of the scope of the empowerment provided for in art. 6 of the ITS Directive. Besides, it would also mean the adoption of an essential policy choice, which only the legislator can make.

c) The empowerment to the Commission to adopt interim measures in case of emergency is outside the scope of the empowerment in art. 6 of ITS Directive. The ITS Directive empowers the Commission to establish organizational provisions affecting the various stakeholders (art. 6.4 (a) (c)), and eventually obliges MS to adopt implementing measures (art. 5(1)). However, art. 6 of ITS Directive does not empower the Commission to adopt interim measures to supplement or suspend the delegated regulation, nor to decide when there is an emergency when implementing the specifications.

4. If the Delegated Act fulfils the conditions set out in annex II. The Commission enjoys a wide margin of discretion when adopting a DA, nevertheless the Annex II of ITS Directive sets out some principles the DA "shall comply with".

One of these principles is *(d): promote equality of Access- do not impede or discriminate against Access to ITS applications and services by vulnerable road users.*

Nevertheless, the COM considers it is not possible for the DA to fulfil it at present time due to technological difficulties according to the Impact Assessment (pg 36) "*Whilst a number of the Day 1 services being deployed in the policy options are aimed at improving safety generally, none of them are specifically aimed at the safety of pedestrians and cyclists. Several stakeholders already foresee the development of specific Day 1.5 services to protect VRUs building on the same C-ITS architecture. However, these services are not yet mature enough to be considered in service specifications or the assessment of impacts...*"

There are two questions: if the COM can allege the lack of maturity of the technology as a valid excuse so as not to comply with one of the principles of annex II. In case of negative answer, if the DA complies with annex II (h) of the ITS Directive.
