



## Additionality under Article 27(3) of RED

*Legal Analysis, June 2022*

### The Question

Transport & Environment tasked Opportunity Green with considering whether the European Commission overstepped its legal powers under Article 27(3) of the Renewable Energy Directive to develop “a Union methodology setting out detailed rules for the production of RFNBOs” by exempting all electrolyzers that become operational before 2027 from the requirement of deploying additional renewables. This analysis looks at whether the scope of the Commission’s delegated authority have been violated. This analysis concludes that the Commission did overstep the limit of its delegated authority, but the ability for an NGO to gain a legal remedy is very uncertain.

### Delegated Authority in RED

Article 290 TFEU defines delegated acts as those that: (1) are adopted by the European Commission; (2) are of general application; (3) 'supplement or amend certain non-essential elements' of the basic act; (4) are based on an explicit delegation of power (contained in a legislative act) that lays down the objectives, content, and scope of the delegated act, and is of specific duration; and (5) may not be concerned with 'essential elements of an area' regulated by the basic act. If any of these principles are violated, then it could be that the act exceeds the authority given to the Commission and could be annulled.

In the case in question the delegated power is set out in Article 27(3) of RED (as consolidated). The Commission’s authority is given throughout the article but for ease of analysis it can be edited down, and emphasis added:

*“In order to ensure that the expected increase... is met with **additional** renewable energy generation capacity, the Commission shall develop a framework on additionality... with a view to determining the baseline of Member States and measuring additionality.”<sup>1</sup>*

Therefore, it can be seen that the entire point of the delegated authority is to ensure that the increase in renewable energy is met with *additional* renewable energy. The authority does not simply state that it is to set rules for how to decide if renewable energy is additional or not but rather the entire authority is designed to ensure that the rules ensure that the energy actually *is* additional.

As stated above, the purpose of delegated acts is to “supplement or amend certain non-essential elements” which dates back to the 1979 case, *230/78 Eridania* where it was held that executive law-

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<sup>1</sup> Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) (Text with EEA relevance), as amended.

making acts cannot touch upon essential elements of the basic act.<sup>2</sup> Though it is to be noted that the Commission can supplement with new elements, such as a system of sanctions, even if not stated in the basic act (*Case C-240/90 Germany v Commission*<sup>3</sup>). What is an “essential” element must be based on objective factors amenable to judicial review. The main factor relevant in the current case is whether the rules entail political choices falling within the responsibility of the EU legislature.<sup>4</sup> Meanwhile the term ‘supplementing’ is supposed to entail giving detail to the non-essential elements of the act. The Court of Justice of the European Union (“CJEU”) have clearly distinguished between the power to ‘amend’ and the power to ‘supplement’ in the case *C-286/14, EP, supported by Council v Commission*. This is directly comparable to Article 27(3) RED which gives the Commission the power to ‘supplement’ but not amend. Relevant extracts from the case set out the difference in detail:

*“Where the Commission exercises that power [to supplement], its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified.*

*By contrast, the delegation of a power to ‘amend’ a legislative act aims to authorise the Commission to modify or repeal non-essential elements laid down by the legislature in that act. In cases where the Commission exercises that power, it is not required to act in compliance with the elements that the authority conferred on it aims precisely to ‘amend’...*

*In that regard, it is important to note, first, that, for reasons of regulatory clarity and transparency of the legislative process, the Commission may not, in the context of the exercise of a power to ‘supplement’ a legislative act, add an element to the actual text of that act. Such an incorporation would be liable to create confusion as to the legal basis of that element, given that the actual text of a legislative act contains an element arising from the exercise, by the Commission, of a delegated power which does not entitle it to amend or repeal that act.”<sup>5</sup>*

It can be difficult to see exactly where essential elements begin and where or what are acceptable supplementing of additional elements, compared to what is an amendment to the legislation. Ultimately this would be decided by the CJEU if it were to be adjudicated. In this case it can certainly be argued that the Commission did not just supplement additional elements but rather wholesale exempted a certain portion of electricity provision from the essential element of the act: to ensure the additionality of electricity used for hydrogen production.

The provisions setting out the delegated authority must contain enough specifications for the Commission to make use of, along with the objective of the delegation. Here too, it seems that the delegated act went beyond what should be allowed as the final subparagraph of 27(3) states, “*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*”

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<sup>2</sup> Case 230/78, SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali, Judgment of the Court of 27 September 1979.

<sup>3</sup> Case C-240/90, Federal Republic of Germany v Commission of the European Communities, Judgment of the Court of 27 October 1992.

<sup>4</sup> Case C-355/10, European Parliament v Council and Commission, Judgment of the Court of 5 September 2012.

<sup>5</sup> Case C-286/14, European Parliament, supported by Council v Commission (Connecting Europe Facility), Judgment of the Court of 17 March 2016.

The fifth and sixth subparagraphs of 27(3) read as follows:

*“However, 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 renewable liquid and gaseous transport fuels of non-biological origin, provided that the installation:*

*(a) comes into operation after, or at the same time as, the installation producing the renewable liquid and gaseous transport fuels of non-biological origin; 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.”*

Again, it can be seen that the purpose is to ensure that the conditions in (a) and (b) are able to be met by commercial companies providing renewable energy. Nowhere in the designation of delegated authority was the Commission given the ability to simply exempt entire parts of industry from having to prove additionality.

Therefore, on balance, it would seem that the Commission have exceeded their authority in this case. This analysis will now turn to the options for overturning the delegated act.

### [Overturning a delegated act](#)

As the delegated act is not yet adopted, it is possible that the Commission may decide not to adopt it. Further, the Council (via QMV) or the Parliament (via a majority of constituent members, not just a majority of votes cast) could object to the act. The rest of this analysis supposes that the Commission adopts the act as currently framed.

Both delegated and implementing acts are subject to judicial review by the CJEU EU which controls their conformity with the basic act. Any challenge to suggest that the Commission have exceeded their powers would be difficult as the CJEU generally defers to the Commission. However, such a challenge could be taken by the Parliament, the Council or a Member State. Since the revision of the Aarhus Regulation<sup>6</sup> NGOs can now bring cases to challenge any such acts that do not comply with other EU environmental law. Essentially T&E could challenge the delegated act as not complying with the Directive. However, as this is a relatively new amendment to the Aarhus Regulation there is no caselaw on how the CJEU would consider or interpret such a case.

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<sup>6</sup> Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies