

Opinion of the European Economic and Social Committee on the ‘Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 485/2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund’

COM(2010) 761 final — 2010/0366 (COD)

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On 1 February and 18 January 2011 respectively, the Council and the European Parliament decided to consult the European Economic and Social Committee, under Articles 42, 43(2) and 304 of the Treaty on the Functioning of the European Union, on the:

Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 485/2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund

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The Section for Agriculture, Rural Development and the Environment, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 6 April 2011.

At its 471st plenary session, held on 4 and 5 May 2011 (meeting of 4 May), the European Economic and Social Committee adopted the following opinion by 149 votes to 3 with 13 abstentions.

1. Conclusions and recommendations

1.1 In order to bring into line with the Lisbon treaty Council Regulation (EC) No 485/2008 on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund, it is proposed that the implementing powers it confers on the Commission be aligned to reflect the distinction between the delegated and implementing powers of the Commission introduced in Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU).

1.2 The EESC is in favour of using consultation procedures with interested parties and gathering and drawing on expertise during the framing of European Union acts.

1.3 As regards the alignment of Regulation 485/2008 with Article 290 TFEU, the EESC considers that the Commission proposal complies with the material limits on the delegation of power, as provided for by the legislator in the second subparagraph of Article 290(1) TFEU. The Commission's proposed new content for the second sentence of Article 1(2) of the draft regulation clearly defines the objectives, content and scope of the delegation of power.

1.4 However, in the EESC's view the Commission has not respected the temporal limits on the delegation of power, as provided for by the legislator in the second paragraph of Article 290(1) TFEU. The Commission's proposal, as set out in Article 13a of the proposed new regulation, which confers on the Commission powers to adopt delegated acts for an

indeterminate period of time, goes beyond the legislator's intention of explicitly defining the duration of the delegation of power, conflicts with the principle of proportionality, and raises issues in relation to the principle of legitimacy. The EESC believes that the duration of the delegation of power to the Commission should be clearly defined, for a specific time period.

1.5 The EESC endorses the reduction of the time within which the European Parliament or the Council may register objections to the delegated act from three months, as it was under the former system, to two months, provided any extension of this period amounts to two months.

1.6 The EESC has reservations about the decision on the provisions relating to the Commission's implementing powers as set out in the proposed Article 13d. This article refers to Regulation No 1290/2005⁽¹⁾, which is currently being amended⁽²⁾. Amended Regulation No 1290/2005 is particularly relevant to Regulation 485/2008, but its content is still unknown⁽³⁾. Considering, however, that the relevant article of amended Regulation No 1290/2005 refers in its turn to the new comitology procedure as provided for in the recently adopted Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for

⁽¹⁾ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ L 209, 11.8.2005, p. 1).

⁽²⁾ Proposal amending Council Regulation (EC) No 1290/2005 on the financing of the common agricultural policy and repealing Council Regulation (EC) No 165/94 and Council Regulation (EC) No 78/2008, COM(2010) 745 final.

⁽³⁾ See point 4.2.

control by Member States of the Commission's exercise of implementing powers⁽⁴⁾ and that this new procedure simplifies the former system, the proposed new Article 13d will not in the EESC's view pose problems in its application.

2. Background

2.1 In the proposal amending the regulation in question, the Commission states that its implementing powers as provided for under Council Regulation No 485/2008 must be aligned to reflect the distinction between delegated and implementing powers of the Commission introduced by Articles 290 and 291 of the Treaty on the Functioning of the European Union.

2.2 Article 291 TFEU is based on former Articles 202(3) and 211(4) of the Treaty Establishing the European Community, conferring upon the Commission or, under certain conditions, the Council, the right to exercise implementing powers. Article 290 TFEU, however, introduces a new power for the Commission, that of adopting non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act. Article 291 TFEU governs the exercise of implementing powers by the Commission or, in specific cases, the Council.

2.3 In the Commission proposal, alignment of Regulation No 485/2008 with Article 290 TFEU is addressed specifically in new Articles 1(2), 13a, 13b and 13c of the proposed regulation. Alignment with TFEU Article 291 is addressed specifically in new Article 13d of the proposed regulation.

3. General comments

3.1 The EESC is in favour of using consultation procedures with interested parties and gathering and drawing on expertise during the framing of European Union acts. In the EESC's view, these are particularly important in relation to the current proposal for the alignment of Regulation No 485/2008 with the Lisbon treaty, as it considers that the amendments aimed at simplification are not limited in their scope of application or of a purely technical nature. They concern the agriculture sector, which as an area of shared competence (Article 4(2)d TFEU) governed by the provisions of Article 43 TFEU is particularly sensitive.

3.2 As regards the alignment of the Commission's implementing powers as set out in Regulation No 485/2008 to reflect the distinction between delegated and implementing powers, a clear distinction must be made between the 'quasi-legislative' acts falling under Article 290 TFEU and the implementing acts of Article 291 TFEU. In its communication on the application of Article 290 TFEU⁽⁵⁾, the Commission notes that

it is in the interests of efficiency that the legislator delegates its powers to the Commission to adopt delegated acts, thus allowing it to supplement or amend the work of the legislator. Such a delegation is always discretionary and must comply with the provisions of the Treaty. Article 291 TFEU, on the other hand, allows the Commission to adopt implementing (but not legislative) acts. It is the Member States that are responsible for implementing and applying legally binding Union acts (in accordance with Article 291(1) TFEU together with Article 4(3) of the Treaty on European Union (TEU)) and they therefore exercise their own responsibility and not that of the Union. This power of the Member States can therefore be restricted only when the implementation of legally binding Union acts calls for uniform conditions. Only then must the Commission exercise its implementing powers in accordance with Article 291 TFEU. In this case its responsibility is compulsory⁽⁶⁾.

3.3 When the legislator confers powers on the Commission to adopt delegated acts, it must define the scope of those powers in each act. The second subparagraph of Article 290(1) TFEU requires the legislator to explicitly define the objectives, content, scope and duration of the delegation of power. It thus sets two types of limit on the delegation of power: material and temporal⁽⁷⁾.

3.4 It is necessary here to examine whether in this proposal for a regulation the legislator is in compliance with the material and temporal conditions fixed.

3.5 The material limits on the delegated power are set out in Article 1(2) of the amended regulation and relate to the drawing up by the Commission of a list of measures that are by their nature unsuited for ex-post control by way of scrutiny of commercial documents and to which the regulation does not apply.

3.6 The specific delegation of power is in fact clear and explicit. It does not violate Article 290 TFEU because it refers to non-essential elements of the legislative act and because the objectives, content and scope of the delegation are sufficiently well-defined.

3.7 With regard to the temporal limits on the delegation of power, the Commission proposes in Article 13a of the new regulation that the powers to adopt the delegated acts referred to in the regulation should be conferred on it for an indeterminate period of time. To begin with, this proposal conflicts with the second subparagraph of Article 290(1) TFEU, which states that legislative acts must explicitly define the duration of the delegation of power.

⁽⁴⁾ OJ L 55, 28.2.2011, p. 13. This regulation repeals Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23).

⁽⁵⁾ COM(2009) 673 final.

⁽⁶⁾ COM(2009) 673 final, p.3 ff.

⁽⁷⁾ The Commission itself recognises this: see COM(2009), 673 final, p.5 ff.

3.8 The rationale for this proposal is set out in the Commission's communication on the application of TFEU Article 290⁽⁸⁾, where it argues that the requirement that the legislator set a clear time limit on the delegation does not sanction the practice of 'sunset clauses', which 'when inserted into a legislative act automatically set a time limit on the powers conferred on the Commission, thus compelling it in practice to present a new legislative proposal when the time limit imposed by the legislator expires'. The argument continues: 'Article 290 requires above all that a clear and predictable framework be established for the delegated powers; but it does not require the Commission to be subject to strict cut-off dates'. For this reason, in the Commission's view, delegations of power should in principle be of indefinite duration. In further support of this view, the Commission points out that under Article 290(2)(a) TFEU the European Parliament or the Council may decide to revoke the delegation: 'Legally the effects of a revocation are exactly the same as those of a sunset clause; both put an end to the powers conferred on the Commission and the onus is then on the Commission to submit a legislative proposal if this is useful and necessary. In other words, if the legislator feels that in certain fields it is necessary to avoid the delegation of powers becoming a permanent mandate, it can confer on itself the right to revoke it. This may prove to be a more flexible option than an automatic sunset clause'.

3.9 In the Annex to its communication, the Commission sets out models for the application of the new Treaty article. As regards the duration of delegation of powers, the Commission proposes either an indeterminate period of time or a set duration which would be automatically renewed for periods of an identical duration unless revoked by the Council or the European Parliament⁽⁹⁾.

3.10 Conferring on the Commission the power to adopt delegated acts for an indefinite period certainly does not constitute an explicit definition of the duration of the delegation of power. The Treaty clearly states that the duration of the delegation of power must be explicitly defined, so that the legislator can exercise regular and effective control over acts adopted by the Commission. The right given in Article 290(2)(a) to the Council or the European Parliament to revoke the delegation may not obviate the requirement that the legislator explicitly define the duration of the delegation of power. The right of revocation is an additional safeguard to ensure that the rights of the legislator are not prejudiced. The indefinite conferral of powers upon the Commission oversteps the temporal limits provided for in Article 290 TFEU and exceeds the Commission's own remit.

3.11 Under Article 4(2)(d) TFEU, the agriculture sector is an area of shared competence between the Union and Member States. This means that the principle of subsidiarity (Article 5(3) TEU) must be observed when legislative initiatives are taken in this domain. The amended regulation under discussion concerns controls, assistance and cooperation between the Member States and the Commission in relation to the transactions forming part of the system of financing

by the European Agricultural Guarantee Fund. The need for a single, uniform European approach in this area justifies the adoption of a regulation by the Union. Under the principle of proportionality (Article 5(4) TEU), the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Conferral upon the Commission of the power to adopt delegated acts for an indefinite period is an infringement of the requirement that the duration of the period of delegation be explicitly defined, a requirement that is designed to permit regular and effective control over the Commission's exercise of 'quasi-legislative' power. It therefore breaches the principle of proportionality and by extension of the principle of subsidiarity, and could provide grounds for proceedings before the Court of Justice of the European Union for infringement of the principle of subsidiarity, under Article 8 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality⁽¹⁰⁾.

3.12 Conferral upon the Commission of the power to adopt delegated acts also has implications for the separation of powers. Whereas the competent legislative bodies of the European Union are the European Parliament and the Council, the power to adopt 'quasi-legislative' acts is conferred exceptionally upon the Commission, the executive body of the European Union. Given that matters of fundamental democratic legitimacy are at stake here, it is necessary to respect the provisions made by the legislator regarding explicit definition of the objectives, content, scope and duration of the delegated power. Moreover, since there is no provision in TFEU Article 290 corresponding to that in TFEU Article 291(3) for mechanisms of control over delegated acts of the Commission, the powers of control of the Council and the European Parliament must be fully upheld.

3.13 The alternative Commission proposal whereby its delegated power would be renewed automatically represents no less an infringement of primary European law than the indefinite duration of a delegation of power.

3.14 In conclusion, the indefinite conferral of powers upon the Commission to adopt delegated acts does not constitute an adequate alignment with Article 290 TFEU. The right of the Council or the European Parliament to revoke the delegation of power does not obviate the purpose of an explicitly defined duration for the delegation of power, which is to allow regular and effective control of 'quasi-legislative' acts of the Commission by the legislator. When adopting delegated acts, the Commission is not exercising its own competence but that of the legislator. The right of the competent body, namely the legislator, to conduct regular and effective checks on the Commission must not be restricted. Given that the agriculture sector is an area of shared competence between the EU and Member States and that therefore any legislative act of the Union in this area must comply with the principles of subsidiarity and proportionality, the Commission's proposal that the power to adopt delegated acts should be conferred on it for an indeterminate period is unacceptable.

⁽⁸⁾ COM(2009) 673 final, p.5 ff.

⁽⁹⁾ Article A. COM(2009) 673 final, p.12.

⁽¹⁰⁾ OJ C 83, 30.3.2010, p. 206.

3.15 The period of two months from the date of notification for the submission of objections by the European Parliament or the Council, set out in the new Article 13c of the proposed regulation, is shorter than the former provision of three months. In the interests of the accelerating and streamlining the procedure, the EESC is not opposed to this shortening of the time period, providing any extension is for two months.

3.16 Article 13d of the proposed regulation concerns the application of Article 291 TFEU and is in compliance with that article. Another act that will apply is the recently adopted Regulation (EU) No 182/2011 of the European Parliament and of 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⁽¹¹⁾, which simplifies the previous comitology procedures by providing for two procedures only, the advisory procedure and the examination procedure.

4. Specific comments

4.1 The EESC points out that it has been consulted on matters that remain unclarified. For instance, recital (4) and

Article 13d of the Commission proposal refer respectively to Article 41d(1) and Article 42d(2) of Council Regulation (EC) 1290/2005 of 21 June 2005 on the financing of the common agricultural policy⁽¹²⁾, whereas there are no such articles in that regulation.

4.2 The Commission has tabled a proposed amendment to the latter regulation⁽¹³⁾, but the adoption process is not yet complete. The Commission's proposal has not yet been adopted by the Council of the European Union and the European Parliament. Even if it is ultimately adopted, Articles 41d and 42d will refer to the new content of Regulation 1290/2005, which will have different numbering. Moreover, Article 1(26) of the Commission proposal states that Article 41 will be deleted and makes no provision for an Article 41d. It is therefore curious that the Commission should be in the process of amending Regulation No 485/2008 when the content of the document on which its proposal is largely based, i.e. Regulation No 1290/2005, is essentially unknown.

Brussels, 4 May 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON

⁽¹¹⁾ OJ L 55, 28.2.2011, p. 13. This regulation repeals Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23).

⁽¹²⁾ OJ L 209, 11.8.2005, p. 1.

⁽¹³⁾ Proposal amending Council Regulation (EC) No 1290/2005 on the financing of the common agricultural policy and repealing Council Regulation (EC) No 165/94 and Council Regulation (EC) No 78/2008, COM(2010) 745 fin.