

**Opinion of the European Economic and Social Committee on the ‘Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny’**

COM(2013) 451 final — 2013/0218 (COD)

**and the ‘Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts in the area of Justice providing for the use of the regulatory procedure with scrutiny’**

COM(2013) 452 final — 2013/0220 (COD)

(2014/C 67/21)

Rapporteur-general: **Mr PEGADO LIZ**

On 16 September 2013 the Council of the European Union and on 4 July 2013 the European Parliament decided to consult the European Economic and Social Committee, under Articles 33, 43(2), 53(1), 62, 64(2), 91, 100(2), 114, 153(2)(b), 168(4)(b), 172, 192(1), 207 and 338(1) of the Treaty on the Functioning of the European Union (TFEU), on the

*Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny*

COM(2013) 451 final — 2013/0218 (COD).

On 4 July 2013 the European Parliament decided to consult the European Economic and Social Committee, under Article 81(2) of the Treaty on the Functioning of the European Union (TFEU), on the

*Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts in the area of Justice providing for the use of the regulatory procedure with scrutiny*

COM(2013) 452 final — 2013/0220 (COD).

In view of the urgency of the matter, the European Economic and Social Committee, at its 493rd plenary session, held on 16 and 17 October 2013 (meeting of 16 October), appointed Mr Pegado Liz as rapporteur-general and adopted the following opinion by 110 votes with 6 abstentions.

## 1. Conclusions and recommendations

1.1 The aim of the two proposals for regulations, COM(2013) 451 final and COM(2013) 452 final of 27 June 2013, which have been referred to the European Economic and Social Committee (EESC) for an opinion, is to align *en bloc* 165 legislative instruments which were initially subject to the regulatory procedure with scrutiny (hereafter referred to as the RPS) to the new delegated act regime.

1.2 This step has been requested by the European Parliament, with the support of the Council, for the purpose of aligning the former "comitology" practices with the delegation procedure laid down in Article 290 TFEU.

1.3 The Committee supports the Commission initiative, which is necessary in order to protect the sources of law in

the European Union as well as making for simpler and more efficient procedures.

1.4 The Committee notes that its detailed report on the delegation procedure was recently adopted and recommends that it be taken into account as it will make the present opinion more readily comprehensible.

1.5 The collective alignment of 165 legal instruments (regulations, directives and decisions) from 12 different areas does in fact raise a number of legal and practical issues.

1.6 Some aspects of the delegation procedure are still far from clear. For example, the concept of "non-essential elements" has yet to be defined. A precise evaluation of how the mechanism actually works in practice also needs to be carried out.

1.7 Some proposals for regulations contain options which misinterpret the framework established by the basic legislative acts, going so far as to allow for delegation to be exercised for a period of unspecified length or setting very short deadlines for scrutiny by the Parliament and the Council.

1.8 As stated in its general and specific comments, the Committee would advise the Commission to tailor this collective alignment more closely to the individual contents of some of the basic legislative acts.

1.9 The Committee would also urge the Council and the Parliament to exercise maximum vigilance and to conduct a detailed evaluation of all the acts included in this alignment.

## 2. Introduction

2.1 The Treaty of Lisbon, which entered into force on 1 December 2009, makes a distinction between the power conferred on the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act under Article 290 TFEU (delegation procedure), and the power to adopt implementing acts under Article 291 TFEU (implementing procedure).

2.2 These two powers are subject to entirely separate legal frameworks.

2.2.1 The use of the power of delegation is set out in non-mandatory instruments:

— the Communication from the Commission to the European Parliament and the Council on the implementation of Article 290 of the Treaty on the Functioning of the European Union <sup>(1)</sup>;

— the Common Understanding on Delegated Acts concluded between the Parliament, the Council and the Commission;

— Articles 87a and 88 of the European Parliament Regulation, as amended by the Decision of 10 May 2012 <sup>(2)</sup>.

2.2.1.1 The Committee recently adopted a detailed information report on the delegation procedure and warmly recommends that it be read so as to make the present opinion <sup>(3)</sup> easier to understand.

<sup>(1)</sup> COM(2009) 673 final of 9.12.2009.

<sup>(2)</sup> Doc. A7-0072/2012.

<sup>(3)</sup> Information Report on Better Regulation: Implementing acts and delegated acts <http://www.eesc.europa.eu/?i=portal.en.int-opinions&itemCode=24245>.

2.2.2 The use of the implementing powers provided for under Article 291 of the TFEU, on the other hand, is regulated by legally binding instruments:

— Regulation 182/2011 <sup>(4)</sup> (hereafter referred to as the Comitology Regulation), which provides for two procedures: the advisory procedure and the examination procedure;

— Decision 1999/468/CE <sup>(5)</sup> (hereafter referred to as the Comitology Decision), amended in 2006 in order to strengthen the Parliament and the Council's powers of scrutiny, which provides for the regulatory procedure with scrutiny (RPS).

2.2.3 The RPS has been used to adopt implementing measures which amend non-essential elements of basic legislative acts. The wording in Article 5 of the Comitology Decision <sup>(6)</sup> is very similar to the definition of delegated acts. A delegated act as defined by Article 290 TFEU is, in fact, a quasi-legislative act adopted by the Commission in order to supplement or amend certain "non-essential elements of the legislative act".

2.2.4 It is because of this similarity that between 2009 and 2014 Article 5a of the Comitology Decision and the RPS will provisionally remain in force, the Commission's intention being to use this limited period to adapt existing provisions requiring the RPS to the delegated acts regime.

2.2.5 In response to a request by the European Parliament <sup>(7)</sup> and with the support of the Council <sup>(8)</sup>, the Commission has therefore undertaken an alignment exercise involving a number of regulations, directives and decisions.

The aim of these proposals for omnibus regulations, which have been referred to the Committee for an opinion, is to introduce this alignment *en bloc*.

## 3. Commission proposals

3.1 The Commission has published two proposals for regulations:

— the first, COM(2013) 451 final, concerns "a number of legal acts";

— the other, COM(2013) 452 final, refers to "a number of legal acts in the area of Justice".

<sup>(4)</sup> OJ L 55 of 28.2.2011, p. 13.

<sup>(5)</sup> OJ L 184, 17.7.1999, p. 23.

<sup>(6)</sup> Introduced by the Council Decision of 17 July 2006, (OJ L 200 of 22.7.2006, p. 11).

<sup>(7)</sup> EP Resolution of 5 May 2010 (P7-TA (2010) 0127) point 18.

<sup>(8)</sup> Statements by the Commission OJ L 55 of 28.2.2011 p. 19.

A third package of proposals is still being drawn up and is expected to be published in the near future.

3.2 The aim of the proposal concerning "a number of legal acts" is to transfer collectively 160 legislative acts (regulations, directives and decisions) from the RPS to the delegation procedure; these cover 11 different areas:

- communications networks, content and technology;
- employment, social affairs and inclusion;
- climate action;
- energy;
- enterprise and industry;
- environment;
- statistics;
- internal market and services;
- mobility and transport;
- health and consumers;
- taxation and customs union.

3.2.1 It comprises an explanatory memorandum, the proposal for a regulation and a simple annex listing the acts included in the transfer from the RPS to the delegation procedure.

3.3 The proposal covering "a number of legal acts in the area of Justice" is contained in a separate text because the legal base of these acts is set out in Part Three, Title V of the TFEU and they do not apply to all the Member States. Under Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TFEU, this Member State will not be subject to the proposed regulation.

3.3.1 The proposal for a regulation adapting a number of legal acts in the area of Justice to Article 290 TFEU concerns five regulations on:

- the taking of evidence in civil or commercial matters;
- the European Enforcement Order for uncontested claims;
- the European order for payment procedure;

— the European Small Claims Procedure;

— the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

#### 4. General comments

4.1 The Commission is proposing omnibus regulations, aligning several regulations, directives and decisions *en bloc*, instead of adopting a separate proposal for a regulation for each of the instruments concerned.

4.1.1 The Commission previously used this method in 2006 to introduce the regulatory procedure with scrutiny (RPS). It used a communication to urgently adapt 25 regulations and directives, including Directive 2005/1/EC of 9 March 2005 establishing a new organisational structure for financial services committees<sup>(9)</sup>. There was also the 2007 Commission communication adapting another series of acts listed in four annexes to the RPS<sup>(10)</sup>. The EESC made comments and recommendations at that time<sup>(11)</sup>.

4.1.2 The Commission has never yet carried out an alignment on such a scale as this.

4.1.3 The Committee notes that the proposals for regulations delineate the scale of the Commission's powers, as they lay down the scope and time available to the Council and the Parliament for raising objections.

4.1.4 This choice is understandable from the point of view of simplification and procedural rapidity, but it raises many questions.

##### a) Indeterminate period

4.2 Article 2 of the two proposals for regulations provides that the power to adopt delegated acts in the context of this exercise is "conferred (...) for an indeterminate period of time".

4.2.1 The Committee points out that, in accordance with Article 290 TFEU, the duration of the delegation of power must be explicitly defined in the basic legislative act, and that until now, with very few exceptions, delegations have in principle always been granted for a specific period, renewable where necessary, with a requirement for a report on the implementation of the delegation.

<sup>(9)</sup> COM(2006) 900 to 926 final.

<sup>(10)</sup> COM(2007) 740 final, COM(2007) 741 final, COM(2007) 824 final, COM(2007) 822 final and COM(2008) 71 final.

<sup>(11)</sup> OJ C 161, 13.7.2007, p. 45 and OJ C 224, 30.8.2008, p. 35.

4.2.2 It notes that the Commission's preference for delegations of indeterminate duration<sup>(12)</sup> is not shared by the Parliament<sup>(13)</sup>. Moreover, the proposal for an omnibus regulation dispenses with the obligation to submit regular reports on the application of the measures provided for in the basic acts<sup>(14)</sup>.

4.2.3 The EESC therefore asks whether the "alignment" regulations proposed by the Commission can go so far as to provide that the delegation will continue for an indeterminate period in all cases, whatever the area concerned.

#### b) Supervision by the EP and the Council

4.3 Moreover, as the Committee stated in its information report on delegated acts, the delegation of powers is subject to supervision by the Council and the Parliament, which may revoke the delegation at any moment, object to a delegated act adopted by the Commission, in principle within two months of the date on which the Council and the Parliament are notified of the delegated act, or inform the Commission within the same period of two months of their intention not to raise any objections. This basic two-month time limit may be extended at the request of the Parliament or Council.

4.3.1 Article 5a(3) to (6) of the Comitology Decision provided for a complex system of different deadlines, ranging from two to four months, depending on 1) whether the measures planned by the Commission were in accordance with the opinion of the Scrutiny Committee and 2) on the institution (Council or Parliament) conducting the scrutiny.

By way of derogation from the "normal" arrangements, Article 5a(5)(b) provided that these time limits could be curtailed in "duly substantiated exceptional cases" and "on the grounds of efficiency", without, however, setting any precise deadline.

Paragraph 6 also made provision for a special one-month deadline, which had to be provided for in the basic instrument, in specific instances where the normal system could not be applied "on imperative grounds of urgency".

4.3.2 Article 2(6) of the proposal for a Regulation adapting a number of legal acts to Article 290 TFEU refers to the possibility of derogation but merely provides that in duly justified exceptional cases the normal time limit within which the Council and Parliament may oppose the delegated act may be reduced to one month<sup>(15)</sup>.

<sup>(12)</sup> COM(2009) 673 final of 9.12.2009, point 3.2.

<sup>(13)</sup> *Common Understanding* point IV.

<sup>(14)</sup> Three years, for example, in Directive 2006/21/EC of 15 March 2006 on the management of waste from extractive industries.

<sup>(15)</sup> However, the proposal for a Regulation adapting a number of legal acts in the area of Justice to Article 290 TFEU does not provide for this possibility.

4.3.3 The new system proposed seems to restrict the room for manoeuvre available to the Council and the Parliament in exercising their powers of scrutiny.

4.3.4 The Committee asks in particular how it will be possible for the Council and the Parliament to exercise their powers of scrutiny over 165 delegated acts effectively in such a brief period.

#### c) Non-essential elements

4.4 The Committee points out, as it stated in its information report, that the delegation procedure concerns the adoption of delegated acts relating to non-essential elements provided for in legislative acts adopted jointly by the Council and the Parliament.

4.4.1 The Commission's proposals for regulations concern twelve different areas.

4.4.2 The exact legal nature of the delegated acts being rather vague and the areas concerned by these proposals for regulations being both extensive and sensitive, it is possible, as demonstrated below, to question the "non-essential" character of certain measures.

4.4.3 Moreover, the concept of "non-essential measure" has been interpreted by the Court in different ways, depending on the area in question. Thus, on 5 September 2012, the Grand Chamber of the Court of Justice of the European Union recognised that the question of individuals' fundamental rights was the prerogative of the legislator and could never therefore be covered by a delegation to the Commission<sup>(16)</sup>.

4.4.4 Moreover, the Court of Justice of the EU has not yet had the opportunity to rule on the implementation of the Commission's delegated competence as such. An action has just been brought before the Court by the Commission, for the first time, in a case concerning biocidal products, for the annulment of Article 80(1) of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012<sup>(17)</sup>.

<sup>(16)</sup> Case C-355/10, *European Parliament v Council of the European Union*, on the surveillance of the Union's external maritime borders and on the powers of border guards to disembark immigrants in the third country from which the boarded ship had originated.

<sup>(17)</sup> Case C-427/12 *Commission v European Parliament and Council of the European Union*. Case concerning the making available on the market and use of biocidal products, in so far as the article provides for the use of an implementing act under Article 291 TFEU for the determination of the fees payable to the European Chemicals Agency, rather than a delegated act under Article 290 TFEU. According to the Commission, the act it is required to adopt under Article 80(1) of Regulation (EU) No 528/2012 should be understood as a delegated act within the meaning of Article 290 TFEU, insofar as it aims to supplement certain non-essential elements of the legislative act.

The action was brought before the Court on 19 September 2012, and the Court is expected to deliver its judgment in late 2013/early 2014 at the earliest, having heard the conclusions of the Advocate-General.

## 5. Specific comments

5.1 In most of the proposals examined in this opinion, the Commission has adapted the RPS in an appropriate and reasonable way to the system of delegated acts provided for in Article 290 TFEU. A number of situations still give rise to specific doubts and difficulties, however.

### a) Lack of clarity with regard to the arrangements

5.2 Most of the legal instruments concerned contain an explicit reference to Article 5a of the Council Decision of 17 July 2006<sup>(18)</sup>, known as the Comitology Decision, which introduced the RPS and asserted the need to use this procedure for the adoption of measures of general scope designed to amend non-essential elements of a basic instrument. However, this change in the system made by the Decision of 28 June 1999 only entered into force on 24 July 2006.

5.2.1 Thus, none of the legal instruments subject to the "alignment" exercise before that date makes it clear which measures are subject to the RPS. In fact, it was only with the decision of July 2006 that a new paragraph 2 was added to Article 2 of the decision of June 1999. This for the first time made provision for the adoption of measures of general scope designed to amend non-essential elements of a basic instrument.

5.2.2 All these legislative acts thus only contain wording<sup>(19)</sup> such as "the measures necessary for the implementation of this directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999", "the Commission shall be assisted by a Committee" and "Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof".

5.2.3 The Committee points out that the adaptation of the RPS to the delegation system would mean doing away with referrals for committee opinions required under the RPS. They are, however, retained for the implementing measures provided for in Article 291 TFEU.

5.2.4 This effectively removes one stage at which the "non-essential" nature of "certain elements" of the basic legislative act is checked.

5.2.5 Acts pre-dating the Comitology Decision appear in the list appended to the Commission's proposal for a regulation.

However, they were published before the comitology procedure had been systematised, and references to measures were therefore extremely vague, e.g. "adaptation to technical progress" (Directive of 20 May 1975 on aerosol dispensers)<sup>(20)</sup>.

### b) Identification of the scope of application

5.3 The identification of the scope of the application of Article 5a to the "non-essential elements" of certain basic legislative acts sometimes leaves room for improvement. For example, the general wording: "The measures (...) designed to amend non-essential elements of this Regulation" in Regulation (EC) No 661/2009 on the general safety of motor vehicles is unsatisfactory without further amplification.

5.3.1 Sometimes Article 5a is applied to elements, the non-essential nature of which is doubtful. This is the case, for example, of:

- Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks (Article 23);
- Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity;
- Articles 23(1) and (4) and 40(3) of Directive 2006/123 of 12 December 2006 on services in the internal market, regarding the appropriateness of professional liability insurance to the nature and extent of the risk;
- Articles 12, 34(1) and 35(2) of Regulation (EC) No 1371/2007 of 23 October 2007 on rail passengers' rights and obligations.

### c) Areas linked to fundamental rights

5.4 Measures which are apparently "non-essential", such as the adaptation of annexes to directives, may nonetheless give rise to doubts regarding the impact on the protection of certain fundamental rights.

5.4.1 The following examples could be cited:

- the annexes to Regulation (EC) No 1338/2008 of 16 December 2008 on Community statistics on public health and health and safety at work (Articles 9 and 10(2));

<sup>(18)</sup> OJ L 200, 22.7.2006, p. 11.

<sup>(19)</sup> See for example Directive 2006/25/EC, Directive 89/391/EEC and Directive 2003/10/EC.

<sup>(20)</sup> A correct way of referring to technical and scientific progress can be found in Regulation (EC) No 1272/2008 of 16 December 2008 on labelling and packaging, or in Directive 2008/56/EC of 17 June 2008 on marine environmental policy.

- the subjects to be covered by the population and housing censuses (Regulation (EC) No 763/2008 of 9 July 2008);
- the annexes to Directive 2006/126/EC of 20 December 2006 on driving licences;
- the derogations to the annexes to Regulation (EC) No 183/2005 of 12 January 2005 laying down requirements for feed hygiene (Article 28 and 31(2));
- the annexes to Regulation (EC) No 852/2004 of 29 April 2004 on the hygiene of foodstuffs (Articles 13(2) and 14);
- the amendment of the annexes which contain wording concerning the exercise of certain rights, such as for example the European Enforcement Order for uncontested claims (Regulation (EC) No 805/2004 of 21 April 2004), the European order for payment procedure (Regulation (EC) No 1896/2006 of 12 December 2006), the European

Small Claims Procedure (Regulation (EC) No 861/2007 of 11 July 2007) and the service of judicial and extrajudicial documents (Regulation (EC) No 1393/2007 of 13 November 2007).

5.4.2 There are also more sensitive cases, such as those where a fundamental part of the rules on a given subject will be laid down via delegated acts, such as:

- the procedure for complaints in connection with "protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community" provided for in Regulation (EC) No 868/2004 of 21 April 2004;
- or the definition of the constituent elements of the APR for consumer credit (Directive 2008/48/EC of 23 April 2008, Articles 19(5) and 25(2)).

Brussels, 16 October 2013.

*The President*  
*of the European Economic and Social Committee*  
Henri MALOSSE

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