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REPORT

From : Presidency
To : COREPER

Subject : Implementation of the Treaty of Lisbon - delegated acts

Delegations will find in Annex the report by the Presidency on the outcome of the work conducted in the framework of the Mertens group on Articles 290 and 291 of the Treaty on the Functioning of the European Union (delegated acts and implementing measures).

Coreper is invited to take note of the report by the Presidency concerning delegated acts (Article 290) and to consider an appropriate follow-up concerning implementing measures (Article 291).

**REPORT BY THE PRESIDENCY TO COREPER
on the implementation of Articles 290 and 291 TFEU
(Delegated acts and implementing measures)**

With the view to ensuring that the entry into force of the provisions in Article 290 TFEU would not lead to unnecessary disruptions of the legislative process, the Mertens Group was asked to report to Coreper about standard wording (“models”) that could be agreed between the three institutions, in view of their insertion in legislative acts delegating to the Commission powers to adopt non-legislative acts of general application ("delegated acts").

The Mertens Group has also briefly discussed the need for an inter-institutional declaration that would confirm that the three institutions agree that the Comitology Decision can continue to be used under Article 291 TFEU until the entry into force of the regulations foreseen under paragraph 3 of this Article .

The Mertens Group met on 16 and 24 November and on 1 December to consider these issues. In preparation of the third meeting, the Presidency had contacts with the European Parliament and a tripartite meeting with representatives of the three institutions concerned was held on 30 November.

On the basis of the work of the Mertens Group and the contacts with the European Parliament, the Presidency is in a position to transmit to Coreper models in respect of delegated acts (annexed to this report) which should be globally acceptable to the Council, under certain conditions which are outlined below.

Concerning Article 291, the Presidency believes that a declaration confirming the possibility to continue to use the Comitology Decision to ensure continuity after the entry into force of the Lisbon Treaty is an option which should be seriously considered for practical reasons. It is clear, however, that the three institutions have very different views on the compatibility of the provisions of the Comitology Decision with Article 291. Therefore a political decision has to be made on the margins of flexibility the Council retains, if any, to find a compromise that would be neutral, pragmatic and not prejudging the negotiations on the forthcoming regulation referred to in Article 291.

On Article 290:

The Commission confirmed its intention to issue a communication, probably on 9 December, containing, as an annex thereto, models providing standard wording for Articles of legislative acts delegating powers to the Commission.

On the basis of the discussions in the Group, it is clear that the issue of consultation of national experts during the preparatory work before the adoption of a delegated act is crucial in order for delegations to accept the models. Delegations underlined the importance of a strong commitment from the Commission to ensure that the experience and the concerns of experts of the Member States are heard and taken into account to create confidence in the new procedure. However, delegations agree that no reintroduction of comitology is possible, since it would be incompatible with the Treaty. It should also be noted that the consultation of national experts during the course of the preparatory work is recognized by the Commission itself as an important factor to have the right technical input into the contents of delegated acts.

Against the background of the concerns expressed by delegations, the Commission has agreed to reflect the following points in its forthcoming communication:

- The consultation of experts will be systematic - not just as a general rule;
- Expert Groups will be composed of experts from the authorities that are responsible for implementation of the relevant legislation in all 27 Member States;
- The Groups will be given sufficient time to enable them to fully contribute their expertise;
- At the end of the process the Commission chair will sum up the main elements brought forward by the experts, give a preliminary reaction and indicate how the Commission intends to proceed.

The actual insertion in the communication of this language is a condition, for many Member States, of the acceptability of the models as a whole.

In addition to the above commitments, the Commission will state in the *chapeau* of the annex that delegated acts will contain explanatory memoranda providing information about the preparatory work, which is meant to cover the consultations that have been conducted, their results and their follow up.

-On the models of delegating provisions to be inserted in basic instruments under ordinary legislative procedure, there was broad agreement, *ad referendum*, to use as a basis for future work in legislative deliberations the structure and the form of words reflected in the document annexed to this report, and which should be reproduced, with only minor changes if any, as an annex to the Commission's communication.

This would facilitate a coherent implementation of Article 290 during the initial phase of its application. It was understood, however, that only the experience of actual negotiations of specific acts and of the use of delegated powers would enable the institutions to have the global vision necessary to codify their practice in a consistent way. Therefore, changes to the models might be necessary in the future to take account of the specific circumstances of particular proposals which might not have been envisaged in preparing these models.

On the issue of the *duration of the delegation*, the models proposed foresee only the possibility of an indeterminate duration and of a duration for a finite period of time, but automatically renewable, subject to the presentation of a report by the Commission, unless it is revoked. This does not mean, however, that in specific circumstances it might not be more advisable to opt for a duration of a finite period of time, not automatically renewable.

As to the *conditions* listed in paragraph 2 of the Article (right of revocation and right of objection), although the Commission holds the view that it is not necessary to use both conditions together, the delegations recognized that delegating acts would likely contain both of the conditions, since they together form a consistent *ex post* control of the delegation by the legislator.

The provisions on *revocation* foresee two obligations of the co-legislators, which do not appear problematic, one being to inform the other co-legislator and the Commission when a revocation is envisaged, the other to state reasons for the revocation. It is not foreseen, for reasons of legal certainty, that the revocation could affect the validity of delegated acts already in force.

Two options are recorded when it comes to the *objection* procedure, one being that the right to object could be exercised during a period of three months following the notification of the delegated act, one based on a period of two months that could be extended by an additional month. The latter has the strong preference of the Commission, but the Council is of the view that a standard period of three months would be more appropriate when no urgency is involved.

Only for cases where imperative grounds of *urgency* so require, it is foreseen that a delegated act could enter into force immediately, but would remain applicable only if no objection were expressed during a period of time that could be six weeks following the notification. An article concerning urgency need not be present in any act containing a delegation of powers; only when it is justified by the nature of the delegated powers.

Finally, as stated above, the *chapeau* of the models contains a clear reference to the recitals and the explanatory memorandum that should accompany delegated acts and, *inter alia*, provide information about the specifics of the preparatory work undertaken. This is meant to facilitate the information of the legislators about the consultations conducted by the Commission and about their results, in relation to the guarantees to be offered in the communication itself.

-On the priority files identified by the Presidency, discussions were held on how the basic approach could be incorporated in pending legislative proposals containing references to "PRAC". This was in particular necessary in order to look into examples of definitions of objective, scope and content of the delegation, which are required under the Treaty but which do not lend themselves to the reproduction of standard clauses.

The Presidency intends, on the basis of discussions to be completed in the relevant working parties in the light of the above mentioned models, to put on the agenda of Coreper 1 (most likely on 9 December) the adjustment of four¹ proposals under consideration to the new legal context of delegated acts in order to prepare the finalisation of the negotiations with the European Parliament on these files.

It is the understanding of the Presidency that the models will also be used in order to adjust other pending proposals containing PRAC comitology provisions to the legal context created by the entry into force of the Lisbon Treaty. It should be noted that PRAC procedures continue to apply where they have their basis in acts adopted before 1 December. However, PRAC procedures can in no way be referred to in the provisions of acts to be adopted after 1 December.

¹ "Energy labelling", "Energy performance of buildings", "Intelligent Transport Systems" and "Animals used for scientific purposes".

On Article 291:

In view of the Mertens Group meeting on 1 December, the Commission circulated a draft inter-institutional declaration with the stated intent of allowing the continued recourse to the Comitology Decision of 28 June 1999, while taking into account the difference of views between the institutions on whether this decision remains *per se* applicable after the entry into force of the Lisbon Treaty and until the regulations foreseen in Article 291 enter into force.

The interpretation of the Council is that no special arrangement is required since the Comitology Decision constitutes an adequate basis to implement Article 291, as long as a regulation to that effect has not entered into force. But the other two institutions have made it clear that they do not share this interpretation and have indicated that they will neither propose, as concerns the Commission, nor adopt, as concerns the European Parliament, provisions based on the Comitology Decision unless a transitional arrangement has been agreed between the three institutions.

It is manifestly very difficult to put down language that would neither prejudice the position of the Council nor that of the European Parliament and of the Commission. The latest version of the Commission's draft makes reference to an agreement "to continue using, where appropriate and for a period which should not exceed one year", the Comitology Decision. The Parliament has expressed the view that the period should be shorter (6 to 9 months), expressed in an imperative way, and that the reference could be limited to certain provisions or patterns of the Comitology Decision.

Although the legal reasoning of the Council on the compatibility of the provisions of the Comitology Decision with the Lisbon Treaty is supported by all the Member States, it is evident that the practical impossibility to implement Article 291, paragraph 2, before the entry into force of the regulations foreseen by paragraph 3 could amount to serious difficulties in the legislative process. It would therefore be worth continuing to assess the chances of a pragmatic arrangement between the three institutions that, from the Council's point of view, should be neutral in legal terms; if containing time limits, the time reference must be indicative; and the document would not prejudice the forthcoming negotiations of the new regulation.

MODELS

These models provide standard wording for the Articles of a basic instrument adopted under the ordinary legislative procedure in which the legislator defines the limits of the delegation of power and lays down the conditions to which the delegation is subject. These models do not concern the delegated acts themselves. Nevertheless, the Commission would already like to clarify that the delegated acts will contain specific recitals explaining the rationale of the acts. The delegated acts will also be accompanied by an explanatory memorandum setting out in a more detailed manner the grounds for the act and providing information about the preparatory work undertaken by the Commission, where relevant.

Recital

The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of [...]

Article(s) delegating powers

(One or several provisions delegate powers to the Commission in the basic instrument. These provisions shall set out the objectives, content and scope of the delegated powers and shall make reference to Article A).

Article A

Exercise of the delegation

1. The powers to adopt the delegated acts referred to in [Article(s) delegating powers] shall be conferred on the Commission for

Option 1

an indeterminate period of time.

Option 2

a period of [X] years following the entry into force of [...]. The Commission shall make a report in respect of the delegated powers at the latest [X] months before the end of the [X] year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article B.

2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles B and C. [Where imperative grounds of urgency so require, Article D shall apply].

Article B

Revocation of the delegation

1. The delegation of power referred to in [Article(s) delegating powers] may be revoked by the European Parliament or by the Council.
2. The institution which has started work in view of deciding whether to revoke the delegation of power shall inform the other legislator and the Commission at the latest one month before the final decision is taken, stating the delegated powers which could be subject to revocation and the reasons for a revocation.
3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

Article C

Objections to delegated acts

1. The European Parliament and/or the Council may object to the delegated act

Option 1

within a period of 2 months from the date of notification. At the initiative of the European Parliament or the Council this period shall be extended by 1 month.

Option 2

within a period of 3 months from the date of notification.

2. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act, or if, before that date, the European Parliament and the Council have both informed the Commission that they have decided not to raise objections, the delegated act shall enter into force at the date stated in its provisions.
3. If the European Parliament or the Council objects to the adopted delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

Article D

Urgency procedure

1. A delegated act adopted under the urgency procedure shall immediately enter into force and continue to apply as long as no objection is expressed in accordance with paragraph 2. The notification of the act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. The European Parliament and/or the Council may within a period of [6 weeks] from the date of notification object to the delegated act. In such a case, the act shall cease to be applicable. The European Parliament or the Council shall state the reasons for objecting to the delegated act.
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