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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. Context of the proposal

In parallel with the proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 and 291 TFEU a number of legal acts providing for the use of the regulatory procedure with scrutiny, the present proposal concerns the alignment of three legislative acts in the area of Justice which still refer to the regulatory procedure with scrutiny.

These instruments need to be aligned by a separate proposal as they were adopted under a legal basis pursuant to Title V part III of the TFEU and therefore do not bind all Member States, and are thus irreconcilable with the legal bases of the other basic acts. In all three cases the United Kingdom and Ireland have opted in, in accordance with the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty and Denmark does not participate, in accordance with the Protocol on the position of Denmark annexed to the Treaty.

The Treaty of Lisbon has substantially modified the structure as regards the powers that can be conferred on the Commission by the legislator. It provides a clear distinction between acts of a quasi-legislative nature, on the one hand, and, on the other hand, acts which implement the provisions of a basic act. It also provides an entirely different legal framework for each type of act.

The two provisions in question are Articles 290 and 291 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”), as introduced by the Treaty of Lisbon that entered into force on 1 December 2009⁽¹⁾. They entail substantial modifications of the procedures known so far as the “comitology procedures”.

In terms of the wording, the definition of delegated acts in Article 290(1) is very similar to that of acts which, under Decision 1999/468/EC², as amended by Council Decision 2006/512/EC, (“the Comitology Decision”), are subject to the regulatory procedure with scrutiny (RPS) established in Article 5a of that Decision. In both cases, the acts in question are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument.

For this reason, the revision of the Comitology Decision by Regulation 182/2011³ (“the Comitology Regulation”), which was adopted on the basis of Article 291(3) TFEU on implementing powers, left out of its scope Article 5a of the Comitology Decision. Article 5a establishing the RPS had therefore to be provisionally maintained for the purposes of existing basic acts referring to this Article.

Consequently, the RPS still appears in the three existing basic acts covered by this proposal and continues to apply (in line with Article 5a of the Comitology Decision) in those acts until they are formally amended and adapted to the Lisbon Treaty.

¹ OJ C 306, 17.12.2007

² OJ L 184, 17.7.1999, p. 23.

³ OJ L 55, 28.2.2011, p. 13.

At the time of adoption of Regulation 182/2011 the Commission made a commitment to review the provisions attached to this procedure, in order to adapt them in due course according to the criteria laid down in the Treaty on the Functioning of the European Union⁴. The alignment of these acts had been earlier proposed by the Commission in 2013⁵, also in a separate proposal, but due to the stagnation of the interinstitutional negotiations on these files, the Commission, as announced in its 2015 Work Programme⁶, withdrew this proposal⁷.

The question of the alignment was taken up again in the discussions on the revision of the Interinstitutional Agreement on Better Law-Making⁸. All institutions acknowledged the need for the alignment and the Commission committed to submit by the end of 2016 a new proposal for the alignment of legislative acts which still contain references to the regulatory procedure with scrutiny. The present proposal responds to this commitment.

At the same time, the Interinstitutional Agreement and the Common Understanding on delegated acts annexed to it also improve the framework for delegated acts and thereby respond to the key concern that often prevented acceptance of delegated acts on the Council side, namely the consultation of Member State experts. The Agreement now provides for a clear commitment to a systematic consultation of experts from the Member States in the preparation of delegated acts, including on the draft text, thereby fulfilling a key condition for a successful second attempt to align the old RPS provisions to the Lisbon Treaty. This commitment is now explicitly included in the new standard clauses that are to be used in the drafting of empowerments for the Commission. The Agreement also clearly recognises the important role of early cooperation and exchange of views with the European Parliament in relation to delegated acts. It confirms that the European Parliament must receive all documents at the same time as Member State experts, including the draft delegated acts, and provides for systematic and facilitated access of European Parliament experts to the meetings of Commission expert groups preparing delegated acts. Finally, the Agreement envisages that the Commission may be invited to meetings in the European Parliament (or the Council) in order to have further exchange of views in the preparation of delegated acts.

Adaptation to the delegated act regime will not affect pending procedures in which an opinion has already been delivered by a committee in accordance with the Comitology Decision.

2. Method of the alignment and main elements of the proposal

The starting point for determining the **scope** of this proposal is the legal acts covered in the respective legislative alignment proposal adopted by the Commission in 2013. Acts on which individual legislative proposals have been made in the meantime are not included in the present proposal. This concerns two acts in the area of Justice: Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure⁹ and Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims

⁴ OJ L 55 of 28.2.2011, p. 19

⁵ COM(2013) 452 final.

⁶ COM(2014) 910 final.

⁷ (2015/C 80/08), OJ C 80 of 7.02.2015, p. 17.

⁸ OJ L 123, 12.05.2016, p.1.

⁹ OJ L 399, 30.12.2006, p. 1.

Procedure¹⁰ have in the meantime been aligned by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure¹¹.

In the 2013 alignment proposals, the **legislative approach** chosen was not to amend the basic acts in question individually, but to generally provide that the references to the RPS contained in the basic acts are to be read as references to Article 290, respectively Articles 290 or 291. Under this approach each individual basic act would have always had to be read together with the relevant Omnibus regulation, had it been adopted.

Given the difficulties that notably the Council had with that technique, the approach chosen in this proposal is different. It is now proposed to amend each basic act concerned. This is similar to the approach chosen when the RPS provisions were introduced in a similar exercise in 2007¹². Accordingly, to each basic act a number of amendments are made. The empowering provision, i.e. the text containing the substantive empowerment for the RPS, is reworded and follows the wording agreed in the standard clauses for articles delegating powers. The standard article on the exercise of the delegation, so the procedural article, is inserted in each basic act and references to the RPS are deleted. It is for each act explicitly mentioned if the empowerment allows for an amendment of the basic act. The new standard clauses providing for consultation of Member States experts in the preparation of delegated acts is now included in each basic act. No empowerments provide for amendments of other acts.

As regards the **choice between delegated and implementing acts empowerments**, the 2013 alignment proposals started from the assumption that the measures covered by the regulatory procedure with scrutiny in principle correspond to those which can be covered by delegations of power as referred to in Article 290 TFEU.

The general assumption underlying the new proposal is that the assessment made in the 2013 Omnibus proposals remains valid. Neither the negotiations on the 2013 Omnibus, nor the case-law on the topic¹³, nor the outcome of the Interinstitutional Agreement on Better Law-Making resulted in new criteria that would have called for a global reassessment.

As regards the **duration of the empowerment** the Commission proposes empowerments with an indeterminate duration. In the negotiations of the 2013 proposals both the Council and the European Parliament had favoured a fixed duration of 5 years with automatic renewal following a Commission report to be presented before the expiry of the delegation. In the new proposal the Commission maintains its position that an indeterminate duration of the empowerment is justified because the legislator has the possibility to revoke an empowerment in all cases and at any time. Finally, with the Interinstitutional Agreement comes also more transparency in relation to delegated act, notably through the joint Register for Delegated Acts that the institutions agreed to set up by the end of 2017. This Register will allow an easy overview of the delegated acts adopted under all instruments.

¹⁰ OJ L 199, 31.7.2007, p. 1

¹¹ OJ L 341 of 24 December 2015, p. 1.

¹² Regulation (EC) No 1137/2008, OJ L 311, 21.11.2008, p.1

¹³ Case C-88/14 Commission v European Parliament and Council, Case C-286/14 European Parliament v Commission and Case C-472/12 Commission v European Parliament and Council

3. Legal basis, subsidiarity

This proposal is based on the legal bases of the basic acts amended. This initiative exclusively relates to the procedures to be applied at Union level in adopting acts based on conferred powers.

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Treaty of Lisbon introduced a distinction between the powers delegated to the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act (delegated acts), and the powers conferred upon the Commission to adopt acts to ensure uniform conditions for implementing legally binding Union acts (implementing acts).
- (2) The measures which may be covered by delegations of powers, as referred to in Article 290(1) of the Treaty on the Functioning of the European Union (TFEU), correspond in principle to those covered by the regulatory procedure with scrutiny established by Article 5a of Council Decision 1999/468/EC¹⁴.
- (3) Earlier proposals relating to the alignment of legislation referring to the regulatory procedure with scrutiny with the legal framework introduced by the Lisbon Treaty¹⁵ were withdrawn¹⁶ due to the stagnation of the interinstitutional negotiations.
- (4) The European Parliament, the Council and the Commission subsequently agreed on a new framework for delegated acts in the Interinstitutional Agreement on Better Law-Making of 13 April 2016¹⁷ and acknowledged the need to align all existing legislation to the legal framework introduced by the Lisbon Treaty. In particular, they agreed on the need to give high priority to the prompt alignment of all basic acts which still refer to the regulatory procedure with scrutiny. The Commission gave a commitment to prepare a proposal for that alignment by the end of 2016.

¹⁴ 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).

¹⁵ COM(2013) 451 final, COM(2013) 452 final and COM(2013) 751 final.

¹⁶ (2015/C 80/08), OJ C 80 of 7.02.2015, p. 17.

¹⁷ OJ L 123, 12.5.2016, p. 1.

- (5) The empowerments in the basic acts which provide for the use of the regulatory procedure with scrutiny fulfil the criteria in Article 290 of the TFEU and should be adapted to that provision.
- (6) This Regulation should not affect pending procedures in which the committee has already delivered its opinion in accordance with Article 5a of Decision 1999/468/EC before the entry into force of this Regulation.
- (7) The acts concerned should therefore be amended accordingly.

HAVE ADOPTED THIS REGULATION:

Article 1

The acts listed in the Annex are amended as set out therein.

Article 2

This Regulation shall not affect pending procedures in which a committee has already delivered its opinion in accordance with Article 5a of Decision 1999/468/EC.

Article 3

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President