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INFORMATION NOTE

From: General Secretariat of the Council
To: Delegations
Subject: Initiative to complement the Common Understanding on delegated acts as regards the consultation of experts

Delegations will find in Annex the Initiative to complement the Common Understanding on delegated acts as regards the consultation of experts, which was endorsed by Coreper on 19 February 2014 by consensus and transmitted to Mr Schulz, President of the European Parliament, and Mr Barroso, President of the European Commission, on 20 February 2014.

INITIATIVE TO COMPLEMENT THE COMMON UNDERSTANDING ON DELEGATED ACTS

AS REGARDS THE CONSULTATION OF EXPERTS

I. EXPLANATORY NOTE

Introduction

The Treaty of Lisbon introduced the possibility for the Union legislator to delegate to the Commission the power to adopt non-legislative acts (Article 290 TFEU). The Council considers this procedure an important tool to guard the efficiency of the Union's decision-making processes as it avoids an overburdening of the legislator. However, serious difficulties have been experienced with the application of this new procedure. Negotiations on key legislative packages such as the Multiannual Financial Framework, the Common Agricultural Policy reform and the Single Market Acts I and II packages were blocked for considerable time due to disagreement over the issue of delegated acts. Only after lengthy discussions causing regrettable delays could these files be adopted.

The Council considers that the time is ripe to take stock of these difficulties and evaluate the practice which has been put into place following the agreement reached in 2011 on the Common Understanding on delegated acts. In the Council's view, many of the difficulties experienced are due to insufficient guarantees about a proper consultation of experts during the preparation of delegated acts. Concerns about this shortcoming, along with criticisms concerning transparency and democratic accountability, have also been voiced by the European Parliament¹, the European Economic and Social Committee², as well as several national parliaments³.

¹ See the report on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, adopted by the Committee on Legal Affairs on 4 December 2013 (A7-0435/2013), as well as the report on the implementation of the Treaty of Lisbon with respect to the European Parliament, adopted by the Committee on Constitutional Affairs of 11 February 2013 (2013/2130(INI)).

² Information report INT/656 "Better Regulation: Implementing acts and delegated acts", <http://www.eesc.europa.eu/?i=portal.fr.int-opinions.24245>.

³ See among others the opinions of the Austrian National Council, the Austrian Federal Council, the French Senat, the German Bundesrat, the Italian Senat, the Polish Sejm and the UK House of Commons European Scrutiny Committee. Source: <http://www.ipex.eu/>.

Analysis of the problem

Some of the difficulties described above are linked to divergent views on the delineation of the respective scopes of Articles 290 and 291 TFEU. In this respect, the Council attaches great importance to the inter-institutional dialogue which aims at determining horizontal guidelines on the application of these two Treaty provisions. Future judgments of the Court of Justice may also shed additional clarity on the matter.

However, more clarity on the delineation will not suffice to unblock the situation as long as the issue of consultation of experts in the preparatory phase of delegated acts is not properly addressed. For the Council, the way in which the Commission consults experts at the moment is insufficient. The same has been criticised by institutions both at European and at national levels⁴, and was the main reason for the Council's recent first objection to a delegated act.⁵

Expert consultation is a cornerstone of good governance and better regulation.⁶ According to the Commission, consulting those who will be affected by a new policy or initiative and those who will implement it is a Treaty obligation and an essential tool for producing high quality and credible policy proposals.⁷ All institutions agree that this applies to the preparation of legislative proposals.⁸ However, as regards delegated acts, no satisfactory agreement could be reached until now about the systematic consultation of experts. And this despite the fact that Member States' authorities will be responsible for implementing or transposing delegated acts once they are adopted.

⁴ See the references in footnotes 1, 2 and 3, respectively.

⁵ EPSCO Council of 9 December 2013; delegated act related to Galileo.

⁶ See the Inter-institutional agreement on better law-making, OJ C 321 of 31.12.2003, p. 1, paragraphs 25 and 26, as well as, for instance, Communication from the Commission "*Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*", COM(2002)704 final; Communication from the Commission on the collection and use of expertise by the Commission: principles and guidelines "*Improving the knowledge base for better policies*", COM(2002)713 final; and the Commission's *White Paper on European Governance*, COM(2001)428 final.

⁷ Commission Impact Assessment Guidelines, SEC(2009)92.

⁸ Protocol on the application of the principles of subsidiarity and proportionality.

The proposed solution

With this initiative, the Council proposes to address the problem described above by improving the consultation of experts in two ways. Firstly, by involving the co-legislators in the ex-ante consultation in order to allow them to properly exercise their right to object as provided for in Article 290 TFEU. Secondly, by giving Member States sufficient guarantees that their experts will be heard by the Commission before delegated acts are adopted that they will have to implement or transpose.

Regarding the form of this initiative, the Council suggests that the three institutions agree on complements to the Common Understanding on delegated acts. The Common Understanding was agreed in 2011 to set out the procedure applicable to the adoption of delegated acts, as well as the standard clauses for legislative acts, and it addresses expert consultation. Hence it is the proper instrument to seek agreement of the European Parliament, the Council and the Commission on improvements regarding this issue.

Complementing the standard clauses with procedural steps regarding the ex-ante consultation of experts is considered necessary to generate the required confidence. The Commission's communication of 2009⁹ failed to generate a sufficient level of confidence.

Regarding the content of this initiative, it aims to establish that the Commission should systematically carry out appropriate and transparent consultations well in advance, including with groups composed of experts designated by all the Member States. It also foresees that the European Parliament and the Council should receive all documentation related to these expert groups' meetings, and should be entitled to send observers to them.

⁹ COM(2009) 673 final of 9 December 2009.

When adopting a delegated act, the Commission is asked to take the utmost account of the opinion delivered by the expert group, without being bound by it. Thus, the purpose of this procedure is to assist the Commission through an ex-ante consultation in its preparatory work. It is not to establish a mechanism for control by Member States of the Commission's exercise of the power to adopt delegated acts.

The initiative is essentially a codification of the unilateral commitments which the Commission has made during the past years on this issue. The wording suggested draws extensively on wording used by the Commission in its communication of 2009¹⁰ and its standard rules for expert groups¹¹. The initiative aims at generalising the good practice that exists in certain fields, but which is absent or insufficiently present in others.

Conclusion

Four years after the entry into force of the Lisbon Treaty and with three years of practice based on the Common Understanding, the institutions have built up a considerable experience as regards delegated acts. The time is ripe to take stock of this experience and assess where improvements can be made. In the hope of avoiding a repetition of these difficulties under the next legislative term, the Council wishes to invite the European Parliament and the Commission to find a solution which would unblock the situation described above on the basis of the present initiative.

¹⁰ Ibid., paragraph 4.2: "*Except in cases where this preparatory work does not require any new expertise, the Commission intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted. This consultation will be carried out in plenty of time, to give the experts an opportunity to make a useful and effective contribution to the Commission. (...) The Commission attaches the highest importance to this work, which makes it possible to establish an effective partnership at the technical level with experts in the national authorities*".

¹¹ Communication from the President to the Commission C(2010) 7649 final "*Framework for Commission expert groups: horizontal rules and public register*".

II. TEXT OF THE INITIATIVE

Note: Changes to the text contained in doc. 8753/1/11, as amended by the lawyer-linguists of the three institutions on 6 December 2011 through doc. 18039/11, are in **bold and underlined**; deletions are marked as [...].

“Common Understanding

I. Scope and general principles

1. Taking into account the commitments mentioned by the Commission in the communication of 9 December 2009, **and having regard to Article 295 TFEU**, this Common Understanding builds further on that communication and streamlines the practice established thereafter by the European Parliament and the Council. It sets out the practical arrangements and agreed clarifications and preferences applicable to delegations of legislative power under Article 290 of the Treaty on the Functioning of the European Union (TFEU), in accordance with the objectives, content, scope and duration of a delegation must be expressly defined in each legislative act making a delegation (hereinafter "the basic act").
2. In exercising their powers and in compliance with the procedures laid down in the TFEU, the three Institutions shall cooperate throughout the procedure with a view to a smooth exercise of delegated power and an effective control of this power by the European Parliament and the Council. To this effect, appropriate contacts at administrative level shall be established.
3. The Institutions concerned, depending on the procedure for the adoption of the basic act, undertake to refer as far as possible to the standard clauses annexed to this Common Understanding when proposing or making delegations of power under Article 290 TFEU.

II. Consultations in the preparation and drawing-up of delegated acts

4. The Commission, when preparing and drawing up delegated acts, will ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council and **systematically** carry out appropriate and transparent consultations well in advance, including [...] **with groups composed of experts designated by all the Member States. To this end, the Commission will rely on existing expert groups or, if necessary, create new ones. If so requested by the European Parliament or the Council, the Commission will invite the European Parliament and/or the Council to send observers to attend the meetings of the expert groups.** The European Parliament [...], the Council **and the Member States** shall indicate to the Commission their respective functional mailboxes to be used for the transmission of documents relating to these consultations. **The preparation and drawing-up of delegated acts may also include consultations with stakeholders, which should however take place before the consultations with the above mentioned expert groups.**

III. Arrangements for the transmission of documents and computation of time periods

5. By way of an appropriate mechanism, the Commission shall officially transmit the delegated acts to the European Parliament and the Council. Classified documents shall be processed in accordance with internal administrative procedures drawn up by each institution with a view to providing all the requisite guarantees.
6. In order to ensure that the European Parliament and the Council are able to exercise the rights provided for in Article 290 TFEU within the time limits laid down in each basic act, the Commission shall not transmit any delegated acts during the following periods:
 - From 22 December until 6 January.
 - From 15 July until 20 August.

These periods shall only apply when the period of objection is based on paragraph 10.

These periods shall not apply for delegated acts adopted under the urgency procedure, as set out in part VI of this Common Understanding. In the event that a delegated act is adopted under the urgency procedure during these periods, the time limit for objection provided for in the basic act shall start to run only when this period is finished.

The three institutions shall agree by 1 October 2013 on an arrangement for the notification of delegated acts during the European Elections in 2014.

7. The period for expressing objections shall start when all official language versions of the delegated act have been received by the European Parliament and the Council.

IV. Duration of the delegation

8. The basic act may empower the Commission to adopt delegated acts for an undetermined or determined period of time.
9. Where a determined period of time is provided, the basic act should in principle provide for the delegation of power to be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes the extension not later than three months before the end of each period. The Commission shall draw up a report in respect of the delegated power not later than nine months before the end of each period. This paragraph does not affect the European Parliament or the Council's right of revocation.

V. Periods for objection by the European Parliament and Council

10. Without prejudice to the urgency procedure, the period for objection defined on a case-by-case basis in each basic act should in principle be of two months, and not less than that, extendable by two months at the initiative of the European Parliament or the Council.
11. However, the delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission that they will not object.

VI. Urgency procedure

12. An urgency procedure should be reserved for exceptional cases, such as security and safety matters, the protection of health and safety, or external relations, including humanitarian crises. The European Parliament and the Council should justify the choice of an urgency procedure in the basic act. The basic act shall specify the cases in which the urgency procedure shall be used.

13. The Commission undertakes to keep the European Parliament and the Council fully informed about the possibility of a delegated act being adopted under the urgency procedure. As soon as the Commission services foresee such a possibility, they shall informally forewarn the secretariats of the European Parliament and the Council via the functional mailboxes mentioned in point 4.
14. A delegated act adopted under the urgency procedure shall enter into force without delay and apply as long as no objection is expressed within the period provided for in the basic act. If an objection is expressed, the Commission shall repeal the act without delay following the notification by the European Parliament or the Council of the decision to object.
15. When notifying a delegated act under the urgency procedure to Parliament and the Council, the Commission shall state the reasons for its use.

VIa. Information on expert group proceedings

15a. The Commission shall keep a register which shall contain: a list of all expert groups, the agendas of expert group meetings; the draft delegated acts on which the expert groups are consulted; the opinions delivered by the expert groups; the summaries of the consultations; and the delegated acts adopted following the consultations of the expert groups.

15b. The Commission shall also publish an annual report on the work of the expert groups.

VII. Publication in the Official Journal

16. Delegated acts shall be published in the L series of the *Official Journal of the European Union* only after the expiry of the period for objection, with the exception of paragraph 11 above. Delegated acts adopted under the urgency procedure shall be published without delay.
17. Without prejudice to Article 297 TFEU, decisions by the European Parliament or Council to revoke a delegation, to object to a delegated act adopted under the urgency procedure or to oppose the tacit renewal of a delegation of power shall also be published in the L series of the *Official Journal of the European Union*. A decision to revoke shall enter into force the day following its publication of the decision in the *Official Journal of the European Union*.
18. The Commission shall also publish in the *Official Journal of the European Union* the decisions repealing delegated acts adopted under the urgency procedure.

VIII. Mutual exchange of information, in particular in the event of a revocation

19. When exercising their rights in applying the conditions laid down in the basic act, the European Parliament and the Council will inform each other and the Commission.
20. When either the European Parliament or the Council initiates a procedure which could lead to the revocation of a delegation, it will inform the other two institutions at the latest one month before taking the decision to revoke.

STANDARD CLAUSES

Recital:

In order to [objective], the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of [content and scope]. It is of particular importance that the Commission **systematically** carry out appropriate consultations during its preparatory work, including [...] **with [the expert group composed of experts designated by the Member States]. In these consultations, the Commission should endeavour to find solutions which command the widest possible support within [the expert group]. The Commission should inform [the expert group] of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards those suggestions which have been largely supported within [the expert group].**

The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

Article(s) delegating power

The Commission shall be empowered to adopt delegated acts in accordance with Article a concerning [content and scope].

Supplementary paragraph to be added where urgency procedure applies:

Where, in the case of [content and scope], imperative grounds of urgency so require, the procedure provided for in Article b shall apply to delegated acts adopted pursuant to this Article.

Article a

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. [duration]

Option 1:

The power to adopt delegated acts referred to in Article[s] ... shall be conferred on the Commission for an indeterminate period of time from ~~the~~ *.

Option 2:

The power to adopt delegated acts referred to in Article[s] ... shall be conferred on the Commission for a period of X years from *. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the X-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

Option 3:

The power to adopt delegated acts referred to in Article[s] ... shall be conferred on the Commission for a period of X years from *.

(*) Date of entry into force of the basic legislative act or from any other date set by the legislator.

3. The delegation of power referred to in Article[s] ... may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

3a. Before the adoption of a delegated act, the Commission shall consult [the expert group]. For this purpose, the Commission shall submit its draft delegated act to [the expert group]. Except in duly justified cases, it shall convene a meeting not less than 14 days from submission of the draft delegated act and of the draft agenda to [the expert group]. [The expert group] shall be given the opportunity to comment on all major changes of the draft delegated act before it is adopted by the Commission.

[The expert group] shall adopt an opinion on the draft delegated act. As far as possible, [the expert group] shall adopt its opinions by consensus. In the event of a vote, the outcome of the vote shall be decided by a simple majority of the members. The Commission shall inform [the expert group] of its preliminary reactions and how it intends to proceed and shall give [the expert group] the opportunity to react.

3b. When adopting a delegated act, the Commission shall take the utmost account of the opinion delivered by [the expert group].

A summary of the consultation shall be drafted by the Commission and adopted by [the expert group]. In case the Commission does not act in accordance with the opinion delivered by [the expert group], it shall set out its reasons **for this in the summary.**

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council. **Along with the delegated act, the Commission shall transmit the summary of the consultation.**

5. A delegated act adopted pursuant to Article[s]... shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of [two months] of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by [two months] at the initiative of the European Parliament or of the Council.

Supplementary article to be added where urgency procedure applies:

Article b

Urgency procedure

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article a(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or by the Council."