

cepCommentary

Commentary on the Commission's Communication [COM(2009) 673]
regarding the

Implementation of Article 290 of the Treaty on the Functioning of the European Union

by

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With the entry into force of the Treaty of Lisbon (hereinafter "the new Treaty"), the legal basis for the comitology system was revoked. In future, the delegation of legislative powers to the Commission will be subjected to Art. 290 and 291 TFEU. However, detailed rules regarding the delegation and scrutiny of how these are exercised are not provided for in the new Treaty. These will have to be the objective of an agreement to be concluded between the European Parliament, the Council and the Commission. However, the interests of these parties differ considerably in parts.

The aim of the Commission is to achieve a maximum degree of autonomy. Therefore, it is willing to accept only a minimum degree of control by the European Parliament and the Council.

However, as the legislative bodies and in the interest of the democratic legitimation of European policy, the European Parliament and the Council are obliged to reserve as far-reaching powers of control as possible and to collect at an early stage comprehensive information on the Commission's intended delegated acts.

The question as to how the European Parliament and the Council can meet their commitments will be illustrated in the following.

Preliminary note to the commentary

The term “comitology” denotes the committee procedure (French: comité = committee) used by the Commission to adopt legal acts on the basis of the powers conferred on it. The conditions for this delegation of powers were laid down in Art. 202 of the Treaty establishing the European Union (TEC) by way of the comitology decision in 1987, which was reworded in 1999 and supplemented in 2006 with the regulatory procedure with scrutiny, which enables the European Parliament to exert a greater degree of influence.¹ Prior to the enactment of these legal acts, committees consisting of national experts had to be consulted and were entitled to approve or reject drafts. Whenever a committee refused its approval the Commission had to submit the draft concerned to the European Parliament and the Council, which could – independently of each other - reject it with the respective majority. However, an approval by these bodies was not required. With the entry into force of the Treaty of Lisbon on 1 December 2009, the hitherto practised comitology system became obsolete, since the legal basis for the delegation of legislative powers to the Commission was recast. As regards secondary legislation which refers to the comitology Decision and which are already in effect, nothing changes until the adjustment to the new legal position is completed.²

The Treaty on the Functioning of the European Union (TFEU)³ in the version of the Treaty of Lisbon distinguishes between delegated legal acts (Art. 290 TFEU) and implementing acts (Art. 291 TFEU).

Article 290 TFEU

(1) A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

(2) Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- a) the European Parliament or the Council may decide to revoke the delegation;
- b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component

members, and the Council by a qualified majority.

(3) The adjective “delegated” shall be inserted in the title of delegated acts.

Article 291 TFEU

(1) Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

(2) Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

¹ Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006/512/EC).

² Cp. Article 9 of the Protocol (No. 36) on transitional provisions.

³ Consolidated version of the Treaty on the Functioning of the European Union, published in OJ C 115, 08 May 2008, p. 47et sqq.

(3). For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

(4) The word 'implementing' shall be inserted in the title of implementing acts.

Starting point for the distinction is the question of which field of responsibility is affected: delegated acts supplement or amend non-essential provisions of the basic act. Thus they affect the legislative sphere of responsibility. The fact that apparently even mere technical questions such as, for instance, the fixing of individual limit and reference values can be of policy relevance and therefore must be answered for by the legislative branch was lately demonstrated by the bulb prohibition set forth by the so-called Eco-design Directive.⁴ These kind of regulations should be adopted in the form of delegated acts. With implementing acts, however, the manner in which Union acts are implemented in Member States is harmonised, so they affect the Member States' executive sphere of responsibility. This could include, for instance, the establishment of a common framework for the exchange of confidential company data for statistical purposes between the Commission (Eurostat) and the Member States.⁵ According to this distinction therefore, two different types of conditions for the delegation of legislative powers to the Commission and for the control of their exercise are intended.

The distinction has to be viewed against the background of the revision of the comitology Decision in 2006, which was the first act granting veto rights to the European Parliament ("regulatory procedure with scrutiny") where "quasi-legislative" measures taken by the Commission were concerned. Such quasi-legislative acts of the Commission amend only non-essential provisions of the basic instrument, but – and this is decisive for the European Parliament – can be of interest politically.

Art. 290 TFEU continues consistently to pursue the approach that has been characteristic of the existing regulatory procedure with scrutiny. If the Commission is empowered to supplement or amend non-essential provisions of a basic instrument, then this affects the legislative power. As a result, Art. 290 of the TFEU stipulates that the European Parliament and the Council as European legislative bodies obtain the option to reject delegated acts of the Commission. Unlike the regulatory procedure with scrutiny, Art. 290 TFEU no longer provides for a participation of committees consisting of national experts. The question of whether or not the input of expert knowledge would still be useful or meaningful for the further development and design of delegated acts, despite these considerations, is another matter.

Implementing measures pursuant to Art. 291 TFEU, however, serve the purpose of harmonising the *application* of legislative acts in Member States. Accordingly, it is the Member States and their competent authorities in particular which are affected, namely the executive. Consequently, Art. 291 TFEU provides that Member States should control how the Commission exercises its delegated executive power. This control can still be exercised by the committees, whose work has been proven valuable by many years of practice. Participation in the procedure by the legislative bodies,

⁴ *Cp. Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast), published in OJ L 285, 31 October 2009, p. 10 et sqq.*

⁵ *Commission Regulation (EC) No 192/2009 of 11 March 2009 implementing Regulation (EC) No 177/2008 of the European Parliament and of the Council establishing a common framework for business registers for statistical purposes, as regards the exchange of confidential data between the Commission (Eurostat) and Member States, published in OJ L 67, 12 March 2009, p. 14 et sqq.*

namely by the European Parliament and the Council, is consequently not mentioned; however, it is their responsibility to define the general rules and principles as to how to exercise Member State control.

It is still unclear which implications Art. 290 and Art. 291 TFEU will entail in practice; however, the Commission, the European Parliament and the Council are already taking them into account. The results will almost certainly by means of a compromise be an object of interinstitutional agreements.

On 9 December 2009, the Commission published a Communication COM(2009) 673 expressing its opinion on the implementation of Art. 290 TFEU. In the following, the consolidated version of this Communication will be commented on in the same order as the table of contents. Our comments, which are marked in italics, always follow the respective section of the Communication. It was decided not to provide commentary for the annexed sample text.

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Implementation of Article 290 of the Treaty on the Functioning of the European Union

1. Introduction

Article 290 of the Treaty on the Functioning of the European Union, as laid down in the Treaty of Lisbon signed on 13 December 2007⁶ (hereinafter "the new Treaty"), allows the legislator to delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act. Legal acts adopted by the Commission in this way are referred to in the terminology used by the new Treaty as "delegated acts" (Article 290(3)).

CEP Comment: In order to prevent misunderstandings, it has to be added that on the one hand Art. 290 TFEU grants to the legislator, namely to the European Parliament and the Council, the option to delegate certain powers to supplement or amend non-essential provisions of legislative acts. On the other hand, however, that does not mean that the legislator is obliged to delegate these powers, nor that the Commission is entitled to demand it. As the Commission has the right of initiative, it is very likely that it will regularly propose the delegation of power in its draft legislative acts in order to increase its policy shaping power.

This provision does not require the adoption of any binding instrument of secondary legislation to ensure its implementation; it is sufficient in itself and contains all the elements required by the legislator for defining, case by case, the scope, content and practical arrangements for delegating power. However, the Commission believes it is useful and necessary to define the general framework within which such delegations of power should operate. The European Parliament, although stressing that this measure should preserve the freedom of the legislator, has reached a similar conclusion and has suggested that the institutions agree on a standard formula for delegations that would be regularly inserted by the Commission in the draft legislative act itself⁷.

CEP Comment: The Commission is right in that Art. 290 TFEU is sufficiently defined for it to be implemented without any secondary legislative framework. Irrespective of that, Art. 290 TFEU contains neither any legal basis for the adoption of such rules, nor can the comitology decision 1999/468/EC serve as a legitimating reference, as its legal basis (laid down in Art. 202 TEC) was revoked with the entry into force of the Treaty of Lisbon.

So if the Commission is to be empowered in future acts to adopt delegated acts, the respective wording would have to be renegotiated for each new act. Such an approach is not efficient and, to this end, it is in the interests of all EU bodies to prepare new standard formula for the delegation of powers in the scope of Art. 290 TFEU as swiftly as possible. At the same time, the "freedom of the legislator" to choose a different formula case by case must be retained, otherwise the intention of Art. 290 TFEU would be

⁶ OJ C 306, 17.12. 2007.

⁷ European Parliament resolution of 7 May 2009 on Parliament's new role and responsibilities in implementing the Treaty of Lisbon.

undermined. The European Parliament expressed the same position in the resolution mentioned by the Commission (No. 68). An interinstitutional agreement would be the appropriate instrument for a compromise in terms of Art. 295 TFEU. A standard formula should contain the key elements which have to be taken account of when delegating powers. Pursuant to Art. 290 (2) TFEU, this includes in particular the conditions for the delegation of power, the definition of the right of revocation and the European Parliament's and the Council's right of opposition to delegated acts.

Without challenging the freedom of the European Parliament and the Council to set the limits and conditions of a delegation of powers at the point when a legislative act is adopted, the principles of better regulation and the smooth running of the interinstitutional process plead for a coordinated and coherent approach. Both the Commission, which is responsible for preparing and adopting delegated acts, and the European Parliament and Council, which are responsible for scrutinising them, should promote the introduction of a system that is as homogeneous and predictable as possible.

CEP Comment: In so doing, the focus should be on the transparency of the procedure – and that at all levels. The Commission will request increased transparency whenever the European Parliament and the Council wish to apply their instruments of control. The European Parliament and the Council, on the other hand, will call for transparency in order to hear about projected delegated acts at their earliest stage. For unlike the ordinary legislative procedure pursuant to Art. 289(1) TFEU in conjunction with Art. 294 TFEU, and the special legislative procedure pursuant to Art. 289(2) TFEU, in which the adoption of legislative acts is subject to a prior approval by the European Parliament and the Council, in the case of delegated acts the legislative bodies must explicitly oppose it if they wish to prevent it from being adopted. In fact, Art. 290 (2) TFEU does not provide for any other option; to this end its wording is final.

The purpose of this communication is to set out the Commission's views on the scope of the delegated acts, the framework for delegations of power, the working methods the Commission intends to use for preparing the adoption of delegated acts and, finally, the conditions under which the legislator might exercise control over the way the powers conferred on the Commission are implemented.

2. Scope of delegated acts

The scope of Article 290 cannot be determined simply by examining in detail the terms used by the authors of the new Treaty to define delegated acts; the provision also needs to be put into context, by looking in particular at its historical connection with the regulatory procedure with scrutiny and at its links with Article 291 on implementing acts. For it is around Articles 290 and 291 that the legal framework will have to be constructed to replace the comitology system established under the Treaty establishing the European Community.

A delegation of power within the meaning of Article 290 is possible only in a legislative act. However, it makes little difference whether or not the legislative act was adopted jointly by Parliament and the Council, because Article 290 does not distinguish between the ordinary legislative procedure (formerly codecision) and special legislative procedures.

CEP Comment: It is indeed irrelevant for the delegation of power whether or not the legislative act was adopted by an ordinary or special legislative procedure. But the rights granted to the European Parliament and the Council within the scope of Art. 290 TFEU must conform to those granted to them within the legislative procedure applicable to legislative acts. As regards the control rights, the following distinction must be made: in the ordinary legislative procedure pursuant to Art. 294 TFEU, the European Parliament and the Council have equal powers as legislative bodies. Therefore, the same rights of control must be granted to both bodies for the delegation of power and the related delegated acts. In the case of the special legislative procedure, however, the European Parliament and the Council are usually not equal as legislative bodies, instead merely providing the respective other approving body with a non-binding statement to the decision. Therefore, in such cases the merely commenting body cannot be granted the same control rights as the decision-making body.⁸

2.1. Relations with the regulatory procedure with scrutiny

Purely 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/EC⁹ ("the comitology Decision"), are subject to the regulatory procedure with scrutiny introduced by Decision 2006/512/EC of 17 July 2006¹⁰. 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.

However, the similarity of the criteria does not mean that they will be implemented in exactly the same way; in a new institutional context the scope of the delegated acts will not necessarily be identical to that of the regulatory procedure with scrutiny. Any automatic duplication of precedents is therefore to be avoided.

CEP Comment: The Commission's warning of the "automatic duplication of precedents", which is mainly based on the assumption that the existing regulatory procedure with scrutiny and the procedure pursuant to Art. 290 TFEU do not fall under the same scope, is not comprehensible. For the purpose of clarification, the relevant passages of the comitology Decision of Art. 290 TFEU are compared as follows:

According to Art. 2 (2) of the comitology Decision, the regulatory procedure with scrutiny is applied to "measures of general scope [...] designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements [...]."¹¹ Art. 290 TFEU states that "a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain

⁸ The European Parliament was entitled to refer to the regulatory procedure with scrutiny, following the amendment of the comitology Decision (1999/468/EC) through the Decision (2006/512/EC), only if the basic instrument was adopted through the co-decision procedure pursuant to Art. 251 EC Treaty.

⁹ OJ L 184, 17.7.1999, p. 23. Consolidated version, as amended by Decision 2006/512/EC, published in OJ C 255, 21.10.2006, p. 4.

¹⁰ OJ L 200, 22.7.2006, p. 11.

¹¹ Recital No. 7a of the comitology Decision accordingly states: „It is necessary to follow the regulatory procedure with scrutiny as regards measures of general scope which seek to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 of the Treaty, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new nonessential elements [...].“

non-essential elements of the legislative act.”

Though the wording of Art. 290 TFEU is not identical with that of the comitology Decision, in terms of content there is no obvious difference. The measures set out in the comitology Decision can be compared to the non-legislative acts referred to in Art. 290 TFEU. The fact that the Treaty of Lisbon uses the term “acts” instead of “measures” must be seen against the background of its linguistic development. This is the reason why the limitation “non-legislative” is required. It merely serves the purpose of making it explicitly clear that a delegated act must not incorporate any provisions which have become separated from the basic instrument. To this end, Art. 290 TFEU can definitely be viewed as a continuation of the regulatory procedure with scrutiny.

Both cases concern measures of general scope which are effected by means of amendment to the legislative act – supplements, additions and deletion are ultimately amendments, too. In the context of the regulatory procedure with scrutiny, the term “quasi-legislative measures” is therefore used.

Something else the two provisions have in common is that their scopes are restricted exclusively to pure non-essential rules which are being amended. From this it follows that there is a parallel to the hitherto applicable regulatory procedure with scrutiny.

2.2. Relations with implementing acts

Before examining the idea of the delegated act in its own right we should consider it in relation to the implementing act, which is the subject of Article 291.

It is clear, first, that an act cannot be classified under two different headings at the same time: an act based on Article 290 is by definition excluded from the scope of Article 291, and vice versa. The authors of the new Treaty clearly intended the two articles to be mutually exclusive, and indeed the resulting acts have different legal names.

Secondly, it should be noted that the authors of the new Treaty did not conceive the scope of the two articles in the same way. The concept of the delegated act is defined in terms of its scope and consequences – as a general measure that supplements or amends non-essential elements – whereas that of the implementing act, although never spelled out, is determined by its rationale – the need for uniform conditions for implementation. This discrepancy is due to the very different nature and scope of the powers conferred on the Commission by the two provisions.

When it receives the power to adopt delegated acts under Article 290 the Commission is authorised to supplement or amend the work of the legislator. Such a delegation is always discretionary: the legislator delegates its powers to the Commission in the interests of efficiency. In the system introduced by Article 291 the Commission does not exercise any “quasi-legislative” power; its power is purely executive. The Member States are naturally responsible for implementing the legally binding acts of the European Union, but because it is necessary to have uniform implementing conditions the Commission must exercise its executive power. Its intervention is not optional but compulsory, when the conditions of Article 291 are fulfilled.

CEP Comment: The mutual exclusion of Art. 290 TFEU and Art. 291 TFEU are of utmost importance, for the wording of Art. 291 TFEU does not provide for direct control through the European legislator. The legislator merely establishes by way of up-front regulations the rules according to which Member States exercise control (Art. 291 (3))

TFEU). Unlike delegated acts pursuant to Art. 290 TFEU, implementing acts pursuant to Art. 291 TFEU are measures which do not amend the legislative act but are to ensure the uniform implementation of the legislative act in the Member States by establishing uniform detailed rules.

In principle, it is the Member States' responsibility to adopt all measures of national law necessary to implement legislative Union act, as set forth in Art. 291 TFEU (1).¹² In so doing, it is at the Member States' discretion how they implement and apply the European legislative act. An implementing act by the Commission, however, restricts this discretionary power of the Member States and may – depending on the regulation intensity – even reduce it to zero. Therefore, an implementing act by the Commission must, at least in areas of shared competence pursuant to Art. 4 TFEU and coordinating competences pursuant to Art. 6 TFEU, be consistent with the principle of subsidiarity. Moreover, the standardisation of implementing measures must be required mandatorily in Member States, provided the implementation of the legislative act could otherwise not be ensured. Implementing conditions that deviate partially from Member State to Member State but do not jeopardise the effective implementation of the legislative act are not a sufficient justification for an implementing act by the Commission.

This restriction also applies to the Commission's view that it would have to intervene "when the conditions of Article 291 are fulfilled". For Art. 291 TFEU does not contain any sufficiently clear specification of the requirements, apart from the empty phrase that "uniform conditions" are needed. When exactly this need exists and when, therefore, the condition has been fulfilled that would require the Commission to take action, cannot be placed at the discretion of the Commission. As the manner in which basic instruments are implemented is at the discretion of Member States, any standardisation of the implementing conditions through the Commission at the same time always constitutes a reduction to zero of the Member States' discretion. To this end, intervention on the part of the Commission is compulsory only in cases where unequal implementing conditions in Member States impede the efficient implementation of a basic instrument; such cases have to be proven in detail by the Commission.

The provision in Art. 291 (3) TFEU whereby Member States should be able to control the Commission's exercise of implementing powers takes account of the fact that this is the executive sphere of responsibility. Consequently, however, from this it follows that direct control through the European legislative – the European Parliament and the Council – is not provided for in Art. 291 TFEU, contrary to delegated acts pursuant to Art. 290 TFEU.

However, the European legislator may lay down rules prescribing the form Member State control may take (Art. 291 (3) TFEU). In so doing one could draw on the hitherto practiced regulatory procedure pursuant to the comitology Decision, according to which the Commission was entitled to adopt measures only in compliance with the voting by the committee of national experts. In order to adopt a measure which went

¹² Arising out of the legal situation pursuant to Art. 10 TEC of the Treaty of Nice.

against their vote, this had to be approved by the Council¹³, though this procedure would have to be adjusted to Art. 291 TFEU in such a way that the legislative rights of the Council were deleted if the committee gave no statement or gave a negative statement.¹⁴ For Art. 291 TFEU states expressly the exclusion of European legislative control; this is to be conferred exclusively upon Member States.¹⁵ In order to ensure the continuation of efficient control of the Commission, the Commission would have to be obliged to participate in the committee's statement which is subject to a qualified majority. Thus it could be prevented that an implementing act is adopted against the will of the committee concerned.

Finally, it is important to stress that the fact that the acts adopted by the Commission are of general application is not in itself sufficient to trigger the application of the legal regime of delegated acts rather than that of implementing acts; Article 291 also allows the Commission to adopt implementing measures of general application. In order to ensure the uniform implementation of a legally binding act of the European Union, the Commission may use either individual measures or acts of general application. However, it is clear from the wording of Article 290 that the Commission may never adopt a delegated act relating to a measure of an individual nature.

CEP Comment: In case of doubt, for the Commission it is preferable if a legislative act refers to Art. 291 TFEU, since Art. 291 TFEU grants a greater degree of autonomy to the Commission than Art. 290 TFEU does. With Art. 291 TFEU the Commission is subjected neither to the strict requirements for a delegation of power pursuant to Art. 290 (1) TFEU nor to the control mechanism exercised by the European Parliament and the Council pursuant to Art. 290 (2) TFEU. The preceding statement by the Commission has to be seen and evaluated against this background. However, it also becomes clear that it is difficult to differentiate between delegated acts and implementing acts. Finally, it only depends on the legislator's decision which aspects are definitely resolved by the basic instrument and which can be supplemented or amended and/or which of them can be assigned to the scope of implementation.

Therefore, before delegating powers the European Parliament and the Council must always assess whether or not the measures to be adopted have a political dimension, the responsibility for which they do not want to delegate irrevocably to the Commission. The fact that even purely technical issues, such as the fixing of individual limit and reference values, can be of political relevance was lately demonstrated by the bulb prohibition set forth by the so-called Eco-design Directive.¹⁶ Even in the case of delegating measures which, at a first glance, seem to comprise merely technical provisions, delegated acts might prove to be the better choice from the European Parliament's and the Council's viewpoint.¹⁷

¹³ Art. 5 of the Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), amended by the Council Decision of 17 July 2006 (2006/512/EC).

¹⁴ Cp. CONV 571/03, p. 16; CONV 424/02, p. 12, Footer 1.

¹⁵ It is questionable whether this provision makes sense since the Member States' executives are represented in the Council. If subordinate officials take the decisions in committees, the hierarchy of the national executives might be undermined.

¹⁶ Cp. Directive 2009/125/EC, loc. cit.

¹⁷ Cp. the definition of delegated acts in CONV 424/02, p. 10.

However, the Commission has a clear advantage here. In proposing the basic instrument it thereby sets the course in terms of policy and decides whether a delegation of power is to be exercised on the basis of either Art. 290 TFEU or Art. 291 TFEU. The latter cannot be (readily) reversed arbitrarily by the European Parliament and the Council. In addition, only the Commission knows what is hiding behind the proposals in detail and, in particular, the impact such a delegation of power can have. In order to eliminate this information deficit in the European Parliament and the Council it would be appropriate if the Commission were obliged to refer explicitly to the possible impact of a delegation of power within the framework of an Impact Assessment Paper accompanying their proposals.

2.3. Criteria for implementing Article 290

It is for the legislator alone to apply the criteria set out in Article 290 which, it should be noted, are cumulative: the act must not only be of general application but must also amend or supplement certain non-essential elements of the legislative act. If either of these conditions is not met Article 290 may not be applied.

The Commission does not intend to interpret these criteria in the abstract; the very wide range of measures that might be envisaged in a given situation precludes any attempt at classification. The Commission would, however, make two comments.

Firstly, it believes that by using the verb "amend" the authors of the new Treaty wanted to cover hypothetical cases in which the Commission is empowered formally to amend a basic instrument. Such a formal amendment might relate to the text of one or more articles in the enacting terms or to the text of an annex that legally forms part of the legislative instrument. It makes little difference whether the annex contains purely technical measures; as soon as the Commission is empowered to amend an annex containing measures of general application, the regime of delegated acts must be applied.

CEP Comment: Art. 290 TFEU does not provide any explanation as to the question of whether or not delegated acts may amend a basic instrument. Nevertheless, the Commission's opinion can be shared in the sense that the "Masters of the Treaties" wanted to grant the European legislator the option to confer, at their own discretion, amending powers on the Commission, at least where non-essential provisions are concerned, without being subjected a priori to restriction under primary law. However, it is extremely alarming when the Commission states that it could amend several articles of a basic instrument at a time by way of a delegated act, since Art. 290 TFEU defines that only non-essential elements of a legislative act may be affected and that the legislator must fix the objectives, content scope and duration of the delegation of power (Art. 290 (1) sub-para. (2) TFEU). This is to ensure that with delegated acts the nature of a legislative act as defined in the legislative procedure cannot be amended arbitrarily.

Secondly, the Commission wishes to stress the importance that should be attached to the verb "supplement", the meaning and scope of which are less specific than those of the verb "amend".

The Commission believes that in order to determine whether a measure "supplements" the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to "supplement" the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures.

CEP Comment: The Commission interprets the term "supplement" in such a way that as far-reaching powers as possible can be conferred upon it. However, in so doing it ignores the fact that it was not the intention of the "Masters of the Treaties" to grant to the Commission legislative powers which could amend the defined character of a legislative act. For according to Art. 14 (1) of the Treaty on the European Union (TEU) in the version of the Treaty of Lisbon¹⁸, only the European Parliament and the Council are legislative bodies of the Union. So in terms of Art. 290 TFEU, the word "supplement" can only be interpreted to mean that the legislator reserves the right to define the legal framework at the same time as authorizing the Commission to substantiate individual detailed provisions within the limits of the delegation of powers. These detailed provisions include regular updates to the latest in science and technology and the establishment of guidelines for the substantiation of a given framework in practice; by no means, however, can it mean the amendment of any framework of legislative acts, as the Commission envisions.

The legislator is entitled to enact full and comprehensive regulations governing a particular field of action, entrusting to the Commission the responsibility for ensuring their harmonised implementation through implementing acts; alternatively the legislator can choose to regulate the field in question only partially, leaving the Commission the responsibility for supplementing the regulations with delegated acts.

3. Framework for delegations of power

When the legislator confers powers on the Commission, it must define the framework within which they are exercised in each legislative act. The second subparagraph of Article 290(1) of the new Treaty requires the legislator explicitly to define the objectives, content, scope and duration of the delegation of power. It thus defines two types of limits on the delegation of power: material limits and temporal limits.

3.1. Material limits

The delegation of power must be clear, precise and detailed. The legislator decides the objectives which the adoption of the delegated acts should make it possible to attain and, where appropriate, the limits which these acts may not exceed.

So in a case where the legislator wished to confer on the Commission the power to amend the annex to a regulation it should, for example, specify that the Commission may amend all or part of the annex in question by a delegated act, provided that certain conditions are fulfilled – scientific

¹⁸ Consolidated version of the Treaty of the European Union, published in OJ C 115, 08 May 2008, p. 13 et sqq.

or technical progress has been made, a particular event has taken place or a certain amount of time has elapsed, etc. Similarly, limits might be imposed on the Commission for amending the annex; if the annex relates to setting quantitative values the Commission might be required by the legislator not to exceed certain thresholds.

3.2. Temporal limits

Article 290 states that the duration of the delegation of power is laid down by the legislator. The Commission does not believe that this requirement sanctions 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. 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. The legislator must be able to strike a balance between the need to establish a framework for the delegated powers and the need to ensure the continuity of the adoption of legal acts that are essential to the implementation of EU policies. Forcing the Commission periodically to present new legislative proposals to renew a delegation of power would be contrary to the very objectives of efficiency and speed that justify the use of delegated acts in the first place.

The Commission believes it is preferable not to increase the institutions' workload by introducing a binding system of short-term delegations. Delegations of power should in principle, therefore, be of indefinite duration. Such a practice would, moreover, be entirely consistent with the current situation. Experience shows that the legislator does not, as a general rule, wish to impose a time limit on the powers conferred on the Commission, even when conferring on it responsibility for taking quasi-legislative measures.

This is not to say that delegations of power should be immutable. It is important to note here that under Article 290(2)(a) the legislator can include in the basic instrument an option to revoke the delegation of power. 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.

This does not mean that revocation, as such, can be understood merely as a "substitute" for sunset clauses. As will be shown later (see point 5.2. below), revocation may serve other purposes. But, clearly, in this prerogative the legislator has at its disposal a mechanism whose practical effect is comparable to that of a sunset clause.

In specific cases it might, however, be appropriate for the legislator to set a precise date on which the delegation of power will expire. In such cases, and in order for the institutions not to have to resort to enacting legislation to renew the delegation of power, a mechanism for tacit renewal should be introduced, conditional on a report by the Commission and, of course, subject to the legislator being able to prevent such an automatic renewal.

CEP Comment: Basically, the Commission supports the delegation of power for an unlimited period of time. This is not surprising as this would mean the Commission were subject to the least amount of restrictions and would not have to engage in the

renewal of a delegation when a sunset clause automatically puts an end to the time limit of a delegation of power. However, in terms of the delegation of power, in no way is the right of revocation equal to doing away with a time limit. The Commission is concealing the hurdles which must be overcome by the European Parliament and the Council when exercising the right of revocation. For in the case of a sunset clause, the legislator no longer has to deal with the delegation of power in order to cease it; in the case of a revocation, however, the legislator must deal with it again and, in addition, even has to organise the required majority for a respective decision.

The Commission mainly argues that the imposition of a time limit goes against efficiency and speed. Such reasoning can by all means be appropriate and should therefore be taken seriously. But even if the temporary delegation of power – as claimed by the Commission – is already common practice, the time limit should not be marginalised a priori. And in particular it is in politically sensitive areas, in other words especially with legislative acts which have been strongly disputed among or within legislative bodies or in the case of substantial financial impact, that the application of a time limit should be favoured. As the Commission rightly points out, the extension of a temporary delegation of powers should be based on a more simplified procedure. However, the European Parliament and the Council should make sure that such an extension be subjected to their explicit approval and not, as is being favoured by the Commission, effected tacitly.

4. Procedure for adopting delegated acts

4.1. Autonomy of the Commission

Article 290 contains no provision referring directly or indirectly to the procedure for adopting delegated acts. Using the powers conferred on it by the legislator the Commission adopts the acts necessary to attain the objectives laid down by the basic instrument.

Article 290(1) on the framework for the delegation of power requires the Commission to comply with the material and temporal limits of the delegation which, in a sense, constitute the essence of the "mandate" issued by the legislator. This first paragraph therefore has an impact at an early stage, before the Commission has even started to prepare a delegated act.

Article 290(2), which deals with the control which may be exercised by the legislator, comes into play at a later stage, after the mandate has been exercised, by acting either on the delegation itself (which may be revoked if the legislator considers that it is being incorrectly used), or on the delegated acts, to which objections may be made once they have been adopted, thus preventing their entry into force.

However, neither of these provisions has anything to say about the procedure by which the Commission adopts a delegated act. Consequently, the Commission enjoys a large measure of autonomy in this matter.

4.2. Preparatory work for the adoption of delegated acts

The Commission intends to carry out the preparatory work it considers necessary in order to ensure, first, that from a technical and legal point of view the delegated acts comply fully with the

objectives laid down by the basic instrument and, second, that from a political and institutional point of view everything possible is done to avoid any objections being made by Parliament or the Council.

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 might form new expert groups¹⁹ for this purpose, or use existing ones.

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. However, it should be made clear that these experts will have a consultative rather than an institutional role in the decision-making procedure. At the end of the consultations, the Commission will inform the experts of the conclusions it believes should be drawn from the discussions, its preliminary reactions and how it intends to proceed.

CEP Comment: Art. 290 TFEU contains – as the Commission rightly points out – no requirements regarding the procedure to be applied to the adoption of delegated acts. Controls carried out by a committee consisting of national experts is not required. That follows from a comparison with Art. 291 TFEU, in which this control option is explicitly stipulated. According to the former legal position, the comitology Decision provided for the participation of the committees consisting of national experts and for the rejection of acts through the European Parliament or the Council. If the Commission wished to adopt an act against the statement given by the committee, the adoption was even subject to the Council's approval instead of the rejection option.

Nevertheless, the Commission acknowledges the value of experts' know-how and that the integration of national experts reduces the risk of the Council exercising its right to veto against delegated acts. Therefore, it announces that in future it will continue to consult voluntary expert groups whilst stressing their "consultative role". The question of whether or not the integration of national expert groups should be at the sole discretion of the Commission is viewed differently. For instance, the German Federal Ministry of Justice concludes that the European legislator could also stipulate in the basic instrument that the Commission must "consult the Member States before adopting a delegated act".²⁰ This interpretation can also be found in the literature on the subject, with reference to other language versions of the Treaty.²¹

The question of whether and how external expert knowledge is integrated could be answered by a horizontal regulation, for example in the form of an interinstitutional agreement according to Art. 295 TFEU, in which the Commission undertakes to include national experts or consult the Member States in a different manner. In any case, the European Parliament in particular should make sure it is kept informed about the work

¹⁹ In line with the practice for all expert groups, the relevant information about the groups set up in this way will be made public via the register of expert groups.

²⁰ Letter of the Federal Ministry of Justice of 20 January 2010.

²¹ Gregor Schusterschitz in: Hummer/Obwexer (Editor), *Der Vertrag von Lissabon*, 1. Edition 2009, p. 231.

of the committees as soon as consultations start, in order to always be up-to-date.²² And, should the Commission not intend to conduct a consultation, the European Parliament and the Council must be informed early enough at least regarding the intended regulatory framework to be able to deal with the material before the delegated act is introduced by the Commission.

In the specific area of financial services the Commission is also committed to continuing to consult experts appointed by the Member States in the preparation of its draft delegated acts, in accordance with its established practice (see Declaration No 39 annexed to the Final Act of the Intergovernmental Conference that adopted the Lisbon Treaty²³).

CEP Comment: Whether or not this declaration will have any value in the future is questionable. For the Commission's response to the financial crisis was, amongst other things, to propose the establishment of a European Banking Supervision (EBA).²⁴ That authority is to replace the existing Committee of European Securities Regulators (CESR). The Commission would, in fact, have been better advised to explain the reciprocity between the impact of the abolition of the CESR on the Lamfalussy procedure and the provisions of Art. 290 TFEU, instead of referring generally to the Declaration No. 39. The Commission fails to comment in detail on this reciprocity, even in its Proposal on establishing a European Banking Authority.

In addition, and where necessary, the Commission will conduct any research, analysis, hearings and consultations required, in the form best suited to the fields in question and within the time limits that have been laid down.

On a general level, the Commission plans to set up an early warning system to enable Parliament and the Council to plan more effectively how they exercise their prerogatives during a period of two months following the adoption of the delegated acts. This period may be extended by one month at the request of either Parliament or the Council (see point 5.3.1 below). In the case of sensitive dossiers, the Commission will also make a point of giving Parliament and Council additional information about the delegated acts it intends to adopt.

5. Scrutiny of delegated acts

5.1. General considerations

Article 290(2) of the new Treaty specifies the two conditions to which the legislator may subject the delegation of power: firstly, the right to revoke the delegation of power; secondly, the right to express objections – that is, the right of opposition. Whereas opposition is a specific motion of censure directed at a clearly defined delegated act, revocation is a general and absolute withdrawal of the delegated powers from the Commission. Opposition should thus be seen as the ordinary means of control exercised by the legislator over all delegated acts, whereas revocation

²² *In accordance with the existing provision pursuant to the Agreement between the European Parliament and the Commission (No. 1 of the Annex XIII to the European Parliament's Rules of Procedure).*

²³ OJ C 115, 9.5.2008, p. 350.

²⁴ *Proposal COM(2009) 501 of 23 September 2009 for a Regulation of the European Parliament and of the Council establishing a European Banking Authority [cp. [CEP-Policy Brief](#)].*

appears to be a more exceptional measure, prompted for example by the occurrence of factors that undermine the very basis of the delegation of power.

The legislator is not obliged to impose these two conditions cumulatively; they are independent of one another. The legislator might feel that it is not always necessary to provide for the possibility of revoking the delegation of power, in that this prerogative, in the case of an act adopted by the ordinary legislative procedure, gives one of the two branches of the legislature the unilateral power to render inoperative a provision that was adopted jointly. Similarly, the right of opposition might sometimes prove difficult to use, particularly when the legislator wishes to confer on the Commission the power to adopt delegated acts with a particularly short deadline or strict timetable (see points 5.2 and 5.3.1 below).

CEP Comment: It is correct that the legislator is entitled to use the right to revoke the delegation of power and the right to express objections (right of opposition) against delegated acts that have not yet entered into force, but it does not necessarily have to incorporate them into the basic instrument. It is at the discretion of the legislator to decide which of the instruments – or both instruments in parallel – it wishes to reserve.

Under no circumstances is the legislator ever to waive its right of opposition, as this is its only possibility to control delegated acts and the Commission's use of delegated powers. The often criticised democratic deficit in the Union would become even greater if the legislator also gave up its rights of control and allowed the Commission - which only indirectly has democratic legitimization - uncontrolled legislative action. For that reason the regulatory procedure with scrutiny was introduced in 2006. To waive the opportunity to control now would neither be in the interests of the European Parliament, which has been fighting for more participation for a long time, nor in the interests of the Council.

While the right of opposition is used to control the exercising of delegated powers by the Commission in individual cases, the right of revocation enables the legislator to reverse its delegation of power to adopt a delegated act. Without the right of revocation, the basic instrument in which the delegation was determined would have to be amended. However, the related right of proposal is exclusively subject to the Commission. In fact, the European Parliament and the Commission have agreed on an "indirect right of proposal" for the European Parliament, but in this case the Commission will also have a period of up to 12 months before it has to submit a draft.²⁵ Thus the legislator would be dependent on the Commission's will in reversing a delegation. To this end, the European Parliament and the Council should not waive their right of revocation. On the contrary, it should be given a standardised wording and become an integral part of each delegation of power.

The Commission's argument against an inclusion of the right of revocation is the result of a superficial view of the matter. Though it is correct that in this way - at least in the case of a delegation of power subject to an ordinary legislative procedure - an individual legislative body is enabled after the fact to declare null and void a regulation that has been resolved together with another legislative body, but what the Commission fails to see is that the original delegation of power would not have come

²⁵ Cp. Decision of the European Parliament of 8 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative period (preliminary version P7_TA-PROV(2010)0009 of 9 February 2010).

into being against the will of one single legislative body. If one follows this through, logically, therefore, if in the course of an ordinary legislative procedure both legislative bodies agree on a revocable delegation of power, each legislative body has at the same time also agreed to the possibility of a subsequent unilateral revocation. It is difficult to discern here the disadvantage that the Commission claims the one legislative body would be put at as a result of the option for a subsequent revocation. The special legislative procedure is even more unambiguous, as in this case there it is only one legislative body anyway - either the European Parliament or the Council - that has the right of final decision and also the sole right of control.

In order to exercise either of the powers of control granted to it by the Treaty, Parliament must act by a majority of its members and the Council by qualified majority, as provided for in the second subparagraph of Article 290 (2).

5.2. Right of revocation

The right of revocation might particularly be envisaged in cases where the legislator wishes to have the possibility of withdrawing at any time the powers it has conferred on the Commission, in order to take account of new circumstances that would justify a legislative intervention.

The legislator might also want to have a right of revocation if it feels that a right of opposition would be ineffective or impractical, for example when the Commission is required to adopt delegated acts subject to time constraints that are incompatible with the exercise of a right of opposition by the legislator. Where the legislator is unable to exercise control over every single act adopted, because they are so numerous, it would retain overall control over the delegation of power through the right of revocation.

Where provided for in the legislative act, the exercise of the right of revocation should be accompanied by a duty to explain the reasons behind it and by an exchange of information between the institutions. The legal consequences should also be specified in advance.

The institution wishing to withdraw its confidence from the Commission should ideally explain its reasons for doing so. This would be useful for two reasons. Firstly, it would help the institution that was not exercising the right of revocation to understand the reasons why the other institution had decided unilaterally to amend the basic instrument. It would also have a preventive function: by explaining the reasons for its decision Parliament or the Council would clearly show the Commission what it had to do or not to do in order to avoid other revocations in the future.

The institution that intends to revoke the delegation should notify its intention not only to the Commission but also to the institution that is not exercising the right of revocation, so that an interinstitutional dialogue can be established before the revocation decision is taken. In addition, the institution that initiates the revocation should explicitly state which delegated powers it is seeking to revoke. Provision should be made, for example, for a situation in which Parliament or the Council proposes to revoke only some of the powers delegated to the Commission. In other words, a "partial revocation" should be possible.

CEP Comment: Art. 290 TFEU prescribes neither an obligation to explain the reasons behind a revocation nor any preceding exchange of information. Nonetheless, it appears appropriate to notify the respective other legislative body and the Commission

of the envisaged revocation and also of the reasons. The Commission is right in stating that an interinstitutional dialogue could help to reveal defaults which might lead to later revocations and thus have a preventive function. Nonetheless, there is no necessity for the European Parliament or the Council to waive the right of revocation and/or opposition in advance.

There are no concerns about the “partial revocation” demanded by the Commission. Art. 290 TFEU only mentions the possibility of revoking a delegation. But if Art. 290 TFEU provides for the complete revocation, a partial revocation can be followed from Art. 290 TEU anyway.

Finally, the consequences of revocation should be explicitly set out in the basic instrument. It might be specified, for example, that the revocation decision terminates the delegation of powers by explicitly targeting the delegated powers that are revoked, but that it does not affect the delegated acts that are already in force.

CEP Comment: In the interests of legal certainty, it is vital to leave the already effective delegated acts untouched, at least temporarily. Nonetheless, one should consider the possibility that the Commission examines the already adopted delegated acts to see whether or not they might be subjected to revocation and which measures could be taken to resolve such issues.

5.3. Right of opposition

Where provided for in the legislative act, the right of opposition should fulfil certain requirements in terms of procedure. Once it has adopted a delegated act, the Commission will notify it to the legislator, i.e. simultaneously to Parliament and the Council, if the basic instrument is governed by the ordinary legislative procedure. The right of opposition would then be triggered and would act like a suspensive condition: the entry into force of the delegated act adopted by the Commission would be suspended for a period specified by the legislative act, during which the legislator would have the right to lodge objections.

The Commission will also take all the necessary measures to ensure that the delegated acts are published as soon as they are adopted.

5.3.1. Time limits

The period allowed for the legislator to examine the delegated act will be laid down in the basic instrument. The legislator will be free to decide how long it thinks it will need in each case. However, the Commission believes it would be best to avoid setting completely different time limits for the different areas involved, unless this were fully justified by the urgency of the measures to be taken – in which case shorter deadlines would have to be set – or, conversely, by the extreme complexity of the acts the Commission was empowered to adopt – in which case the review period ought to be extended.

The period for expressing objections would start to run from the moment the Commission transmitted the delegated act, adopted in all the EU official languages.

Experience with the regulatory procedure with scrutiny shows that the three months currently allowed for exercising the right of opposition is longer than required, in that Parliament and the Council are often able to establish more quickly whether the act in question is likely to pose problems. In most cases the three-month period is thus a simple procedural time limit, which delays the entry into force of the act without bringing any real added value.

Consequently, the Commission favours a system in which the period for expressing objections would be two months, but would automatically be extended by one month on the initiative of Parliament or the Council. This would help to increase the efficiency of the procedures without undermining the principle of a total period of three months. In specific cases, where the issues on which powers were delegated to the Commission were so complex or sensitive that the two-month period would not be long enough to allow Parliament and the Council to exercise their prerogatives, it might be necessary to provide for a fixed period of three months.

Provision should also be made for the possibility of the two institutions deciding to inform the Commission that they will not oppose the delegated act even before the legal deadline has expired, thus enabling the delegated act to enter into force immediately.

CEP Comment: The reasons given to justify reducing the time limit so far given to the comitology procedure are not really convincing. The Commission does not deny that the time limit was often longer than necessary, but it has to be stressed that until now the legislator has always been informed in good time about the committees' work, for instance on the drafts for implementing measures and meeting agendas.²⁶ Thus the actual objection period was in fact extended. Moreover, in some cases the administrative structures in the European Parliament have meant that not enough attention could be paid to ongoing comitology procedures due to their sheer volume. Against this background, too, cutting the time limit is therefore not recommendable. Irrespective of that, the European Parliament should adjust its administrative structures to the legislative reality as soon as possible.

The standard procedure should continue to provide a regular time limit of three months in conjunction with the option to have it extended or reduced by the legislator. In so doing, the extension option could regularly relate to one or two months and, in exceptional cases, allow for longer periods.

In addition, the cases in which the Commission chooses not to consult advisory committees should also be taken into consideration, even though such a waiver should be excluded from the start (cp. Comment on 4.2. above). For in such cases it is very likely that the European Parliament or the Council make use of an extension option due to the information deficit.

To be welcomed is the Commission's proposal that where no opposition is planned against a delegated act, the legislator should not wait until a deadline expires but declare its consent immediately. Thus the Commission's wish to streamline the procedure is much more likely to be fulfilled than through a general reduction of the deadlines. However, it is also clear that the European Parliament in its current form is hardly in a position to be able to provide the extra time and effort that this requires.

²⁶ Cp. the provision in the Agreement between the European Parliament and the Commission (No. 1 of Annex XIII on the European Parliament's Rules of Procedure).

Obviously this standard formula would not suit every area of action. Some policies require the Commission to act very quickly, even when it is not an emergency. In such cases the legislator could be asked significantly to shorten the scrutiny period or even dispense with it altogether, if it also has a right of revocation (see point 5.2 above).

CEP Comment: Alongside the standard procedure, an urgency procedure, in which the time limits for the legislator are cut accordingly, is indispensable. When such urgency procedures should be applied must be decided on a case-by-case basis. An additional procedure, however, for special cases which are not an emergency but urgent, is not required.

5.3.2. Grounds

Article 290 TFEU does not list the grounds on which the legislator may object to a delegated act. The right to express objections, which represents the ordinary type of scrutiny of the delegation of power by the legislator, should in principle fall under the discretionary power of Parliament and the Council.

However, the institution opposing the act should explain the reasons for its decision by setting them out in the Council decision or Parliamentary resolution formalising its objections. This will ensure that the Commission does not continue to pursue the course of action that prompted Parliament or the Council to express objections. If, for example, the institution that expressed objections shows clearly that the Commission has exceeded the framework of the delegation of power, this would enable the Commission, if necessary, to opt for legislation instead.

CEP Comment: A justification on the part of the body exercising its veto right is to be desired, in particular for the Commission, which could then adjust its actions accordingly. The European Parliament and the Council are aware of this fact and will therefore endeavour on a regular basis to provide an explanation. On the other hand, however, the obligation to give reasons, as the Commission demands, is not in any way necessary nor is it provided for in the Treaty.

5.3.3. Consequences of opposition

A delegated act that Parliament or the Council has opposed cannot enter into force. The Commission will then have the possibility of either adopting a new delegated act, amended where necessary to take account of the objections expressed, or presenting a legislative proposal under the terms of the Treaties, if the objections were based on its having overstepped the powers delegated to it. It is also conceivable that the Commission will decide not to do anything at all.

5.3.4. Urgency procedure

The Commission believes that there might be some cases where a delegated act subject to the right of opposition had to be adopted and enter into force as a matter of particular urgency. At the height of the financial crisis in autumn 2008, for example, certain accounting rules had to be amended very quickly. The deadlines for the regulatory procedure with scrutiny, which applied in this case, had to be considerably shortened to enable the measures to be taken and implemented in the shortest possible space of time.

The normal exercise of the right of opposition may, therefore, prove incompatible with the urgency of the situation in question. Consequently, the Commission feels it is essential to introduce an urgency procedure for use by the legislator.

Such a procedure could be organised in several ways. One would be to limit to the strict minimum the period allowed for expressing objections. Thus for overriding reasons of urgency a delegated act adopted by the Commission could, for example, enter into force eight days after being sent to Parliament and the Council. This approach has the advantage of being simple and of not altering the traditional procedural circuit. However, the danger is that it renders the legislator's right of opposition completely illusory; the legislator would have enormous difficulty formulating any objections in such a short time.

For this reason the Commission would recommend an alternative approach, which would allow it to adopt and implement immediately a delegated act which would nevertheless be subject to the right of opposition. This act would be notified immediately to the legislator and would apply provided no objection was expressed by Parliament or the Council during a period that might be fixed at six weeks. If objections were expressed, the delegated act would cease to apply.

CEP Comment: The Commission is right in calling for special rules of procedure in order to react adequately to cases of particular urgency and higher force. The scope of application for such cases should be defined precisely and provide for a flexibility clause facilitating the application to unforeseeable circumstances. The options proposed by the Commission, however, are by no means acceptable.

A deadline of eight days as defined in option 1 is not compatible with the European legislative procedure. The European Parliament regularly convenes on a monthly basis. It is virtually impossible to conclusively evaluate a delegated act by the Commission in only eight days, beyond the regular meeting agenda which has to be coordinated with all committees.

The Commission's favoured option 2, whereby the act first enters into force and then can be withdrawn retroactively within a period of six weeks by the European Parliament and the Council, is also to be objected to. The Commission does not fully recognise the far-reaching consequences of the acts to be adopted under the scope of Art. 290 TFEU. Even though these acts may constitute "only" adjustments to the latest developments in science and technology, such as prohibiting the use of a certain substance in cosmetics that is reputedly harmful to health, a consequence might be substantial changes in production. However, companies will not accept such changes to their production processes – if this is even possible within six weeks – unless they can be sure that the act concerned will not be retroactively withdrawn by the European legislator. So the consequence would be that the apparently urgent regulation would not be complied with, at least not during the period of six weeks. Option 2 would therefore be even worse than option 1, which has been rejected by the Commission. Irrespective of this negative consequence, another reason to reject option 2 is that it might entail unforeseeable consequential costs. For if the aforementioned situation occurs – the affected parties follow the prescribed measures, bear the costs for it and then said measure is subsequently withdrawn – compensation claims against Member States that applied the rules might follow.

In view of these facts, the European Parliament and the Council should be entitled to comment on urgent cases submitted by the Commission within the following two

weeks without the delegated act entering into force. In this way it could be guaranteed that the legislative bodies of the Union have at least four weeks to deal with a delegated act.

6. Conclusion

This communication takes account of the exploratory contacts with the departments of the European Parliament and the discussions that took place with the Council in the weeks before its adoption. The Commission believes that this communication will enable the three institutions to organise the delegations of power conferred under Article 290 of the new Treaty in the most harmonious way possible.

In line with the ideas set out in this communication, the Commission encloses herewith several models for articles in future legislative acts conferring on it the power to adopt delegated acts.

Recommendations for delegated acts pursuant to Art. 290 TFEU

The question of whether either Art. 290 or 291 TFEU apply to a delegation of legislative power to the Commission always depends on whether a legislative or executive measure is affected. Accordingly, the Commission is either controlled by the European legislator (Art. 290 TFEU) or the Member States (Art. 291 TFEU).

The European Parliament and the Council should ensure that the amount of control rights and obligations does not become an inappropriate burden; in order to exercise a right of opposition or revocation, a majority against the Commission must be organised. Moreover, the agreement on standard formula must not impose excessive restraints upon them as they must be able to react adequately to individual cases. The European Parliament and the Council should pay special attention to the following aspects:

- Each delegation of power must provide for a right of opposition and a right of revocation.*
- Each delegation of power must provide for a sunset clause whose time limit can be extended solely subject to the majority approval of the European legislator. An automatic extension should not be allowed.*
- The periods for exercising control rights should be appropriate and take into account internal structures, such as the European Parliament.*
- An urgency procedure must by no means lead to legal uncertainty and, despite its urgency, give the European legislator enough time for an orderly decision procedure.*
- The Commission should be obliged to at least consult committees consisting of national experts before adopting a delegated act and to notify the European Parliament and the Council of the content of the consultation at an early stage.*

Recommendations for implementing acts pursuant to Art. 291 TFEU

In adopting implementing acts the Commission is subject only to the Member States' control. The European Parliament and the Council must, however, determine the way in which this control should be carried out. In so doing, they should include the following aspects:

- The procedure for adopting implementing acts should provide for Member States being represented by national experts in committees.*
- Implementing acts by the Commission should be subject to the approval of a committee, at least with the same majority required in the Council for adopting the basic act.*
- It must not be possible for the Commission to adopt an implementing act without a prior statement by the committee.*

ANNEX

Models

These models provide standard wording for the Articles of a basic instrument 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]²⁷.

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 commenced an internal procedure for 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 the Council may object to the delegated act

Option 1

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

Option 2

within a period of three 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.

²⁷ This last sentence shall be inserted only in basic acts which foresee an urgency procedure.

*Article D**Urgency procedure²⁸*

1. A delegated act adopted under the urgency procedure shall enter into force without delay and 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 the Council may within a period of [six weeks] from the date of notification object to the delegated act. In such a case, the act shall cease to be applicable. The institution which objects shall state the reasons for objecting to the delegated act.

²⁸ Provisions referring to this Article shall clearly cite the "imperative grounds of urgency".