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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers

EXPLANATORY MEMORANDUM

1. BACKGROUND TO THE PROPOSAL: NEW INSTITUTIONAL CONTEXT

The Treaty of Lisbon (hereinafter "the new Treaty"), which entered into force on 1st December 2009, substantially modifies the framework for implementing powers that are conferred upon the Commission by the legislator. Contrary to the provisions of the Treaty establishing the European Community (hereafter "the EC Treaty"), set out in Article 202 thereof, the new Treaty makes a clear distinction between the powers delegated to the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act (delegated acts) on the one hand and the powers conferred on the Commission to adopt implementing acts on the other hand. They are subject to entirely different legal frameworks:

– The provisions of the new Treaty on delegated acts, which are set out in Article 290 of the Treaty on the Functioning of the European Union (hereinafter "the Treaty"), provide for the legislator to control the exercise of the Commission's powers by means of a right of revocation and/or a right of objection. These provisions are sufficient in themselves and do not require any legally binding framework to make them operational.

– The provisions of the new Treaty on implementing acts, which are set out in Article 291, do not provide any role for the European Parliament and the Council to control the Commission's exercise of implementing powers. Such control can only be exercised by the Member States. A legal framework is required to establish the mechanisms of such control.

By providing for these two very different legal frameworks, the authors of the new Treaty sought to reflect more closely the nature of these two different types of acts:

– In the case of delegated acts, the legislator delegates to the Commission the power to adopt measures that it could have adopted itself. This is why it is the legislator that controls the Commission's exercise of these delegated powers.

– In the case of implementing acts, the context is very different. The Member States are naturally responsible for implementing the legally binding acts of the European Union. However, where such basic acts require uniform implementing conditions, it is the Commission that must exercise implementing powers. This is why it is the Member States that are responsible for controlling the Commission's exercise of these implementing powers.

The provisions of the new Treaty also put the co-legislators on an equal footing in relation to the conferral of delegated and implementing powers.

Under the EC Treaty it was the Council that could confer implementing powers on the Commission. The Council could also reserve implementing powers to itself in specific cases.

Under the new Treaty provisions it is a direct obligation deriving from the Treaty that acts must confer implementing powers on the Commission where this is needed in view of ensuring uniform implementation of these acts. Those acts can also, in duly justified specific

cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, confer implementing powers on the Council instead of the Commission. This does not imply, however, that the Council has any role in controlling the exercise of implementing powers when these are conferred on the Commission.

The new Treaty clearly entails that it is the Member States, and they alone, that control the implementation by the Commission where such control is required by a legally binding Union act.

As regards the implementation of Article 290 of the Treaty, the Commission has set out its views on the scope of delegated acts, the framework for delegations of power and the working methods it intends to use for preparing delegated acts in a Communication to the European Parliament and the Council (COM(2009) 673 of 9 December 2009).

2. OBJECTIVES AND CONTENT OF THE PROPOSAL

2.1. Rationale and key principles guiding the proposal

Article 291 of the Treaty provides that 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. The purpose of this proposal is to implement Article 291 of the Treaty.

This proposal is guided first and foremost by the new provisions of the Treaty and the new institutional context described under point 1 above. However, the proposal also draws on Council Decision 1999/468/EC (hereafter "the Comitology Decision") and experience gained in implementing that Decision, whilst simplifying its provisions taking into account in particular the following general principles:

– It is the Member States that are responsible for controlling the Commission's exercise of implementing powers;

– Procedural requirements should be proportionate to the nature of implementing acts.

2.2. Main elements of the proposal including similarities and innovations in relation to the Comitology Decision

The key elements of the proposal are as follows:

– The proposal maintains the Committee structure foreseen in the Comitology Decision (Article 3), but rationalises it as outlined below;

– Only two procedures are foreseen: the advisory procedure, which mirrors the existing advisory procedure, and a new "examination" procedure, which would replace the existing management and regulatory procedures (Articles 4 and 5);

– The advisory procedure is the general rule and can be applied to all policy domains and for all types of binding implementing measures (Article 2(3));

– The criteria for the choice of the examination procedure mirror those provided for in the Comitology Decision. Nevertheless for the purpose of achieving greater consistency and in order to ensure that procedural requirements are proportionate to the nature of implementing acts to be adopted, these criteria are binding in the sense that only when the criteria are met can the examination procedure in question be used (Article 2(2)) ;

– The examination procedure (Article 5) would function as follows:

- Where the Committee delivers a negative opinion on the draft measures, the Commission could not adopt them. The Commission would have the possibility to re-submit the draft to the committee for a second deliberation, or table an amended draft. In very exceptional circumstances, the Commission would be able to adopt the draft measures despite a negative opinion but in such a case the committee would have the last word within a time-period which will not exceed one month;

- Where no opinion is reached, the Commission could ultimately decide whether to adopt the measures or not, taking into account *inter alia* the positions expressed within the committee;

- In the case of a positive opinion of the committee, the Commission would adopt the measures unless exceptional circumstances or new elements would justify them not being adopted.

Under the examination procedure, the Committee itself would therefore be able to prevent the adoption of the draft measures by the Commission if a qualified majority of Member States were against. The voting rules for this procedure would reflect the voting rules that were required for the Council, acting as an appeal body, to prevent the adoption of a draft measures by the Commission under the Comitology Decision. It would also be coherent that the voting rules of the committees acting under the examination procedure would be similar than the voting rules foreseen for the Council to oppose a delegated act under Article 290 of the Treaty.

However, another innovation is that there would not be an obligation for the Commission to adopt draft measures in cases where neither a qualified majority in favour nor a qualified majority against is reached[1]. Indeed, greater flexibility is needed in such cases in order to enable the Commission to reconsider draft measures. The Commission should be in a position to decide whether or not to adopt the draft measures or to present an amended draft to the committee, taking account *inter alia* of positions expressed within the committee. Introducing such flexibility would, on the one hand, enable the positions of Member States to be better taken into account and on the other hand, it would help to improve the quality and adequacy of the decisions taken.

– Specific procedures are foreseen for measures to apply immediately on imperative grounds of urgency and where this is provided for in a basic act (Article 6). This provision would enable the relevant committee to examine and deliver an opinion on

[1] Under the Comitology Decision, the Commission was required to adopt the draft measures where the Committee was unable to deliver an opinion under the management procedure, and where the Council, acting as an appeal body, was unable to take a decision under the regulatory procedure.

a measure after it has been adopted by the Commission. Where the measure is not in accordance with the opinion of the committee under the examination procedure, the Commission would be obliged to repeal the measure but could maintain it in force if warranted on a limited number of grounds such as health and safety.

– The proposal maintains provisions relating to the rules of procedures of committees (Article 7) and regarding public access to information on committee proceedings (Article 8(3)).

– Building on experience gained with the implementation of the Comitology Decision, the proposal also includes a number of important provisions that are common practice but were so far not covered by the Decision or were only foreseen in the Rules of Procedure of committees. These include the provisions for the use of written procedures (Article 3(5)) in order to obtain the committee's opinion and the possibility for draft measures to be amended in order to take into account discussions in the committee prior to it delivering its formal opinion (Article 3(4)).

– Whilst only the Member States have a role to play in the control of the exercise of the implementing powers by the Commission, both legislators should be properly and continuously informed of committee proceedings through the continued use of the existing Comitology Register, which would be adapted to the new procedures (Article 8(1) and (2)). This right of information would not suspend the decision-making process, since that would give the legislators a prerogative incompatible with Article 291 of the Treaty.

– Finally, for reasons of clarity, consistency and efficiency, the proposal foresees an automatic alignment of the existing acquis to the new procedures (Article 10). All references to the procedures provided for in the Comitology Decision, with the exception of Article 5a thereof, would be understood as being references to the corresponding procedures of the Regulation: this approach would have the advantage of avoiding having a complex set up with the old Comitology procedures and the new ones running in parallel; at the same time it would avoid having to align the existing acquis act by act or through omnibus regulations. In order to make ready the register, which will have to accomplish technically the automatic alignment of all existing procedures, Article 10 will apply two months after the entry into force of the Regulation.

– Such an adaptation to the new system would not affect pending procedures in which an opinion has already been delivered, at a committee meeting or by written procedure (Article 11). This does not mean that ongoing procedures in which no opinion has been delivered should stop and restart from scratch; they should continue: meetings should take place and written procedures should carry on. Indeed the consequences of such an alignment relate in essence to the procedure to be followed after an opinion is taken by the committee.

– Article 10 and 11 do not apply to the specific procedures that are not subject to the Council Decision 1999/468/EC, in particular those created for the implementation of the common commercial policy. Consequently, those specific procedures will continue to apply until the basic acts will have been adapted in the light of the system of implementing powers created by Article 291 of the Treaty and the rules and

general principles for the exercise of the Commission's implementing powers as set out in this proposal.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 291(3) thereof,

Having regard to the proposal from the European Commission,

Acting in accordance with the ordinary legislative procedure[2],

Whereas:

(1) Where uniform conditions for implementing legally binding Union acts (hereafter: "basic acts") are needed, those acts are to 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.

(2) In the context of the Treaty establishing the European Community, the exercise of implementing powers by the Commission was governed by Council Decision 1999/468/EC of 28 June 1999.

(3) The Treaty on the Functioning of the European Union now requires the European Parliament and the Council to lay down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

(4) It is necessary to ensure that procedures for such control are clear, effective and proportionate to the nature of the implementing acts and that they reflect the institutional requirements of the Treaty as well as the experience gained and the common practice followed in the implementation of Decision 1999/468/EC.

(5) In those basic acts which require the control of the Member States for the adoption by the Commission of implementing acts, it is appropriate that for the purposes of such a control there should be instituted committees composed of the representatives of the Member States and chaired by the Commission.

[2] OJ C , , p. .

(6) In order to simplify the requirements for the Commission's exercise of implementing powers, there should only be two procedures: the advisory procedure and the examination procedure.

(7) In the interests of simplification, common rules should apply to the committee, including the key provisions relating to the functioning of their proceedings and the possibility for the committee to deliver an opinion by written procedure.

(8) Criteria should be laid down to determine the procedure to be used for the adoption of implementing acts. In order to achieve greater consistency and in order to ensure that procedural requirements are proportionate to the nature of the implementing acts to be adopted, those criteria should be binding.

(9) The examination procedure should only apply for the adoption of measures of general scope designed to implement basic acts and specific measures with a potentially important impact. That procedure should provide for the control of the Member States in such a way that measures cannot be adopted if they are not in conformity with the opinion of the committee, except in very exceptional circumstances, where the Commission should be able, in spite of a negative opinion, to adopt and apply measures for a limited period of time. The Commission should be able to review the draft measures in the event that no opinion is delivered by the committee, taking into account the views expressed within the committee.

(10) The advisory procedure should apply in all other cases and where it is considered to be most appropriate.

(11) It should be possible to adopt measures to apply immediately on imperative grounds of urgency, where this is provided for in a basic act.

(12) The European Parliament and the Council should be kept informed of committee proceedings on a regular basis.

(13) Public access to information on committee proceedings should be ensured.

(14) Decision 1999/468/EC should be repealed. In order to ensure the transition between the regime provided for in Decision 1999/468/EC and this Regulation, any reference in existing legislation to the procedures provided for in that Decision should, with the exception of the regulatory procedure with scrutiny provided for in Article 5a thereof, be understood as a reference to the corresponding procedures provided for in this Regulation. The effects of Article 5a of Decision 1999/468/EC should be maintained for the purposes of existing basic acts which refer to that Article.

(15) The Commission's powers, as laid down by the Treaty, concerning the implementation of the competition rules, are not affected by this Regulation,

HAVE ADOPTED THIS REGULATION:

Article 1
Subject matter

This Regulation lays down the rules and general principles governing the mechanisms which shall apply in cases where a legally binding Union act (hereafter "basic act") requires that the adoption of binding implementing acts by the Commission be subject to the control of Member States.

Article 2
Selection of procedures

1. A basic act may provide for the application of the examination procedure or the advisory procedure, according to the type of implementing measures concerned.

2. The examination procedure may only apply for the adoption of:

   (a) Implementing measures of general scope;

   (b) Other implementing measures relating to:

      i) common agricultural and common fisheries policies;

      ii) environment, security and safety or protection of the health or safety of humans, animals or plants;

      iii) common commercial policy.

3. For all other implementing measures, and for implementing measures referred to in paragraph 2 where it is considered to be appropriate, the advisory procedure shall apply.

Article 3
Common provisions

1. Where a basic act provides for the application of the procedures referred to in Articles 4, 5 and 6, the provisions set out in paragraphs 2 to 6 of this Article shall apply.

2. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by a representative of the Commission.

3. The chairperson shall submit to the committee a draft of the measures to be taken.

4. The committee shall examine the draft measures. Until an opinion has been delivered, the chairperson may present amended versions of the draft measures in order to take into account the discussions within the committee. For that purpose, the chairperson may convene several meetings of the committee. The committee shall

deliver its opinion on the draft within a time-limit which the chairperson may lay down according to the urgency of the matter.

5. The chairperson may obtain the committee's opinion by written procedure. He or she shall send the committee members the draft measures on which their opinion is sought and shall lay down a time-limit according to the urgency of the matter. Any committee member who does not explicitly oppose or abstain before the time-limit laid down expires is considered to have given their tacit agreement to the draft measures.

Within the time-limit laid down in accordance with the previous subparagraph, any committee member may ask for the written procedure to be terminated and for the draft measures to be examined at a committee meeting. The chairperson may decide to maintain the written procedure or to terminate the written procedure without result, in which case a committee meeting shall be convened as soon as possible.

6. The committee's opinion shall be recorded in the minutes. Each Member State may ask to have its position recorded in the minutes.

Article 4
Advisory procedure

1. The committee shall deliver its opinion, if necessary by taking a vote. If the committee takes a vote, the opinion shall be delivered by the majority laid down in Article 238(1) of the Treaty.

2. The Commission shall decide on the measures to be taken, taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered. It shall inform the committee of the manner in which the opinion has been taken into account.

Article 5
Examination procedure

1. The committee shall deliver its opinion by a qualified majority as provided for in Article 16(4) and (5) of the Treaty on European Union.

2. If the draft measures are in accordance with the opinion of the committee, the Commission shall adopt these measures, unless exceptional circumstances or new elements have arisen which would justify the measures not being adopted. In such cases, the chairperson may submit to the committee a new draft of the measures to be taken.

3. If the draft measures are not in accordance with the opinion of the committee, the Commission shall not adopt those measures. The chairperson may submit to the committee the draft measures for further deliberation or submit an amended version of the draft measures.

4. If no opinion is delivered, the Commission may adopt the draft measures. Where the Commission does not adopt the draft measures, the chairperson may submit to the committee an amended version of the draft measures.

5. By derogation from paragraph 3, the Commission may adopt draft measures which are not in accordance with the opinion of the committee where their non adoption within an imperative deadline would create a significant disruption of the markets or a risk for the security or safety of humans or for the financial interests of the Union.

In such a case the Commission shall immediately inform the committee of its reasons for adopting the measures and may submit them to a second deliberation of the committee. If the measures adopted are not in accordance with the second opinion of the committee, or if the measures have not been submitted to a second deliberation within a month after their adoption, the Commission shall repeal the measures forthwith. If the measures are in accordance with the second opinion of the committee, or if no opinion is delivered, those measures shall remain in force.

Article 6
Immediately applicable measures

1. By way of derogation from Articles 4 and 5, a basic act may provide that, on imperative grounds of urgency, the provisions set out in paragraphs 2 to 5 of this Article shall apply.

2. The Commission shall adopt measures which shall apply immediately.

3. The chairperson shall without delay submit the measures referred to in paragraph 2 to the relevant committee in order to obtain its opinion in accordance with the procedure provided for in the basic act.

4. In the case of the examination procedure, where the measures are not in accordance with the opinion of the committee pursuant to Article 5(3), the Commission shall repeal the measures adopted in accordance with paragraph 2.

5. By way of derogation from paragraph 4, the Commission may maintain the measures in force on grounds related to the protection of the environment or of the health or safety of humans, animals or plants, the conservation of marine resources, for security and safety reasons, or to avoid disruption or threat of disruption of the markets. In those cases, the chairperson shall without delay either resubmit to the committee the same measures for a second deliberation or submit an amended version of the measures.

The measures referred to in paragraph 2 shall remain in force until they are repealed or replaced by another implementing act.

Article 7
Rules of procedure

1. Each committee shall adopt by a majority of its component members its own rules of procedure on the proposal of its chairperson, on the basis of standard rules which shall be published by the Commission in the *Official Journal of the European Union.*

   In so far as necessary existing committees shall adapt their rules of procedure to the standard rules.

2. The principles and conditions on public access to documents and on data protection applicable to the Commission shall apply to the committees.

Article 8
Information on committee proceedings

1. The Commission shall keep a register of committee proceedings which shall contain:

   (a) the agendas of committee meetings,

   (b) the summary records, together with the lists of the authorities and organisations to which the persons designated by the Member States to represent them belong,

   (c) the draft measures on which the committees are asked to deliver an opinion,

   (d) the results of voting,

   (e) the final draft measures following the opinion of the committees,

   (f) the information concerning the final adoption of the measures by the Commission, and

   (g) statistical data on the working of the committees.

2. The European Parliament and the Council shall have access to the information referred to in paragraph 1.

3. The references of all documents referred to in points (a) to (f) of paragraph 1 as well as the information referred to in point (g) of paragraph 1 shall be made public in the register.

Article 9
Repeal of Decision 1999/468/EC

Decision 1999/468/EC shall be repealed.

The effects of Article 5a of the repealed Decision shall be maintained for the purposes of existing basic acts making reference thereto.

Article 10
Adaptation of existing basic acts

1. Where basic acts adopted before the entry into force of this Regulation provide for the exercise of implementing powers by the Commission in accordance with Decision 1999/468/EC, the following rules shall apply:

   (a) references to Article 3 of Decision 1999/468/EC shall be understood as references to Article 4 of this Regulation;

   (b) references to Articles 4 and 5 of Decision 1999/468/EC shall be understood as references to Article 5 of this Regulation;

   (c) references to Article 6 of Decision 1999/468/EC shall be understood as references to Article 6 of this Regulation;

   (d) references to Articles 7 and 8 of Decision 1999/468/EC shall be understood as references to Article 8 of this Regulation.

2. Articles 3 and 7 of this Regulation shall apply to all existing committees.

Article 11
Transitional Arrangement

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

Article 12

This Regulation shall enter into force on 1 October 2010.

Article 10 of this Regulation shall apply from 1 December 2010.

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

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*