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*Committee on Legal Affairs
The Chair*

26.2.2013

Mr Matthias Groote
Chair
Committee on the Environment, Public Health
and Food Safety

BRUSSELS

Subject: Opinion drawn up pursuant to Rule 37a of the Rules of Procedure on the use of delegated acts, in the context of Parliament's scrutiny of the Amendment of Directive 2006/66/EC (placing on the market of portable batteries and accumulators containing cadmium intended for use in cordless power tools) (COM(2012)0136 – C7-0087/2012 – 2012/0066(COD))

Dear Mr Chair,

By letter of 3 December 2012, you asked the Committee on Legal Affairs, pursuant to Rule 37a of the Rules of Procedure, to give an opinion on the provisions of the above-mentioned proposal which delegate legislative powers to the Commission in accordance with Article 290 TFEU and on the provisions conferring implementing powers on the Commission in accordance with Article 291 TFEU.

Having regard to the preparation of the draft report in ENVI and the approach taken to the proposal in the Council, which suggests replacing the provisions of the proposal providing for the adoption of delegated acts by provisions providing for the adoption of implementing acts, you ask the Committee on Legal Affairs to examine the Commission proposal, with particular attention to the objectives, content, scope and duration of the delegation, and to the conditions to which it is subject.

I - Background

The main purpose of the proposal is to amend Directive 2006/66/EC (hereinafter "the Batteries Directive") in order to extend its prohibition of the placing of the market of batteries and accumulators containing cadmium to cordless power tools, but the proposal also intends to align with Articles 290 and 291 TFEU¹ the provisions in the Batteries Directive which provided for procedures under the now repealed Comitology Decision², and which were introduced by Directive 2008/12/EC³.

The Commission proposed provisions on delegated acts to replace provisions providing for the regulatory procedure with scrutiny (RPS) in five cases. It further proposed that one previous RPS provision and two provisions which provided for the regulatory procedure should be replaced by provisions on implementing acts.

In a Presidency compromise text presented in the Council, it has been suggested that only one provision which previously provided for RPS should be replaced by a provision which provides for delegated acts, whereas the other seven provisions mentioned above should all provide for implementing acts.

II - Background to delegated and implementing acts

The Working Group on Simplification of the European Convention on the Future of Europe recommended in its Final Report that the hierarchy of Community legislation should be clarified by demarcating, as far as possible, matters falling within the legislative area and by adding a new category of legislation⁴:

"At present there is no mechanism which enables the legislator to delegate the technical aspects or details of legislation whilst retaining control over such delegation. As things stand, the legislator is obliged either to go into minute detail in the provisions it adopts, or to entrust to the Commission the more technical or detailed aspects of the legislation as if they were implementing measures, subject to the control of the Member States, in accordance with the provisions of Article 202 TEC."

The Group therefore proposed to introduce "delegated acts", which would flesh out the detail

¹ While Article 290 TFEU is self-executing, the rules and general principles concerning Article 291 TFEU are laid down in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms or control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

² Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23), as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

³ Directive 2008/12/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2006/66/EC (OJ L 76, 19.3.2008, p. 39).

⁴ Working Group IX on simplification, Final Report of 29 November 2002, pp. 8-12.

or amend certain elements of a legislative act, under some form of authorisation defined by the legislator, and "implementing acts", which would implement legislative acts. With delegated acts, it would be for the legislator to determine whether and to what extent it was necessary to adopt at Union level acts implementing legislative acts and/or delegated acts, and, where appropriate, the committee procedure mechanism (Article 202 TEC) which should accompany the adoption of such acts. Legislative acts were therefore defined by the Group as being adopted directly on the basis of the Treaty and containing the *essential elements* and the *fundamental policy choices* in a certain field. The powers to be delegated would range from rules on the technical and detailed elements which develop a legislative act, to the subsequent amendment of certain aspects of the legislative act itself. However, the Group thought that, if it were decided to create the new category of delegated acts, it might be possible to simplify certain committee procedures, but pointed out that any change would not come under the Treaty directly but under secondary legislation.

These suggestions resulted in proposals for provisions in the Draft Treaty Establishing the Constitution of Europe on delegated and implementing acts. These provisions ultimately survived virtually untouched in the Lisbon Treaty: Articles 290 and 291 TFEU.

Article 290 TFEU provides that (emphasis added):

"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 provides that (emphasis added):

"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.

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."

It should be noted that, in contrast to the approach taken in Article 291 TFEU concerning implementing measures, Article 290 TFEU does not contain a legal basis for the adoption of a horizontal act - the Implementing Acts Regulation cited above for Article 291 TFEU - setting out the rules and general principles applicable to delegations of power. Those conditions must therefore be set out in each basic act.

Declaration No 39 to TFEU on financial services has the following wording:

"Declaration on Article 290 of the Treaty on the Functioning of the European Union

The Conference takes note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice. "

In preparation for the practical implementation of Article 290 TFEU, the Committee on Legal Affairs on 23 March 2010 adopted a non-legislative initiative report on the power of legislative delegation, rapporteur József Szájer¹. The following are excerpts from the explanatory memorandum of the report, which set out the background to the demarcation between delegated and implementing acts:

"Control of the power delegated by the Legislator should in all logic remain the preserve of the Legislator. Moreover, any other form of control by anyone but the Legislator would per se be contrary to Article 290 TFEU. In particular, Member States, and a

¹ Report on the power of legislative delegation (A7-0110/2010).

fortiori committees composed of experts from the Member States, have no role to play in this area."

[...]

It is undisputed that the primary responsibility for the implementation of Union law lies with the Member States. This is made clear in Article 4(3) second subparagraph TEU (ex Article 10 EC - "the Member States shall take any appropriate measure (...) to ensure fulfilment of the obligations arising out of the Treaties") and in Article 291 TFEU itself ("Member States shall adopt all measures of national law necessary to implement legally binding Union acts"). This was also the case prior to the entry into force of the Lisbon Treaty.

However, where the Legislator considers that uniform conditions for implementing legally binding Union acts are needed, a binding piece of secondary law (whether a legislative act or not) must empower the Commission to adopt implementing measures. Article 291 TFEU, following on directly from the "comitology" mechanisms based on Article 202 EC, provides a basis for the adoption of implementing acts by the Commission, subject to certain controls by the Member States of the Commission's exercise of implementing powers¹. Given the primary responsibility of Member States for implementation, it is natural that Article 291 mentions them to the exclusion of the Legislator. There is no fundamental conceptual difference between the previous system based on Article 202 EC and the future system based on Article 291 TFEU.

It is clear that it is the Legislator that establishes the conditions for the exercise of such implementing powers. A new legal framework for implementing acts is urgent because the current "comitology" decision is partly incompatible with the new regime established under Article 291 TFEU."

The resolution finally adopted in plenary on 5 May 2010 includes the following three final paragraphs²:

"18. Urges the Commission to present as a matter of priority the legislative proposals needed to adapt the acquis to the provisions of Articles 290 and 291 TFEU; considers, in respect of Article 290 TFEU, that this alignment should not

¹ The rules and general principles for control by Member States are however to be adopted in the form of regulations by the Legislator acting in accordance with the ordinary legislative procedure - Article 291(3) TFEU.

² European Parliament resolution of 5 May 2010 on the power of legislative delegation, P7_TA(2010)0127.

be limited to those measures previously dealt with under the regulatory procedure with scrutiny but should cover all appropriate measures of general scope independently of the decision-making procedure or comitology procedure applicable to them prior to the entry into force of the Treaty of Lisbon;

19. *Insists that the first priority must be to adapt the acquis in policy areas which, prior to the entry into force of the Treaty of Lisbon, were not subject to the codecision procedure; calls for them to be dealt with on a case-by-case basis in such a way as to ensure that, in particular, all appropriate measures of general scope which were previously adopted under Articles 4 and 5 of [the Comitology Decision] are defined as delegated acts;*
20. *Considers that, in order to fully preserve the Legislator's prerogatives, special attention should be given to the relative use of Articles 290 and 291 TFEU and to the practical consequences of having recourse to one article or the other, be it during the above-mentioned alignment or when dealing with proposals under the ordinary legislative procedure; insists that the co-legislators have the power to decide that the matters previously adopted under the regulatory procedure with scrutiny can be adopted either under Article 290 TFEU or under the ordinary legislative procedure; "*

For the practical application of Article 290 TFEU, a Common Understanding¹ was agreed in April 2011 between Parliament, the Council and the Commission. It sets out the practical arrangements and agreed clarifications and preferences applicable to delegations of legislative power. It does provide guidance and model wordings for the definition of the objectives, content, scope and duration of a delegation, but it is silent as to the demarcation between delegated and implementing acts.

In addition, Parliament's Rules of Procedure were amended to include a new Rule 37a, which has the following wording:

"Delegation of legislative powers

1 When scrutinising a proposal for a legislative act which delegates powers to the Commission as provided for in Article 290 of the Treaty on the Functioning of the European Union, Parliament shall pay particular attention to the objectives, content, scope and duration of the delegation, and to the conditions to which it is subject.

¹ Common Understanding on Delegated Acts, approved on 3 March 2011 by the Conference of Presidents.

2. The committee responsible for the subject-matter may at any time request the opinion of the committee responsible for the interpretation and application of Union law.

3. The committee responsible for the interpretation and application of Union law may also, on its own initiative, take up questions concerning the delegation of legislative powers. In such cases it shall duly inform the committee responsible for the subject-matter. "

III - Parliament's position on the delegation of legislative power

The demarcation between delegated and implementing acts has been the subject of some controversy in a number of legislative procedures following the entry into force of the Lisbon Treaty. The Council has insisted on the use of implementing acts in order better to influence the preparatory phase of such acts through the experts from the Member States sitting in the relevant committees provided for in the Implementing Acts Regulation. In the preparation of delegated acts there is no formal role for national experts. Furthermore, the role, influence and prerogatives of Parliament are far greater when it comes to delegated acts, with the possibility of objecting to a proposed delegated act and revoking a delegation being the strongest tools in its possession. When it comes to implementing acts, the powers of Parliament are limited to a right of scrutiny, and the Commission may adopt a proposed implementing act notwithstanding any objection from Parliament.

The choice of the correct instrument has significant consequences not only for the possibility of Parliament to exercise its right of control or scrutiny, but also for the validity of the legal act itself. The President of the Commission, in a letter to the President of Parliament, has stressed that the delineation between implementing and delegated acts is not a matter of political choice, and that the starting point of any analysis therefore must be the legal criteria established in Articles 290 and 291 TFEU¹. The Commission has therefore sought clarification from the Court of Justice on the delineation issue in a case where it considers that the wrong kind of act has been chosen².

In order to establish a horizontal political position on the issue of delegated acts to protect Parliament's prerogatives and avoid further risk of legal challenges and the risk of annulment of legislative acts with an incorrect choice of delegated or implementing acts, the Conference of Presidents endorsed in 2012 the following 4-step approach with a view to ensuring that Parliament is capable of exercising to the full the powers conferred on it by the Lisbon

¹ Letter of 3 February 2012 from President Barroso to President Schulz.

² On 19 September 2012, the Commission brought an action to the Court of Justice against the Parliament and the Council seeking to annul an article in the Biocidal Products Regulation which provides for the adoption of measures establishing the fees payable to the European Chemicals Agency (ECHA) by an implementing act rather than by a delegated act. The Commission argues that since the article in question seeks to supplement certain non-essential elements of the legislative act, and with regard to the nature of the delegation and the purpose of the act to be adopted under those powers, such an act ought therefore to be adopted in accordance with the procedure laid down in Article 290 TFEU and not the procedures laid down in Article 291 TFEU. Case C-427/12, Commission v European Parliament and Council of the European Union.

Treaty¹:

1. Choice of the right instrument;
2. Strengthening the Member States' role in the preparatory phase of delegated acts;
3. Inclusion in the basic act ("codecision");
4. Adoption of Parliament's position without a first reading agreement.

As a last step, where delegated acts could not be included in a particular file, although it had been established that they should, this approach calls for refusing to submit the file to the plenary as such, and that further horizontal negotiations with the Council would then be required.

IV - Analysis

In the absence of any case law from the Court of Justice on the question of the demarcation between delegated and implementing acts, the starting point for any analysis must be the wording of the Treaty itself. Article 290 TFEU only permits a delegation of legislative power for the adoption of "*non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act*" (emphasis added).

To examine whether those criteria are fulfilled here, it is necessary to examine the nature of the power in question on a case-by-case basis.

Article 1(2) on transitional arrangements regarding minimum waste collection rates

This provision relates to Article 10(4) first subparagraph of the Batteries Directive, which according to Directive 2008/12/EC provided for transitional arrangements regarding minimum waste collection rates of batteries and accumulators to be adopted by the regulatory procedure in Article 5 of the Comitology Decision.

According to Article 13(1)(c) of the Implementing Acts Regulation, where a basic act adopted before the entry into force of that Regulation makes reference to Article 5 of the Comitology Decision, the examination procedure of the Regulation shall apply.

The proposed change to implementing acts in this case is therefore correct.

Article 1(2) on a common methodology for the calculation of annual sales

This provision relates to Article 10(4) second subparagraph of the Batteries Directive, which according to Directive 2008/12/EC provided for the establishment, with the use of RPS, of a common methodology for the calculation of annual sales of portable batteries and accumulators to end-users, in order to monitor waste collection rates. It further provided that

¹ Political guidelines on a horizontal approach within Parliament on dealing with delegated acts (Letter of 19 April 2012 from the Chair of the CCC to the President of Parliament).

that measure was "*designed to amend non-essential elements of this Directive by supplementing it*".

This provision is of general application, since the calculation of sales "*apply to objectively determined situations*"¹. The fact that the words "methodology for the calculation" are preceded by the adjective "common" gives further support to this conclusion.

The original provision further stated that the measure to be taken was designed to amend non-essential elements by supplementing the Directive. This provision can therefore only be aligned by providing for the adoption of delegated acts.

The proposed change to implementing acts in this case is therefore **incorrect**, and the provision must be the subject of a delegation under Article 290 TFEU.

Article 1(3) on the adapting or supplementing of Annex III to take account of technical or scientific progress

This provision relates to Article 12(6) of the Batteries Directive, which according to Directive 2008/12/EC provided for Annex III of the Batteries Directive (on detailed treatment and recycling requirements) to be adapted or supplemented in accordance with RPS to take account of technical or scientific progress. It further provided that those measures were "*designed to amend non-essential elements of this Directive, inter alia, by supplementing it*".

This provision is of general application, since the technical or scientific progress when it comes to the treatment and recycling requirements relating to batteries and accumulators are "*addressed in abstract terms to undefined classes of persons and apply to objectively determined situations*"².

The original provision further stated that the measures to be taken were designed to amend non-essential elements by supplementing the Directive. This provision can therefore only be aligned by providing for the adoption of delegated acts.

The proposed change to delegated acts in this case is therefore correct.

Article 1(5) on detailed rules supplementing the criteria for the assessing equivalent conditions outside the Union

This provision relates to Article 15(3) of the Batteries Directive, which according to Directive 2008/12/EC provided for detailed rules for the assessment of equivalent conditions of recycling operations outside the Union, in the context of exports, to be laid down under RPS. It further provided that those measures were "*designed to amend non-essential elements of this Directive by supplementing it*".

¹ See Case C-263/02, *Commission v. Jégo-Quéré* [2004] ECR I-3425, para. 43.

² Ibid.

This provision is of general application, since the rules for the assessment of equivalent conditions for recycling operations relating to batteries and accumulators are "*addressed in abstract terms to undefined classes of persons and apply to objectively determined situations*".

The original provision further stated that the measures to be taken were designed to amend non-essential elements by supplementing the Directive. This provision can therefore only be aligned by providing for the adoption of delegated acts.

It could moreover be noted that Parliament in the ongoing procedures concerning the Accounting Directive and the Data Protection Regulation and Directive has taken the position that the determination of equivalence in third countries could only be the subject of a delegation of legislative powers, and has nothing to do with uniform conditions for implementation.

The proposed change to delegated acts in this case is therefore correct.

Article 1(6) on the requirements for the registration of producers

This provision relates to Article 17 of the Batteries Directive, which according to Directive 2008/12/EC provided for the procedural requirements for the registration of producers to be adopted under RPS. It further provided that those requirements were "*designed to amend non-essential elements of this Directive by supplementing it*".

This provision is of general application since it is "*addressed in abstract terms to undefined classes of persons and apply to objectively determined situations*".

The original provision further stated that the requirements in question were designed to amend non-essential elements by supplementing the Directive. This provision can therefore only be aligned by providing for the adoption of delegated acts.

The proposed change to delegated acts in this case is therefore correct.

Article 1(8)(a) on detailed rules supplementing the labelling of capacity

This provision relates to Article 21(2) of the Batteries Directive, which according to Directive 2008/12/EC provided for detailed rules ensuring that capacity labels on batteries and accumulators are visible, legible and indelible, to be adopted under RPS. It further provided that those measures were "*designed to amend non-essential elements of this Directive by supplementing it*".

This provision is of general application since it is "*addressed in abstract terms to undefined classes of persons and appl[ies] to objectively determined situations*".

The original provision further stated that the measures to be taken were designed to amend non-essential elements by supplementing the Directive. This provision can therefore only be

aligned by providing for the adoption of delegated acts.

The proposed change to delegated acts in this case is therefore correct.

Article 1(8)(b) on exemptions from labelling requirements

This provision relates to Article 21(7) of the Batteries Directive, which according to Directive 2008/12/EC provided for exemptions from the labelling requirements in Article 21 to be adopted under RPS. It further provided that those measures were "*designed to amend non-essential elements of this Directive by supplementing it*".

This provision is of general application since it is "*addressed in abstract terms to undefined classes of persons and appl[ies] to objectively determined situations*".

The original provision further stated that the measures to be taken were designed to amend non-essential elements by supplementing the Directive. This provision can therefore only be aligned by providing for the adoption of delegated acts.

The proposed change to delegated acts in this case is therefore correct.

Article 1(9) on a questionnaire to the Member States for reporting purposes

This provision relates to Article 22(2) of the Batteries Directive, which provided for a questionnaire or outline to be established under the regulatory procedure of Article 5 of the Comitology Decision to form the basis for the reports on the implementation of the Directive which the Member States are required to submit every three years.

According to Article 13(1)(c) of the Implementing Acts Regulation, where a basic act adopted before the entry into force of that Regulation makes reference to Article 5 of the Comitology Decision, the examination procedure of the Regulation shall apply.

The proposed change to implementing acts in this case is therefore correct.

The objectives, content, scope and duration of the suggested delegations

As regards the objective, content and scope of the suggested delegations, none of these have been changed as compared with the Batteries Directive when it made reference to the Comitology Decision, taking into account that the proposed changes are intended to align the Directive to Articles 290-291 TFEU. The proposed changes are therefore procedural rather than substantive and do not affect the objective, content and scope.

Amendment 12 in the ENVI draft report seeks to change Article 1(2) of the proposal, on a common methodology for the calculation of annual sales, to provide for delegated acts rather than implementing acts. This is a procedural change and does not affect the objective, content and scope of the proposed delegation as compared with the previous comitology situation.

When it comes to the duration of the suggested delegations, the Commission proposal introduces a new Article 23a with the heading "Exercise of the delegation", which is in line with model "article a" and "option 1" in the Common Understanding. This provides for indeterminate duration of the delegation and a 2+2 months period for objection by Parliament or the Council.

Amendment 14 in the ENVI draft report seeks to change "option 1" to "option 2" of the Common Understanding and provide for delegation periods of 5 years with the Commission being required to report on the delegation of power not later than nine months before the end of a 5-year period, a period which will be tacitly extended unless Parliament or the Council opposes such extension not later than three months before the end of each period.

This suggested amendment is well within the prerogatives of the Legislator to make, and it has the added value of providing for a regular check-up of the delegations.

The Council compromise text

On 14 September 2012, the Cypriot Presidency presented a compromise text on the proposal¹. This text maintains delegated acts for Article 1(8)(b), on exemptions from labelling requirements, but provides for implementing acts in all of the other relevant provisions discussed above.

V - Conclusion and recommendation

At its meeting of 21 February 2013 the Committee on Legal Affairs adopted the following opinion by unanimity²:

In light of the foregoing reasoning, the Committee on Legal Affairs takes the view that with the exception of Article 1(2) of the proposal, which concerns a common methodology for the calculation of annual sales, and which must provide for delegated acts rather than implementing acts, the Commission proposal is correct when it comes to aligning the comitology provisions in the Batteries Directive with Articles 290 and 291 TFEU. The Legislator is free to choose "option 2" of the Common Understanding as regards the duration of the delegation.

In view of the political guidance endorsed by the Conference of Presidents, and since the criteria of Article 290 TFEU are clearly met for the common methodology in Article 1(2) of the proposal, the Committee on Environment, Public Health and Food Security should insist on delegated acts for this provision, and should support the alignment proposed by the Commission for the other relevant provisions. If the Council maintains its compromise text

¹ Council document No 13763/12.

² The following were present: Evelyn Regner (acting Chair), Raffaele Baldassarre (Vice-Chair), Françoise Castex (Vice-Chair), Francesco Enrico Speroni (rapporteur), Luigi Berlinguer, Piotr Borys, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Eva Lichtenberger, Antonio López-Istúriz White, Bernhard Rapkay, József Szájer, Alexandra Thein, Rainer Wieland, Tadeusz Zwiefka.

and the position that implementing acts should be used more extensively, the Committee should inform the Council that the file will not be submitted to the plenary as such, and if the Council still persists, the Committee should recommend the adoption of Parliament's position without a first reading agreement.

Yours sincerely,

Klaus-Heiner Lehne