



*Committee on Legal Affairs
The Chair*

3.4.2019

Mr Pavel Svoboda
Chair
Committee on Legal Affairs
BRUSSELS

Subject: Opinion on the legal basis of the Opinion on the legal basis of the proposal for a Regulation of the European Parliament and of the Council adapting a number of legal acts providing for the use of regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union (COM(2016)0799 – 2016/0400(COD))

Dear Mr Chair,

Following the provisional agreement reached on 12 February 2019 in the course of interinstitutional negotiations on the proposal for a Regulation of the European Parliament and of the Council adapting a number of legal acts providing for the use of regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union (2016/0400(COD); the “Proposal”), which includes the agreement on the change of the legal basis resulting from the agreed split of the Proposal, the coordinators of the Committee on Legal Affairs decided on 18 February 2019 to provide an opinion, pursuant to Rule 39(3) of the Rules of Procedure, on the appropriateness of the legal basis of the two parts of the Proposal as resulting from its split. The provisional agreement was endorsed by Coreper on 27 February 2019 and by the Committee on Legal Affairs on 4 March 2019. The split was subsequently endorsed by the Conference of Presidents on 7 March 2019.

I - Background

Article 5a of Decision 1999/468/EC, as amended by Council Decision 2006/512/EC (‘the Comitology Decision’), established the so-called regulatory procedure with scrutiny (RPS). In 2008 and 2009, a number of instruments were adopted to that regulatory procedure with scrutiny

(“alignment to RPS”)¹. With the entry into force of the Treaty of Lisbon and in light of the new legal framework established by Articles 290 and 291 TFEU, the Comitology Decision had to be revised. However, Regulation 182/2011 (‘the Comitology Regulation’), which was adopted for this purpose on the basis of Article 291(3) TFEU, intentionally left Article 5a of the Comitology Decision that established the RPS out of its scope. Article 5a had therefore to be provisionally maintained for the purposes of existing legal acts referring to that article. On the other hand, the *acquis* in question has to be aligned as required by the Treaty of Lisbon in order to ensure legal certainty. To that end, in 2013, the Commission proposed completing the alignment with three extensive proposals (so-called ‘Omnibus proposals’), which Parliament adopted at first reading in February 2014 on the basis of the reports of the Committee on Legal Affairs. However, the proposals were withdrawn by the Commission as no solution could be found by the Council.

Once the new Interinstitutional Agreement on Better Law-making (IIA BLM) of 13 April 2016 entered into force, the Commission presented two new proposals for alignment in December 2016, one focusing on legislative files in the area of justice² and one on the remaining policy areas (the Proposal, covering 168 legal acts).

In the Proposal’s Explanatory Memorandum, in the section concerning the choice of legal basis, the Commission specified that “*This proposal is based on the legal bases of all the basic acts amended*”. This means that the Treaty provisions forming the legal bases of the Commission Proposal correspond to all the Treaty provisions included in the respective legal bases of those 168 legal acts. The legal basis of the Proposal as presented by the Commission was thus Article 33, Article 43(2), Article 53(1), Article 62, Article 64(2), Article 91, Article 100(2), Article 114, Article 153(2)(b), Article 168(4) (a), Article 168(4)(b), Article 172, Article 192(1), Article 207, Article 214(3), and Article 338(1) of Treaty on the Functioning of the European Union (TFEU). The Commission also explicitly stated in the Explanatory Memorandum that “*This initiative exclusively relates to the procedures to be applied at Union level in adopting acts based on conferred powers.*”

The Commission’s approach concerning legal basis followed the approach taken during the alignment to RPS and in the 2013 Omnibus proposals.

On 12 February 2019, the negotiators of the three Institutions agreed in the trilogue to split the Omnibus proposal and closed the negotiations on 64 legal acts covered by it. They also agreed that the negotiations on the remaining 104 legal acts would continue in the next term.

¹ Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 adapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part One, OJ L 311 of 21.11.2008, p. 1, Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Two, OJ L 87 of 31.3.2009, p. 109, Regulation (EC) No 1103/2008 of the European Parliament and of the Council of 22 October 2008 adapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Three, OJ L 304 of 14.11.2008, p. 80.

² Proposal for a Regulation of the European Parliament and of the Council adapting a number of legal acts in the area of Justice providing for the use of regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union (2016/0399(COD)).

Following this split, it was agreed that the Treaty provisions forming the legal bases of the first agreed part of the Proposal would correspond to the Treaty provisions included in the respective legal bases of the 64 legal acts covered by that part, and consequently the Treaty provisions forming the legal bases of the remaining, non-agreed part of the Proposal would correspond to the Treaty provisions included in the legal bases of the 104 legal acts covered by that part.

For the part of the Commission Proposal agreed in the interinstitutional negotiations on 12 February 2019 the legal bases concerning 64 legal acts are Articles 33, 43(2), 53(1), 62, 91, 100(2), 114, 153(2)(b), 168(4)(b), 172, 192(1), 207(2), 214(3), and 338(1) TFEU. Compared to the initial Commission proposal, Articles 64(2) and 168(4)(a) TFEU have not been included because they form the legal basis of legal acts which are not comprised in this first part.

The non-agreed part of the Commission proposal covering the remaining 104 legal acts would be based on the Treaty provisions corresponding to their respective legal bases, namely Articles 43(2), 53(1), 62, 91, 100(2), 114, 153(2)(b), 168(4)(a), 168(4)(b), 192(1) and 338(1) TFEU. It should be noted that Article 64(2) TFEU does not correspond to any act among the 104 remaining legal acts and its initial inclusion in the Proposal was erroneous.

II - Relevant Treaty Articles

The articles below are the legal bases of the first part of the Commission proposal agreed by co-legislators and concerning 64 legal acts.

Article 33 TFEU, which is found in the chapter on customs cooperation, reads:

Article 33

(ex Article 135 TEC)

Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

Article 43(2) TFEU, which is found in the title III concerning agriculture and fisheries, reads:

Article 43(2)

(ex Article 37 TEC)

(...) 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.(...)

Article 53(1) TFEU, which is found in the chapter on the right of establishment under the title on the free movement of persons, services and capital, reads:

Article 53(1)

(ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.(...)

Article 62 TFEU, which is found in the chapter on services under the title on the free movement of persons, services and capital, reads:

Article 62

(ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

Article 91 TFEU, which is found under the title on transport, reads:

Article 91

(ex Article 71 TEC)

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

- (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;*
- (b) the conditions under which non-resident carriers may operate transport services within a Member State;*
- (c) measures to improve transport safety;*
- (d) any other appropriate provisions.*

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.

Article 100(2), which is likely found under the title on transport, reads:

Article 100(2)

(ex Article 80 TEC)

(...) 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

Article 114, which is found under the chapter on approximation of laws, reads:

Article 114

(ex Article 95 TEC)

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the

Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.

Article 153(2)(b), which is found under the title relating to social policy, reads [clarification added]:

Article 153(2)(b)

(ex Article 137 TEC)

(...) 2. *To this end [i.e. the achievement of the objectives of Article 151, through the EU support and complement of the activities of the Member States in the fields listed on paragraph (1)], the European Parliament and the Council:*

(a) (...)

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.(...)

Article 168(4)(b), which is found under the title dealing with public health, reads:

Article 168(4)(b)

(ex Article 152 TEC)

(...) 4. *By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:*

(a) (...)

(b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health; (...)

Article 172, which is found under the title on the establishment and development of trans-European networks, reads:

Article 172

(ex Article 156 TEC)

The guidelines and other measures referred to in Article 171(1) shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

Guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned.

Article 192(1), which is found under the title XX on environment reads:

Article 192

(ex Article 175 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191. (...)

Article 207, which is found under the title on common commercial policy, reads:

Article 207

(ex Article 133 TEC)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Article 214(3), which is found under the chapter on humanitarian aid, reads:

Article 214(3)

(...) 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented.(...)

Article 338(1), which is found under the seventh part of the TFEU concerning general and final provisions, reads:

Article 338

(ex Article 285 TEC)

1. Without prejudice to Article 5 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for the production of statistics where necessary for the performance of the activities of the Union (...).

III - Case-law on legal basis

It is settled case law of the Court of Justice that "*the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure*"³. The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

When it comes to multiple legal bases it has to be established whether the proposal either:

1. pursues multifold purposes or has multifold components, and one of those is identifiable as the main or predominant purpose or component, whereas the others are merely incidental; or
2. simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other.

According to the case law of the Court of Justice, in the first case the act must be based on a single legal basis, namely that required by the main or predominant purpose or component, and in the second case the act can be founded on the various corresponding legal bases.⁴

Whilst the choice of the legal basis should in principle not depend on the choice made for earlier legislative acts, according to settled case-law the legal basis for a measure must be determined having regard to its own aim and content and not to the legal basis used for the adoption of other EU measures that might, in certain cases, display similar characteristics. However, where a legislative act is designed merely as a supplement or a correction of another legislative act, without altering its original goal, the EU legislature is fully entitled to base the latter act on the legal basis of the first act.⁵

IV. Aim and content of the Proposal

The Lisbon Treaty introduced delegated and implementing acts, including an explicit distinction between them (Articles 290 and 291 of the TFEU respectively). Following the entry into force of the Lisbon Treaty, a number of pre-Lisbon acts containing a reference to the regulatory procedure with scrutiny (RPS) still requires adaptation to Articles 290 TFEU

³ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] ECR I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

⁴ See the Case C-411/06, cited above, paras 46-47.

⁵ See judgment of 21 June 2018, *Poland v Parliament and Council*, C-5/16, EU:C:2018:483, p. 49, p. 69 and case-law cited.

and 291 TFEU.

The Proposal covers, as indicated before, the legal acts included in the three legislative alignment proposals adopted by the Commission in 2013 plus an act which was not covered by the 2013 proposal, but which requires alignment, and that has been added to this Proposal. It did not include acts on which individual legislative proposals have been made in the meantime.

The legislative approach chosen in the Proposal is to amend each legal act concerned.

Specifically, the provision containing the substantive empowerment for the RPS is reworded following a wording agreed in the standard clauses for articles delegating powers. A standard article on the exercise of the delegation is inserted in each act while the references to RPS are deleted. In some cases co-legislators decided that there is no need to give any empowerment and limited themselves to deletion of RPS.

According to the Explanatory Memorandum of the Proposal, this “*exclusively relates to the procedures to be applied at Union level in adopting acts based on conferred powers*”.

The adaptations and amendments to be made based on the Proposal concern procedures at Union level only and are therefore independent of any measure of reception into national law. Consequently, in the case of directives, the Member States do not need to transpose them.

V - Determination of the appropriate legal basis

In principle the fact that the proposal is based on the legal bases of all the legal acts amended is not problematic from a legal point of view.

However, it is true, as the Legal Service correctly pointed out, that some of the legal acts in question are directives, whereas the present Commission proposal is for the adoption of a regulation. In particular, Articles 53(1) and 153(2)(b)TFEU which constitute two of the legal basis of the agreed part of the Proposal, allow the Parliament and the Council to adopt directives and not regulations.

As is apparent from the Commission’s original choice of legal bases and the above outlined aim and content of the Proposal, it does not aim at amending the legal acts in the usual sense of the term. On the contrary, its objective is the alignment of legislation referring to the regulatory procedure with scrutiny to the legal framework introduced by the Lisbon Treaty. It does not imply any transposition by Member States.

It should also be noted that the Commission’s approach concerning legal basis of the Proposal followed the approach taken during the alignment to RPS and in the 2013 Omnibus proposals.

Taking the above into account, it is therefore acceptable that under this regulation a number of directives will be amended within the limits set out above.

VI - Conclusion and recommendation

In the light of the foregoing analysis Articles 33, 43(2), 53(1), 62, 91, 100(2), 114, 153(2)(b), 168(4)(b), 172, 192(1), 207(2), 214(3), and 338(1) TFEU constitute the proper legal basis for the provisional agreement reached.

At the same time, Articles 43(2), 53(1), 62, 91, 100(2), 114, 153(2)(b), 168(4)(a), 168(4)(b), 192(1) and 338(1) TFEU constitute the appropriate legal basis for the second part of the Proposal, which is to be adopted by the Parliament as its position at first reading.

At its meeting of 1 April 2019 the Committee on Legal Affairs accordingly decided, unanimously⁶, by 14 votes in favour, to recommend that following the split of the Proposal the above are considered as legal basis for the provisional agreement, as proposed in the text agreed by Coreper on 27 February 2019 and approved by the Committee on Legal Affairs on 4 March, and for the Parliament's position at first reading with regards to the 104 remaining acts of the second part of the Proposal.

Yours sincerely,

Pavel Svoboda

⁶ The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada (Vice-Chair), Mady Delvaux (Vice-Chair), Max Andersson, Marie-Christine Boutonnet, Pascal Durand, Sajjad Karim, Sylvia-Yvonne Kaufmann, Julia Reda, Evelyn Regner, Virginie Rozière, , József Szájer, Julie Ward, Tadeusz Zwiefka, Mylène Troszczynski (for Gilles Lebreton pursuant to Rule 200(2))