

Memo



From: Marta Toporek, Climate and Energy Lawyer

Re: Legality of continuing to apply 'old' comitology procedures to the Ecodesign Directive¹

Ecodesign Directive - Civil society participation in 'old' comitology procedures and in the process of adoption of implementing and delegated acts

Brussels, 13 December 2010

Summary

The Lisbon Treaty has amended but not replaced existing Treaties. It is legally correct to continue applying the comitology procedures ('old' comitology procedures') of the Council Decision 1999/468/EC² ('the Comitology Decision') to the Ecodesign Directive to ensure legal continuity.

This means that the rules concerning the participation of the civil society in the comitology processes under the Ecodesign Directive remain unchanged for the time being.

Civil society participation in the procedure of adopting implementing acts is not guaranteed in the Commission proposal for a Regulation on implementing powers³. Even though the legislative process is still ongoing, it seems that there may be no express provisions concerning civil society participation in the text of the regulation. However, it is not excluded that the relevant provisions may be included in standard rules of committee procedure, or in the rules of procedure of particular committees. That would mean that in practice, solutions similar to the ones under the Comitology Decision may be used in relation to implementing acts procedure.

As to the delegated acts, according to the Treaty on the Functioning of the European Union (TFEU), the objectives, content, scope and duration of the delegation of power will be explicitly defined in the particular legislative acts and there is no need to

¹ 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), OJ L 285, 31.10.2009, p. 10.

² Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23, as amended.

³ 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; COM(2010)83 final, 9.3.2010.

provide any secondary legislation of the general nature additional to what is already included in the TFEU. Article 290 TFEU on delegated acts does not include provisions on civil society participation. There are no express provisions on civil society participation in the Commission Communication on Implementation of Article 290 TFEU⁴ either.

However, a general requirement of civil society participation in the processes of adopting implementing and delegated acts could be based on the provisions of the Treaties, namely Articles 10.3 and 11.2-3 of the Treaty on European Union (TEU) and Articles 15.1 and 15.3 of the TFEU. Also the Communication on minimum standards for consultation by the Commission recognises the important role of civil society organisations in the consultation process and is a valuable source useful for demonstrating Commission’s commitment to inclusion of civil society in consultation processes. These provisions can be a very good argument in discussions concerning involvement of the civil society in the process of adoption of implementing and delegated acts.

⁴ 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; COM(2009)673 final, 9.12.2009.

Introduction

This memo responds to the following issues:

- whether it is acceptable from the legal point of view to continue applying comitology procedures ('old' comitology procedures') of the Council Decision 1999/468/EC⁵ ('the Comitology Decision') to the Ecodesign Directive, and
- if so, whether rules concerning NGOs participation in the 'old' comitology procedure have changed since the entry into force of the Lisbon Treaty.

The memo also assesses the provisions allowing civil society participation in the comitology process under the Comitology Decision and in the adoption procedures of implementing and delegated acts as provided by the Lisbon Treaty.

Legality of continuing to use old comitology procedures under the Ecodesign Directive

Legislative acts adopted after the entry into force of the Lisbon Treaty logically have to comply with the provisions of the Treaties as amended by the Lisbon Treaty.

Acts adopted before the entry into force of the Lisbon Treaty had to comply with the Treaty provisions from before the entry into force of the Lisbon Treaty.

As the continuity needs to be ensured, the new provisions of the Lisbon Treaty cannot automatically amend provisions of particular directives adopted before its entry into force.

While there exist clear transitional provisions for titles V and VI of the Treaty on the European Union ('EU Treaty' or 'TEU')⁶, there are no transitional provisions applying to the former Treaty establishing the European Community ('EC Treaty').

However, taking into account that the Lisbon Treaty has amended but not replaced existing Treaties, the continuity needs to be ensured. This means that even if not stated explicitly, the same rules as established in the Protocol No 36 in relation to the EU Treaty, apply also to the EC Treaty provisions. Therefore, the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the EC Treaty prior to the entry into force of the Treaty of Lisbon shall be

⁵ See footnote 2.

⁶ Article 9 of the Protocol No 36 to the Treaty on European Union and the Treaty on the Functioning of the European Union: *'The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.'*

preserved until those acts are repealed, annulled or amended in implementation of the Treaties.

As the Ecodesign Directive has been adopted prior to the entry into force of the Lisbon Treaty, it will remain unchanged until it is repealed, annulled or amended. This applies to the whole directive, including provisions referring to the Comitology Decision procedures.

The Comitology Decision itself will also remain valid until it is repealed, annulled or amended.

To conclude, it is legally correct to continue applying 'old' comitology procedures to the Ecodesign Directive.

Have rules concerning NGOs participation in 'old' comitology procedures changed for the Ecodesign Directive since the entry into force of the Lisbon Treaty?

As explained above, the rules of the Comitology Decision will continue applying to the Ecodesign Directive until either the Comitology Decision or the Ecodesign Directive is repealed, annulled or amended.

In consequence, for the time-being, the rules concerning civil society participation in the comitology procedures of the Ecodesign Directive remain unchanged.

These rules are established on a case-by-case basis in the rules of procedure of particular committees. According to the standard rules of committee procedure⁷, which constitute the basis for rules of procedure of particular committees, and in particular according to Article 8 of the standard rules, the participation of observers is in principle possible. However, Article 8 also specifies that the participation must be in accordance with *'the Council act, an agreement by the EU, Association Council decision or other basic instrument that provides for the presence of observers'*.

That precision can be interpreted in different ways but one of the possible interpretations is that the participation of observers is possible only when there is some basic instrument that provides for their presence.

Article 8 of the standard rules of committee procedure⁸ states the following:

'1. The Chairman may decide to invite experts to talk on particular matters, at the request of a member or on his or her own initiative.

2. The representatives of (specify the third country or the organisation in question) are welcome to attend the committee meetings, in accordance with (specify the

⁷ OJ C 38, 6.2.2001, p. 3.

⁸ Idem

Council act, the agreement made by the Community, Association Council decision or other basic instrument that provides for the presence of these observers).

3. Experts and representatives of third countries or organisations must withdraw when the committee moves to a vote.'

It should be mentioned that this Article 8 is based on Article 7.1 of the Comitology Decision which provides:

'Each committee shall adopt its own rules of procedure on the proposal of its chairman, on the basis of standard rules of procedure which shall be published in the Official Journal of the European Communities.

Insofar as necessary existing committees shall adapt their rules of procedure to the standard rules of procedure.'

Therefore, the Comitology Decision does not refer directly to the possibility for the civil society to participate in the committees procedures even if it provides some standard rules on transparency.

These rules on transparency are included in recital 11 and Article 7 of the Comitology Decision. They recognise a necessity to improve information to the public on committee procedures and mention in particular that principles and conditions on public access to documents applicable to the Commission should also apply to the committees and that a list of committees, an annual report on the working of committees and references to documents related to committees transmitted to the European Parliament are made public (the latter, in a public register).

The situation as established under the above mentioned acts and documents remains in force for the time-being.

What are the rules of civil society participation in the procedure for adoption of implementing and delegated acts?

The Lisbon Treaty introduced a distinction between implementing and delegated acts.⁹

Implementing acts

Implementing acts are regulated by Article 291 TFEU.

However, the Treaty admits that these provisions are not sufficient. In that respect, Article 291.3 of the TFEU provides for the adoption through an ordinary legislative procedure of a regulation laying down the rules and general principles concerning the mechanisms for control by Member States of the Commission's exercise of implementing powers.

⁹ Delegated acts : Article 290 TFEU ; Implementing acts : Article 291 TFEU.

In response to this requirement, the European Commission published on 9 March 2010 a proposal for a regulation laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers¹⁰.

This proposal does not include provisions providing for the civil society participation in the committees' meetings. However, it contains provisions almost identical to the ones of Comitology Decision, which request the adoption by each committee of its rules of procedure on the basis of standard rules which shall be published by the Commission in the Official Journal of the European Union.¹¹ In that respect, Article 7.1 of the Commission's proposal states:

'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.'

The proposal, similarly to the Comitology Decision, contains also provisions on transparency and in particular mentions in its recital 13 that *'public access to information on committee proceedings should be ensured'*, in its Article 7.2 that principles and conditions on public access to documents applicable to the Commission shall apply to the committees and in Article 8 what the rules applicable to a register of committee proceedings are.¹²

As the proposal is still in the legislative process, its final text obviously cannot be determined at the present stage. However, it seems that there may be no provisions concerning civil society participation added directly to the text of the regulation. In this case, such provisions may be intended to be included either in the standard rules of procedure and/or rules of procedure of particular committees.

Civil society could consider getting involved in the legislative process on the regulation on implementing powers in order to influence the inclusion of provisions on civil society participation. Such involvement could be also considered for the elaboration of the standard rules of committees' procedure.

¹⁰ See footnote 3.

¹¹ Article 7.1 of the 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; *idem*.

¹² It is interesting to note that the proposal does not mention, as it was the case in the Comitology Decision, an obligation to publish a list of all committees; on the other hand, it requires making public (through a register) of statistical data on the working of the committees.

It should be also mentioned that the rule 88 of the Rules of Procedure of the European Parliament¹³ establishes some procedural requirements for the European Parliament concerning its involvement in the procedure of adopting of implementing acts.

Delegated acts

As specified in Article 290.1 TFEU, *‘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 Treaty provisions do not require adopting of any secondary legislation of a general nature additional to what is already included in the TFEU. According to Article 290.1 TFEU, the objectives, content, scope and duration of the delegation of power will be explicitly defined in each particular legislative act¹⁴.

Moreover, the process of adopting delegated acts does not require a system of control by Member States as provided currently through comitology.

Although not required by the Treaty, the Commission adopted on 9 December 2009 the Communication on Implementation of Article 290 of the Treaty on the Functioning of the European Union¹⁵. The purpose of this document, as explained in its introduction, is to set out the Commission’s views on certain elements of delegated acts.

Article 290 TFEU does not mention involvement of the civil society. The civil society participation is not mentioned in the Commission communication on Article 290 TFEU either. Although the Communication provides for the possibility of consultations by the Commission of experts from the national authorities, it does not mention consultations of civil society organizations.

Therefore, for the time-being, there are no provisions providing for civil society organizations to participate in the process of adopting delegated acts.

For the completeness of information it should be also mentioned that rule 87a of the Rules of Procedure of the European Parliament provides some guidance on the European Parliament’s procedure in relation to delegated acts.

¹³ See for legal basis: Article 232 TFEU; see for the text of the Rules of Procedure: <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=56>

¹⁴ Article 290.1, first sentence of sub-paragraph 1 TFEU: *‘the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts’*

¹⁵ See footnote 4.

Provisions relevant for the civil society participation in the process of adopting implementing and delegated acts

It must be stressed that both the Treaty on the European Union and the Treaty on the Functioning of the European Union contain provisions that can be used for supporting the civil society representation in the procedures of adoption of implementing and delegated acts.

The relevant provisions of the Treaty on European Union (TEU) are: Article 10.3, Article 11.2-3. The relevant provisions of the Treaty on the Functioning of the European Union are: Article 15.1 and 15.3.

One of these provisions, namely Article 11.3 TEU, explicitly provides for the European Commission to carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Also the Commission Communication on minimum standards for consultation by the Commission¹⁶ recognises the important role of civil society organisations in the consultation process and refers to Article 12 of the European Charter of Fundamental Rights providing the fundamental right of citizens to form associations in order to pursue a common purpose. It also states that 'the Commission does not intend to create new bureaucratic hurdles in order to restrict the number of those that can participate in consultation processes' even though it provides also that best practice requires that the target group is clearly identified prior to the launch of a consultation process and that clear selection criteria are necessary where access to consultation is limited for practical reasons. This Commission Communication is a valuable source useful for demonstrating Commission's commitment to inclusion of civil society in consultation processes.

The above mentioned provisions can be a very good argument in discussions concerning involvement of the civil society in the process of adoption of implementing and delegated acts.

¹⁶ Communication from the Commission – Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission; COM(2002)704 final, 11.12.2002.