

# ***Bundesrat*** **[Upper House of Parliament]**

Official Document **768/13** (Decision)  
(Draft Official Documents 768/13 and 770/13)

19 December 2013

## **Decision** of the *Bundesrat*

**Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny**

**COM(2013) 451 final; Council document 12730/13**

in conjunction with

**Proposal for a Regulation of the European Parliament and of the Council adapting to Article 290 and 291 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny**

**COM(2013) 751 final; Council document 15882/13**

At its 918th meeting on 19 December 2013, in accordance with Sections 3 and 5 of the Act on Cooperation between the Federation and the Federal States in European Union Affairs [*Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union — EUZBLG*], the *Bundesrat* adopted the following opinion:

Regarding the proposals in general

1. The *Bundesrat* understands the need to adapt a number of EU legal acts to the Lisbon Treaty (Treaty on the Functioning of the European Union (TFEU)).

It notes that the Commission is adapting a number of legislative acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 TFEU by means of framework regulations.

2. The *Bundesrat* emphasises that the adaptation to the TFEU of EU Regulations or Directives providing for the use of the regulatory procedure with scrutiny must not weaken the Member States' power of (co-)decision in the EU legislative process with regard to key provisions. As already pointed out in the opinion of the *Bundesrat* of 12 February 2010 (*Bundesrat* Official Document 875/09 (Decision)), delegated legal acts should be kept to an absolute minimum and the objectives, content and scope of the remaining implementation powers should be explicitly and clearly defined.
3. The *Bundesrat* considers it necessary for the Commission to work with experts from the Member States to develop transparent and objective criteria, which could then be used to differentiate between essential and non-essential elements of legal acts providing for the use of the regulatory procedure with scrutiny. For example, it is not generally appropriate for legal acts to be changed over to the delegated act system if the changes relate, *inter alia*, to the scope of the legal act or ongoing legislative procedures, if they entail a large amount of additional work and high costs for the Member States or the parties concerned, or if other significant national or regional concerns of Member States must be taken into account. Provisions in legal acts that largely serve to protect consumers or the environment can also not be regarded as 'non-essential' elements of legal acts under Article 290 TFEU. As the *Bundesrat* has already pointed out in its abovementioned opinion, reservations expressed by experts from the Member States with regard to a switch to the delegated act procedure should be taken into account, and a switch to the implementing act procedure or the ordinary legislative procedure should be selected instead of a switch to the delegated act procedure.
4. The *Bundesrat* refers to its opinions on the 'Communication from the European Commission to the European Parliament and the Council: Implementation of Article 290 of the Treaty on the Functioning of the European Union' in *Bundesrat*

Official Document 875/09 (Decision) and 97/11 (Decision) and repeats the fundamental concerns it expressed there with regard to individual aspects of the procedure for adopting delegated acts as defined in Article 290 TFEU.

5. It reiterates that the decision on the duration of the delegation of power as referred to in Article 290 TFEU falls within the discretion of the EU legislature. The EU legislature must check whether the delegation of power for an indefinite period (as desired by the Commission) makes sense in the individual case. The *Bundesrat* once again states explicitly that the sunset and review clauses are not only common elements of European legislation, but are also effective means of consolidating legislation and cutting red tape. The complete lack of any time limit desired by the Commission as the norm for the delegation of power is justified by the efficiency and time saving to be achieved through this delegation of power. The *Bundesrat* is not convinced by this. It is of the opinion that this complete lack of a time limit as the norm for the delegation of power would contradict the basic intention of the second subparagraph of Article 290(1) TFEU that power should only be delegated for a limited duration. Should it nevertheless make sense to delegate power for an indefinite period in an individual case, this should be duly substantiated in any event.
6. The *Bundesrat* also considers it necessary to extend the standard period for raising objections as defined in the first sentence of Article 2(5) of the proposals for regulations to three months. In many cases, legislative powers are conferred on the Commission for highly complex matters. The European Parliament and the Council are both only able to exercise their rights to the necessary extent if sufficient time is allowed for a detailed examination of the legislative proposals, which also makes it possible to incorporate the enforcement and administrative experience of the Member States.
7. The *Bundesrat* calls for binding rules on the involvement of experts from the Member States in the adaptation to the TFEU of legal acts providing for the use of the regulatory procedure with scrutiny. The move to the delegated act procedure should be legitimised by a majority of the Member States.
8. The *Bundesrat* also points out that, in its Communication COM(2009) 673 final, the Commission announced that it would also continue to systematically consult experts

from the national authorities of all Member States and form expert groups for this purpose or use existing ones.

The *Bundesrat* supports this approach and reiterates its view that delegated legal acts should generally only be adopted after first consulting experts from the Member States. The Commission should seriously examine any concerns expressed and, where appropriate, adapt its proposal accordingly or clearly state why it is not acting on these concerns.

#### The legal acts in the Annex

9. The *Bundesrat* also considers that, in the case of many of the legislative acts in the proposal for a regulation adapting to Article 290 of the Treaty on the Functioning of the European Union a number of legal acts providing for the use of the regulatory procedure with scrutiny (*Bundesrat* Official Document 768/13), the requirements regarding the adoption of delegated acts as defined in Article 290 are not sufficiently complied with. These legislative acts are not suitable for adaptation by means of a framework regulation but instead a check must be carried out in individual cases to establish whether a switch to the implementing act procedure or the ordinary legislative procedure should be selected instead of a switch to the delegated act procedure. This is especially true of the following legislative acts:

#### Annex to the proposal for a regulation adapting to Article 290 TFEU a number of legal acts

- a) Number 23 (Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer).

In the second subparagraph of Article 7(2), the regulatory procedure with scrutiny should be replaced with an implementing regulation.

Any amendments under Article 25 of the Regulation would entail a large amount of additional work and high costs for operators, and would thus represent substantial changes.

The *Bundesrat* therefore asks the Federal Government to request that Number 23 be deleted.

- b) Number 39 (Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC).

We oppose any amendment to the REACH Regulation at the present time. During the review procedure for the Regulation and based on the requirements for a stable and predictable legal framework, there was a broad consensus that no changes should be made to the operative part of REACH. At the present time, switching the parts of the REACH Regulation providing for the use of the regulatory procedure with scrutiny would conflict with this balanced consensus and jeopardise the existing stability.

The REACH Regulation provides for switching to allow the Commission to adopt delegated acts in a large number of very different situations. A general switch across the board is not beneficial here as essential parts of the Regulation would also be affected by this.

For example, the inclusion of a new entry or the amendment of an entry in Annex XVII to REACH on 'restrictions on the manufacture, placing on the market and use of certain dangerous substances, preparations and articles' is to be regarded as essential for the implementation of the Regulation. It concerns a fundamental area of application of the Regulation. The same applies to the addition or removal of substances in Annex XIV, 'List of substances subject to authorisation'.

The *Bundesrat* therefore asks the Federal Government to request that Number 39 in the Annex to the proposal for a regulation be deleted.

- c) Number 40 (Directive 2004/10/EC of the European Parliament and of the Council of 11 February 2004 on the harmonisation of laws, regulations and administrative provisions relating to the application of the principles of good laboratory practice and the verification of their applications for tests on chemical substances).

Article 4 of the Directive refers (as a consequential amendment) to the committee set up under Article 133 of Regulation (EC) No 1907/2006. Any amendments would

entail a large amount of additional work and high costs for operators, and would thus represent substantial changes.

- d) Number 41 (Directive 2004/9/EC of the European Parliament and of the Council of 11 February 2004 on the inspection and verification of good laboratory practice (GLP)).

Articles 7 and 8 of the Directive refer (as a consequential amendment) to the committee set up under Article 133 of Regulation (EC) No 1907/2006. Any amendments would entail a large amount of additional work and high costs for supervisory bodies, and would thus represent substantial changes.

- e) Number 42 (Regulation (EC) No 2003/2003 of the European Parliament and of the Council of 13 October 2003 relating to fertilisers).

- f) Number 43 (Directive 2000/14/EC of the European Parliament and of the Council of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors).

Any amendments to the scope of the equipment regulated or the requirements for this would represent a considerable interference in enforcement by the municipalities.

- g) Number 44 (Directive 97/68/EC of the European Parliament and of the Council of 16 December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery).

Any amendments under Article 15 of the Directive would entail a large amount of additional work and high costs for operators, and would thus represent substantial changes.

- h) Number 47 (Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds).

As set out in Article 15 of the Birds Directive, amendments adapting Annexes I and V to the Directive to technical and scientific progress may be made in accordance with the regulatory procedure with scrutiny. Annex I covers the species of bird that are

subject to special protection and for which the most suitable territories in number and size are to be classified as special protection areas ('Natura 2000 areas') for the purpose of their conservation. Annex V contains the subjects on which the Member States should develop research as a basis for the protection, management and use of the populations of all species of bird referred to in Article 1. In particular, owing to the far-reaching implications of including additional species of bird in Annex I to the Birds Directive, the possibility (envisaged in the current proposal for a regulation) of amending Annex I to the Birds Directive without making the decision subject to consultation with experts from the Member States is viewed extremely critically. Annex I relates to Article 4 of the Birds Directive. Article 4 establishes the obligation to set up special protection areas for the species listed in Annex I and specifies an absolute ban on the deterioration of the areas to be classified within the meaning of the third sentence of Article 4(1), where the species listed in Annex I are present. An amendment to Annex I may therefore result in considerable new protection and conservation requirements being imposed on the Member States and considerable obstacles to approval occurring for all types of authorisation procedure, potentially in large areas.

- i) Number 49 (Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006).

Article 54 of the Regulation refers to the committee set up under Article 133 of Regulation (EC) No 1907/2006. Any amendments would entail a large amount of additional work and high costs for operators and supervisory bodies, and would thus represent substantial changes.

- j) Number 50 (Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Waste Framework Directive)).

Amendments to provisions of European legislation on waste management, particularly in the Waste Framework Directive, may have a substantial financial impact on operational services, collection structures and also on enforcement. In addition, they

may have an impact on the preservation of services of general interest in this area and may affect the industry.

- k) Number 51 (Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)).

In any event, amendments to Annex I are substantial changes and should therefore be adopted in accordance with the ordinary legislative procedure.

- l) Number 52 (Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe).

The delegated acts would involve interference in the constitutional self-government tasks of the federal states and of the municipalities in particular. The principle of subsidiarity would probably be infringed. The requested implementation of measures requires parliamentary decisions at the level of the federal states (e.g. on highway plans including their financing), the municipalities (safeguarding of measures supported by the municipalities under the clean air plan through the budget for the municipality) and the districts (e.g. financing of local public transport). The constitutional implementation of the Directive is thus only possible if federal and subsidiary rights and obligations are safeguarded.

- m) Number 53 (Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks).

The amendment to the Annex concerns the organisation of the central action element as defined in Article 7. The amendment entails a large amount of additional work and high costs for the Member States and the parties concerned. It is therefore a substantial change and should for that reason be adopted in accordance with the ordinary legislative procedure.

- n) Number 54 (Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)).



The Directive currently stipulates that the regulatory procedure with scrutiny should be used, *inter alia*, for the description of spatial data themes (Article 4(7)) and for various implementing rules (metadata: Article 5(4), technical arrangements for interoperability: Article 7(1), technical specifications for network services: Article 16, data-sharing: Article 17). However, owing to the financial implications for the federal states, the rights of the Member States to participate at EU level should be comprehensively safeguarded, and Directive 2007/2/EC should be excluded from the Commission's general authority to adopt 'delegated acts' for that reason. Instead, the implications of the authorisation provided should be examined on a case-by-case basis and adapted where appropriate.

- o) Number 55 (Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste).

Amendments to provisions on cross-border disposal of waste may result in a considerable amount of processing work on the one hand and in unpredictable costs on the other for both the economic operators involved and the authorities.

- p) Number 56 (Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC).

Collecting and checking the data on pollutants and the shipping of pollutants as required under the Regulation is already a considerable amount of work for companies, and also for the national administrations. Germany has developed its own software to collect, analyse and present the data, and this has been adapted to the format specified by the EU. Any change made by the EU to the requirements for the register (additional substances, different thresholds, different types of installations) would require additional capacity and costs on the part of the authorities.

- q) Number 57 (Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration).

Any amendments to Annex II would have a considerable impact on public budgets and polluters; they are therefore substantial changes and should for that reason be adopted in accordance with the ordinary legislative procedure.

- r) Number 60 (Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC).

Article 29 refers (as a consequential amendment) to the committee set up under Article 133 of Regulation (EC) No 1907/2006. Any amendments would entail a large amount of additional work and high costs for operators and supervisory bodies, and would thus represent substantial changes.

- s) Number 62 (Directive 2004/42/CE of the European Parliament and of the Council of 21 April 2004 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain paints and varnishes and vehicle refinishing products and amending Directive 1999/13/EC).

Any amendments under Article 13 of the Directive would entail a large amount of additional work and high costs for operators, and would thus represent substantial changes.

- t) Number 63 (Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise).

Any changes to the methods of calculation for environmental noise, the scope of the data to be collected or the scope of the requirements to be implemented with regard to the noise action plan represent considerable interference in the work to be carried out by the relevant regional authority and in the noise action plan task to be implemented as part of municipal planning activities and the planning authority of the municipalities. A coordination process between the Member States and other stakeholders (CNOSSOS-EU) has been underway for many years now for the purpose of developing and harmonising the calculation and assessment methods for environmental noise, and a proper legislative procedure will be required when this process is completed.

- u) Number 64 (Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants).

The provisions of this Directive have a significant impact on industry and investments, and therefore have a great deal of political relevance.

- v) Number 65 (Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy).

Annex III to the Water Framework Directive concerns the central planning tool as defined in Article 9 of the Directive (infringement proceedings are currently underway against Germany). The amendment entails a large amount of additional work and high costs for the Member States and the parties concerned. It is therefore a substantial change and should for that reason be adopted in accordance with the ordinary legislative procedure.

- w) Number 66 (Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles).

Changes in this context mainly affect industry: manufacturers (including component producers) and disposers of motor vehicles. Any changes here could well threaten the existence of these parties. Public authorities are also affected through the potential increase in the monitoring or approval workload.

- x) Number 67 (Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste).

Owing to the extensive requirements with regard to closure and the generally long after-care periods after the end of deposit operations, changed requirements for landfills could result in high additional costs. Provisions leading to major changes in the area of municipal waste disposal could have a negative impact on tried and tested, service-oriented and socially acceptable disposal structures, and could even seriously impair the task of providing services of general interest.

- y) Number 68 (Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption).

The adaptation across the board of the regulatory procedure with scrutiny to the delegated act procedure under Article 290 TFEU is not suitable for the amendment of Annexes II and III to the Drinking Water Directive as these annexes do not relate to legislative procedures but rather to the organisation of enforcement tasks, which must in principle be left to the responsibility of the Member States and the federal states tasked with enforcement. Instead of the delegated act procedure, the possibility of changing over to the implementing act procedure under Article 291 TFEU could be considered.

- z1) Number 71 (European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste).

Any changes here could have a huge impact on both the public waste disposal system and on the industry. This concerns packaging manufacturers, the recycling industry and energy recyclers.

- z2) Number 72 (Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources).

Any amendments to the annexes would have a considerable impact on polluters. They are therefore substantial changes and should for that reason be adopted in accordance with the ordinary legislative procedure.

- z3) Number 73 (Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment).

The following content of the Urban Waste-Water Directive is affected in particular:

- update to Article 3(2) to reflect the requirements for collecting systems laid down in Annex I A,
- update to Article 4(3) to reflect the requirements for discharges from urban waste water treatment plants laid down in Annex I B,
- update to Article 5(3) to reflect the requirements for discharges from urban waste water treatment plants laid down in Annex I B ,
- update to Article 11(2) to reflect the requirements for regulations/authorisations for industrial waste water laid down in Annex I C,

- update to Article 12(3) to reflect the requirements for discharges from urban waste water treatment plants laid down in Annex I B.

In the majority of cases, additions or amendments to Annex I to the Directive could entail a considerable financial impact in the Member States. For example, a requirement for more stringent cleaning to prevent anthropogenic trace substances in discharges from urban waste water treatment plants could necessitate substantial investments (in excess of EUR 10 million across Germany), as could a conceivable requirement for decontamination of waste water. Any additions or amendments to Annex I to the Directive can certainly not be classified as 'not substantial', therefore. They are in fact substantial changes and should consequently be adopted in accordance with the ordinary legislative procedure.

- z4) Number 94 (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market).

Any amendments under Article 40 of the Directive would entail a large amount of additional work and high costs for operators, and would thus represent substantial changes.

- z5) Number 97 (Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006).

- z6) Number 98 (Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC).

- z7) Number 100 (Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market).

- z8) Number 107 (Regulation (EC) No 1371/2007 on rail passengers' rights and obligations) and Number 108 (Directive 2007/59/EC on the certification of train drivers operating locomotives and trains on the railway system in the Community).

Reference is here made to the reservations with regard to the delegated act procedure, which are expressed in Section 4 of the *Bundesrat* Official Document 64/13 (Decision) and which exist for the whole rail sector. As the national administrations also enforce rail legislation, it should be possible to conduct an effective review of the Commission's legal act and to influence this piece of legislation. In view of the short veto periods in which the Council can raise an objection, sufficient formal involvement of the *Bundesrat* in accordance with the provisions of the Act on Cooperation between the Federation and the Federal States in European Union Affairs is not guaranteed.

- z9) Number 109 (Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (recast)).

- z10) Number 121 (Directive 2003/59/EC of the European Parliament and of the Council of 15 July 2003 on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers, amending Council Regulation (EEC) No 3820/85 and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC).

- z11) Number 125 (Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports).

Procedures with regard to the introduction of noise-related operating restrictions at airports must be regularly adopted by the aviation authorities of the Member States. It is therefore not possible for them to be established using the delegated acts procedure.

- z12) Number 133 (Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides).

z13) Number 134 (Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters).

As this Directive needs to undergo a substantial revision anyway, any amendment to it should be reviewed in accordance with the ordinary legislative procedure. Irrespective of this, the method of analysis at least should be set out in an implementing regulation.

z14) Number 135 (Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the contained use of genetically modified micro-organisms (recast)).

z15) Number 141 (Regulation (EC) No 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 98/109/EEC).

z16) Number 142 (Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption).

Numerous powers contained in Article 18 of the Regulation allow the Commission to define uniform conditions for the organisation of official controls on products of animal origin intended for human consumption and thus implement the provisions of Articles 5 to 8 of the Regulation. These possibilities may be so far-reaching in individual cases that the procedure under Article 290 TFEU is not suitable for this.

z17) Number 146 (Regulation (EC) No 2160/2003 of the European Parliament and of the Council of 17 November 2003 on the control of salmonella and other specified food-borne zoonotic agents).

z18) Number 148 (Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition).

z19) Number 149 (Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products

produced from genetically modified organisms and amending Directive 2001/18/EC).

Article 8 of Regulation (EC) No 1830/2003 stipulates that the Commission may adapt the system for development and assignment of unique identifiers to GMOs laid down in Regulation (EC) No 65/2004 in keeping with relevant international developments. Such an adaptation is not covered by Article 290 TFEU as it constitutes a significant legislative matter.

z20) Number 154 (Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC).

#### Transmission to the Commission

10. The *Bundesrat* will submit this opinion directly to the Commission.