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from: Secretary-General of the European Commission,
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to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European
Union

Subject: Communication from the Commission to the European Parliament and the
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- Implementation of Article 290 of the Treaty on the Functioning of the
European Union

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**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

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

1. INTRODUCTION

Article 290 of the Treaty on the Functioning of the European Union, as laid down in the Treaty of Lisbon signed on 13 December 2007¹ (hereinafter "the new Treaty"), allows the legislator to delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act. Legal acts adopted by the Commission in this way are referred to in the terminology used by the new Treaty as "delegated acts" (Article 290(3)).

This provision does not require the adoption of any binding instrument of secondary legislation to ensure its implementation; it is sufficient in itself and contains all the elements required by the legislator for defining, case by case, the scope, content and practical arrangements for delegating power. However, the Commission believes it is useful and necessary to define the general framework within which such delegations of power should operate. The European Parliament, although stressing that this measure should preserve the freedom of the legislator, has reached a similar conclusion and has suggested that the institutions agree on a standard formula for delegations that would be regularly inserted by the Commission in the draft legislative act itself².

Without challenging the freedom of the European Parliament and the Council to set the limits and conditions of a delegation of powers at the point when a legislative act is adopted, the principles of better regulation and the smooth running of the interinstitutional process plead for a coordinated and coherent approach. Both the Commission, which is responsible for preparing and adopting delegated acts, and the European Parliament and Council, which are responsible for scrutinising them, should promote the introduction of a system that is as homogeneous and predictable as possible.

The purpose of this communication is to set out the Commission's views on the scope of the delegated acts, the framework for delegations of power, the working methods the Commission intends to use for preparing the adoption of delegated acts and, finally, the conditions under which the legislator might exercise control over the way the powers conferred on the Commission are implemented.

2. SCOPE OF DELEGATED ACTS

The scope of Article 290 cannot be determined simply by examining in detail the terms used by the authors of the new Treaty to define delegated acts; the provision also needs to be put into context, by looking in particular at its historical connection with the regulatory procedure

¹ OJ C 306, 17.12.2007.

² European Parliament resolution of 7 May 2009 on Parliament's new role and responsibilities in implementing the Treaty of Lisbon.

with scrutiny and at its links with Article 291 on implementing acts. For it is around Articles 290 and 291 that the legal framework will have to be constructed to replace the comitology system established under the Treaty establishing the European Community.

A delegation of power within the meaning of Article 290 is possible only in a legislative act. However, it makes little difference whether or not the legislative act was adopted jointly by Parliament and the Council, because Article 290 does not distinguish between the ordinary legislative procedure (formerly codecision) and special legislative procedures.

2.1. Relations with the regulatory procedure with scrutiny

Purely in terms of the wording, the definition of delegated acts in Article 290(1) is very similar to that of acts which, under Decision 1999/468/EC³ ("the comitology Decision"), are subject to the regulatory procedure with scrutiny introduced by Decision 2006/512/EC of 17 July 2006⁴. In both cases the acts in question are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument.

However, the similarity of the criteria does not mean that they will be implemented in exactly the same way; in a new institutional context the scope of the delegated acts will not necessarily be identical to that of the regulatory procedure with scrutiny. Any automatic duplication of precedents is therefore to be avoided.

2.2. Relations with implementing acts

Before examining the idea of the delegated act in its own right we should consider it in relation to the implementing act, which is the subject of Article 291.

It is clear, first, that an act cannot be classified under two different headings at the same time: an act based on Article 290 is by definition excluded from the scope of Article 291, and vice versa. The authors of the new Treaty clearly intended the two articles to be mutually exclusive, and indeed the resulting acts have different legal names.

Secondly, it should be noted that the authors of the new Treaty did not conceive the scope of the two articles in the same way. The concept of the delegated act is defined in terms of its scope and consequences – as a general measure that supplements or amends non-essential elements – whereas that of the implementing act, although never spelled out, is determined by its rationale - the need for uniform conditions for implementation. This discrepancy is due to the very different nature and scope of the powers conferred on the Commission by the two provisions.

When it receives the power to adopt delegated acts under Article 290 the Commission is authorised to supplement or amend the work of the legislator. Such a delegation is always discretionary: the legislator delegates its powers to the Commission in the interests of efficiency. In the system introduced by Article 291 the Commission does not exercise any "quasi-legislative" power; its power is purely executive. The Member States are naturally responsible for implementing the legally binding acts of the European Union, but because it is necessary to have uniform implementing conditions the Commission must exercise its

³ OJ L 184, 17.7.1999, p. 23. Consolidated version, as amended by Decision 2006/512/EC, published in OJ C 255, 21.10.2006, p. 4.

⁴ OJ L 200, 22.7.2006, p. 11.

executive power. Its intervention is not optional but compulsory, when the conditions of Article 291 are fulfilled.

Finally, it is important to stress that the fact that the acts adopted by the Commission are of general application is not in itself sufficient to trigger the application of the legal regime of delegated acts rather than that of implementing acts; Article 291 also allows the Commission to adopt implementing measures of general application. In order to ensure the uniform implementation of a legally binding act of the European Union the Commission may use either individual measures or acts of general application. However, it is clear from the wording of Article 290 that the Commission may never adopt a delegated act relating to a measure of an individual nature.

2.3. Criteria for implementing Article 290

It is for the legislator alone to apply the criteria set out in Article 290 which, it should be noted, are cumulative: the act must not only be of general application but must also amend or supplement certain non-essential elements of the legislative act. If either of these conditions is not met Article 290 may not be applied.

The Commission does not intend to interpret these criteria in the abstract; the very wide range of measures that might be envisaged in a given situation precludes any attempt at classification. The Commission would, however, make two comments.

Firstly, it believes that by using the verb "amend" the authors of the new Treaty wanted to cover hypothetical cases in which the Commission is empowered formally to amend a basic instrument. Such a formal amendment might relate to the text of one or more articles in the enacting terms or to the text of an annex that legally forms part of the legislative instrument. It makes little difference whether the annex contains purely technical measures; as soon as the Commission is empowered to amend an annex containing measures of general application, the regime of delegated acts must be applied.

Secondly, the Commission wishes to stress the importance that should be attached to the verb "supplement", the meaning and scope of which are less specific than those of the verb "amend".

The Commission believes that in order to determine whether a measure "supplements" the basic instrument, the legislator should assess whether the future measure specifically adds new non-essential rules which change the framework of the legislative act, leaving a margin of discretion to the Commission. If it does, the measure could be deemed to "supplement" the basic instrument. Conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures.

The legislator is entitled to enact full and comprehensive regulations governing a particular field of action, entrusting to the Commission the responsibility for ensuring their harmonised implementation through implementing acts; alternatively the legislator can choose to regulate the field in question only partially, leaving the Commission the responsibility for supplementing the regulations with delegated acts.

3. FRAMEWORK FOR DELEGATIONS OF POWER

When the legislator confers powers on the Commission, it must define the framework within which they are exercised in each legislative act. The second subparagraph of Article 290(1) of the new Treaty requires the legislator explicitly to define the objectives, content, scope and duration of the delegation of power. It thus defines two types of limits on the delegation of power: material limits and temporal limits.

3.1. Material limits

The delegation of power must be clear, precise and detailed. The legislator decides the objectives which the adoption of the delegated acts should make it possible to attain and, where appropriate, the limits which these acts may not exceed.

So in a case where the legislator wished to confer on the Commission the power to amend the annex to a regulation it should, for example, specify that the Commission may amend all or part of the annex in question by a delegated act, provided that certain conditions are fulfilled - scientific or technical progress has been made, a particular event has taken place or a certain amount of time has elapsed, etc. Similarly, limits might be imposed on the Commission for amending the annex; if the annex relates to setting quantitative values the Commission might be required by the legislator not to exceed certain thresholds.

3.2. Temporal limits

Article 290 states that the duration of the delegation of power is laid down by the legislator. The Commission does not believe that this requirement sanctions the practice of sunset clauses which when inserted into a legislative act automatically set a time limit on the powers conferred on the Commission, thus compelling it in practice to present a new legislative proposal when the time limit imposed by the legislator expires. Article 290 requires above all that a clear and predictable framework be established for the delegated powers; but it does not require the Commission to be subject to strict cut-off dates. The legislator must be able to strike a balance between the need to establish a framework for the delegated powers and the need to ensure the continuity of the adoption of legal acts that are essential to the implementation of EU policies. Forcing the Commission periodically to present new legislative proposals to renew a delegation of power would be contrary to the very objectives of efficiency and speed that justify the use of delegated acts in the first place.

The Commission believes it is preferable not to increase the institutions' workload by introducing a binding system of short-term delegations. Delegations of power should in principle, therefore, be of indefinite duration. Such a practice would, moreover, be entirely consistent with the current situation. Experience shows that the legislator does not, as a general rule, wish to impose a time limit on the powers conferred on the Commission, even when conferring on it responsibility for taking quasi-legislative measures.

This is not to say that delegations of power should be immutable. It is important to note here that under Article 290(2)(a) the legislator can include in the basic instrument an option to revoke the delegation of power. Legally the effects of a revocation are exactly the same as those of a sunset clause; both put an end to the powers conferred on the Commission and the onus is then on the Commission to submit a legislative proposal if this is useful and necessary. In other words, if the legislator feels that in certain fields it is necessary to avoid the delegation of powers becoming a permanent mandate, it can confer on itself the right to revoke it. This may prove to be a more flexible option than an automatic sunset clause.

This does not mean that revocation, as such, can be understood merely as a "substitute" for sunset clauses. As will be shown later (see point 5.2. below), revocation may serve other purposes. But, clearly, in this prerogative the legislator has at its disposal a mechanism whose practical effect is comparable to that of a sunset clause.

In specific cases it might, however, be appropriate for the legislator to set a precise date on which the delegation of power will expire. In such cases, and in order for the institutions not to have to resort to enacting legislation to renew the delegation of power, a mechanism for tacit renewal should be introduced, conditional on a report by the Commission and, of course, subject to the legislator being able to prevent such an automatic renewal.

4. PROCEDURE FOR ADOPTING DELEGATED ACTS

4.1. Autonomy of the Commission

Article 290 contains no provision referring directly or indirectly to the procedure for adopting delegated acts. Using the powers conferred on it by the legislator the Commission adopts the acts necessary to attain the objectives laid down by the basic instrument.

Article 290(1) on the framework for the delegation of power requires the Commission to comply with the material and temporal limits of the delegation which, in a sense, constitute the essence of the "mandate" issued by the legislator. This first paragraph therefore has an impact at an early stage, before the Commission has even started to prepare a delegated act.

Article 290(2), which deals with the control which may be exercised by the legislator, comes into play at a later stage, after the mandate has been exercised, by acting either on the delegation itself (which may be revoked if the legislator considers that it is being incorrectly used), or on the delegated acts, to which objections may be made once they have been adopted, thus preventing their entry into force.

However, neither of these provisions has anything to say about the procedure by which the Commission adopts a delegated act. Consequently, the Commission enjoys a large measure of autonomy in this matter.

4.2. Preparatory work for the adoption of delegated acts

The Commission intends to carry out the preparatory work it considers necessary in order to ensure, first, that from a technical and legal point of view the delegated acts comply fully with the objectives laid down by the basic instrument and, second, that from a political and institutional point of view everything possible is done to avoid any objections being made by Parliament or the Council.

Except in cases where this preparatory work does not require any new expertise, the Commission intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted. This consultation will be carried out in plenty of time, to give the experts an

opportunity to make a useful and effective contribution to the Commission. The Commission might form new expert groups⁵ for this purpose, or use existing ones.

The Commission attaches the highest importance to this work, which makes it possible to establish an effective partnership at the technical level with experts in the national authorities. However, it should be made clear that these experts will have a consultative rather than an institutional role in the decision-making procedure. At the end of the consultations, the Commission will inform the experts of the conclusions it believes should be drawn from the discussions, its preliminary reactions and how it intends to proceed.

In the specific area of financial services the Commission is also committed to continuing to consult experts appointed by the Member States in the preparation of its draft delegated acts, in accordance with its established practice (see Declaration No 39 annexed to the Final Act of the Intergovernmental Conference that adopted the Lisbon Treaty⁶).

In addition, and where necessary, the Commission will conduct any research, analysis, hearings and consultations required, in the form best suited to the fields in question and the time limits that have been laid down.

On a general level, the Commission plans to set up an early warning system to enable Parliament and the Council more effectively to plan how they exercise their prerogatives during a period of two months following the adoption of the delegated acts. This period may be extended by one month at the request of either Parliament or the Council (see point 5.3.1 below). In the case of sensitive dossiers, the Commission will also make a point of giving Parliament and Council additional information about the delegated acts it intends to adopt.

5. SCRUTINY OF DELEGATED ACTS

5.1. General considerations

Article 290(2) of the new Treaty specifies the two conditions to which the legislator may subject the delegation of power: firstly, the right to revoke the delegation of power, and secondly the right to express objections, that is the right of opposition. Whereas opposition is a specific motion of censure directed at a clearly defined delegated act, revocation is a general and absolute withdrawal of the delegated powers from the Commission. Opposition should thus be seen as the ordinary means of control exercised by the legislator over all delegated acts, whereas revocation appears to be a more exceptional measure, prompted for example by the occurrence of factors that undermine the very basis of the delegation of power.

The legislator is not obliged to impose these two conditions cumulatively; they are independent of one another. The legislator might feel that it is not always necessary to provide for the possibility of revoking the delegation of power, in that this prerogative, in the case of an act adopted by the ordinary legislative procedure, gives one of the two branches of the legislature the unilateral power to render inoperative a provision that was adopted jointly. Similarly, the right of opposition might sometimes prove difficult to use, particularly when

⁵ In line with the practice for all expert groups, the relevant information about the groups set up in this way will be made public via the register of expert groups.

⁶ OJ C 115, 9.5.2008, p. 350.

the legislator wishes to confer on the Commission the power to adopt delegated acts with a particularly short deadline or strict timetable (see points 5.2 and 5.3.1 below).

In order to exercise either of the powers of control granted to it by the Treaty, Parliament must act by a majority of its members and the Council by qualified majority, as provided for in the second subparagraph of Article 290(2).

5.2. Right of revocation

The right of revocation might particularly be envisaged in cases where the legislator wishes to have the possibility of withdrawing at any time the powers it has conferred on the Commission, in order to take account of new circumstances that would justify a legislative intervention.

The legislator might also want to have a right of revocation if it feels that a right of opposition would be ineffective or impractical, for example when the Commission is required to adopt delegated acts subject to time constraints that are incompatible with the exercise of a right of opposition by the legislator. Where the legislator is unable to exercise control over every single act adopted, because they are so numerous, it would retain overall control over the delegation of power through the right of revocation.

Where provided for in the legislative act, the exercise of the right of revocation should be accompanied by a duty to explain the reasons behind it and by an exchange of information between the institutions. The legal consequences should also be specified in advance.

The institution wishing to withdraw its confidence from the Commission should ideally explain its reasons for doing so. This would be useful for two reasons. Firstly, it would help the institution that was not exercising the right of revocation to understand the reasons why the other institution had decided unilaterally to amend the basic instrument. It would also have a preventive function: by explaining the reasons for its decision Parliament or the Council would clearly show the Commission what it had to do or not to do in order to avoid other revocations in the future.

The institution that intends to revoke the delegation should notify its intention not only to the Commission but also to the institution that is not exercising the right of revocation, so that an interinstitutional dialogue can be established before the revocation decision is taken. In addition, the institution that initiates the revocation should explicitly state which delegated powers it is seeking to revoke. Provision should be made, for example, for a situation in which Parliament or the Council proposes to revoke only some of the powers delegated to the Commission. In other words a "partial revocation" should be possible.

Finally, the consequences of revocation should be explicitly set out in the basic instrument. It might be specified, for example, that the revocation decision terminates the delegation of powers by explicitly targeting the delegated powers that are revoked, but that it does not affect the delegated acts that are already in force.

5.3. Right of opposition

Where provided for in the legislative act, the right of opposition should fulfil certain requirements in terms of procedure. Once it has adopted a delegated act, the Commission will notify it to the legislator, i.e. simultaneously to Parliament and the Council, if the basic instrument is governed by the ordinary legislative procedure. The right of opposition would

then be triggered and would act like a suspensive condition: the entry into force of the delegated act adopted by the Commission would be suspended for a period specified by the legislative act, during which the legislator would have the right to lodge objections.

The Commission will also take all the necessary measures to ensure that the delegated acts are published as soon as they are adopted.

5.3.1. Time limits

The period allowed for the legislator to examine the delegated act will be laid down in the basic instrument. The legislator will be free to decide how long it thinks it will need in each case. However, the Commission believes it would be best to avoid setting completely different time limits for the different areas involved, unless this were fully justified by the urgency of the measures to be taken - in which case shorter deadlines would have to be set – or, conversely, by the extreme complexity of the acts the Commission was empowered to adopt – in which case the review period ought to be extended.

The period for expressing objections would start to run from the moment the Commission transmitted the delegated act, adopted in all the EU official languages.

Experience with the regulatory procedure with scrutiny shows that the three months currently allowed for exercising the right of opposition is longer than required, in that Parliament and the Council are often able to establish more quickly whether the act in question is likely to pose problems. In most cases the three-month period is thus a simple procedural time limit, which delays the entry into force of the act without bringing any real added value.

Consequently, the Commission favours a system in which the period for expressing objections would be two months, but would automatically be extended by one month on the initiative of Parliament or the Council. This would help to increase the efficiency of the procedures without undermining the principle of a total period of three months. In specific cases, where the issues on which powers were delegated to the Commission were so complex or sensitive that the two-month period would not be long enough to allow Parliament and the Council to exercise their prerogatives, it might be necessary to provide for a fixed period of three months.

Provision should also be made for the possibility of the two institutions deciding to inform the Commission that they will not oppose the delegated act even before the legal deadline has expired, thus enabling the delegated act to enter into force immediately.

Obviously this standard formula would not suit every area of action. Some policies require the Commission to act very quickly, even when it is not an emergency. In such cases the legislator could be asked significantly to shorten the scrutiny period or even dispense with it altogether, if it also has a right of revocation (see point 5.2 above).

5.3.2. Grounds

Article 290 TFEU does not list the grounds on which the legislator may object to a delegated act. The right to express objections, which represents the ordinary type of scrutiny of the delegation of power by the legislator, should in principle fall under the discretionary power of Parliament and the Council.

However, the institution opposing the act should explain the reasons for its decision by setting them out in the Council decision or Parliamentary resolution formalising its objections. This will ensure that the Commission does not continue to pursue the course of action that prompted Parliament or the Council to express objections. If, for example, the institution that expressed objections shows clearly that the Commission has exceeded the framework of the delegation of power, this would enable the Commission, if necessary, to opt for legislation instead.

5.3.3. Consequences of opposition

A delegated act that Parliament or the Council has opposed cannot enter into force. The Commission will then have the possibility of either adopting a new delegated act, amended where necessary to take account of the objections expressed, or presenting a legislative proposal under the terms of the Treaties, if the objections were based on its having overstepped the powers delegated to it. It is also conceivable that the Commission will decide not to do anything at all.

5.3.4. Urgency procedure

The Commission believes that there might be some cases where a delegated act subject to the right of opposition had to be adopted and enter into force as a matter of particular urgency. At the height of the financial crisis in autumn 2008, for example, certain accounting rules had to be amended very quickly. The deadlines for the regulatory procedure with scrutiny, which applied in this case, had to be considerably shortened to enable the measures to be taken and implemented in the shortest possible space of time.

The normal exercise of the right of opposition may, therefore, prove incompatible with the urgency of the situation in question. Consequently, the Commission feels it is essential to introduce an urgency procedure for use by the legislator.

Such a procedure could be organised in several ways. One would be to limit to the strict minimum the period allowed for expressing objections. Thus for overriding reasons of urgency a delegated act adopted by the Commission could, for example, enter into force eight days after being sent to Parliament and the Council. This approach has the advantage of being simple and of not altering the traditional procedural circuit. However, the danger is that it renders the legislator's right of opposition completely illusory; the legislator would have enormous difficulty formulating any objections in such a short time.

For this reason the Commission would recommend an alternative approach, which would allow it to adopt and implement immediately a delegated act which would nevertheless be subject to the right of opposition. This act would be notified immediately to the legislator and would apply provided no objection was expressed by Parliament or the Council during a period that might be fixed at six weeks. If objections were expressed, the delegated act would cease to apply.

6. CONCLUSION

This communication takes account of the exploratory contacts with the departments of the European Parliament and the discussions that took place with the Council in the weeks before its adoption. The Commission believes that this communication will enable the three institutions to organise the delegations of power conferred under Article 290 of the new Treaty in the most harmonious way possible.

In line with the ideas set out in this communication, the Commission encloses herewith several models for articles in future legislative acts conferring on it the power to adopt delegated acts.

ANNEX

Models

These models provide standard wording for the Articles of a basic instrument in which the legislator defines the limits of the delegation of power and lays down the conditions to which the delegation is subject. These models do not concern the delegated acts themselves. Nevertheless, the Commission would already like to clarify that the delegated acts will contain specific recitals explaining the rationale of the acts. The delegated acts will also be accompanied by an explanatory memorandum setting out in a more detailed manner the grounds for the act and providing information about the preparatory work undertaken by the Commission, where relevant.

Recital

The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of [...].

Article(s) delegating powers

(One or several provisions delegate powers to the Commission in the basic instrument. These provisions shall set out the objectives, content and scope of the delegated powers and shall make reference to Article A.)

Article A

Exercise of the delegation

1. The powers to adopt the delegated acts referred to in [Article(s) delegating powers] shall be conferred on the Commission for (...)

Option 1

an indeterminate period of time.

Option 2

a period of [X] years following the entry into force of [...]. The Commission shall make a report in respect of the delegated powers at the latest [X] months before the end of the [X] year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article B.

2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles [B] [and] [C]. [Where imperative grounds of urgency so require, Article D shall apply]⁷.

Article B

Revocation of the delegation

1. The delegation of power referred to in [Article(s) delegating powers] may be revoked by the European Parliament or by the Council.
2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of power shall inform the other legislator and the Commission at the latest one month before the final decision is taken, stating the delegated powers which could be subject to revocation and the reasons for a revocation.
3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

Article C

Objections to delegated acts

1. The European Parliament and the Council may object to the delegated act

Option 1

within a period of two months from the date of notification. At the initiative of the European Parliament or the Council this period shall be extended by one month.

Option 2

within a period of three months from the date of notification.

2. If, on expiry of that period, neither the European Parliament nor the Council has objected to the delegated act, or if, before that date, the European Parliament and the Council have both informed the Commission that they have decided not to raise objections, the delegated act shall enter into force at the date stated in its provisions.
3. If the European Parliament or the Council objects to the adopted delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

⁷ This last sentence shall be inserted only in basic acts which foresee an urgency procedure.

Article D

Urgency procedure⁸

1. A delegated act adopted under the urgency procedure shall enter into force without delay and apply as long as no objection is expressed in accordance with paragraph 2. The notification of the act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.
2. The European Parliament and the Council may within a period of [six weeks] from the date of notification object to the delegated act. In such a case, the act shall cease to be applicable. The institution which objects shall state the reasons for objecting to the delegated act.

⁸ Provisions referring to this Article shall clearly cite the "imperative grounds of urgency".