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*Committee on Legal Affairs  
The Chair*

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11.9.2017

Mr Pavel Svoboda  
Chair  
Committee on Legal Affairs  
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Council Regulation amending Regulation (EU) No 216/2013 on the electronic publication of the Official Journal of the European Union (COM(2017)0087 – 2017/0039(APP))

Dear Mr Chair,

At its meeting of 19-20 July 2017 the Committee on Legal Affairs decided on its own initiative pursuant to Rule 39(3) to consider whether the legal basis of the above Commission proposal was valid and appropriate.

The committee considered the above question at its meeting of 7 September 2017.

**I - Background**

The Official Journal of the European Union (hereinafter “OJ”) ensures official publication of the legislation and other acts of the European Union. Until 2014, only the printed edition of the OJ was considered to be the valid and legally binding publication. The electronic version, which had been available on the Internet since 1998, was only considered to be an information tool, devoid of any legal value.

The Court of Justice had held in the Skoma-Lux case<sup>1</sup> that legal acts of the Union are not enforceable against individuals if they have not been properly published in the Official Journal and that making such acts available online does not equate to valid publication in the Official Journal in the absence of any rules in that regard in Union law.

In order to remedy this situation, and to enable everyone to rely on the electronic edition as

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<sup>1</sup> Judgment of 11 December 2007 in Case C-161/06, Skoma-Lux, ECLI:EU:C:2007:773, paragraph 48.

the official, authentic, up-to-date and complete version of the OJ, Regulation (EU) No 216/2013<sup>1</sup> reversed the previous practice as from 2014 so that the electronic version would be authentic and produce legal effects whereas the printed version would only be published and hold legal effects when the information system of the Publications Office of the EU were not operational pursuant to a disruption.

There is no explicit legal basis in the Treaties which provides for a legislative procedure to be used for matters relating to the publication of acts in the OJ. Articles 287 and 297 of the Treaty on the Functioning of the European Union (TFEU) nevertheless includes obligations to publish acts in the OJ. Regulation (EU) No 216/2013 was therefore based on Article 352 TFEU, the so-called flexibility clause, which may only be used if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.

Since the entry into force of the Lisbon Treaty in 2009, use of the flexibility clause in Article 352 TFEU requires the consent of Parliament. Such consent was given when Regulation (EU) No 216/2013 was adopted, given that the change from printed to electronic version was considered to be purely technical in nature, did not comprise any potential policy choices on which Parliament, in its role as co-legislator, should pronounce itself and given the interest of having the Regulation enter into force as soon as possible.<sup>2</sup>

The current proposal to amend Regulation (EU) No 216/2013 aims at updating the procedure for authenticating the electronic version of the OJ against the background of relevant EU legislation on electronic signatures having been updated in the meantime. That legislation was adopted by making use of the ordinary legislative procedure on the basis of Article 114 TFEU on harmonisation measures in the internal market.

The question is therefore whether this amending proposal should be based on the flexibility clause in Article 352 TFEU or the harmonisation legal basis in Article 114 TFEU, or both.

## **II - Relevant Treaty Articles**

The following Article of the TFEU was presented as the legal basis in the Commission's proposal (emphasis added):

### ***Article 352*** **(ex Article 308 TEC)**

*1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the*

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<sup>1</sup> Regulation (EU) No 216/2013 on the electronic publication of the Official Journal of the European Union (OJ L 69, 13.3.2013, p. 1).

<sup>2</sup> See the explanatory statement to the draft recommendation of the Committee on Legal Affairs of 14 March 2012 in procedure 2011/0070(APP).

*appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.*

*2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.*

*3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.*

*4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.*

Article 114 TFEU has the following wording (emphasis added):

***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.*

*[...]*

Articles 287 and 297 TFEU have the following wording (emphasis added):

***Article 287***  
(ex Article 248 TEC)

*1. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Union. It shall also examine the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union in so far as the relevant constituent instrument does not preclude such examination.*

*The Court of Auditors shall provide the European Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions which shall be published in the Official Journal of the European Union. This statement may*

*be supplemented by specific assessments for each major area of Union activity.*

*[...]*

*4. The Court of Auditors shall draw up an annual report after the close of each financial year. It shall be forwarded to the other institutions of the Union and shall be published, together with the replies of these institutions to the observations of the Court of Auditors, in the Official Journal of the European Union.*

*[...]*

#### **Article 297** (ex Article 254 TEC)

*1. Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council.*

*Legislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them.*

*Legislative acts shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.*

*2. Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.*

*Regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.*

*Other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification.*

### **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"<sup>1</sup>. The choice of an incorrect legal basis may

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<sup>1</sup> Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case

therefore justify the annulment of the act in question.

In this context, an institution's wish for more active participation in the adoption of a given measure, the circumstances in which a measure was adopted as well as the work that has been done in other aspects within the scope of action covered by a given measure are irrelevant for the identification of the right legal basis.<sup>1</sup>

When it comes to dual basis it has to be established whether the proposal either:

1. pursues a twofold purpose or has a twofold component, and one of those is identifiable as the main or predominant purpose or component, whereas the other is 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 will have to be founded on the various corresponding legal bases.<sup>2</sup>

#### **IV. Aim and content of the proposed regulation**

The aim of the proposal is to update the procedure for authenticating the electronic version of the OJ by an electronic signature. Directive 1999/93/EC on a Community framework for electronic signatures<sup>3</sup> provided for the use of a qualified certificate for such signatures. That Directive has since been repealed and replaced by Regulation No 910/2014 on electronic identification and trust services for electronic transactions in the internal market<sup>4</sup>, which introduced the possibility of authenticating a document with an advanced electronic seal.

According to the Commission, the use of such an advanced electronic seal would make it possible to automate the electronic signature and accelerate the procedure for publication of the OJ on the EUR-Lex database, given that the use of an electronic seal rather than a signature would make a difference in legal terms since the authentication method for a signature involves a specific natural person, whereas when a seal is used it is created by a legal person with no indication of who within that legal person was responsible for authenticating the document.

The proposal consists of merely two articles; the first amends Article 2(1) of Regulation (EU) No 216/2013 in light of the above, and the second is a standard article on the date of entry into force.

#### **V - Determination of the appropriate legal basis**

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C-440/05 *Commission v. Council* [2007] ECR I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

<sup>1</sup> Case C-269/97, *Commission v Council* [2000] ECR I-2257, para 44.

<sup>2</sup> See the Case C-411/06, cited above, paras 46-47.

<sup>3</sup> OJ L 13, 19.1.2000, p. 12.

<sup>4</sup> OJ L 257, 28.8.2014, p 73.

It should first be noted that since the purpose of the proposal is to update Regulation (EU) No 216/2013 to incorporate technological and legislative developments which have taken place since its entry into force in 2014 in order to make the publication of the OJ more efficient, this dossier does not entail any potential policy choices. The proposal is therefore purely technical in nature.

Against the background of the above-mentioned case-law from the Court of Justice, and taking into account that Parliament gave its consent to the adoption of Regulation (EU) No 216/2013 by making use of the flexibility clause in Article 352 TFEU, the fact that this amending proposal was motivated by the emergence of technological changes relating to electronic signatures brought about by Regulation No 910/2014, which was adopted on the basis of Article 114 TFEU, does not have the effect of altering the legal basis of Regulation (EU) No 216/2013.

It should also be noted that Parliament, when it gave its consent to the adoption of Regulation (EU) No 216/2013, rejected the notion that it could have been adopted by making use of the ordinary legislative procedure on the basis of the so-called “implied competence” theory with the justification that this theory had been made obsolete by the many Treaty revisions and changes to decision-making procedures which have taken place in the close to 60 years which have passed since the Council decision of 1958 setting-up the OJ was adopted on the basis of that theory.<sup>1</sup>

Furthermore, the flexibility clause is only to be used if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers. While the obligation to publish acts in an Official Journal is clear from Articles 287 and 297 TFEU, the fact that Article 114 TFEU provides for the use of the ordinary legislative procedure is therefore irrelevant for this purpose since it does not relate to such publication but to harmonisation in the internal market, the use of which is relevant for Regulation No 910/2014 on electronic signatures but not for Regulation (EU) No 216/2013 on publication of the OJ.

The proposal can therefore not be adopted on Article 114 TFEU alone, but must be adopted on the basis of the flexibility clause in Article 352 TFEU.

The question then becomes whether Article 114 TFEU instead should be included in the legal basis for the proposal together with Article 352 TFEU. According to settled case-law, a single legal basis shall be used when a proposal has a twofold purpose or has a twofold component, but one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental. It is clear in this case that the main purpose of the proposal is publication of the OJ, and that the provisions on electronic signature as derived from Regulation No 910/2014 are in any event merely incidental.

The proposal should therefore be based on Article 352 TFEU.

It should nevertheless be noted that the use of the flexibility clause is cumbersome and

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<sup>1</sup> See the explanatory statement to the draft recommendation of the Committee on Legal Affairs of 14 March 2012 in procedure 2011/0070(APP).

potentially time-consuming – not least given that it is intended to be used sparsely and only exceptionally, that Parliament is only able to say yes or no without any direct involvement in the elaboration of the final text and that some Member States require national parliamentary scrutiny for its use – and that future technological developments in robotics and automation may require the adoption of provisions on the publication of the OJ and the activities of the Publications Office which entail fundamental policy choices. Consideration should therefore be given to the possibility that future revisions of the Treaties may include the addition of an explicit legal basis for the adoption of measures relating to such publication and activities by the use of the ordinary legislative procedure.

## **VI – Conclusion**

In the light of the foregoing analysis Article 352 TFEU constitutes the proper legal basis for the proposal.

## **VII – Recommendation**

At its meeting of 7 September 2017 the Committee on Legal Affairs accordingly decided, by unanimity<sup>1</sup>, to recommend that a letter should be sent to the President with a recommendation to inform the Council and the Commission about the potential problems which could arise should more comprehensive amendments to Regulation (EU) No 216/2013 be proposed in light of technological advances in the future, and whether this could justify the creation, in the context of upcoming governmental conferences to amend the Treaties, of a new, explicit legal basis which makes reference to the ordinary legislative procedure in matters relating to the publication of the Official Journal and the activities of the Publications Office.

Yours sincerely,

Pavel Svoboda

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<sup>1</sup> The following were present for the final vote: Jean-Marie Cavada (acting Chair and rapporteur), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Isabella Adinolfi, Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Kostas Chrysogonos, Sergio Gaetano Cofferati, Lidia Joanna Geringer de Oedenberg, Mary Honeyball, Sylvia-Yvonne Kaufmann, Gilles Lebreton, António Marinho e Pinto, Julia Reda, Evelyn Regner, Axel Voss, Rainer Wieland, Tiemo Wölken, Tadeusz Zwiefka, Gabriel Mato, Andrey Novakov (for Rosa Estaràs Ferragut, Emil Radev pursuant to Rule 200(2)).