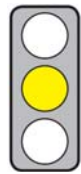


Status: 10 October 2011

MAIN ISSUES

Objective of the Regulation: The general rules and principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers are to be laid down procedurally.

Parties affected: Member States, all parties affected by basic acts.



Pros: An advisory procedure serving as the standard procedure, an examination procedure with the committee's right to veto and an appeal procedure which is limited to certain cases all increase transparency and efficiency when adopting implementing measures.

Cons: (1) The aim to objectify the procedure of choosing between the advisory and the examination procedure is not achieved.

(2) Under advisory procedures, i.e. in most cases, neither Member States nor the European legislator has a right to veto if the Commission exceeds its implementing powers.

CONTENT

Title

Regulation (EU) No. 182/2011 of the European Council of 16 February 2011 laying down the **rules** and general **principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers**

Brief Summary

Unless otherwise provided for, the articles quoted refer to the Regulation.

► Context and objective

- “Implementing acts” serve to implement a legally binding EU legal act (“basic act”) (Art. 291 (1) TFEU). By definition they must not be confused with “delegated legal acts”; by adopting delegated legal acts the Commission can complement or amend the basic act itself (Art. 290 (1) TFEU).
- Implementing binding legal EU acts according to national law is in principle the duty of Member States (Art. 291 (1) TFEU). If an EU-wide implementation is required, the basic legal act serves to delegate implementing powers to the Commission (Art. 291 (2) TFEU).
- The Member States control the exercise of the implementing powers by the Commission (Art. 291 (3) TFEU). To this end, committees chaired by the Commission are appointed consisting of representatives from Member States.
- The Regulation rules the control of implementing powers by the committees.

► Control of implementing powers through the committee procedure

- The committees are composed of one representative each per Member State and one representative of the Commission who chairs the committee (Art. 3 (2)).
- Controlling procedures are provided as follows:
 - the advisory procedure (Art. 4),
 - the examination procedure (Art. 5) and
 - the appeal procedure which, in certain cases, may serve as a “second instance” following the examination procedure (Art. 6).
- Regarding control, the basic act must at least stipulate that:
 - uniform conditions of implementation are needed (Art. 1, Recital 2) and
 - the implementing acts “be subject to the control of Member States” (Art. 1).
- The basic act may provide for the application of the advisory procedure or the examination procedure. However, this is not mandatorily required (Art. 2 (1)).

► Advisory procedure

- The advisory committee delivers its opinion on the draft implementing act by a simple majority (Art. 4 (1)).
- The opinion delivered by the advisory committee is not binding for the Commission. Therefore, the Commission takes “the utmost account” of the opinion (Art. 4 (2)).

► Examination procedure

- Under the examination procedure, the committee delivers its opinion on draft implementing acts by a qualified majority (Art. 5 (1) in conjunction with Art. 16 (4) and 5 TEC, Art. 238 (3) TFEU). In the case of a
 - positive opinion, the Commission adopts the implementing act (Art. 5 (2));
 - with a negative opinion, the Commission does not adopt the implementing act (Art. 5 (3)) in principle.

- If the Commission deems an implementing act “necessary”, it may:
 - submit to the examination committee an amended draft version within two months of the delivered opinion (Art. 5 (3)); or
 - submit to the appeal committee (Art. 6) an amended draft version for further deliberation within one month of delivery of the negative opinion (Art. 5 (3) in conjunction with Art. 6).
 - If the committee fails to deliver an opinion, the Commission may in principle:
 - adopt the implementing act; or
 - submit an amended draft to the examination committee (Art. 5 (4) sub-par. (1)).
 - In “particularly sensitive sectors” and other defined cases, the Commission must not adopt implementing acts without a prior opinion delivery (Art. 5 (4) sub-par. 2, Recital 14):
 - The planned implementing act affects areas such as:
 - taxation and financial services;
 - health care or the protection of people, animals, plants; or
 - final trade policy measures with a multilateral scope.
 - The basic act defines whether or not an implementing act may be adopted without an opinion delivery.
 - The examination committee may reject planned implementing acts by simple majority.
 - However, if the Commission deems such implementing acts “necessary”, it may:
 - submit to the examination committee an amended draft within two months following the voting (Art. 5 (4) sub-par. (3)); or
 - submit to the appeal committee (Art. 6) an amended draft for further deliberation within one month of the delivered opinion (Art. 5 (4) sub-par. (3) in conjunction with Art. 6).
 - In exceptional cases, the Commission may adopt an implementing act “without delay”, even if the delivered opinion was negative (Art. 5 (3)) or without a delivery of opinion in specified cases (Art. 5 (4) sub-par. (2)). This is applicable only if the basic act refers to the administrative procedure pursuant to the comitology decision (1999/468/EC) (Art. 7 in conjunction with Art. 13 (3)). Then, the objective of the Commission on adoption must be:
 - to avoid creating a “significant disruption” of the markets in the area of agriculture; or
 - to protect the financial interests of the EU, meaning the financial interests affecting the EU budget and all financial activities related to the EU (Art. 7 (1)).
 - Upon adoption, in exceptional cases the Commission submits the implementing act to the appeal committee (Art. 7 (2)).
- **Selection of procedures: advisory or examination procedure**
- When selecting the procedure, the “nature” or “impact” of the implementing act must be taken “into account” (Art. 2 (1)). Normally, the advisory procedure applies (Art. 2 (3)).
 - The examination procedure may be applied in exceptional cases if the implementing act:
 - is of “general scope” (Art. 2 (2) lit. a), or
 - the following policy areas are affected (Art. 2 (2) lit. b):
 - programmes with substantial budgetary implications (Recital 12);
 - the common agricultural and common fisheries policies;
 - the environment, security and safety, or protection of the health or safety, of humans, animals or plants;
 - the common commercial policy;
 - taxation.
 - In the quoted cases, the advisory procedure may, however, be applied in “duly justified cases” (Art. 2 (3)).
- **Appeal procedure**
- The appeal procedure convenes “at the appropriate level” (possibly high-ranking representatives of the Member States) if the Commission wishes second consultation procedures regarding a draft implementing act (Art. 5 (3), Art. 5 (4) sub-par. 3) or if statutorily required (Art. 5 (5) sub-par. 2, Art. 7 sub-par. 2).
 - A prerequisite for both a positive or negative delivered opinion by the appeal committee is a qualified majority in the committee (Art. 6 (1) in conjunction with Art. 5 (1)). With regard to draft definitive anti-dumping or countervailing measures, however, opinions are temporarily delivered by simple majority until 1 September 2012. In the case of:
 - a positive opinion, the Commission adopts the implementing act immediately;
 - a negative opinion, the Commission does not adopt the implementing act (Art. 6 (3)).
 - If the committee does not deliver any opinion, the Commission may adopt the implementing act (Art. 6 (3) sub-par. 2). Definitive multilateral protection measures are exempted from this rule and may be adopted only subject to a positive opinion (Art. 6 (4)).
- **General rules regarding the conduct of the committee proceedings**
- The chair of a committee convenes a meeting at the earliest 14 days after submission of the draft implementing act and of the draft agenda to the committee (Art. 3 (3) sub-par. 2). In “duly justified cases”, it may deviate from this rule. The appeal committee must not be convened any later than after six weeks (Art. 3 (7) sub-par. 3).

- The committee chair may lay down a time limit that is “proportionate” “to the urgency of the matter”, allowing the committee to examine the draft implementing act and express their views (Art. 3 (3) sub-par. (2)). Irrespective of this, the appeal committee is to deliver an opinion within two months of the date of referral (Art. 3 (7) sub-par. 3 in conjunction with Art. 6).
 - The committee chair may amend the draft until the committee delivers an opinion (Art. 3 (4) sub-par. (1)). The committee chair is to “endeavour” to find solutions “which command the widest possible support within the committee” (Art. 3 (4) sub-par. 2).
 - The committee chair may obtain the committee’s opinion by written procedure.
 - If, then, no committee member categorically opposes the draft implementing act or does not explicitly abstain from voting thereon, it is regarded as having been tacitly agreed to (Art. 3 (5) sub-par. 1).
 - Every committee member may “request” within the set time limit that the written procedure be terminated without result, as can the committee chair within the given time limit. In such a case, a committee meeting is convened within a “reasonable” time (Art. 3 (5) sub-par. 2).
 - Each committee may adopt its own rules of procedure on the proposal of its chair [Art. 9 (1), Art. 3 (7) sub-par. 2]. They are to be based on [Standard Rules](#) (Art. 9 (1)).
- **Cases of urgency**
- On “duly justified imperative grounds of urgency” the basic act may stipulate that the Commission adopts an implementing act without its prior submission to a committee (Art. 8 (1) and 2). This also applies to provisional anti-dumping or countervailing measures (Art. 8 (5)).
 - The implementing act remains in force:
 - generally for a maximum period of six months;
 - more than six months if the basic act provides so (Art. 8 (2)).
 - At the latest 14 days after adoption, the Commission must submit the implementing act to the relevant advisory or examination committee (Art. 8 (3)). If the examination committee delivers a negative opinion, the Commission is to repeal immediately the implementing act (Art. 8 (4)).
- **Right of scrutiny for the European Parliament and the Council**
- If the European Parliament and the Council hold the view that the Commission’s draft implementing act exceeds the implementing powers provided for in the basic act, they may indicate this to the Commission. The precondition for exercising such a “right of scrutiny” is that the basic act was adopted under the ordinary legislative procedure (Art. 11).
 - The Commission examines the information and informs the European Parliament and the Council as to whether the draft implementing act is to be maintained, amended or withdrawn (Art. 11).
- **Adaptation of existing basic acts to the new legislation**
- The new committee procedures stipulated under this Directive also apply for basic acts which still refer to the Comitology Decision, (Art. 13 (1)).
 - Excluded are:
 - the regulatory procedure with scrutiny according to Art. 5a of the Comitology Decision (Art. 12 sub-par. 2) and
 - pending procedures in which a committee has already delivered its opinion (Art. 14).

Changes to the Status Quo

The changes presented refer to the Comitology Decision 1999/468/EC.

- Committee proceedings apply only to implementing acts, for unlike the EC Treaty (ex-Art. 202 TEC), the Lisbon Treaty makes a distinction between delegated acts (Art. 290 TFEU) and implementing acts (Art. 291 TFEU) in respect of the delegation of powers to adopt legal acts.
- The European Parliament and the Council are no longer involved in committee proceedings. However, they may indicate to the Commission if a draft implementing act exceeds the implementing powers defined in a basic act. This “right of scrutiny” follows the same right issued to the European Parliament under the framework of the Comitology Decision (there Art. 8).
- The number of committee proceedings is to be reduced; an advisory procedure (Art. 4) still exists (Art. 3 Comitology Decision). The new examination procedure (Art. 5) replaces the existing regulation and administration procedures (Art. 4 and 5 Comitology Decision). In certain cases, the examination procedure will be followed by an appeal procedure as a “second instance” (Art. 6). The procedure for protective measures (Art. 6 Comitology Decision) is in general replaced by the provision on cases of urgency (Art. 8).
- Whereas until now the European legislator could determine, due to non-binding criteria, which type of committee procedure was to be applied (Art. 2 Comitology Decision), in future the advisory procedure is to be applied as a rule; the examination procedure may only be applied if certain criteria are complied with.
- The right of the committee chair to request opinions in writing and to amend the drafts before the opinions are delivered has not actually been laid defined until now, but it has been practiced .
- What is new is that in future special rules will also apply to measures of EU commercial policy (e.g. antidumping or countervailing measures).

Policy Context

S. [CEP Policy Brief](#) on the previous Proposal COM(2010) 83.

Legislative Procedure

The Regulation entered into force on 1 March 2011.

Formalities

S. [CEP Policy Brief](#) on the previous Proposal COM(2010) 83.

ASSESSMENT

Legal Assessment

Limiting the number of possible committee procedures to an advisory procedure, an examination procedure and an appeal procedure as a “second instance” **creates more transparency and efficiency**. **Providing for the advisory procedure as the standard procedure** and only allowing the examination procedure where Member State interest in substantial control is very high **facilitates the adoption of implementing measures**. The advisory procedure is less complex than the examination procedure; the Commission remains flexible due to the non-binding nature of the opinions delivered by the committees but still can rely on the expertise of the committee members. Member States are, however, at risk of being circumvented by the Commission (for further details see [CEP Analysis](#)).

The objective of the Regulation, to objectify the procedure of choosing the advisory or examination procedure by way of binding criteria is not achieved: in addition to explicitly mentioned policy areas, the examination procedure is to be applied where there is “general scope” – unless the advisory procedure is preferred in “duly justified cases”, despite the fact that the criteria in specific cases would appear to favour the examination procedure. What exactly “general scope” or “duly justified cases” mean is not explained. The scope for definition regarding the procedure to be applied is thus without any real limitations.

Where sensitive policy constellations are affected, the appeal procedure as a “second instance” **enables the Commission** in the case of negative or missing delivered opinions **to consult higher-ranking levels in Member States to find out whether or not an implementing act** deemed necessary by the Commission **can be adopted**.

For the efficient control and implementation of the basic act, it makes sense that there are principally no opinions delivered by the advisory or examination committees **standing in the way of adopting implementing acts**. However, hindering efficiency is the fact that after failing to find agreement regarding a negative opinion due to there not being a qualified majority, a simple majority in the examination committee then suffices to prevent the adoption of the implementing act. In other words, the hurdle to opposing adoption is in retrospect lowered, compared to the actually required qualified majority. However, the Commission may then assert the appeal procedure.

The European Parliament and the Council are not involved in the committee procedure. This is in line with the requirements of Art. 291 TFEU, according to which the implementation of European acts is subject to Member States. **At the same time, however, this means that under the advisory procedure – which is applied in most cases – neither the Member States nor the European legislator have the right to veto if the Commission exceeds the implementing powers transferred to it.** The right to complain does not suffice.

Legislative Competency

The EU legislator lays down the general terms and conditions for controlling all the implementing powers delegated to the Commission pursuant to Art. 291 (3) TFEU.

Conclusion

Limiting committee procedures to an advisory procedure, an examination procedure and an appeal procedure creates more transparency and efficiency. Setting the advisory procedure with a non-binding delivered opinion by the committee as the standard procedure facilitates the adoption of implementing measures. The aim to objectify the procedure for choosing the advisory or examination procedure is not achieved, for the criteria do not set any real limits to the scope of selection. The appeal procedure following the examination procedure in defined cases allows for a “second instance” in politically sensitive constellations. In the advisory procedure, i.e. in most cases, neither the Member States nor the European Parliament or the Council have the right to veto if the Commission exceeds its implementing powers.