

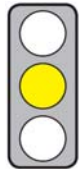
# COMMITTEE PROCEEDINGS FOR THE CONTROL OF IMPLEMENTING POWERS

Status: 3 May 2010

## MAIN ISSUES

**Objective of the Regulation:** The Member States' right of control over the Commission's exercise of implementing powers are to be shaped procedurally.

**Parties affected:** Member States, parties (indirectly) affected by each (basic) act.



**Pros:** The restriction to only two procedures, namely either the advisory procedure as the ordinary procedure or the examination procedure including the committee's right to veto, increases efficiency when adopting implementing measures.

**Cons:** (1) The aim to objectify with binding criteria the choice between either the advisory or examination procedure is not achieved.

(2) Basic procedural rules allow the Commission unjustified room for manoeuvre at the cost of Member States.

## CONTENT

### Title

**Proposal COM(2010) 83** of March 2010 for a **Regulation** of the European Parliament and the Council **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 Proposal.

#### ► Context and targets

- “Implementing acts” serve the purpose of implementing legislative EU acts (“basic act”) (Art. 291 (1) TFEU). They must be distinguished from “delegated acts”; by adopting delegated acts the Commission is able to complement or amend the basic act itself (Art. 290 (1) TFEU).
- The implementation of legally binding EU acts subject to national law is principally a task of the Member States (Art. 291 (1) TFEU). If an implementation is required throughout the EU, the basic act provides for a conferment of powers upon the Commission.
- The Member States control the Commission's exercise of implementing powers. The general rules and principles concerning such control mechanism are to be laid down in a regulation (Art. 291 (3) TFEU in conjunction with Art. 294 AEUV), which is the aim of the present Proposal.

#### ► Comitology procedure

- The Member States control the Commission through committees. These consist of one representative of the Member States each and one representative of the Commission, the latter being in charge of chairing the committee concerned (Art. 3 (2)).
- There are two comitology procedures possible: either the advisory procedure (Art. 4) or the examination procedure (Art. 5).
- Both procedures are applicable only if the basic act stipulates that:
  - the delegation concerns a “legally binding implementing act” (Art. 1) and
  - the implementing act may be adopted only subject to the prior “control of the Member States” (Art. 1; Recital 5).

#### ► Advisory procedure

- An advisory committee delivers its opinion on the draft version of an implementing act by the simple majority of its members (Art. 4 (1) in conjunction with Art. 238 (1) TFEU).
- For the Commission, the opinion delivered is not legally binding. The Commission is to take “the utmost account” of the conclusions drawn from the discussions within the committee concerned and of the opinion delivered. It is to inform the committee as to the extent to which the opinion has been taken account of (Art. 4 (2)).

#### ► Examination procedure

- An examination committee is to deliver its opinion on the draft version of an implementing measure (Art. 5 (1)). For the (either approving or negative) opinion a qualified majority in the committee is required.

- If the committee does not deliver an opinion, the Commission may either adopt the proposed measure or submit an amended draft (Art. 5 (4)).
  - In the case of an approving opinion, the Commission may adopt the measure. It may refrain from an adoption only under “exceptional circumstances” or in the case of “new elements” arising. In such an event it may submit a new draft version to the committee concerned. (Art. 5 (2))
  - In the event of a negative opinion the Commission is to reject the measure. However, it may resubmit either the same or an amended draft version to the committee (Art. 5 (3)).
  - In exceptional cases, the Commission may adopt measures, despite a negative opinion delivered by the committee in charge.
    - This is possible where otherwise “within an imperative deadline”
      - significant disruptions of the markets would occur,
      - or a risk for the security or safety of humans,
      - or for the financial interests of the Union (Art. 5 (5) sub-par. 1).
    - The Commission must resubmit such measures to the committee in charge, enabling it to deliver a second opinion within the period of one month. If it fails to do so, it must repeal the measure adopted. The Commission must also repeal the measure if the second opinion does not approve it. Otherwise it remains in force (Art. 5 (5) sub-par. 2).
- **Applicable procedure**
- The question as to which of the committee proceedings are applicable is defined in the basic act.
  - As a rule, the advisory procedure is to be applied (Art. 2 (3)).
  - The examination procedure may be applied only in exceptional cases where the implementing measures
    - are “of general scope” (Art. 2 (2) lit. a) or
    - relate to one of the following policy areas (Art. 2 (2) lit. b):
      - common agricultural or common fisheries policies,
      - environment, security and safety or protection of the health or safety of humans, animals or plants and
      - the common commercial policy.
  - The advisory procedure may be applied in the quoted cases if it is “considered to be appropriate” (Art. 2(3)).
- **Procedural rights of the Commission concerning committees chaired by the Commission**
- The chair of a committee may amend a draft until an opinion has been delivered (Art. 3 (4)).
  - The chair of a committee may set a deadline “according to the urgency of the matter” in which the committee must deliver an opinion (Art. 3 (4)).
  - The chair of the committee may request the committee’s opinion by written procedure.
    - If a member of the committee then does not reject the draft explicitly, it is deemed a tacit agreement (Art. 3 (5) sub-par. 1).
    - Each committee member may apply for the written procedure to be terminated. The chairperson decides on the matter (Art. 3 (5) sub-par. 2).
- **Matter of urgency**
- On “imperative grounds of urgency” the Commission may declare an implementing measure immediately applicable if provided for in the basic act (Art. 6 (1)). Thereupon, the measure is submitted to the committee in charge, which then may deliver a subsequent opinion.
  - If the examination procedure is applicable, the Commission must repeal the measure in case the opinion delivered by the committee in charge is negative.
  - In exceptional cases, the Commission may nevertheless maintain it (Art. 6 (5) sub-par. 1)
    - for the protection of the environment,
    - for the protection of the safety and health of humans, animals and plants or
    - to avoid disruption of the markets.
 If a measure is maintained on grounds of exception, the Commission must resubmit either the measure concerned or an amended version for further deliberation (Art. 6 (5) sub-par. 1).
- **Register of committee proceedings**
- The European Parliament and the Council are to have access to a register kept by the Commission and which contains comprehensive information on ongoing committee proceedings (Art. 8 (1)).
  - Information on the final adoption of implementing measures and statistical data on the working of the committees should be made public (Art. 8 (3)).
- **Adapting existing basic acts to the new legal position**
- With the entry into force of the new Regulation (Art. 9), the comitology decision (1999/468/EC) will be repealed.
  - For basic acts which still refer to the comitology decision (1999/468/EC), the new Regulation is to apply automatically two months following its entry into force (Art. 10).
  - Exceptions to this rule are:
    - regulatory procedure with scrutiny pursuant to Art. 5 of the comitology decision (Art. 10) and
    - ongoing procedures where committees have already delivered their opinion (Art. 11).

## Changes Compared to the Status Quo

Changes are described in comparison with the comitology decision 1999/468/EC.

- ▶ The European Parliament and the Council no longer participate in committee proceedings.
- ▶ Committee proceedings now apply only to implementing acts, for unlike the EC Treaty (ex-Art. 202 EC Treaty), the Lisbon Treaty distinguishes between delegated acts (Art. 290 AEUV) and implementing acts (291 TFEU) when referring to the delegation of powers to adopt acts.
- ▶ The number of committee proceedings is to be reduced to two; the advisory procedure (Art. 4) still exists (Art. 3 comitology decision). The new examination procedure (Art. 5) replaces the hitherto existing regulatory and management procedure (Art. 4 and 5 comitology decision). The former safeguard procedure (Art. 6 comitology decision) is covered by the procedure for matters of urgency (Art. 6).
- ▶ While it has been the case until now that the Union legislator could decide on the basis of non binding criteria which committee proceedings had to be applied (Art. 2 comitology decision), in future, the advisory procedure is prescribed as a rule; the examination procedure may be applied only if certain criteria are met.
- ▶ According to the examination procedures, the committee itself may prevent the adoption of a measure instead of the Council, as has hitherto been the case in regulatory and management procedures.
- ▶ To date, the Commission was obliged to adopt draft measures if the management committee did not deliver any opinion or in the regulatory procedure the Council did not reject the draft in due time. In the examination procedure the Commission will in future be free to adopt measures or to resubmit an amended version of them to the committee if neither an approving nor any negative opinion is delivered.
- ▶ The extraordinary proceeding conditions in the case of matters of urgency are new.
- ▶ The possibilities that the committee chair was able to request written statements and to amend drafts prior to opinions being delivered were until now not expressly stipulated, they were but practiced.

## Political Context

With the entry into the force of the Lisbon Treaty the delegation of legislative powers pursuant to Art. 290 TFEU (“implementing acts”) was recast. With Art. 290 TFEU the legal instrument of “delegated acts” to amend or complement non-essential basic acts was introduced as a new category. With regard to Art. 290 TFEU – which unlike Art. 291 TFEU is directly applicable – the Commission has already published a Communication [COM(2009) 673 of 9 December 2009; cp. [CEP Commentary](#)]. Through this splitting, in terms of primary law the distinction is already made between the delegation of legislative powers and the conferment of executive and/or implementing powers. The control of these delegated powers is harmonized accordingly: the European Parliament and the Council control delegated legislative powers (Art. 290 TFEU), while the Member States control delegated implementing powers (Art. 291 TFEU). The delegation of implementing powers to the Commission is – unlike the hitherto practice (ex-Art. 202 third indent EC Treaty) – no longer carried out solely by the Council but the Union legislator, in other words by the Council and the European Parliament together, and must be stipulated already have been laid out in the basic act (Art. 291 (2) TFEU).

## Legislative Procedure

9 March 2010	Adoption by Commission
5 July 2010	First reading Reading in the European Parliament

## Options for Influencing the Political Process

Leading Directorate General:	Secretariat-General
Committees in the European Parliament:	Legal Affairs (in charge), rapporteur: Szájer József (EPP Group, HU)
Committees in the German Bundestag:	Committee on the affairs of the European Union (in charge)
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany 29 votes)

## Formalities

Legal competence:	Art. 291 (3) TFEU
Form of legal competence:	Exclusive competence
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure; ex-Art. 251 EC Treaty)

# ASSESSMENT

## Legal Assessment

The Regulation Proposal reduces the number of committee proceedings to only two in comparison to the comitology decision, namely to either advisory or examination procedures, thereby creating greater streamlining and transparency. Refraining from the integration of the legislative bodies in the control mechanisms (the European Parliament and the Council) is in compliance with the requirements of Art. 291

TFEU, since this is the provision that stipulates that the implementation of European acts and the control of delegated implementing powers are subject to the Member States.

**Establishing the advisory procedure as the standard** and allowing for examination procedures only where Member States have a high interest in a tight control **makes the adoption of implementing measures easier**. The advisory procedure is less complex than the examination procedure; the Commission remains flexible due to the non-binding nature of the committee's statements and, at the same time, has access to the expertise of the committee members. The political responsibility clearly lies with the Commission. The Member States are able to put the Commission under political pressure merely by threatening to deliver a negative opinion. In fact, Member States are put at a disadvantage, as in the advisory procedure they have no sweeping impact on the adoption of implementing measures and thus cannot prevent them. Nonetheless, this disadvantage can be limited by stipulating certain requirements in the basic act according to which the implementing measure must be designed. However, this balance of disadvantage is somewhat limited due to the fact that when negotiating the basic act, Member States do not yet know how the Commission will later want to organize its implementation measures. Apart from that, not only the Council has influence on the legislative procedure but also the European Parliament.

**The Regulation's aim to objectify with binding criteria the choice between the advisory and the examination procedure is not achieved**, since analogous to the criteria for management and regulatory procedures already mentioned in the comitology decision (though in a non-binding manner), the examination procedure is to be applied to matters of "general scope" in addition to explicitly quoted policy areas, unless the advisory procedure is viewed as "appropriate" although the criteria of the case concerned speak for the examination procedure. Yet there are no definitions given in the Regulation Proposal as to what is to be understood by "general scope" or "appropriate". The provision regarding the question of which procedure is relevant and applicable does not, therefore, really set any limits to discretion. The Commission may, on grounds of its right of initiative allowing for the power to design, utilize this to enforce the non-binding advisory procedure; it is, however, in the interest of the Council to ensure that Member States have a right to veto during the legislative process through establishing examination committees.

**Further procedural rules allow the Commission unjustified room for manoeuvre at the cost of Member States**. For instance, it is not comprehensible why within the examination procedure the Commission may, against a negative opinion of the committee in charge, adopt implementing measures or, respectively, abstain in the case of an approving opinion. This would be substantiated only where facts have obviously changed. The situation is further exacerbated by the ambiguity of the provision whereby the Commission may under "exceptional circumstances" ignore the committee's consent, resulting in an excessive latitude of judgement for the Commission. In light of an efficient implementation it is reasonable, though, that a missing committee opinion does not prevent the Commission from adopting a measure.

#### Legislative competence

The Union legislator establishes the general rules and principles for the control of the Commission's exercise of implementing powers pursuant to Art. 291 (3) TFEU.

#### Compatibility with EU Law

Legally questionable is the provision that the automatic alignment of existing basic acts to the new rules of procedure is not to be effected until two months following entry into force of the Regulation. The reason for this delay is a technical one with regard to the adaptation process. As the comitology decision 1999/468/EC is to be repealed with the entry into force of the Regulation, there would be a regulatory loophole for this period of two months as the basic acts still refer to the comitology decision. Therefore, the regulation for repealing the comitology decision should also not apply until two months following its entry into force.

#### Compatibility with German Law

Unproblematic.

#### Conclusion

The planned committee proceedings reduce the number of procedures of the comitology decision to either an advisory procedure or an examination procedure, granting to the committee the right to veto the adoption of implementing measures. To establish the advisory procedures with a non-binding statement by the committee as the ordinary procedure makes it easier to adopt implementing measures. The loss of control on the part of Member States and, at the same time, the considerable gain in power for the Commission due to the advisory procedure being the ordinary procedure, can be limited by stipulating certain requirements relating to the exercise of implementing powers in the basic act. The aim of the Regulation, namely to objectify with binding criteria the choice between either advisory or examination procedures, is not met. For the criteria for choosing either the advisory or the examination procedure do not set any real limits to the exercise of discretion. Some of the provisions of the Regulation Proposal – in particular on the examination procedure – are too vague and thus create unjustified room for manoeuvre for the Commission at the cost of Member States.