

Comitology Reform 2017

Why we need to include the European Parliament as well as the Council

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The European Commission's proposal to amend the Comitology Regulation regarding the procedure in the appeal committee is basically appropriate:

- ▶ Facilitating the decision-making process is appropriate because otherwise the appeal committee offers no institutional added value.
- ▶ Convening a further meeting of the appeal committee at ministerial level should be rejected because it would unnecessarily prolong the procedure.
- ▶ Making the votes public is appropriate because the political responsibility of individual Member States should be made clear.
- ▶ The Commission should also be able to ask for a non-binding opinion from the European Parliament, as well as from the Council, in order to increase the democratic legitimacy of politically sensitive implementing acts.

Introduction	3
1 Status quo: Current comitology procedure	4
1.1 Purpose of the comitology procedure	4
1.2 Control of the Commission by Member States.....	4
1.2.1 Advisory procedure in the committee	5
1.2.2 Examination procedure in the committee and appeal committee	5
2 Commission’s amendment proposal.....	7
3 Assessment of the Commission’s proposal.....	8
3.1 Changing the voting rules in the appeal committee is appropriate	8
3.1.1 No regard for absences and abstentions when calculating the qualified majority..	8
3.1.2 Quorum with simple majority of yes or no votes.....	9
3.2 Convening a further meeting of the appeal committee at ministerial level would unnecessarily prolong the procedure.....	10
3.3 Making the voting public clarifies the responsibility of the individual Member States.....	10
3.4 The Commission should also be able to ask for a non-binding opinion from the European Parliament as well as from the Council	11
3.4.1 Why the Commission should be able to ask the Council and the European Parliament for a non-binding opinion.....	12
3.4.1.1 Basic principle: Political decisions must be made by the Council and the European Parliament in the basic act.....	12
3.4.1.2 Reality: The comitology procedure: caught between politics, science and technocracy.....	12
3.4.1.3 Problem: Commission’s lack of democratic legitimacy	14
3.4.1.4 Solution: Democratic legitimacy through the Council and the European Parliament.....	14
3.4.2 Inclusion of the Council and the European Parliament does not contradict the system of delegated acts and implementing acts	14
3.4.2.1 Clear distinction between delegated acts and implementing acts is not possible for reasons of law	15
3.4.2.2 For institutional reasons, the choice between delegated acts and implementing acts is a subject of contention between the Council and European Parliament.....	16
3.4.2.3 The abilities of the Council, the European Parliament and the Member States to exert influence overlap in the case of delegated acts and implementing acts.....	16
3.4.2.4 Non-binding opinions do not breach the various control powers relating to delegated acts and implementing acts.....	17
4 Conclusion: How the comitology procedure should be changed regarding the appeal committee	18

Introduction

On 14 February 2017, the Commission submitted a proposal ¹ amending the comitology procedure. ² The Commission wants to make decision-making in the appeal committee easier and more transparent. In addition, the Council will be included in the comitology procedure. This cepInput will first set out the details of the current comitology procedure (Section 1) and the Commission's amendment proposal (Section 2). It will then assess the Commission's amendment proposal (Section 3) and suggest that, in addition to the Council, the European Parliament should also be included in order to increase the democratic legitimacy of implementing acts relating to politically sensitive issues (Section 3.4). This amendment proposal presented here is based on the assumption that politically sensitive issues must not be decided by the Commission but only by the EU legislative, i.e. by the Council and the European Parliament.

¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, COM(2017) 85, of 14.02.2017 (hereinafter COM(2017) 85).

² Regulation (EU) No. 182/2011 of the European Parliament and of the 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 (hereinafter Comitology Regulation); see [cepPolicyBrief](#) Control of Implementing Powers through Committees.

1 Status quo: Current comitology procedure

1.1 Purpose of the comitology procedure

The comitology procedure is part of the legislative procedure of the EU. It refers to the committee procedure³ for adopting implementing acts by the Commission pursuant to Art. 291 TFEU.⁴ In principle, the Member States are responsible for implementing EU law.⁵ However, the Council and the European Parliament can empower the Commission to adopt implementing acts by way of legislative acts or other basic acts, if both institutions consider this to be necessary in order to create uniform conditions in the Member States for the implementation of EU law.⁶ Implementing acts are intended to clarify the basic acts adopted by the Council and the European Parliament and thereby ensure their uniform application in the Member States.⁷ Since the adoption of implementing acts by the Commission encroaches upon the fundamental competence of the Member States to implement EU law, Art. 291 (3) TFEU provides that, when adopting implementing acts in the comitology procedure, the Commission is subject to control not by the Council and the European Parliament but by “Member States”.

The Council and the European Parliament can empower the Commission to adopt delegated acts pursuant to Art. 290 TFEU.⁸ Delegated acts allow the Commission to supplement or amend the non-essential provisions of a legislative act.⁹ The adoption of delegated acts does not take place in the comitology procedure.¹⁰

1.2 Control of the Commission by Member States

In the comitology procedure, implementing acts are either adopted in the advisory or in the examination procedure.¹¹ Which of the two procedures applies, is determined by the Council and by the European Parliament in the basic act. The Comitology Regulation provides that in both procedures, the Commission is controlled by a committee made up of representatives of the Member States.¹² In practice, over 250 specialist committees have been established to carry out the tasks of this committee specified in the Comitology Regulation.¹³ The representatives of the Member States in the committee are generally civil servants of the responsible Ministries in the Member States.

The Commission initiates either the advisory procedure or the examination procedure by submitting a draft implementing act to the committee. The draft together with the agendas of all committee meetings in the comitology procedure must also be sent to the Council and the

³ The term comitology derives from the French word for committee: comité.

⁴ In exceptional cases, implementing acts can also be adopted by the Council. This situation is not covered by the Comitology Regulation, however, and is not therefore considered in this report.

⁵ Art. 291 (1) TFEU.

⁶ Art. 291 (2) TFEU.

⁷ ECJ, Judgement of 18 March 2014, European Commission/European Parliament and Council, C-427/12, EU:C:2014:170, para. 39; Judgement of 15 October 2014, Parliament/Commission, C-65/13, EU:C:2014:2289, para. 43.

⁸ For detail on this see [cepKommentar](#) Implementation of Article 290 of the Treaty on the functioning of the European Union.

⁹ Art. 290 (1) TFEU.

¹⁰ The adoption of delegated acts pursuant to Art. 290 TFEU is only discussed in the context of this cepInput insofar as it serves to give a better understanding of the comitology procedure.

¹¹ Art. 4 and 5 Comitology Regulation.

¹² Art. 3 (2) Comitology Regulation.

¹³ Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) No. 182/2011, COM(2016) 92 of 26.02.2016, p. 3.

European Parliament.¹⁴ Until the committee gives an opinion on the draft from the Commission, any committee member may suggest amendments to the draft and the Commission can submit an amended draft.¹⁵

1.2.1 Advisory procedure in the committee

In the advisory procedure, the committee can only give a non-binding opinion on the Commission's draft of which the Commission must take the "utmost account".¹⁶ Thus the committee has no right of veto as against the Commission.

1.2.2 Examination procedure in the committee and appeal committee

Procedure in the committee

In the examination procedure, the Commission's powers depend on the committee's position on the Commission's draft. In this regard, there are basically three possible scenarios: The Commission

- must adopt the implementing act if the committee votes in favour of the draft,¹⁷
- must not adopt the implementing act if the committee votes against the draft,¹⁸
- can adopt the implementing act if the committee fails to give an opinion.¹⁹

The committee can only decide for or against a proposed implementing act by way of a qualified majority. As in the Council, a double majority of 55 percent of the Member States representing 65 percent of the population of the EU is required.²⁰

Where the committee votes against the Commission's draft, the Commission can submit an amended draft to the committee or an unamended draft to the appeal committee.²¹ By way of exception, where the committee fails to deliver an opinion the Commission is not permitted to adopt the implementing act if

- the proposed implementing act concerns taxation, financial services, the protection of the health or safety of humans, animals or plants,
- the basic act provides that the draft implementing act may not be adopted without an opinion of the committee, or
- although it is not opposed by a qualified majority in the committee, a simple majority of the committee members rejects the Commission's draft.²²

¹⁴ Art. 10 (4) Comitology Regulation.

¹⁵ Art. 3 (4) Comitology Regulation.

¹⁶ Art. 4 (2) Comitology Regulation.

¹⁷ Art. 5 (2) Comitology Regulation.

¹⁸ Art. 5 (3), sentence 1 Comitology Regulation.

¹⁹ Art. 5 (4), sentence 1 Comitology Regulation.

²⁰ Art. 5 (1) Comitology Regulation; COM(2017) 85, p. 7.

²¹ Art. 5 (3) Comitology Regulation.

²² Art. 5 (4), sub-para. 2 Comitology Regulation.

In these cases too, the Commission can submit an amended draft to the Committee or an unamended draft to the appeal committee.²³

Procedure in the appeal committee

The appeal committee is also made up of representatives of the Member States but they rank above the members of the committee.²⁴ Until the appeal committee gives an opinion on the Commission's draft implementing act, any committee member can propose amendments to the draft and submit an amended draft to the Commission.²⁵ Just as in the committee, the Commission's powers depend on the appeal committee's position on the Commission's draft. The Commission

- must adopt the implementing act if the appeal committee votes in favour of the draft,
- must not adopt the implementing act if the appeal committee votes against the draft,
- can adopt the implementing act if the appeal committee fails to give an opinion.²⁶

Like the committee, the appeal committee can only deliver an opinion with a qualified majority.²⁷

Publication

The voting results in the committee and in the appeal committee are published,²⁸ although publication only includes the number of yes and no votes and abstentions. How the individual committee members voted is not published. It is not therefore evident which Member States have voted for or against the proposed implementing act or have abstained.

²³ Art. 5 (4), sub-para. 3 Comitology Regulation.

²⁴ Pursuant to Art. 3 (7), sub-para. 5 Comitology Regulation Member States are to have an "appropriate level of representation" in the appeal committee.

²⁵ Art. 3 (4) Comitology Regulation.

²⁶ Art. 6 (3) Comitology Regulation.

²⁷ Art. 6 (1) in conjunction with Art. 5 (1) Comitology Regulation.

²⁸ Art. 10 (1) (e) Comitology Regulation.

2 Commission's amendment proposal

The Commission only wants to amend the comitology procedure with regard to the examination procedure. The first part of the examination procedure, i.e. the procedure in the committee, remains unaffected by the Commission. Only the procedure in the appeal committee is to be changed. In this regard, the Commission essentially makes the following proposals:

1. The voting rules in the appeal committee will be changed²⁹:
 - a. Committee members who are absent or who abstain will no longer be taken into account when determining the qualified majority.
 - b. Votes in the appeal committee are only valid if a simple majority, i.e. at least 15 of the 28 committee members, vote either for or against the draft implementing act, that is to say less than half of the committee members are absent or abstain. Otherwise, the appeal committee is considered not to have delivered an opinion.
2. If the appeal committee fails to deliver an opinion, the Commission can convene a further meeting of the appeal committee in which Member States are to be represented by their Ministers. In this case, the appeal committee has three months to deliver an opinion.³⁰
3. The voting of the individual committee members in the appeal committee will be made public.³¹
4. If the appeal committee convened at ministerial level also fails to deliver an opinion, the Commission can ask the Council to provide an opinion. It will take this opinion into account when reaching its final decision on the adoption of the proposed implementing act.³²

²⁹ COM(2017) 85, p. 7.

³⁰ COM(2017) 85, p. 8.

³¹ COM(2017) 85, p. 8.

³² COM(2017) 85, p. 8-9.

3 Assessment of the Commission's proposal

The Commission's proposal to amend the procedure in the appeal committee only relates to a small number of comitology procedures: In 2015, the specialist committees delivered a total of 1726 opinions. In the same period, the appeal committee was only engaged in 10 cases, and in the period 2011 to 2015, in a total of 40 cases.³³ However, these generally involved politically sensitive matters, such as the authorisation of the chemical substance Glyphosate or genetically modified food such as maize.

Overall, the Commission's proposal aims to ensure that Member States take greater responsibility in politically sensitive comitology procedures.³⁴ This is basically appropriate because the Commission does not, on its own, have the required democratic legitimacy or public acceptance to make politically sensitive decisions relating to the protection of human health or the environment.

3.1 Changing the voting rules in the appeal committee is appropriate

3.1.1 No regard for absences and abstentions when calculating the qualified majority

The Commission's proposal not to take account of absences and abstentions when calculating the qualified majority in the appeal committee³⁵ is appropriate: Where the committee fails to deliver an opinion, it is only appropriate to convene the appeal committee if it offers an institutional added value. That is only the case where decisions are made in the appeal committee which could not be made in the committee. In practice, however, in most of the cases where the committee fails to deliver a decision, the appeal committee also fails to do so.³⁶ Thus, engaging the appeal committee does not generally produce an institutional added value but simply prolongs the comitology procedure.

If we are nevertheless going to maintain a two-stage comitology procedure, the first stage involving the committee and the second stage involving the appeal committee, the delivery of an opinion in the appeal committee should at least be more likely than in the committee. The voting rules in the appeal committee should therefore be amended to make it easier to achieve a qualified majority than in the committee. On this basis, the Commission's proposal not to take account of absences and abstentions in future, when calculating the qualified majority, is appropriate because a qualified majority for or against the proposed implementing act can then be achieved with a smaller number of votes being cast.

³³ COM(2017) 85, p. 5.

³⁴ COM(2017) 85, p. 6.

³⁵ COM(2017) 85, p. 7.

³⁶ COM(2017) 85, p. 5; see also the Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) No. 182/2011, COM(2016) 92 of 26.2.2016, p. 5.

No return to the old comitology procedure

Contrary to repeated claims³⁷, the Commission's proposal does not mean a return to the old comitology procedure applicable before the current Comitology Regulation came into force in 2011.³⁸ Under the old comitology procedure, the Commission had no discretion when adopting implementing acts. If the committee or the Council voted for or against the proposed implementing act, the Commission was bound by this decision. However, where the committee and the Council failed to deliver a decision, the Commission still had to adopt the proposed implementing act.

Under the current proposal from the Commission amending the Comitology Regulation, it is still possible for the appeal committee not to deliver an opinion. Even where absences and abstentions are not taken into account, a qualified majority for or against the implementing act may still not be achieved. Then, as before, the Commission itself has to decide on adopting the implementing act.

No breach of the voting rules in primary law

The Commission's proposal to amend the rules on calculating the qualified majority in the appeal committee is not in breach of the voting rules contained in primary law. Art. 291 TFEU does not contain any requirements on voting in the comitology procedure. The Comitology Regulation provides that the calculation of the qualified majority in the committee and in the appeal committee takes place pursuant to Art. 16 (4) and (5) TEU and Art. 238 (3) TFEU.³⁹ These provisions determine how the qualified majority is calculated in the Council. Since the committee and the appeal committee are both EU institutions independent of the Council, Art. 16 (4) and (5) TEU and Art. 238 (3) TFEU only apply in the comitology procedure because and insofar as the Comitology Regulation declares these provisions to be applicable. The Commission can therefore propose that the calculation of the qualified majority in the Comitology Regulation be regulated differently to Art. 16 (4) and (5) TEU and Art. 238 (3) TFEU.

3.1.2 Quorum with simple majority of yes or no votes

The Commission's proposal, to base the quorum on the simple majority⁴⁰, is appropriate: This ensures that the decisions of the appeal committee are representative.

³⁷ See e.g. Jacqu , Une nouvelle r forme de la Comitologie - En arri re toute, Droit de l'Union europ enne, available at: <http://www.droit-union-europeenne.be/433583711> (last accessed 17 July 2017); Weimer, No More Blame Game: Back to the Future of Comitology, Verfassungsblog: <http://verfassungsblog.de/no-more-blame-game-back-to-the-future-of-comitology/> (last accessed 17 July 2017).

³⁸ Before the current Comitology Regulation came into force, the comitology procedure was governed by Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

³⁹ Art. 5 (1) and Art. 6 (1) Comitology Regulation.

⁴⁰ COM(2017) 85, p. 7.

3.2 Convening a further meeting of the appeal committee at ministerial level would unnecessarily prolong the procedure

The Commission's proposal, to allow a further meeting of the appeal committee in which Member States are to be represented by their ministers⁴¹, should be rejected. The proposal does not correspond to any institutional added value and would therefore prolong the procedure unnecessarily. According to the Commission's proposal, the appeal committee has three months in order to deliver an opinion in a further meeting at the ministerial level. However, if the appeal committee fails to deliver an opinion in its usual formation, even under the proposed new voting rules, it is unlikely that the Ministers will deliver one. The Commission's proposal creates no incentive for the Member States to vote any differently in the additional meeting than they did before.

In addition, it is hardly likely that Member States will actually be represented by their Ministers. In the Council, where under Art. 16 (2) TEU representation should be at ministerial level, Member States are, in practice, often only represented by Secretaries of State or civil servants of the respective Permanent Representation. It is therefore even less likely that Member States will send their Ministers to a meeting in the comitology procedure.

3.3 Making the voting public clarifies the responsibility of the individual Member States

The Commission's proposal, to make public the voting of the representatives of the Member States in the appeal committee,⁴² is appropriate: Under Art. 10 (3), sentence 2 TEU, decisions in the EU should be taken as openly and as closely as possible to the citizen. Other provisions of the EU Treaties, however, give rise to a tiered system of transparency. Legislative proceedings are given a high level of transparency: The meetings of the European Parliament are always public.⁴³ The same applies to meetings of the Council where they relate to legislation.⁴⁴ EU documents also have to be published insofar as they relate to legislation.⁴⁵ Other than for legislation, the EU Treaties do not contain any special requirements on transparency. The meetings of other institutions are therefore not generally public and documents are only accessible where this is stipulated under secondary law.⁴⁶ Thus transparency is primarily required where political decisions are involved. Otherwise, transparency is only provided to a limited degree.

The comitology procedure is currently characterised by a low level of transparency: The work, both in the committee and in the appeal committee, is deemed to be confidential.⁴⁷ The Commission only publishes the result of voting, i.e. the number of yes and no votes and abstentions. This does not show how the representatives of the individual Member States voted nor is the content of the debates in the appeal committee made public.

⁴¹ COM(2017) 85, p. 8.

⁴² COM(2017) 85, p. 8.

⁴³ Art. 15 (2) TFEU.

⁴⁴ Art. 15 (2) TFEU.

⁴⁵ Art. 15 (3), sub-para. 5 TFEU).

⁴⁶ See in particular Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁴⁷ COM(2017) 85, p. 8.

The low level of transparency in the comitology procedure basically fits into the tiered system of transparency under EU law. In the vast majority of cases, comitology procedures only relate to technical details on the implementation of basic acts. These details can usually be regulated at the first level in one of the specialist committees.

Where, in the exceptional case, the appeal committee has to be engaged, however, it is not generally just technical details of regulation that are concerned but politically sensitive decisions relating for example to the protection of human health or the environment.⁴⁸ Given the tiered system of transparency, these procedures, due to their political significance, must be accorded a higher level of transparency than uncomplicated procedures which can be dealt with in the committee. If nothing else, this will clarify the political responsibility of the individual Member States.

3.4 The Commission should also be able to ask for a non-binding opinion from the European Parliament as well as from the Council

The Commission's proposal of allowing the Commission to ask the Council for an opinion where the appeal committee fails to deliver an opinion,⁴⁹ is a step in the right direction: The proposal has the aim of passing on politically sensitive issues, which may arise in the appeal committee, to an institution which is responsible for making political decisions. By proposing only to include the Council, i.e. the Governments of the Member States, in the comitology procedure, the Commission is following the principle expressed in Art. 291 (1) TFEU that the Member States - represented in the Council - are basically responsible for implementing EU law.

With this proposal, though, the Commission has misjudged another principle, namely that according to the functional separation of powers in the EU, politically sensitive issues must not be decided by the Commission but only by the EU legislative, i.e. the Council and the European Parliament. Where politically sensitive issues arise in the comitology procedure, it is not only the Member States that should be included in the comitology procedure but also the institutions responsible for adopting the relevant basic act.

Since most basic acts are adopted jointly by the Council and the European Parliament in the ordinary legislative procedure, politically sensitive issues must be decided by both of these institutions. Therefore, where a basic act has been adopted jointly by both institutions and the appeal committee fails to deliver an opinion, the Commission should be able to ask the Council and the European Parliament for a non-binding opinion on the draft implementing act. Only where a basic act has been adopted by the Council alone should the Commission - as it suggests - be able to ask only the Council for an opinion. The comitology procedure in the form of an examination procedure should therefore, insofar as the basic act was adopted in the ordinary legislative procedure, include the following three steps:

1. Binding opinion of the committee
2. where required, a binding opinion of the appeal committee
3. where required, a non-binding opinion of the Council and the European Parliament

⁴⁸ Art. 5 (4), sub-para. 2 (a) Comitology Regulation.

⁴⁹ COM(2017) 85, p. 8-9.

3.4.1 Why the Commission should be able to ask the Council and the European Parliament for a non-binding opinion

3.4.1.1 Basic principle: Political decisions must be made by the Council and the European Parliament in the basic act

The need to include the Council and the European Parliament in the comitology procedure insofar as politically sensitive issues are being decided, arises from the functional separation of powers in the EU. The Council and the European Parliament are the two institutions with the most democratic legitimacy.⁵⁰ They therefore act as the EU legislative.⁵¹ The Commission, on the other hand, is principally accorded administrative functions under the EU Treaties.⁵²

All essential aspects of the subject matter to be regulated must be laid down by the EU legislative, i.e. by the Council and the European Parliament, in the basic act.⁵³ The essential aspects of a legislative proposal are primarily deemed to be issues which require a political decision.⁵⁴ Thus the Council and European Parliament make the political decisions, i.e. decisions which are contentious in a society. In order to actually be able to concentrate on solving the essential political issues, the EU legislative can empower the Commission to supplement or amend non-essential aspects of the basic act by way of delegated acts pursuant to Art. 290 TFEU.

Implementing acts, on the other hand, are only intended to clarify the basic act as regards the technical details thereby contributing to the uniform application of the basic act by the authorities in the Member States.⁵⁵ Thus, when adopting implementing acts, the Commission should not make any political decisions but only regulate technical issues regarding implementation. The relevant expert officials from the Commission and the Member States, so-called “technocrats”, therefore work together in the specialist comitology committees.

3.4.1.2 Reality: The comitology procedure: caught between politics, science and technocracy

The power to authorise the Commission to regulate the technical details of the basic acts, is correct and appropriate in order to facilitate the legislative procedure under which the basic acts are adopted. The power is very broadly interpreted however: the essential aspects of the subject matter to be regulated by the EU legislative itself are only deemed to include the general aims of a regulatory proposal.⁵⁶

⁵⁰ Art. 10 (2) TEU states that EU citizens are represented by the European Parliament; the Member States by the Council.

⁵¹ Art. 14 (1), sentence 1 and Art. 16 (1), sentence 1 TEU.

⁵² Art. 17 (1), sentence 5 TEU.

⁵³ CJEU, Judgement of 5 September 2012, European Parliament/Council, C-355/10, EU:C:2012:516, para. 64 et seq.; Judgement of 10 September 2015, European Parliament/Council, C-363/14, EU:C:2015:579, para. 46; Judgement of 22 September 2016, European Parliament/Council, C-14/15, EU:C:2016:715, para. 52.

⁵⁴ CJEU, Judgement of 5 September 2012, European Parliament/Council, C-355/10, EU:C:2012:516, para. 64 et seq.

⁵⁵ CJEU, Judgement of 18 March 2014, European Commission/European Parliament and Council, C-427/12, EU:C:2014:170, para. 39; Judgement of 15 October 2014, Parliament/Commission, C-65/13, EU:C:2014:2289, para. 43.

⁵⁶ CJEU, Judgement of 23 October 2007, European Parliament/Commission, C-403/05, EU:C:2007:624, para. 51; Judgement of 1 April 2008, Parliament and Denmark/Commission, C-14/06, EU:C:2008:176, para. 52; Judgement of 15 October 2014, Parliament/Commission, C-65/13, EU:C:2014:2289, para. 44.

Politically contentious issues can be “passed on”

The Council and the European Parliament can use their broad power to delegate power to the Commission, and thereby “pass on” to the comitology procedure politically contentious issues that could not be solved on adoption of the basic act. The provisions on roaming on public mobile phone networks,⁵⁷ the authorisation of genetically modified food and feed⁵⁸ or on the authorisation of plant protection products⁵⁹ are just a few of the examples from recent years in which the Council and the European Parliament has transferred extensive decision-making powers to the Commission.⁶⁰ The heated public debates concerning the approval of genetically modified types of maize and the approval of the chemical substance Glyphosate, show that the Commission sometimes has to make highly contentious political decisions in the comitology procedure.

Influence of EU agencies

In many cases, implementing acts, although formally passed by the Commission, are substantially prepared by EU agencies: Where the committee or the appeal committee fails to deliver an opinion in the comitology procedure, the Commission generally has to decide “taking account” of the opinion of the relevant specialist EU agency.⁶¹ The Commission can derogate from the opinions of the EU agencies because the opinions are non-binding and the Commission is also permitted to take other factors into account when reaching its decisions. However, it is the task of the EU agency to examine whether for example products meet the health and environmental protection standards of the basic acts. The Commission generally therefore follows the opinions of the EU agencies.⁶² The decision on whether to approve specific products is often therefore based on a scientific evaluation.

Influence of representatives of the Member States

The decisions on adopting implementing acts may, however, be purely politically motivated: the representatives of the Member States in the committee and in the appeal committee can at any time propose an amendment to the Commission’s draft implementing act.⁶³ In addition, they are free in their decision on whether and why to support or reject the Commission’s draft or whether to

⁵⁷ Regulation (EU) No. 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union.

⁵⁸ Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (hereinafter Reg 1829/2003).

⁵⁹ Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (hereinafter Reg 1107/2009).

⁶⁰ Reg 1829/2003 and Reg 1107/2009 were adopted prior to the Lisbon Treaty, i.e. at a time when no distinction was made between delegated acts under Art. 290 TFEU and implementing acts under Art. 291 TFEU, and the comitology procedure always had to be implemented under Art. 202 ECT where the Commission was empowered by way of a basic act to adopt legal acts. The Commission proposes that the basic acts passed prior to the Lisbon Treaty be adapted to take account of the distinction between delegated acts and implementing acts; see COM(2016) 798 and COM(2016) 799 (known as “Omnibus Regulations or “PRAC alignment”). In this context, it proposes the insertion into Reg 1829/2003 of both a delegation of power pursuant to Art. 290 TFEU and a delegation of power pursuant to Art. 291 TFEU; see COM(2016) 799, Annex, p. 297 et seq. The Commission has not yet made an alignment proposal for Reg 1107/2009; see COM(2016) 799, p. 3, footnote 11.

⁶¹ Cf. Art. 7 Reg 1829/2003, Art. 13 Reg 1107/2009.

⁶² Press Release of the EU Health Commissioner Vytenis Andriukaitis of 1 June 2016: “Das letzte Wort haben die Agenturen”, available at: http://europa.eu/rapid/press-release_STATEMENT-16-2011_en.htm (last accessed 17 July 2017).

⁶³ Art. 3 (4) and Art. 6 (2) Comitology Regulation.

abstain. The committee members could therefore reject the draft implementing act, irrespective of the opinion of the responsible EU agency, solely out of domestic political considerations for example.⁶⁴

3.4.1.3 Problem: Commission's lack of democratic legitimacy

The broad power of the Council and the European Parliament to delegate power to the Commission may mean that politically sensitive issues, which are the subject of public debate, are not handled by the responsible political institutions in a public session but by unelected officials behind closed doors. Implementing acts of the Commission relating to such issues must, however, have a sufficient level of democratic legitimacy.

Where committee members vote with a qualified majority for or against a draft of such an implementing act, the Member States bear the political responsibility for this. Where the committee and the appeal committee fail to deliver an opinion because too many committee members abstain, the responsibility for such implementing acts lies solely with the Commission. The latter does not however possess the necessary level of democratic legitimacy to make politically sensitive decisions. Even giving consideration to the expertise of the responsible EU agency cannot provide sufficient legitimacy for the adoption of politically contentious implementing acts.⁶⁵

3.4.1.4 Solution: Democratic legitimacy through the Council and the European Parliament

By including the Council - as proposed by the Commission - and the European Parliament - which is not proposed by the Commission - i.e. the two EU institutions with the most democratic legitimacy, the Commission could acquire political orientation in contentious comitology procedures.⁶⁶ This would strengthen the democratic legitimacy of politically sensitive implementing acts adopted by the Commission within the margin of its discretion. At the same time, it would reduce the incentive for the Council and the European Parliament to deliberately "pass on" politically sensitive issues to the comitology procedure because it could then expect to have to deal with the subject again at the Commission's request. The inclusion of the Council and the European Parliament thus aims to ensure that political issues are addressed in the place where they belong according to the functional separation of powers: the Council and the European Parliament.

3.4.2 Inclusion of the Council and the European Parliament does not contradict the system of delegated acts and implementing acts

The proposed inclusion of the Council and the European Parliament into the comitology procedure does not contradict the system of delegated acts pursuant to Art. 290 TFEU and implementing acts

⁶⁴ Cf. proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1829/2003 as regards the possibility for the Member States to restrict or prohibit the use of genetically modified food and feed on their territory, COM(2015)177, of 22.04.2015, p. 4.

⁶⁵ Cf. EGC, Judgement of 11 September 2002, Pfizer Animal Health /Council, T-13/99, EU:T:2002:209, para. 201.

⁶⁶ Pursuant to Art. 10 (2) TFEU, EU citizens are represented by the European Parliament; the Member States by the Council; both institutions act jointly as the EU legislative pursuant to Art. 14 (1), sentence 1 and Art. 16 (1), sentence 1 TEU. Art. 16 Abs. 1 S. 1 EUV.

pursuant to Art. 291 TFEU. Under the scheme of the EU Treaties, delegated acts and implementing acts have differing functions. Delegated acts aim to supplement or amend non-essential provisions of legislative acts and are thus quasi-legislative in nature.⁶⁷ Implementing acts, on the other hand, aim to ensure uniform execution of the respective basic act and therefore have more of an executive role.⁶⁸

The differing functions of delegated acts and implementing acts is reflected in the provisions of the EU Treaties on who exercises control over the Commission when the respective acts are adopted. Since delegated acts can supplement or amend a legislative act, the Commission is to be controlled, according to Art. 290 (2) TFEU, by the Council and the European Parliament. Since the adoption of implementing acts by the Commission encroaches upon the fundamental competence of the Member States to implement EU law, Art. 291 (3) TFEU provides that, in the comitology procedure, the Commission is controlled by the Member States.

At first glance, it therefore appears inconsistent with this system to include the Council and the European Parliament into the comitology procedure. On closer inspection, however, it becomes clear that the distinction between delegated acts and implementing acts is legally complex and institutionally controversial; the Council and the European Parliament are already involved in the comitology procedure and consulting them does not violate Art. 291 (3) TFEU.

3.4.2.1 Clear distinction between delegated acts and implementing acts is not possible for reasons of law

A clear distinction between delegated acts and implementing acts is already virtually impossible for reasons of law.⁶⁹ Art. 290 und Art. 291 AEUV contain hardly any indications for defining the scope of delegated acts and implementing acts.⁷⁰ The differing functions of delegated acts and implementing acts themselves give some orientation in this regard but both types of legal acts can be used to clarify the content of the underlying basic act.⁷¹ The functions of delegated acts and implementing acts thus overlap to a certain extent.⁷² Where these functions intersect, it is, according to the case law of the European Court of Justice, at the discretion of the Council and European Parliament to decide whether to authorise the Commission to adopt delegated acts or implementing acts.⁷³

⁶⁷ Schmidt, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th Edn. 2015, Art. 290 TFEU, para. 10.

⁶⁸ Schmidt, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th Edn. 2015, Art. 291 TFEU, para. 2.

⁶⁹ For an in-depth analysis: Craig, *Delegated Acts, Implementing Acts and the new Comitology Regulation*, *European Law Review* 2011, 671, 672 et seq.

⁷⁰ Nettesheim, in: Grabitz/Hilf/id., *Das Recht der Europäischen Union*, 60th Update 2016, Art. 290 TFEU, para. 22; Schmidt, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th Edn. 2015, Art. 290 TFEU, para. 10.

⁷¹ Nettesheim, in: Grabitz/Hilf/id., *Das Recht der Europäischen Union*, 60th Update 2016, Art. 291 TFEU, para. 1; Schmidt, in: von der Groeben/Schwarze/Hatje, *Europäisches Unionsrecht*, 7th Edn. 2015, Art. 290 TFEU, para. 13.

⁷² Gellermann, in: Streinz, *EUV/AEUV*, 2nd Edn., 2012, Art. 291 TFEU, para. 2; Nettesheim, in: Grabitz/Hilf/id., *Das Recht der Europäischen Union*, 60th Update 2016, Art. 290 TFEU, para. 23.

⁷³ CJEU, Judgement of 18 March 2014, *Commission/Parliament and Council*, C-427/12, EU:C:2014:170, para. 40; likewise Gellermann, in: Streinz (Ed.), *EUV/AEUV*, 2nd Edn., 2012, Art. 291 TFEU, para. 2; Nettesheim, in: Grabitz/Hilf/id., *Das Recht der Europäischen Union*, 60th Update 2016, Art. 290 TFEU, para. 23; Ruffert, in: Calliess/id., *EUV/AEUV*, 7th Edn., 2016, Art. 290 TFEU, para. 2.

3.4.2.2 For institutional reasons, the choice between delegated acts and implementing acts is a subject of contention between the Council and European Parliament

Due to the differing procedures for controlling the Commission, the institutional interests of the Council and the European Parliament often diverge when it comes to their discretion as to whether to empower the Commission to adopt delegated acts or to adopt implementing acts. The Council has an interest in ensuring that the Commission is only controlled by the Member States pursuant to Art. 291 (3) TFEU because the Council is made up of representatives of the Member States.⁷⁴ The Council often therefore pushes for as many provisions of the basic act as possible to be clarified by the Commission in the comitology procedure.

The European Parliament, on the other hand, has an interest in controlling the Commission itself pursuant to Art. 290 (2) TFEU. In the legislative procedure, it therefore pushes for the non-essential provisions of the basic act to be defined in more detail by the Commission by way of delegated acts rather than by implementing acts. The extent to which the Commission is authorised by a basic act to adopt delegated acts or implementing acts depends therefore on the result of political negotiations in the legislative proceedings.

3.4.2.3 The abilities of the Council, the European Parliament and the Member States to exert influence overlap in the case of delegated acts and implementing acts

Irrespective of the treaty requirements that, when adopting delegated acts under Art. 290 (2) TFEU, the Commission is controlled by the Council and the European Parliament, whereas when adopting implementing acts under Art. 291 (3) TFEU that it is controlled by the Member States, the abilities of the various actors to exert influence overlaps due to the design of the respective procedures under secondary legislation.

On the one hand, the Council, the European Parliament and the Commission have established in an Interinstitutional Agreement that the Commission must consult experts from the Member States before adopting delegated acts.⁷⁵ The consultations can take place within the framework of the committees set up for the comitology procedure.⁷⁶ Member States can decide which experts to send to the committees for the consultations.⁷⁷ The only difference between these consultations and the comitology procedure is the fact that the Commission is not legally bound by the experts' opinion. The Commission must however set out the extent to which it intends to take account of the experts' opinion.⁷⁸ As a result, it is always under pressure to justify itself if it decides to diverge from the majority opinion of the experts from the Member States.

On the other hand, the Council and the European Parliament are already included in the comitology procedure. According to the Comitology Regulation, the Commission must provide the Council and the European Parliament, inter alia, with the proposals for implementing acts and the agendas of committee meetings.⁷⁹ Where a basic act has been passed in the ordinary legislative procedure, the Council or the European Parliament can submit a non-binding opinion to the

⁷⁴ Art. 16 (2) TFEU.

⁷⁵ No. 28 Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on better regulation (hereinafter Interinstitutional Agreement).

⁷⁶ No. 4 Annex to the Interinstitutional Agreement.

⁷⁷ No. 4 Annex to the Interinstitutional Agreement.

⁷⁸ No. 5 Annex to the Interinstitutional Agreement.

⁷⁹ Art. 10 (4) Comitology Regulation.

Commission at any time, if one of the two institutions takes the view that the Commission's draft implementing act is not compatible with the underlying legislative act.⁸⁰

3.4.2.4 Non-binding opinions do not breach the various control powers relating to delegated acts and implementing acts

The fact that the Commission is controlled, under Art. 290 TFEU, by the Council and the European Parliament and, under Art. 291 TFEU, by the Member States, does not exclude other actors, not mentioned in Art. 290 or Art. 291 TFEU, from being asked for a non-binding opinion by the Commission prior to the adoption of the relevant legislative acts. The control powers of the Council and the European Parliament under Art. 290 (2) TFEU, and of the Member States under Art. 291 (3) TFEU, only relate to the ability to exert legally binding influence over the adoption of delegated acts or implementing acts. Only the specified actors are to be allowed to make binding decisions on the adoption of the respective legislative acts. For this reason, the Council and the European Parliament can only submit a non-binding opinion where they are of the opinion that the implementing act proposed by the Commission is not compatible with the underlying legislative act.⁸¹

However, a request by the Commission for a non-binding opinion, directed at any actor other than those specified under Art. 290 and 291 TFEU, has no effect on the designated control powers. The fact that the institutions have specified that the Commission has to consult experts from the Member States prior to adopting delegated acts, does not therefore breach Art. 290 (2) TFEU. Correspondingly, nor does it contradict the exclusive control powers of the Member States under Art. 291 (3) TFEU where the Commission asks the Council and the European Parliament for a non-binding opinion in the comitology procedure.

⁸⁰ Art. 11 Comitology Regulation.

⁸¹ Art. 11 Comitology Regulation.

4 Conclusion: How the comitology procedure should be changed regarding the appeal committee

The Commission's proposal to amend the Comitology Regulation regarding the procedure in the appeal committee is basically appropriate. Facilitating the decision-making process in the appeal committee is appropriate because otherwise the appeal committee offers no political added value. Convening a further meeting of the appeal committee at ministerial level should be rejected because it would unnecessarily prolong the procedure. Making the votes public is appropriate because, in comitology procedures relating to politically sensitive issues, the current requirement for confidentiality is unsuitable and the responsibility of individual Member States should be made clear.

The Commission's proposal of allowing the Commission to ask the Council for a non-binding opinion where the appeal committee fails to deliver an opinion, is a step in the right direction but does not go far enough. The Commission should also be able to ask for a non-binding opinion from the European Parliament, as well as from the Council, in order to increase the democratic legitimacy of politically sensitive implementing acts. This amendment proposal is based on the assumption that politically sensitive issues must not be decided by the Commission but only by the EU legislative, i.e. by the Council and the European Parliament. Such inclusion of the Council and the European Parliament into the comitology procedure does not contradict the system of delegated acts and implementing acts.

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