
Implementing Lisbon: what's new in comitology?

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BACKGROUND

Following the entry into force of the Lisbon Treaty, the so-called 'comitology system' has witnessed important changes meant to simplify the European Union's instruments and procedures, as well as to strengthen its democratic legitimacy. But are the new provisions likely to render the system more comprehensible and legitimate? What repercussions will the new rules have for the balance of power among EU institutions? And how might they impact the effectiveness of decision-making at European level?

In the EU, as in all legislatures, once the decision-making process enters the implementation stage, the executive – i.e. the European Commission – can receive delegated powers to execute the acts adopted in co-decision. Committees of Member States' representatives control the Commission in the exercise of delegated competences and are collectively referred to as 'comitology'. The first committees were convened in the 1960s by the Member States and the Commission to deal with the technicalities of the Common Agricultural Policy, which would have otherwise requested cumbersome

procedures to be adopted by the Council. With no role to play, the EP strongly criticised that system and led a resolute campaign – mirrored in various comitology reforms over the years – to earn legislative scrutiny in the process.

Its call became difficult to ignore as successive Treaty amendments extended the EP's powers, making it a co-legislator on equal footing with the Council. Moreover, as comitology measures started to regulate politically sensitive issues, such as Genetically Modified Organisms, the need for a radical overhaul of the system and clarification of the institutions' roles became imperative.

Therefore, the idea of restructuring comitology was taken up by the Convention on the Future of Europe, which emphasised the importance of redrafting the separation of EU legislative and executive tasks in a transparent and democratic manner. The Lisbon Treaty formalised most of the Convention's proposals on comitology in Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU).

STATE OF PLAY

The Treaty formally separates for the first time all comitology measures into delegated (Article 290) and implementing acts (Article 291).

Delegated acts

Delegated acts refer to “non-legislative acts of general application” whose aim is to “supplement or amend” laws in their “non-essential elements”. The EP and the Council confer delegated powers on the Commission for the adoption of implementation measures that are likely to add further content to the act agreed through co-decision. The legislators must also define

the precise terms of this delegation, i.e. objectives, scope, and duration.

Article 290 abolishes the previous use of comitology committees and makes the Commission solely responsible for drafting and adopting delegated acts. However, since these execution measures can be politically charged, they still require the *ex-post* control of legislators. Thus, emulating the practice of legislative control over the executive in several Member States, the EP and the Council can choose to either oppose the delegated act on any grounds or revoke the delegation (see *Appendix*).

As no secondary legislation was required, Article 290 became directly applicable to new directives and regulations with the entry into force of the Lisbon Treaty. For existing *acquis*, since no automatic alignment was foreseen, a pre-Lisbon mechanism called “the regulatory procedure with scrutiny” remains in place until that legislation is recast.

Implementing acts

According to Article 291, when a “legally binding Union act [...] identifies the need for uniform conditions of implementation”, it can require the adoption of implementing acts, which are of a technical and administrative nature. These are adopted by the Commission, i.e. the EU executive, and overseen by the Member States, i.e. the 'national' executives.

The EP and the Council had to clarify in a regulation the exact procedures for the Member States' control of the Commission's executive powers. Regulation 182/2011 entered into force on 1 March 2011 and specifies two procedures: “advisory” and “examination” (see *Appendix*). In both cases, committees formed by representatives of Member States and chaired by the Commission are in charge of scrutinising the proposed implementing acts.

The “examination procedure” should be used for measures of general scope, programmes with substantial implications, common agricultural and common fisheries policy, the environment, security and safety, protection of the health or safety of humans, animals or plants, the common commercial policy, and taxation. Conversely, as pre-Lisbon, the “advisory procedure” should “apply in all other cases or where it is considered more appropriate.”

While the “advisory committee” only issues non-binding opinions, the “examination committee” is called upon for a binding qualified-majority vote on the draft measure. If the result is “positive”, the Commission shall adopt the implementing act. However, if the poll delivers a “negative” opinion, the Commission can amend its proposal or send it to a so-called “appeal committee”.

Alternatively, a “no opinion” verdict from the examination committee forces the Commission

to rework its draft or triggers a mandatory referral to the appeal committee if (a) the basic act so provides; (b) a simple majority of the committee opposes it; or (c) the measure concerns specific matters, i.e. taxation, financial services, the protection of humans, animals or plants health, or definitive multilateral safeguard measures.

The appeal committee represents a real innovation because it eliminates the previous call-back right of the Council and allows instead national representatives to maintain control throughout the procedure. Where the appeal committee delivers a negative opinion, the Commission may not adopt the draft or can proceed with it in the case of positive or no opinion.

The examination procedure provides for specific rules on antidumping measures and “exceptional cases”. The former obliges the Commission to consult Member States and send its draft to the appeal committee, should the examination committee be unable to agree on it. The latter refer to situations in which the failure to adopt measures could cause a “significant disruption of the markets” in agriculture or pose “a risk for the financial interests of the Union”. Then, and where the examination committee delivers a negative or no opinion, the Commission must immediately ask the appeal committee for approval.

Finally, for both the examination and advisory committees, the regulation specifies an “urgency” mechanism, whereby an implementing act is judged “immediately applicable” on grounds of urgency. In such cases, the Commission is able to adopt the measures without prior committee consultation. However, these measures must be eventually submitted to the relevant committee and where the examination procedure applies, opposition forces the Commission to repeal them.

As legislator and not executor of EU law, the Parliament is officially kept outside the procedures concerning implementing acts. Still, Article 291 grants the EP (alongside the Council) the right to intervene by submitting a non-binding resolution when it considers that the Commission has overstepped its execution competences. The EP could use such instrument to exert significant political influence in the process.

PROSPECTS

Turning to the likely implications of the new comitology rules, attention falls on whether they help to simplify the system; improve the quality of democracy in the EU; and make decision-making at the European level more effective.

Clearing up the 'comitology jungle'

Regarding the search for less complexity – both in terms of a more comprehensible comitology system and a more straightforward delegation

process for participating actors – the new rules assist in two ways.

First, the latest procedure for delegated acts is more streamlined and transparent than pre-Lisbon, as the Commission can now present its draft measure directly and simultaneously to the EP and the Council, instead of having to ask first a committee's opinion. While the Commission might still consult expert groups when drafting delegated acts, its work is explicitly subject only to the control of the two legislators.

Second, the system provides for a clearer distinction, with resonance to the national level, between the legislative and the executive arms of the Union. Akin to most national contexts, the legislative – i.e. the EP and the Council – has to specify for each act the legal framework for the delegation of implementing powers to the EU executive – *par attribution* the Commission.

But despite these positive developments, the comitology system is not yet free of complexity and ambiguity. Most notably, the procedures for implementing acts remain quite intricate. The regulation brings in new types of committees (e.g. appeal committee, examination committee), a new taxonomy of implementing issues (e.g. specific, immediately applicable), and several thresholds and possibilities to revisit any given measure. As for delegated acts, although the Treaty does not mention the committees, they might still have major influence on the Commission, as its December 2009 communication hints at.

Moreover, the imprecise definition of terms in Articles 290 and 291 may cloud the clarity of the new system. The distinction between delegated and implementing acts is not accurate. While in theory delegated and implementing measures are instruments under the scrutiny of the Union's legislators and the Member States' power respectively, in practice there is considerable potential for institutional disagreement over the classification of acts. The European Court of Justice might be called upon to settle possible stalemates (e.g. Council versus EP, legislators versus Commission), but the criteria that will inform its decision are presently unidentified.

Likewise, Article 290 vaguely qualifies delegated measures as “non-legislative” and limits their scope to “non-essential elements of the legislative act”. The “non-legislative” description does not *per se* preclude that some delegated acts will be quasi-legislative. And the objective meaning behind the “non-essential elements” that delegated acts are supposed to “supplement or amend” is equally absent, risking disputes between the Commission and the legislators in their effort to delineate measures.

Finally, the unsure regulatory framework might hinder the simplification of the system, at least temporarily.

Although Article 290 became applicable on 1 December 2009, existing *acquis* and new legislative proposals are being painstakingly adapted on a case-by-case basis, and this process could extend well into 2014. Meanwhile, the previous “regulatory procedure with scrutiny” continues to apply to all other acts. Furthermore, implementing measures remained subject to pre-Lisbon rules until 1 March 2011, when Regulation 182/2011 set off the automatic alignment.

Imparting democratic legitimacy on comitology

As for changes in democratic terms, the search for more legitimacy is the main focus, since the role of the EP and the Member States is now considerably strengthened in the delegation process.

Article 290 places the Parliament and the Council at strict parity in their control of delegated acts. Together with the Council, the EP enjoys now not only the right to veto but also to revoke the Commission's delegated competence. Similarly, under Article 291 the EP becomes equal co-delegator with the Council where the ordinary legislative procedure applies, and is responsible alongside the Council for setting the terms of delegated authority.

Upgrading the role of the EP could inject more democratic legitimacy into the system. Moreover, since the new rules effectively remove the traditional dominance of the Council in framing comitology, they also help to reflect more accurately the post-Lisbon decision-making context, where almost all legislative acts are adopted via co-decision.

The need to agree on the terms of delegation, as well as the right to object to any delegated act on whatever grounds, boosts the legislators' power of scrutiny and increases democratic deliberation in the co-decision phase of the EU policy cycle. Greater control and involvement of the EP and the Council in the delegation process might disprove earlier criticism that the non-elected and non-transparent Commission had 'hijacked' comitology.

Additionally, under Article 291, the Council is no longer the appeal body for the Commission's use of implementing acts. Instead, Member States' representatives in the different committees are now in charge of directly seeking amendments to the Commission's proposals. Thus, the exercise of delegated authority could become a more democratic level-playing field where the EP, the Council, the Member States, and the Commission try to *share* rather than *seize* political power.

In reality, as the interests of the Member States and the Council largely coincide, even if the Council is no longer the referral body, it continues to have an indirect voice on implementing acts through the

strong role enjoyed by the Member States in the examination committee. And since the Parliament has no binding say in this process, the Council appears to have retained an overall *de facto* advantage over the EP instead of yielding to full parity.

Moreover, the Commission seems to consolidate rather than disperse its influence under the new rules for delegated acts and the advisory procedure insofar as it can now decide autonomously over a large amount of execution measures. Additionally, the fact that the Commission continues to simultaneously chair committees and be the object of their scrutiny might compromise the integrity of the new system. More generally, the fact that the new system still provides no role for non-institutional stakeholders does little to increase legitimacy.

Finally, it is unclear how the composition of the appeal committee will be decided and on what basis implementing acts will be identified as urgent. The absence of manifest and consistent selection criteria opens the door to arbitrary and contradictory decisions or to turf wars between the institutions, thereby undermining the legitimacy of the new system. Future comitology reforms should clarify these issues.

Fuelling EU decision-making engine

Concerning the potential impact of the new rules on the efficiency of delegation, the roles of the EP and the Commission warrant discussion.

Faced with more responsibility and power, the EP might undergo a constrained learning process to develop, albeit in the medium- to long-term, superior expertise and capacity for prompt reaction, with obvious benefits for the functioning of EU decision-making. Similarly, the fact that the Commission deals directly with the legislators over delegated acts and can ignore the opinion of national representatives in the advisory procedure might speed up the adoption of proposed measures.

However, the legislative process could be slowed down, or even brought to a halt, in the case of differences of opinion between the EP and the Council over the terms of delegation. This would

merely shift the 'comitology war' from the executive to the legislative arena. Moreover, the new right of legislators to object to delegated acts on any grounds could increase the likelihood of objections and the politicisation of delegated measures, preventing their swift adoption by the Commission. The Parliament especially should refrain from cherry-picking issues for political showcasing.

Additionally, in the short term, the EP could face significant difficulties, especially when confronted with policy fields such as agriculture, where only the Council had delegation authority in the past. And there is also no evidence that the adoption of implementing acts under the examination procedure would be facilitated by the new rules when a negative or no opinion can summon the appeal committee.

And the saga continues

The new comitology brings a more transparent division of executive and legislative powers and a more balanced distribution of roles among EU institutions. The responsibility of legislators to set the terms of delegation could intensify their discussions, thereby boosting democratic legitimacy. Moreover, the streamlining of procedures for delegated acts can increase system efficiency. However, without clear criteria, the need for productive cooperation might breed inter-institutional conflicts and obstruct EU decision-making.

Thus, future reforms of comitology cannot be ruled out. In particular, after some experience with the new system in practice, a better clarification of the role that committees play in the adoption of delegated acts should be provided to ensure the transparency and consistency of the process. Also, new mechanisms should be devised to prevent an excessive politicisation and instrumentalisation of the system by different actors (e.g. EP). Finally, to secure popular appeal and efficiency, a further simplification of the rules for implementing acts will be necessary.



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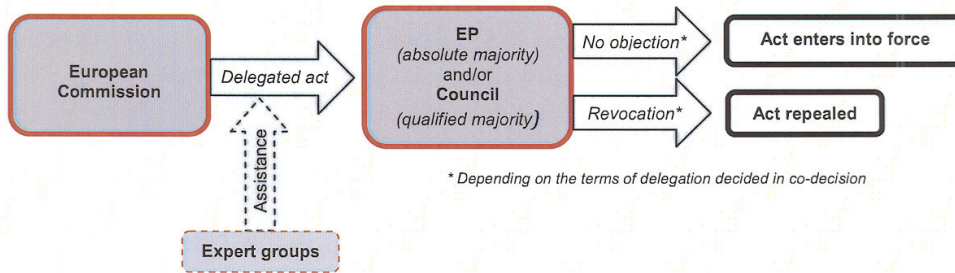
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DELEGATED ACTS (ARTICLE 290 TFEU)



IMPLEMENTING ACTS (ARTICLE 291 TFEU)

