The 2006 Reform of Comitology: *Problem Solved or Dispute Postponed?*

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The issue of parliamentary scrutiny of comitology – the system of implementation committees that control the Commission in the execution of delegated powers – has been contested for some time by the political forces involved. The European Parliament in particular has become increasingly dissatisfied with the exclusive arrangement for Member State representatives controlling the Commission. Because of the changes to the legislative process brought about by co-decision, the EP has demanded greater involvement in the process. The Comitology Decisions of 1987 and 1999, and the inter-institutional agreements that have been concluded around them, addressed these concerns in various ways, but they appear not to have settled the matter conclusively. Hence, the continued pressure for reform that led to a Council Decision in the summer of 2006 amending the 1999 Decision. This article seeks to illuminate the background to the way in which this Decision has come about, provides the details of its main provisions and assesses the extent to which this most recent reform of the system can be seen as a solution to the problem that has dogged comitology for the past decade.

Introduction

Comitology is a never-ending story. From its obscure beginnings in the undergrowth of the Common Agricultural Policy of the 1960s, it has grown to become one of the hallmarks of the EU administrative system. Community legislation frequently relies on the delegation of power to the European Commission and Member States have therefore expanded the supervisory mechanism involving implementation committees that the Commission needs to consult before adopting implementing measures – the comitology system. In the inter-institutional relations of the EU the comitology system has always veered between being a solution to problems, and being a problem in its own right. It facilitates more efficient legislation because the delegation of implementing acts to the Commission allows the legislator to concentrate on setting the essential rules, leaving technical details to the experts in the Commission and in the implementing committees. But it has become also a problem because, as the system has grown, it has become more complex and lacks transparency. Given that the members of the implementing committees control the Commission, one may ask who controls these controllers?.[2] As the system has grown to over 250 committees, and the Union has expanded to 25 Member States, the number of public officials has risen to around 7,000 and some, the EP in particular, have commented that such a system setting authoritative rules with direct relevance for citizens needs to be open to scrutiny by Parliament, if not by the public in general.

Despite earlier debates about the potential for "renationalisation" of Community competences through comitology, the supranational-intergovernmental divide has, perhaps surprisingly, not been the main bone of contention. Instead, it has been this issue of public and, by extension, parliamentary scrutiny that has been contested by the political forces involved. Essentially, the European Parliament has become increasingly dissatisfied with the compromise between Commission and Council (Member State representatives controlling the Commission's delegated powers) that is at the heart of comitology. In the eyes of the EP, the delegation of implementing powers to the Commission was legitimate in the pre-Maastricht era when the Member States in the Council had the last word

on legislative acts. However, the onset of co-decision changed this fundamentally, and since then the EP has demanded a greater degree of oversight over the whole process. The Comitology Decisions of 1987 and 1999, and the inter-institutional agreements that have been concluded around them, addressed these concerns in various ways, but they appear not to have settled the matter conclusively. Hence, the continued pressure for reform that has led to a Council Decision in the summer of 2006 amending the 1999 Decision. This article seeks to illuminate the background to the way in which this Decision came about, provides the details of its main provisions and assesses the extent to which this most recent reform of the system can be seen as a solution to the problem that has dogged comitology for the past decade.

Background: The historical evolution of comitology

The origins and early development of comitology are by now well documented and do not need to be revisited in great detail here.[3] Suffice it to say that the genesis of comitology in the 1960s was closely tied to the search for an ad hoc solution to the difficulty of regulating the economic and social life of the Community by relying exclusively on legislation. The need to address changing economic and social circumstances quickly led Community legislators to a course of action that is well-known at the domestic level: the delegation of implementing powers to the executive. In the absence of treaty reform – a far-fetched idea in the 1960s – and faced with increasing difficulties in the legislative process (the "Empty Chair" crisis and Luxembourg compromise), delegating implementing powers for routine measures to the Commission was an attractive solution, but required a degree of administrative innovation: implementing powers were delegated to the Commission, but also the supervision of the Commission's use of these powers through committees composed of Member State representatives was spelt out in each individual legislative act.

This was a development that satisfied both the search for greater efficiency and the desire by Member States to maintain a degree of control over the process. Even though it occurred outside the letter of the Rome Treaties, the European Court of Justice was satisfied when comitology was for the first time tested in the Courts: comitology committees did not upset the institutional balance of the Community as they were only tasked with providing opinions rather than actually taking decisions. And the separation between executive and legislative powers was maintained, as only decisions about non-essential elements of the legislation were delegated to the Commission. The rights and duties of the legislator were not infringed through delegation and comitology.[4]

It was on this basis that comitology then developed rapidly through the 1970s and 1980s. What was initially a limited solution to deal with the problems concerning the implementation of the CAP, quickly became a success story in many sectors of Community policy making: before long, many other areas of legislation such as environment policy, consumer protection, transport, energy or single market regulation also involved delegation of power and the arrival of comitology committees. Indeed, the growth of comitology was such that it became an issue as soon as the treaties were reformed for the first time with the Single European Act. The reformulation of Article 145 [now Article 202] took account of the fact that delegation of power had become a standard feature of Community legislation, and that a "system of control" was necessary. The subsequent 1987 Decision provided, for the first time, a range of systematic procedures which the Commission would have to follow in consulting implementing committees. This ex post formalisation of the comitology system was not without challenges, however. The seven procedures provided by the 1987 Decision were rather cumbersome; there was no guidance as to which procedure should be applied in which case. Additionally, the role of the EP as an emerging co-legislator was entirely unrecognised. This shortcoming in particular dominated the interaction between the European institutions in the subsequent decade. With the arrival of co-decision with the Maastricht Treaty, the stage was set for a series of inter-institutional struggles that caused a lot of instability in the system and ultimately led to the 1999 reform of comitology.

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The 1999 Decision[5] was a milestone in the evolution of comitology and remains the legislative base for the procedures governing the relationship between Commission and implementing committees. Reducing the number of procedures from seven (under the 1987 Decision) to three (advisory, management and regulatory), the Decision also introduced criteria according to which the legislator chooses which of these procedures should be applied in which case. This idea of giving instructions to the legislative institutions about the way in which legislation should be written has led analysts to describe the 1999 Decision as a piece of "meta-legislation" situated below the treaties but somehow above "normal" legislation. There were further provisions in the 1999 Decision concerning the creation of rules of procedure for committees, an obligation of annual reporting by the Commission and, crucially, the introduction of legal rights of the European Parliament vis-à-vis comitology. As mentioned above, it had been the pressure from the EP that had been driving the push for reform in the first place.

The main question asked by the European Parliament

was: If Council and Parliament are equals in the adoption of co-decided legislation, and if such legislation delegates implementing powers to the Commission, and if the legislator considers a control over these powers through comitology committees necessary, then how is it legitimate to exclude the EP from this supervisory function? The response from Commission and Council to this far-reaching challenge was initially half-hearted and limited: a series of inter-institutional agreements followed, as well as the 1999 Decision which provided the EP with certain rights to information and an advisory function to scrutinise the scope of implementing measures. However, these reforms did not provide the Parliament with the substantive powers to actually oppose or influence the adoption of Commission implementing measures – a state of affairs that was soon to bring the issue back onto the reform agenda.

The 1999 Decision had briefly settled the argument at the end of the 1990s. It took several years to implement, given the time needed to compile the first lists of all comitology committees, and to draft and adopt the required "alignment regulations", as well as to apply the new procedures backwards to the existing acquis, and to introduce rules of procedure to all comitology committees. It also took time for the EP to get to grips with its newly found powers and issue opinions on the basis of its scrutiny rights. The first real use of the new scrutiny rights came in 2000,[6] producing a response from the Commission – a belated addition of a new recital to the act in question[7] – that was also rather unconventional. In the first five years of the new comitology Decision being in force, the EP passed a total of six resolutions with reference to comitology. This is a more than modest number considering the more than 10,000 implementing measures that had passed through comitology under co-decision in this period. What is evident from these cases is the tendency of the Parliament to use such instances of scope control in comitology as an opportunity to also make statements on the political issues surrounding these cases. In other words, rather than limiting itself to the purely procedural power of scrutiny, the EP will also engage with the political substance of the measures proposed by the Commission.[8]

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The EP's use of its scrutiny rights was also somewhat uneven, with some EP committees (e.g. Environment and Consumer Affairs) being much more active than others in initiating resolutions under the scope control provided by Article 8 of the 1999 Decision. On the whole it seems fair to say that the EP has been selective in making use of its scrutiny rights specifically in areas in which it also has a political interest in voicing its opinion, rather than systematically scrutinising all incoming implementing measures transmitted to it by the Commission.

However, as the EP became more experienced in applying its new, albeit limited, powers under the 1999 Decision, the continued shortcomings of this system also became more evident. One bone of contention had been the actual practicality of "document transmission" from Commission to Parliament. Since the launch of the Comitology Register[9] – a website on the Europa Server facilitating public access to all documents that need to be made available to the EP – the Commission has relied on that register as the mechanism of transmission. The EP, on the other hand, demanded a continued direct transfer of the documents to its own services in addition to publication in the register.

What really brought things to a head in 2005 was an investigation by the EP into possible non-transmission of documents from the Commission that would ordinarily have to be transmitted under the terms of the 1999 Decision. Referring to its own findings that in several cases the documents had not been transmitted on time, or indeed not at all, the EP addressed this point in a formal question to the Commission. The Commission in turn then had to investigate the matter and had to report to the EP the fact that indeed in some 50 cases the required documents had not been made available to the EP in time, thus depriving it of its legally enshrined right to scrutiny.[10] It was a rather embarrassing admission on the part of the Commission, forcing a public apology from the Commissioner responsible and reinforcing the Parliament's demand for further improvements of its status *vis-à-vis* comitology. Indeed, these difficulties occurred against the background of several long-term reform projects, both at the level of legislation and at the level of treaty reform. In order to fully understand the 2006 reform we need to briefly look at these developments that occurred against the background of the long-standing inter-institutional tensions described above.

The road to reform: Constitutional Treaty, Lamfalussy Process and Commission proposal

The avenue of fundamentally reforming the system of delegated powers, implementing committees and parliamentary scrutiny through treaty reform had been opened up by the launch of the Convention on the Future of Europe and the subsequent Intergovernmental Conference (IGC) which negotiated the Constitutional Treaty. Obviously, parliamentary influence was significant in the European Convention which was mainly composed of MPs and MEPs and, even though the IGC made some changes to the provisions contained in the Draft Treaty, most of them were part of the final treaty that was signed by the Heads of State or Government in October 2004.

As far as comitology was concerned, the Constitutional Treaty contained a number of important and interesting innovations. The first of these was a new nomenclature for legal acts which made a distinction between, on the one hand legislative acts – re-named "laws" and "framework laws", which would replace current regulations and directives

– and on the other hand so-called "non-legislative acts".[11] Among the latter there would be, for the first time, designated instruments for implementing Community legislation. While the Constitutional Treaty contains the usual provision for adopting implementing acts through the conventional method via comitology committees, there is also the creation of a novel instrument called "Delegated European Regulation" (Article I-36). This Delegated Regulation would allow the Commission to implement legislation without necessarily going through comitology committees. Instead, a number of other control mechanisms were foreseen: first, the delegation of powers to the Commission might be limited in time (using a so-called sunset clause) and could be withdrawn at the initiative of other legislative institution; and second, if and when the Commission intended to adopt such a Delegated Regulation, EP and Council could object to the adoption within a prescribed time-limit. Had the Constitutional Treaty been ratified as intended, further legislation and/or a revision of internal rules of procedure would probably have been required to spell out precisely how this new instrument would have been used. It is also fair to say that both Council and EP would have had to set up some committee mechanism of their own in order to check draft implementing acts from the Commission, and indeed the Commission would probably want to have a forum for the systematic exchange of views with national officials and parliamentary representatives. In other words, a less formalised way of interaction between Commission, Member States and EP on implementation could be envisaged in such a new system.

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However, considering the failure of ratification of the Constitutional Treaty and the doubts about its future, by the end of 2005 the focus shifted to the adoption of secondary legislation as the way of reforming the comitology system. Before looking at the details of the Commission proposal to this effect, we need to briefly look at another area of legislation which has significantly influenced the reform of comitology: the Lamfalussy Process in the area of financial services regulation.[12] This new way of legislating and implementing financial services regulations followed the recommendations of a group chaired by Baron Lamfalussy, and introduced a more complex consultation procedure for the adoption of implementing acts, which included not only a comitology committee (European Securities Committee), but also a separate expert advisory committee, composed of representatives from national regulatory agencies in this area (the Committee of European Securities Regulators).[13] Another innovation brought about through the Lamfalussy Process was the introduction of "sunset clauses" in the legislation, putting a four-year time-limit on the duration of the delegation of implementing powers to the Commission.[14]

Apart from feeding into the proposed Delegated European Regulations contained in the Constitutional Treaty, as we have already seen this use of sunset clauses in financial services legislation had another important effect for the reform of comitology: it provided the EP with a powerful leverage to have a say in legislative changes to the comitology system that are, formally, the domain of the Council. When the original Lamfalussy legislation, which had been adopted under co-decision and which delegated powers to the Commission initially for a period of four years, was due for renewal, the EP could – and did – use its required agreement to this renewal as a bargaining chip in order to achieve a greater say in comitology.

Through this and other mechanisms[15] the EP managed, first, to prod the Member States towards a new reform of comitology, and, second, to significantly influence the outcome of this round of reform. The Commission had already, in December 2002, submitted a new legislative proposal to deal with the issue of parliamentary involvement in the control over implementation of co-decided legislation. This proposal had been sent to the Council which, according to the consultation procedure, had submitted it to the EP for an opinion. However, while the EP passed a broadly favourable resolution based on the Report produced by Richard Corbett,[16] the proposal did not get much attention in the Council. The lack of interest from the Member States can be partly explained by the substance of the proposal which, as we will see, did not exactly favour the Member States. But the main reason for the Member States not engaging with this proposal was the fact that in 2003 and 2004 all eyes had been on the negotiation and ratification of the Constitutional Treaty – indeed passing new legislation in the shadow of the major changes that the new treaty promised would not have been very sensible.

Everything then changed when ratification of the Constitutional Treaty ran into problems, and when the EP renewed its pressure on Commission and Council via the Lamfalussy Process. In late 2005, towards the end of the UK Presidency, Coreper set up a Friends of the Presidency Group – a designated working group to prepare the Council response to the Commission proposal of late 2002. With Article 202 being the treaty base of this legislative proposal, Council decisions on this matter required unanimity – another factor that explains why the reform of this system is fraught with such difficulty. And yet, despite the two years of inactivity since the original proposal had been submitted by the Commission, and even though the initial positions among the Member States differed quite considerably from one another, negotiations were intense under the Austrian Presidency and progressed rather swiftly towards the adoption of the decision on the new "regulatory procedure with scrutiny" – technically an amendment of the

original 1999 Decision.[17] What is remarkable – and crucial to the understanding of the nature of the reform – is the way in which a compromise was eventually found: it was the outcome of negotiations between Council and Parliament even though the legislative procedure was formally that of the consultation procedure. As it happens, the negotiations in the Friends of the Presidency Group were shadowed in the EP through the Constitutional Affairs Committee. Under a mandate from the Conference of Presidents, MEPs Joseph Daul and Richard Corbett negotiated on behalf of the Parliament with the Council and the Presidency in particular in order to achieve improvements to the status quo ante. In effect, we had here the use of an informal procedure which somehow approximated to the kind of tripartite meetings which one would normally expect in the co-decision procedure.

The 2006 Decision: Finally putting the EP on the map of comitology?

Turning to the substance of the reform, we should first look at the original Commission proposal.[18] This had been rather brief but still had contained a number of far-reaching changes in the way in which comitology was intended to work in those areas governed by co-decision. In particular, the Commission had proposed to abolish the Management Procedure for implementing measures based on co-decided legislative acts, and had sought to change the regulatory procedure in a rather radical way. In the reformed regulatory procedure, in contrast to the already existing one, the Commission would have to submit draft implementing measures after the comitology committee stage – irrespective of the actual opinion delivered by the committee – to both the Council and the European Parliament. Each institution would scrutinise the proposal after the comitology had given its opinion, and would then have one month (possibly extended by a further month) in order to voice objections. If, at the end of this review, either the Council (by qualified majority) or the EP (by absolute majority) or both objected to the proposed measure, the Commission would have a range of options: to abandon the implementing measure, to propose a new legislative act (accepting that implementation is impossible) or adopt an implementing measure, possibly amended.

It was the word "possibly" in this proposal that became a bone of contention for both the Council and Parliament since it implied the logical possibility of the Commission adopting an implementing measure even after this had been rejected by the regulatory committee, by the Council and by the Parliament – something that was always unlikely to be acceptable to the Member States, and that had also been criticised by the EP in the Corbett Report. The Commission argued that this was the way in which the EP could be given equal rights with the Council without risk to the overall output of the systems. The "possible amendment" provision also provided the Commission with a way of dealing with potentially contradictory objections from the two institutions in a balanced way and thus maintaining greater flexibility.

However, these arguments cut little ice with the Member States and thus, when the comitology reform dossier reappeared on the agenda in late 2005, negotiations quickly shifted away from the original Commission proposal and focused on a number of key issues that proved to be rather intractable. The abolition of the Management Procedure, for example, which the Commission had proposed, was also opposed by several delegations and it soon became evident that this was not an option. Because of this, the simple two-fold distinction the Commission had envisaged in its proposal – advisory procedure for measures with no legislative impact, and regulatory procedure for those with legislative impact – had to be abandoned. Instead, the negotiations had to confront the need for a definition of a new category of implementing act which could be described as "quasi-legislative" in order to distinguish those measures that would involve substantial scrutiny by the EP from those that would not. In the actual wording of the 2006 Decision these are "measures [implementing co-decided basic acts] of general scope designed to amend non-essential elements [of the basic act] inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements." The logic behind this idea was the need to identify those measures on which the EP would have a legitimate reason to share the control function with the Council. Hence the emphasis here on the legislative impact, and the ultimate decision to distinguish between implementing measures with legislative impact (which would therefore require a procedure involving the EP more substantially than in the past), and those without. Once there was an emerging consensus among the national delegations that such a category of implementing acts could be defined – a process in which also the advice from the Legal Service of the Council Secretariat was an important element – the discussion in the working group then shifted to the question of how the EP could be included in the process.

As we mentioned above, the negotiations – among Member States as well as between Council and Parliament – were in the end surprisingly swift and by the summer of 2006 produced an agreement that was based on the recognition of the rights of the EP with regard to such quasi-legislative implementing measures. Part of the "deal" was an explicit quid pro quo between Council agreeing to the introduction of this new regulatory procedure "with scrutiny" by the Parliament and the EP in turn agreeing to a "ceasefire" on sunset clauses which would not only allow the renewal of the delegation of implementing powers to the Commission in the area of Lamfalussy regulations, but would also prevent the use of this instrument in the future. Despite its limitations, which we will discuss below, this outcome is an impressive demonstration of the ability of the EP to informally influence the passage of legislation and indeed expand its "constitutional" powers – something that has been observed on previous occasions.[19]

At the heart of the new Decision is the procedure that needs to be followed in the adoption of quasi-legislative implementing acts. As an addition to the existing procedures, this one is spelt out in a new Article 5a which the 2006 Decision introduces to the existing 1999 Decision. It introduces an intricate mechanism that is significantly more complex than the "old" regulatory procedure which, incidentally, will remain in use for those measures which are deemed not to be quasi-legislative. The addition of a new procedure of such high complexity is somewhat ironic considering that the initial proposal from the Commission was couched in terms of a simplification of the system, and also presented in the context of the effort towards "better regulation" that arose from the White Paper on European Governance. Some of those who will have to work with the

new Article 5a Procedure may have a wry smile at the results of this instance of "simplification".

Rather than trying to present all the steps involved in this procedure, this article intends to identify the key aspects of this reform. In some ways the changes go beyond the text of the adopted Decision as they include undertakings from Commission and Parliament that formed part of the compromise. A summary of the main elements of the deal that was reached at the end of the Austrian Presidency among Council, Commission and European Parliament has to start by emphasising that the basis for the entire reform is the introduction of the above-mentioned distinction between quasi-legislative and non-quasi-legislative implementing measures. Having established this new category of implementing measures, a new "regulatory procedure with scrutiny" has been created for those quasi-legislative acts that arise from co-decided basic acts.

This new procedure is actually quite complex. The Commission submits its draft measures to the comitology committee, as usual. But unlike in the existing regulatory procedure, the Commission has to submit its draft implementing measures to the Committee and to both the Council and the EP, even if it receives a positive opinion from the committee. Both institutions have the possibility to block the adoption of the proposed measure, sending the Commission back to the Committee.

If the Commission initially receives a negative opinion or no opinion from the comitology committee on its draft measure, it needs to submit this to the Council in the first instance. If the Council intends to permit the adoption of the measure, then the measure is also sent to the EP for its opinion. The power of the EP goes beyond the scope control it already had under the "normal" regulatory procedure. Under the new regulatory procedure the EP can object to the adoption of draft measures submitted to it also if it believes that these are not in line with the aims of the basic act, or on the grounds of subsidiarity and proportionality.

Thus, in addition to the power of scrutiny, the EP now has the right to veto the adoption of those measures that are submitted to it under the new procedure. And the EP will in fact receive all draft implementing measures proposed by the Commission under co-decided legislation except in the following case: if a proposed draft measure receives a negative opinion or no opinion from the comitology committee, and is then also rejected by the Council, it does not have to be submitted to the EP. Although this means that there is not complete equality between the two institutions, this clearly is a substantive increase in parliamentary powers compared to the existing rights the EP has had under the 1999 Decision.

Further elements of the reform concern the retrospective application of the new provisions to existing legislative acts which contain delegation of implementing powers that are regarded as falling into the quasi-legislative category. Here the Commission has undertaken to submit to the Council and EP legislative proposals for the revision of 25 legislative acts that have already been identified as priority cases for the ex post application of the new procedure. Beyond this initial alignment there might be a further screening of the acquis in order to identify those legislative acts that could be adapted to the new procedure in due course.

In return for receiving these additional powers the EP has given an undertaking to refrain from requiring new legislation to feature a time-limit on the duration of the delegation of implementing powers to the Commission. In other words, the EP has agreed to lay down the "weapon" of the sunset clause which had proven to be so effective on the path to this reform. Finally, there will also be a need to conclude a new inter-institutional agreement between the Commission and EP to provide new provisions on transparency, transmission of documents to the EP and introducing a linguistic regime.

At the time of writing, the new procedure had not yet been tested. But the legislative activity has already started, with the Commission preparing the designated 25 acts for revision, with the Commission also having started on the identification of other existing pieces of legislation from the acquis that will need to be revised in due course, and current legislative proposals now to be considered for the new procedure. It will therefore be only a question of time until new legislation makes use of the "regulatory procedure with scrutiny", and only then will it become clear how these new provisions will operate in practice. What can be said already at this point is that the introduction of this new procedure is bound to increase the time required for adopting some implementing measures. Although under the "old" regulatory procedure the Council had a maximum of three months to react to the Commission's draft measure, and referrals to the Council were in any case extremely rare, one must expect regular "delays" of between three and five months before the Commission can adopt a measure under the "new" regulatory procedure. This time may be well spent on improvements that the implementing measure receives as a result of the involvement of Council and Parliament. But the increase in the time it takes to adopt implementing acts diminishes the ability of the Commission to react quickly to changing circumstances and on the whole decreases the efficiency of comitology when the new procedure is applied. In some cases, when the basic act demands from the Commission regular implementing acts to be adopted by specific deadlines, there might be serious problems with maintaining such schedules. In other words, the application of the new procedure somewhat reduces the very benefits expected from the delegation of implementing powers to the Commission. In that sense, the new Article 5a is a fairly straightforward example of the well-known trade-off between democracy and efficiency, between input legitimacy and output legitimacy.

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Concluding remarks: Comitology reform – problem solved or dispute postponed?

Clearly it is too early for a proper assessment of the way the new procedure will work. We will need to wait for the application of the decision to existing legislative acts, in order to better understand the extent of this reform. Only after that application has begun and new legislative acts have gone through the co-decision procedure, will it become clear how the new category of quasi-legislative acts will be defined. Inter-institutional agreements between the Commission and Parliament will need to be concluded in order to manage the details of document transmission and the use of languages. And, last but not least, we will need to wait and see how the first draft implementing measures fare in the maze of the "regulatory procedure with scrutiny". In other words it will take months, and probably years, before a reliable picture of the impact of the 2006 Decision will emerge.

All we offer here are some initial thoughts about the issues that may arise in the course of introducing the changes brought about by the reform. The first, and perhaps most important observation we have already made above, is the fact that, rather than providing a simplification of comitology, the reform has significantly increased the complexity of the comitology system – an aspect of the Union that was not famous for its simplicity to start with. From four procedures we have moved to five, or indeed six if one considers the separate avenues created by positive, negative or no opinion from the comitology committee. If the legislator, as is likely, decides to make frequent use of the new Article 5a procedure, then implementation will take significantly longer and will be harder to follow. Even if insiders and experts understand the nature of the new process, communicating to citizens and businesses how these implementing measures have been arrived at, and who precisely was responsible for them, will be extremely difficult.

There are related problems that might be anticipated concerning the internal arrangements in the Council and Parliament about the way in which each deals with the new system. Neither institution is very experienced when it comes to intervention regarding implementing measures – the Council has had only a few dozen referrals from comitology committees since the 1999 Decision was introduced, and Parliament has only issued a handful of Resolutions under its existing – much lighter – right of scrutiny. It remains to be seen how effective these two legislative institutions will be in establishing the necessary infrastructure to deal systematically with their new role in scrutinising executive measures.

A different set of issues surround the earlier stage of drafting legislation, the point at which the decision will need to be made to choose one or the other regulatory procedure as the way of adopting implementing measures. From what was said above one may expect considerable differences in the duration and nature of implementation, depending on whether the existing or the new regulatory procedure is being chosen. In the first instance, it has to be acknowledged that the decision which of the two regulatory procedures is to be used is not a free choice, but should of course be governed by the degree of legislative impact that implementing measures can be expected to have. If they have general scope, and if non-essential elements are being amended, then the new procedure should be used. Thus, if implementing measures are not of general scope, the existing, lighter procedure should be used.

In most cases it will probably be clear which procedure is to be used in which case, especially since this choice – in contrast to the application of the criteria spelt out in the 1999 Decision to choose between advisory, management and regulatory procedure – is supposed to be mandatory rather than indicative. However, one can also imagine a grey area of cases where the legislative impact or the scope of the implementing measures will be debatable. In such cases, the 2006 Decision has set the stage for further disagreements and institutional power struggles in the legislative phase. Crucially, the EP will have an inherent interest in defining the quasi-legislative category as broadly as possible, given that this will provide it which much more extensive scrutiny rights. Equally, the Council may be expected to try and use the existing procedure as much as possible, as this is where Member States and the Commission can negotiate the implementation of legislation without much interference from the EP. The Commission may also prefer this type of procedure, given what was said already about the impact on time that the new procedure may have. Then again, the Commission has in the past been at the sharp end of the EP's irritation and will be sensitive to its demands.

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Basically, the 2006 reform may not only lead to a more lengthy process of adopting implementing measures, but may indeed also prolong the legislative procedure. Institutions may wrangle over the choice of right procedure in cases where the law does not provide a clear-cut answer. And even after both the legislative act and the implementing measures based on it have been adopted, the possible argument about the choice of the correct procedure may not be settled. If a party feels aggrieved, it may seek a ruling from the ECJ to overturn the decision. We have already seen the Court being asked to rule on a matter of procedural choice under the 1999 Decision,[20] so it is fair to assume that the – potentially more contentious – choice between quasi-legislative and non-quasi-legislative procedure may also appear on the agenda of the ECJ.

The discussion of the potentially contestable nature of the new category of quasi-legislative measures brings us to the wider question of the "winners" and "losers" of this reform. The immediate response to this question might be to regard the EP as a winner: it was the EP that forced the issue on the agenda, and that achieved its aim of a right to also scrutinise the substance of those implementing measures having a legislative impact. Through a sustained

and fairly well co-ordinated campaign the EP managed to receive a considerable increase in its overview of the Commission's delegated powers.

However, a second look reveals some weaknesses in the EP's position. First of all, the EP only received the demanded equality with the Council in that part of the procedure that follows on from a positive opinion from the comitology committee. If comitology issues either a negative or no opinion, the EP is a distinct "second class" citizen to the Council: first of all, if the Council follows the comitology committee in objecting to the draft measure, the EP is not consulted at all; secondly, even if the Council considers adopting the measure, the EP is only consulted after the Council. This shows that symbolically and practically the EP falls short of having the same role as the Council – and this had actually been the ultimate objective of the Parliament. The Parliament also paid a potentially high price in order to achieve this reform, having given up the instrument of sunset clauses for the delegation of implementing powers. As we have seen from the way in which the EP used its veto over the extension of the delegation to the Commission in the area of Lamfalussy, the sunset clauses proved to be a powerful tool in order to generate leverage in inter-institutional relations with the Council and Commission. Having now undertaken to give up the use of this instrument, the EP has lost an important weapon in its armoury. The combined effect of these developments – legal uncertainty over the use of the right procedure and less control over the Commission through sunset clauses – may be a greater hesitation by the EP to agree to the delegation of implementing powers in the first place.

To sum up we can conclude that the 2006 reform of the comitology procedures is more than just an amendment of 1999 Decision. It promises huge changes to the way in which the delegation of implementing powers to the Commission is going to be controlled by Council and Parliament. In particular, it genuinely puts the EP on the map when it comes to scrutinising the way in which the Commission is using such delegated powers, and therefore promises not just significant legal changes but possibly also a degree of cultural change when it comes to the way in which comitology works. But just as it accommodates the demands of the Parliament to a large extent, it also raises many new questions concerning the operation of the new procedure. As with previous instances of reforms of comitology, while some long-standing problems are being addressed by the new reform, new questions are being opened at the same time – questions that will only be answered once the new regulatory procedure is being put into practice. Time will tell whether this reform of comitology has solved the problems or whether the inter-institutional dispute over the legislative control of delegated implementation has only been postponed. ::

NOTES

[1] We are grateful for helpful comments received from Edward Best, Christoph Demmke, Pamela Lintner, Johanna Oettel and Paolo Ponzano. Any remaining errors are, of course, the sole responsibility of the authors.

[2] See R. Dehousse, "Comitology: Who watches the watchmen?" *Journal of European Public Policy*, Vol. 10, No. 5 (2003), pp. 798-813.

[3] There is now quite a large body of literature on the workings of the comitology system. See R. Pedler and G. Schaefer (eds), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (Maastricht: EIPA, 1996); T. Christiansen and T. Larsson, *The Role of Committees in the EU Policy-Process* (Cheltenham: Edward Elgar, forthcoming in 2007); C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999); C. Joerges and J. Neyer, "Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuff sector", *Journal of European Public Policy*, Vol. 4, No. 4 (1997), pp. 609-625; C. Joerges and J. Falke (eds), *Das Ausschußwesen der Europäischen Union – Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, (Baden-Baden: Nomos, 2000); W.Wessels "Comitology: fusion in action. Politico-administrative trends in the EU system", *Journal of European Public Policy*, Vol. 5, No. 2 (1998) pp. 209-34; A. Toeller, *Komitologie, Theoretische Bedeutung und praktische Funktionsweise von Durchführungsausschüssen der Europäischen Union am Beispiel der Umweltpolitik* (Opladen: Leske+Budrich, 2002); H. Hofmann and A. Toeller, "Zur Reform der Komitologie – Regeln und Grundsätze für die Verwaltungskooperation im Ausschußsystem der Europäischen Gemeinschaften" *Staatswissenschaften und Staatspraxis* Vol. 98, No. 2, pp. 207-237; Mark A. Pollack, "Control Mechanism or Deliberative Democracy? Two images of Comitology", *Comparative Political Studies*, Vol. 36, No. 1-2, (2003) pp. 125-155; T. Christiansen and E. Kirchner (eds), *Committee governance in the European Union* (Manchester: Manchester University Press, 2000); F. Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (Oxford: OUP, 2005); C. Blumann, "Le Parlement européen et la comitologie: une complication pour la conférence intergouvernementale de 1996", *Revue trimestrielle de droit européen*, Vol. 32, No. 1 (1996), pp. 1-23; M. Andenas and A. Tuerk (eds), *Delegated Legislation and the Role of Committees in the EC* (The Hague: Kluwer Law International, 2000); J. Neyer, "Justifiying Comitology: The Promise of Deliberation" in K.H. Neunreither and A. Wiener (eds), *European Integration. Institutional Dynamics and Prospects for Democracy After Amsterdam* (Oxford: OUP, 1999); M. Rhinard, "The Democratic Legitimacy of the European Union Committee System", *Governance: An International Journal of Policy*, Administration and Institutions, Vol 14, No. 2 (2002), pp. 185-210; E. Vos, "The rise of commitees" *European Law Journal*, Vol. 3, No. 3 (1997), pp. 230 254; W. Wessels, "Comitology: fusion in action. Politico-administrative trends in the EU system", *Journal of European Public Policy*, Vol. 5, No. 2 (1998), pp. 209-34; B. Steunenberg, C. Koboldt and D. Schmidtchen, "Comitology and the Balance of Power in the European Union", *International Review of Law and Economics* (1996) pp. 329-344; K. Bradley, "Comitology and the Courts: Tales of the Unexpected", in H. Hofmann and A. Türk (eds), *EU Administrative Governance*, (Cheltenham, UK and Brookfield, US: Edward Elgar, 2006); R. Dogan, "Comitology: Little Procedures with Big Implications", *West European Politics*, No. 3 (1997); C. Demmke, "The Secret life of Comitology or the role of public officials in EC Environmental Policy", EIPASCOPE, No. 1998/3 (1998); A. Türk "Transparency and Comitology", in C. Demmke and C. Engel (eds), *Continuity and Change in the European Integration Process* (Maastricht: EIPA, 2003), pp. 175-198; M.P.C.M Van Schendlen (ed), EU *Committees as influential policymakers*,

(Aldershot: Ashgate, 1998); H. Hofmann and A. Türk, *EU Administrative Governance* (Cheltenham, Edward Elgar, 2006).

4 European Court of Justice, Case No. C-25/70 (Koester).

5 Council Decision 1999/468/EC laying down procedures for the exercise of implementing powers conferred on the Commission.

6 EP Resolution A5-01777/200 on Commission Decision on the Safe Harbour Privacy Principle, OJ 2001 C121/152.

7 Commission Decision on the adequacy of protection provided by the privacy principle issued on the implementation of the Directive 95/46/ EC of the EP and Council on the protection of individuals with the regard to the processing of personal data on the free movement of such data, OJ 1995 L 281/31.

8 P. Lintner and B. Vaccari, "The European Parliament right of scrutiny over Commission Implementing acts: a real parliament Control?", EIPASCOPE No. 2005/1; C. Neuhold, "European Governance by Committees. The Implications of Comitology on the Democratic Arena", in A. Benz and I. Papadopoulos (eds), *Governance and Democracy. Comparing National, European and International Experiences* (London: Routledge, 2006).

9 http://ec.europa.eu/transparency/regcomitology/registre.cfm?CL=en

10 Commission communication to the European Parliament of 20 July 2005 on the "Resolution of 12 April 2005 on hazardous substances – Review of transmission of draft implementing measures (B6 0218/2005), annexes I, II, III, IV.

11 Treaty Establishing a Constitution for the European Union, Art.I-33 – Art.I-36.

12 Conclusions of the Stockholm European Council, March 2001.

13 Commission Decision establishing comitology and CESR committees.

14 B. Vaccari, "Le processus Lamfalussy: une réussite pour la comitologie et un exemple de "bonne gouvernance européennee", *Revue de droit de l'UE*, No. 4 (2005).

15 The EP used the uncertainty surrounding the adoption of the 2007-2013 Financial Perspective to flex its budgetary muscles and briefly blocked the funding for comitology committees – a tool it had already used to some effect in the 1990s. There was also the insistence by the EP to insert sunset clauses in new legislative acts going through the co-decision procedure at the time.

16 Report on the draft Council Decision amending Decision 1999/468/EC laying down procedures for the exercise of implementing powers conferred on the Commission.

17 Council Decision 2006/512/EC amending Decision 1999/468/EC laying down procedures for the exercise of implementing powers conferred on the Commission.

18 Commission Proposal for a Council Decision amending Decision 1999/468/EC laying down procedures for the exercise of implementing powers conferred on the Commission

19 See, for example, H. Farrell and A. Héritier "Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe", *Governance* Vol. 16, No. 4 (2003), pp. 577-600; A. Maurer, D. Kietz and C. Völkel, *Interinstitutional Agreements in the CFSP: Parliamentarisation through the Backdoor*? EIF Working Paper Series, No. 5 (2005); S. Hix, 2000, "Parliamentary oversight of executive power: what role for the European Parliament in comitology?", in T. Christiansen and E. Kirchner (eds), *Committee governance in the European Union* (Manchester: Manchester University Press, 2000). For a wider discussion of the significance of informal arrangements in the politics of the EU, see J. Stacey and B. Rittberger (eds), "Dynamics of formal and informal institutional change in the EU", Special Issue of the *Journal of European Public Policy*, Vol. 10, No. 6 (2003); T. Christiansen and S. Piattoni, *Informal Governance in the European Union* (Cheltenham: Edward Elgar, 2003); G. Peters, "Forms of Informal Governance: Searching for Efficiency and Democracy" in T. Christiansen and T. Larsson *The Role of Committees in the EU Policy-Process* (Cheltenham: Edward Elgar, forthcoming in 2007).

20 European Court of Justice, Cases Nos. C-378/00 (LIFE) and Case C-122/04 (Forest Focus).