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THE POST-LISBON BATTLE OVER COMITOLOGY:  
ANOTHER ROUND OF THE POLITICS  
OF STRUCTURAL CHOICE

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## **Abstract**

The entry into force of the Lisbon Treaty has presented the three EU institutions with a rare opportunity to completely re-design the system of control of the Commission's delegated powers. Hitherto, the Commission's ability to adopt implementing measures was controlled via the by now well-known comitology system, that has undergone only minor changes since it was introduced in the early 1960s. Since the new Treaty distinguishes between delegated and implementing acts, and also specifies that the rules of the game for implementing acts have to be decided via a co-decision regulation, all institutions attempted to secure strong control positions in the newly emerging system. Now that the new system has been finally agreed upon, this paper asks the *qui bono* question: Who benefits from the new system, and how did those actors get what they wanted? In our analysis we treat the negotiations on the new system as a game of structural choice, and trace back the course of the negotiations through a close analysis of formal and informal documents and interviews. Although in the end we find much support for our hypotheses, we find that the course of events in some respects has gone further than we theoretically expected.

## **Keywords**

Comitology, implementing acts, delegated legislation, structural choice, deck-stacking



## Introduction

The vast majority of decisions, directives and regulations adopted by the European Union's institutions are of an executive nature. Obviously, the aims and principles of policy are covered in legislation that is adopted by the Council of Ministers and the European Parliament, mostly according to the co-decision or ordinary legislative procedure. Although the truly legislative co-decision acts receive most attention by far, they only constitute a very small portion of the total. Throughout history, 60 to 90 percent of European directives, decisions and regulations have been executive acts adopted by the Commission (Brandsma 2010, Van Schendelen 2010). Those 'little rules' flesh out and apply European legislation, mostly in the form of further decisions, directives and regulations adopted by the Commission. It is for that reason that, as in any parliamentary democracy, the executive has been placed under control of the legislator in this.

The system of controlling the Commission in its executive capacities has thus far to a great extent relied on the comitology system, in which the Commission consults a committee of member state representatives with voting power. Where basic legislation so provides, draft executive measures have to be voted on by a committee and depending of the voting scheme used, issues can be referred to an appeal body after a certain outcome of the vote (cf. below for more details on the past and present referring systems). Basic co-decision legislation specifies which voting scheme applies in which cases. Some voting schemes make it more difficult for the Commission to get a draft measure accepted than other schemes, and for that reason the choice for using a certain voting procedure is essentially political.

But the question of how the system as such is designed is also a deeply political matter since it specifies the degree of autonomy allowed to the Commission in delegated rule-making. Thus far, the comitology system has evolved from the early 1960s and changes, although significant at times, were incremental. The Lisbon Treaty created an opportunity to create a new control system almost from scratch because it gave a new legal status to executive measures. The new Treaty distinguishes between delegated acts and implementing acts, with the former specifying control instruments for the Council and the European Parliament, and with the latter placing control in the hands of the Member States, for which the Council and the European Parliament had to agree on common rules on a proposal from the Commission. This situation gave all involved institutions the opportunity to design a new control system corresponding to their own preferences.

Following the entry into force of the Lisbon Treaty, the Commission proposed a new system for the control of delegated rule-making. The proposals introduced the future systems for Council and Parliament control of delegated acts (article 290 TFEU) and member state control of implementing acts (article 291 TFEU). After protracted inter-institutional negotiations the new systems were decided in December 2010. In this paper we investigate the *cui bono*-question: Who benefits from these new control systems, and how did the winners get what they wanted? To answer this question, we use a structural choice perspective (Moe 1990a; 1990b) in an analysis of the negotiations between the institutions. We distill the interests of the involved actors, analyze their formal powers during the negotiations, and we trace the course of the negotiations between the institutions in order to see what was at stake, how the actors pursued their interests, who was successful, and why the new control regime took its final form.

This paper is structured as follows. First, we introduce the comitology system. We then introduce the politics of structural choice as our analytical framework, which also leads to hypotheses as to the institutions' stances in the negotiations. Then, after explaining our

methods and data, we provide a detailed chronological account of the inter-institutional negotiations on the new systems for control of delegated rule-making. We then convert this account into an analytical causal explanation. The paper ends with a conclusion teasing out the lessons of our study for further negotiations to come.

### The EU Comitology System And The Changes In The Lisbon Treaty

Comitology refers to a system that, until the reform investigated in this article, consisted of about 250 committees of member state representatives that control the Commission in its executive capacities. In the early 1960s, this system was invented as a control mechanism enabling the member states of the Council to oversee the implementation of its policies by the Commission. Within legislative acts, articles can be inserted by the legislator specifying which tasks are delegated to the Commission, if a comitology committee is established, and which voting rules are applied in the committees (Bergström 2005; Pollack 2003: 114-155).

With the growth of community legislation, the practice of establishing committees grew as well. Until 1987, each piece of legislation specified individually which voting scheme applied. From then, the first Comitology Decision (87/373/EEC) specified standard procedures which could be referred to in new legislative acts. These voting rules were updated several times. At the time of the adoption of the Lisbon Treaty, there were four voting procedures as specified in Table 1 below (see Council Decisions 1999/468/EC and 2006/512/EC).

**Table 1. Committee procedures in the comitology system**

	Decision rule in committee to refer Commission proposal to the Council of Ministers or European Parliament	Involvement of European Parliament (if based on co-decision act)	Decision rule in Council of Ministers to block Commission proposal
Advisory Procedure	No referrals – committee opinion not binding for Commission	Receives documents; weak <i>ultra vires</i> control	-
Management Procedure	Qualified majority against Commission proposal; referral to Council only	ibidem	Qualified majority against
Regulatory Procedure	Blocking minority against Commission proposal; referral to Council only	ibidem	Qualified majority against
Regulatory Procedure with Scrutiny	Always referral to both institutions	ibidem, plus veto power	Qualified majority against

When the *advisory procedure* is used, committees give their opinion on Commission proposals through a simple majority vote by member states. The Commission is allowed to ignore the opinion of the committee, although it is supposed to give ‘the utmost’ consideration to the expressed position. Any constraint upon the Commission is therefore purely informal under this procedure. If the original act is adopted under co-decision, the European Parliament is allowed to adopt a non-binding resolution in plenary within one



month of the committee's opinion when the Commission has exceeded its competences of implementation through the adopted measure (referred to as 'droit de regard' or 'ultra vires control').

The *management procedure* is a bit more constraining. Here, the Commission can always proceed with implementation unless there is a qualified majority of member states against a draft measure: then the matter is referred to the Council of Ministers. In practice, this means that the Commission only needs just over a third of the votes to be positive or abstaining in order to get its way. But even if a proposal is forwarded to the Council, the Commission may still have its draft measure implemented as long as the Council does not oppose the draft measure by a qualified majority before a certain deadline. If the implementation measure follows on a co-decision act, the European Parliament again has a 'droit de regard'. Typically, the management procedure is used when it comes to managing or approving the budget of a continuing work programme. Examples of this include the 'Framework Programmes' for research and the Common Agricultural Policy.

Again more constraining to the Commission is the *regulatory procedure*. In this procedure the Commission needs a qualified majority to be in favour of its proposal in order to adopt a draft measure. When this qualified majority in favour is not reached, the matter is forwarded to the Council which, in turn, can only block the adoption of the proposed measures by means of a qualified majority against. Again, the Parliament has a 'droit de regard' under co-decision. This variant is commonly used for policies that relate to the health of humans, animals and plants, as well as to other situations where the legislators have chosen to refer to this procedure in the basic act.

Finally, the *regulatory procedure with scrutiny* is by far the most complicated procedure in the committee system and deals with quasi-legislative activities. It was introduced in 2006 because the Council and, especially, the European Parliament felt they should always be consulted when 'non-essential elements of basic legislation' (usually annexes) are changed or supplemented as part of implementation. The voting procedures in the committees are the same as those in the standard regulatory procedure, but even in the case of a positive opinion the Parliament and the Council need to be consulted. If either of them objects, the proposal is blocked. In the case of a negative committee opinion, the measure is only adopted when the Council agrees and the European Parliament does not oppose the proposed measure.

The Lisbon Treaty, which entered into force in December 2009, has important implications for the comitology system. The Treaty repeals the EC Treaty's article 202, the hitherto legal basis of the comitology system, and introduces a new hierarchy of legal acts (Hofmann 2009). Legislative acts are adopted by the Council and the European Parliament acting under the codecision procedure, while delegated acts and implementation acts are adopted by the Commission (articles 289-291 TFEU). Delegated acts are controlled by the Council and the European Parliament by new rights of revocation and opposition, while implementation acts are controlled by the member states. The rules of the new control system for implementing acts, as specified in Treaty Article 291, are set in a regulation adopted by the codecision procedure, which in essence replaces the Council's comitology decision.

The Lisbon Treaty thus represents a new approach to delegated rule-making in the EU. The new system requires answers to three interconnected questions. First, how are delegated acts to be controlled by the new rights of revocation and opposition in practice? Second, what committee procedures are to be used to control implementation acts in the new comitology system? Third, how is the distinction between delegated and implementation acts to be used in daily legislative practice? These three questions constitute the dividing lines for the political battle on the control of delegated powers in the post-Lisbon EU system.

## **Understanding The Post-Lisbon Battle Over Comitology: The Politics Of Structural Choice**

The Lisbon Treaty presented the EU institutions with an opportunity to fundamentally re-design the control of the Commission's delegated powers. This was a rare opportunity. Since the early 1960's control had relied on the comitology system. This system had only been given three overhauls. The first was in 1987 when the Council made its first comitology decision. This reform codified the existing committee procedures into four generic types with several variants (Bergström 2005: 189-208). The second was in 1999 when the Council made its second comitology decision. This reform abolished the procedural variants, but maintained the four generic types (Pollack 2003: 119-125). The third reform came in 2006, when the second comitology decision was amended, and the new regulatory procedure with scrutiny was introduced. This reform was deliberately meant to be limited because all actors had already agreed on the new rules to be incorporated into the Lisbon Treaty (Blom-Hansen 2011). In sum, the three pre-Lisbon comitology reforms had all an incremental nature and represented marginal changes of the status quo.

The limited ambitions of past comitology reforms are not due to a lack of conflicts of interests among the involved actors. Almost all observers of comitology are struck by the inter-institutional rivalry about this system. Franchino (2007: 283) talks of a 'legislative battle on comitology' when investigating the European Parliament's endeavours to strengthen its position in the system. Bergström (2005: 313) states that 'the role of the European Parliament has been characterized by struggle... the tactic of the European Parliament has been to wear its opponents down by use and abuse of all means available until the point has been reached where they realize that it will be less costly to make concessions than to resist'. Pollack (2003: 120) speaks of 'an ongoing political battle' among the EU institutions when explaining the evolution of the comitology system. Bradley (2008: 850) concludes on the 2006 reform of comitology that 'Parliament had to use the full panoply of its institutional prerogatives, legislative, budgetary and jurisdictional ... these are for the most part weapons of mass obstruction ... yet the fact is that, without recourse to such tactics, it seems unlikely that the 2006 reforms would ever have got off the ground'.

The modest results of prior reforms can be explained by the privileged position of the Council. It has consistently resisted increased autonomy for the Commission and more involvement of the European Parliament in the comitology system, and it has been able to pursue these preferences because of its Treaty based powers (cf. Bergström et al. 2007). Until the Lisbon Treaty comitology rules were decided as Council decisions adopted under the consultation procedure. In contrast, the Lisbon Treaty specifies that comitology rules are to be made as regulations adopted under the codecision procedure. The basic rules of the game have been changed.

Why do the EU institutions care so much about controlling delegated powers? And why are the new Treaty rules likely to make a difference? Our argument is that the design of the future system for monitoring delegated and implementation acts is a game of control positions. No-one in the EU system knows for certain how delegated powers to the Commission are going to be used, or what the future precisely entails. But all actors know that there will be many policy decisions to make down the line. When specifying the details of the new parliamentary control mechanisms and the new comitology procedures, the EU legislators cannot precisely determine the contents of delegated decisions, but they can make sure that they will be in a position to influence them. They know that the delegated decision

systems they choose may well influence the content, direction, and effectiveness of future policies. In this sense, delegated decision systems are political weapons. They are structural means to pursue political interests.

The political choice of delegated decision systems is variously referred to as the politics of structural choice (Moe 1990a; 1990b), deck stacking (McCubbins et al. 1987; 1989), or institutional power maximization (Bergström et al. 2007; Heritier and Moury 2011). This perspective assumes that actors are rational utility-maximizers in pursuit of influence over future policy decisions. It is a behavioural logic that does not result in technically rational procedures, but complex, restrictive, at times even bizarre, administrative arrangements. The reason is threefold. First, actors cannot afford to prioritize efficiency. Since the future is uncertain, they need to secure control positions in future decisions-making situations. Administrative efficiency comes second, if at all. Second, decision-making in a democratic system often involves compromising. This means that the losing side is granted concessions. Since it is opposed to the policy decisions of the winning side, the losing side does not want efficient procedures, but procedures that make it difficult to implement the winning side's policies. Third, some degree of autonomy at the level of the bureaucracy is unavoidable because it is impossible to completely foresee all future contingencies within a policy field in legislative acts. Since the executive may use its autonomy contrary to the interests of the legislative coalition, this coalition takes an interest in overseeing the administration. In sum, delegated decision systems are designed by actors who may care about administrative efficiency, but who primarily care about controlling future policy decisions and monitoring the executive.

When designing the new monitoring mechanisms and the new comitology procedures the EU legislators specify the degree of control which they will have over the use of delegated powers in the future. They do not know what the future will bring. But the system can be specified in ways that will ensure that future decisions will be enacted through procedures which maximize their control over those decisions. The deck may be stacked in favour of some actors and against others. Consequently, the individual EU legislators will press for a system that ensures efficient institutional control positions for themselves and inefficient control positions for their opponents.

If the making of the new parliamentary monitoring mechanisms and the new comitology procedures represents an example of the politics of structural choice or deck stacking, the individual EU legislators seek to use these rules to increase their own control over delegated decision-making. This means that the legislators will have different preferences over the rules. Our contention is that their preferences will be of the following nature.

The member states in the *Council* acknowledge the need to delegate decision-making power to the Commission. But they are also wary of the Commission. They want to be in a position to monitor the Commission and to intervene in individual cases. If this position is secured, they are willing to accept extensive delegation since this minimises transaction costs.

The *European Parliament* wants recognition as a full EU co-legislator. It insists on the same monitoring rights over delegated decision-making as the Council. It has traditionally been opposed to the comitology system because this left it no powers over delegated decision-making. The Lisbon Treaty transforms the most controversial and extensive parts of delegated powers into delegated acts and thus takes them out of the comitology system and places them under the new supervising mechanisms of article 290. The European Parliament is likely to prefer the Article 290 over the Article 291 scheme in legislative negotiations, which is beyond the scope of our study but which may well result in less hostility against the implementing

acts regime as such. Nevertheless it is likely to keep a close watch over the distinction between delegated and implementation acts.

The *Commission* is likely to favour broad delegation with minimal parliamentary control. It is therefore likely to work for a narrow interpretation of the new monitoring devices introduced in relation to delegated acts and for a less constraining comitology system in relation to implementation acts. However, to some extent the Commission is likely to have mixed feelings about parliamentary control mechanisms. Knowing the Council's and Parliament's reluctance to delegate unlimited decision-making powers, it may be willing to accept control mechanisms in order to increase delegation.

To what extent are the actors able to pursue these preferences? Their bargaining powers depend first and foremost on the Treaty. The new parliamentary control mechanisms introduced by article 290 in relation to delegated acts do not need any secondary rules to become operative. The EU institutions have stated a wish that some sort of understanding can be reached *a priori* on the use of the new control mechanisms, cf. below. But the absence of a formal requirement leaves all actors with an effective veto position and makes a case-by-case approach a credible default position. In contrast, the new comitology system in relation to implementation acts under article 291 requires secondary rules to be operative. The Treaty specifies that the new system must be decided by a regulation adopted under the codecision procedure. This leaves the Commission with the right of initiative and a sort of pre-veto since changes to its proposal require unanimity in the Council. Further, the codecision procedure implies that the European Parliament, in contrast to the pre-Lisbon comitology rules, now has full veto-rights over the rules of the new comitology system.

Although the actors' Treaty based bargaining powers are the most important, they are not the only ones. Previous comitology reforms have shown that the actors also have access to other means (Blom-Hansen 2011; Bradley 2008; Schusterschnitz and Kotz 2006). First, the European Parliament has used its budgetary powers to freeze funding for comitology committees and thus put pressure on the Council for concessions. Second, time has often been a valuable asset for the Council. Since it can veto changes and is favoured by the status quo it can employ delaying tactics. Third, both the Parliament and individual member states have used court proceedings to put pressure on the Commission to change the comitology rules.

Based on these preferences and bargaining powers we expect the following scenario for the negotiations on the rules for delegated decision-making in the post-Lisbon system. Given the expressed wish to reach an understanding on the use of delegated acts under article 290 we expect the actors to make such a compromise since this will reduce decision-making costs in daily legislation. However, we expect this understanding to have a rather vague and broad nature. This is because, first, all actors have effective veto-rights, and agreement therefore must be a true compromise. Second, since the understanding cannot be given a binding nature, it is vulnerable to ex-post defection, which means resorting to a case-by-case approach. This again means that it does not make much sense for any of the actors to go for more than broad guidelines.

In relation to implementation acts under article 291 we expect the Commission to use its right of initiative and pre-veto to pursue minimal constraints in the new comitology system. This primarily means making the committee system as consultative as possible. In contrast, we expect the Council to have a strong preference for maximum control by their national experts. The Parliament's preferences are likely to be less intense since its main interests are in delegated decision-making covered by the article 290 mechanisms, not in the new comitology system under article 291. We therefore expect the main battle to be between the Commission and the Council. Since the battle is institutional in nature, we do not expect a great deal of preference divergence among the member states. Hence, the Commission's pre-

veto and ability to decide the decision rule in the Council is likely to be a blunt weapon. Furthermore, the Council can easily afford to employ delaying tactics since it is favoured by the status quo. In sum, it seems likely that the Council has a bargaining advantage. We therefore expect the new comitology system to be close to the Council’s preferences. Table 2 provides a summary of our hypotheses on preferences and negotiation results.

**Table 2. Hypotheses on institutional preferences and negotiation results**

	Implementation of art. 290 TFEU	Implementation of art. 291 TFEU
Preferences	H1: The Commission, the Council and the EP do not have strong preferences for an a priori compromise	H3a: The Commission has a strong preference for minimal parliamentary control H3b: The Council has a strong preference for maximal member state control H3c: The EP has no strong preferences H3d: There is little preference divergence between member states
Negotiation result	H2: Broad compromise	H4: Close to Council’s preference

### **Methods And Data**

To investigate our hypotheses we employ the process-tracing method (George and Bennett 2005: 205-233). That is, we analyse all the steps in the process leading to the result of the negotiations. These observations are not independent cases; on the contrary they must be linked in a particular way to constitute a confirmation of our expectations. All the steps must be as predicted by our expectations. That is, at each step we should be able to observe that the Commission, Council, and Parliament act in accordance with the assumed preferences. In the case of control of delegated acts under article 290 we should also be able to observe the gradual movement towards a genuine compromise, while in the case of implementation acts under article 291 we should see a movement towards the preferences of the Council as the negotiations process unfolds.

The first step when employing the process-tracing method is to define the process to be traced. This involves identifying a starting point and an end point which, however, are often less than self-evident. As noted by Gerring (2007: 19), the temporal boundaries of a case are often less apparent than its spatial boundaries. Although the negotiations on the Lisbon Treaty’s system for control of delegated decision-making can be said to be part of the Treaty negotiations (and thus date back at least as far as the European Convention which prepared the Constitutional Treaty after the turn of the millennium), we take the Lisbon Treaty stipulations as given and start our analysis when this Treaty entered into force. Although, as we shall document, some pre-negotiations began somewhat earlier, this means that we begin our analysis in November 2009. As far as delegated acts (art. 290 TFEU) are concerned, the negotiation process ended when the Commission, the Council and the Parliament reached a common understanding on 16 December 2010. As to implementing acts (art. 291 TFEU), the new regulation on the post-Lisbon comitology system was formally adopted by the Council as a first reading agreement in February 2011, but the real

negotiations ended with parliamentary agreement on 16 December 2010 following trilogues. Defined in this way the process entailed a number of steps which are listed in Table 3 below.

**Table 3. Formal steps in the process leading to the post-Lisbon system for control of delegated decision-making**

Control of delegated acts (art. 290 TFEU)		Control of implementing acts (art. 291 TFEU)	
9 Dec 2009:	Commission communication	9 March 2010:	Commission proposal for new regulation
5 May 2010:	EP resolution	16 Dec 2010:	EP first reading
20 Oct 2010:	Framework agreement on relations between the EP and the Commission	14 Feb 2011:	Council decision (first reading agreement)
16 Dec 2010:	Common understanding (EP Plenary)	16 Feb 2011:	Regulation 182/2011
3 March 2011:	Adoption by EP Conference of Presidents		

We conduct our empirical analysis in two steps. First, we present a detailed narrative in the form of a chronicle of the negotiation processes on the implementation of articles 290 and 291 TFEU. The purpose of this narrative is to provide a thick description of the actors' moves and counter-moves. Second, we convert this narrative into an analytical causal explanation focusing on the preferences of the actors and the movement from initial bargaining positions to the final result.

Table 4 lists the different types of data that we have used for analysis. First, several documents were retrieved that reveal the institution's positions. Some of these are official documents that can be found in the EU's on-line document repositories, such as the Commission's communication and proposal related to the two types of acts, EP reports and COREPER agendas. However, we also made extensive use of informal documentation such as meeting documents, non-papers and minutes that were made available to us by a variety of actors who, in one way or the other, were involved in the negotiations on these files. Second, we were kept informed by several of those actors about ongoing events. Because some documents were only available to a very select number of actors, at points in our analysis we are not able to refer to those documents in order not to jeopardize the anonymity of our sources.

**Table 4. Overview of sources**

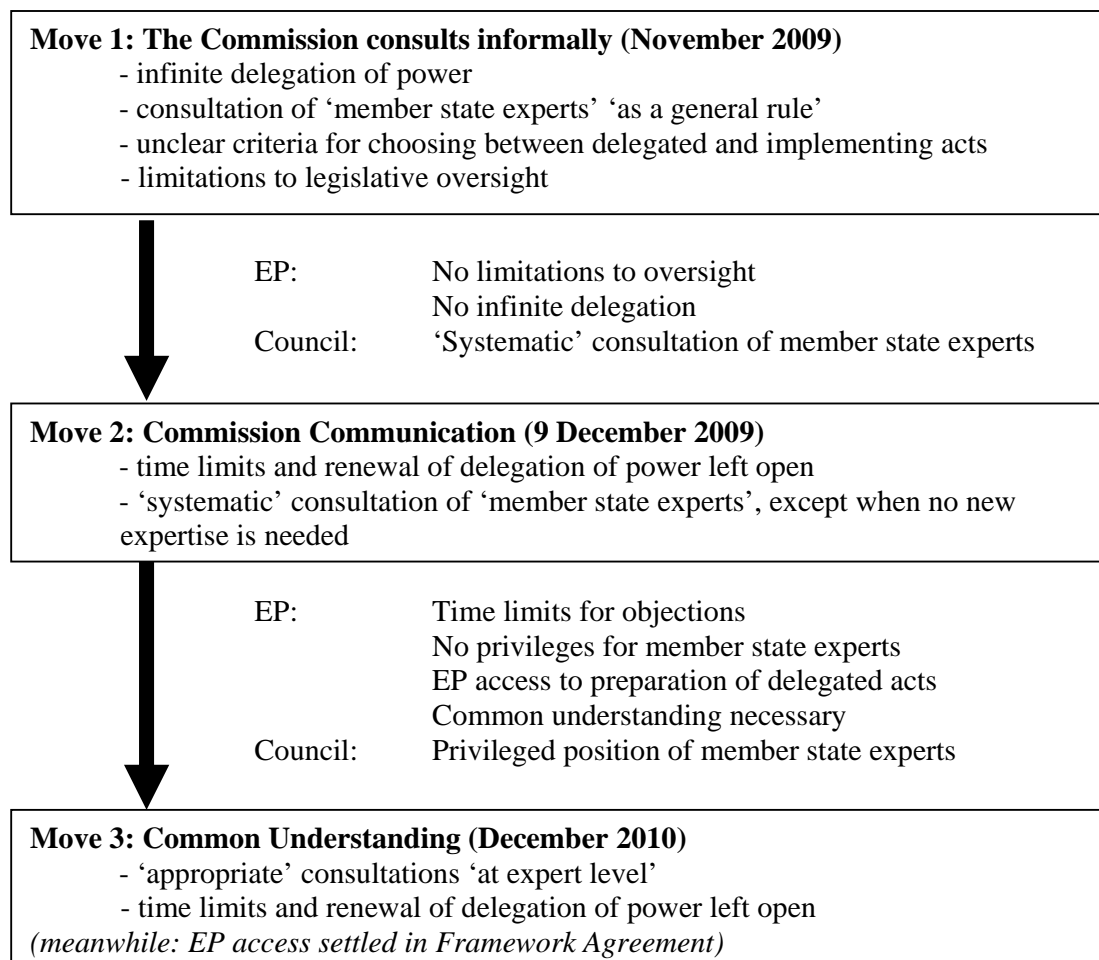
<p><i>Official documents:</i></p> <ul style="list-style-type: none"> <li>• Report by the Council Presidency to the European Council on preparatory work in view of the entry into force of the Lisbon Treaty (Council 2009a).</li> <li>• Report by the Presidency to Coreper on the implementation of Articles 290 and 291 TFEU (Council 2009b)</li> <li>• Introductory note by the Presidency to Coreper II on the implementation of Articles 290 and 291 TFEU (Council 2009c)</li> <li>• Report from the Friends of the Presidency Group to Coreper II (Council 2010a)</li> <li>• Q&amp;A Comitologie onder Lissabon, newsletter of the Center of Expertise of European Law, Dutch Ministry of Foreign Affairs, March 2010 (Ministerie van Buitenlandse Zaken 2010)</li> <li>• Information notes from the Danish Foreign Ministry to the Danish Parliament's EU committee (Udenrigsministeriet 2009; 2010a; 2010b)</li> <li>• Communication from the Commission on the implementation of Article 290 TFEU (Commission 2009)</li> <li>• Commission proposal for a regulation laying down the rules and general principles concerning mechanisms for control by member states of the Commission's exercise of implementing powers (Commission 2010a)</li> <li>• Note a l'attention des membres du GRI (Commission 2010b)</li> <li>• European Parliament resolution of 7 May 2009 on Parliament's new role and responsibilities in implementing the Treaty of Lisbon (EP 2009)</li> <li>• EP Draft report on the power of legislative delegation (EP 2010a)</li> <li>• EP Report on the power of legislative delegation (EP 2010b)</li> <li>• Minutes of the Committee on Legal Affairs, 2 September 2010 (EP 2010c)</li> <li>• EP Draft report on the proposal for a regulation on control by member states on the Commission's exercise of implementing powers (EP 2010d)</li> <li>• EP Report on the proposal for a regulation on control by member states on the Commission's exercise of implementing powers (EP 2010e)</li> <li>• Framework Agreement on relations between the European Parliament and the European Commission (EP and Commission 2010)</li> <li>• 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 (EP and Council 2011)</li> <li>• Commission proposal for a regulation amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (Commission 2011)</li> </ul>
<p><i>Non-official documents (partly made available on condition of confidentiality):</i></p> <ul style="list-style-type: none"> <li>• Draft opinions and draft reports from 12 EP committees</li> <li>• Reports on 10 Coreper meetings, Mertens-group meetings and Friends of the Presidency group meetings</li> <li>• 22 Non-papers, draft texts and meeting documents</li> </ul>
<p><i>Interviews (all interviewees were promised anonymity):</i></p> <ul style="list-style-type: none"> <li>• 4 persons involved in COREPER's negotiations and/or coordinating this in the member states</li> <li>• 5 persons working for the EP's committees and services</li> </ul>

## **Empirical Analysis: Negotiating The Control Of Delegated Acts**

The Commission, the Council and the EP are composite actors and thus face an internal coordination problem. In order to be able to take strategic action in the inter-institutional negotiations on the implementation of articles 290 and 291 TFEU, they all relied on extensive delegation. In the Commission, a team was formed by the secretariat-general. In the Council, the issue rotated with the presidency. In the European Parliament, the Legal Affairs committee was put in charge which appointed József Szájer as its rapporteur. These three negotiators, in turn, were advised by a variety of actors from the member states and the three institutions' services.

Figure 1 below gives a brief overview of the positions taken by the institutions in the course of the negotiations. While some contested issues may appear clear at first sight, this overview also shows that political battles can sometimes be fought out over the use of a single word in the text.

**Figure 1. Negotiating the control of delegated acts**





### ***The Commission's First Move***

The first formal document that the Commission presented on the application of delegated acts by means of Treaty article 290 is its Communication to the Council and the European Parliament of 9 December 2009 (Commission 2009). In fact, although Treaty article 290 does not require any secondary legislation in order to be applied, both the Parliament and the Council presidency expressed in the run-up to the entry into force of the Treaty that it would be useful if the three institutions would reach an understanding on standard recitals, and on how the Commission would use its delegated powers (Council 2009a; EP 2009). The Commission's communication of 9 December 2009 was specifically meant to provide such insights. But in preparation of this Communication and in order to facilitate the debate, the Commission already informally shared its views with the Council and the European Parliament in November by means of several non-papers, which give a clearer view of its initial intentions.

These non-papers underline several important points of departure of the Commission. The first concerns the choice between delegated and implementing act procedures in new legislation. Although the Commission considers the criteria for including the Regulatory Procedure with Scrutiny under the old comitology system to be similar to those for including delegated acts, it underlines (but does not further specify) that these criteria are not exactly the same. Secondly, the Commission stresses that delegation of power should be, as a rule, infinite, since the legislative power is entitled to revoke delegated powers. It, thus, strongly rejects the idea of subjecting delegation of power to a sunset clause in basic legislation. Thirdly, the Commission stresses that it is free to choose its own work processes in the run-up to adopting a delegated act, but still intends to consult experts from member states through expert groups as a general rule. Finally, the Commission proposes some conditions to which legislative oversight should be subject, such as limiting the means of the Council and Parliament to revocation of delegated power and/or the right of opposition against individual measures only; a three-month time limit for expressing opposition but also committing to inform the Commission of a possible intention to oppose or revoke within one month; and an urgency procedure for adopting temporary delegated acts without possibility for objection by Parliament and the Council. The Commission also proposes standard wording to be used in new legislation based on the above points of departure.

### ***Initial Response From The EP And The Council***

In a series of informal bilateral and trilateral meetings in November and December 2009, both the European Parliament and the Council expressed several concerns with respect to the Commission's points of departure. The European Parliament criticized two of the Commission's viewpoints. First, it considered that delegation should not be infinite by default, since it is up to the legislators to decide this. Second, it expressed concerns regarding the proposed conditions of oversight. It considered particularly problematic the possibility for urgency acts to be adopted without scrutiny by the legislators, and the proposed time limit of only one month to consider opposing or revoking, after which it would have another two months to finalize the control processes. To the Parliament, these deadlines were too short since such issues have to be discussed and voted upon both at committee level and in plenary. Furthermore, the Parliament considered it useful to reach a common understanding on the approach regarding delegated acts only after some experience had been gained with the new procedure.

In the Council's Mertens-group, to which the Commission had forwarded a modified set of standard recitals in which urgency measures were made subject to control and in which delegation of powers was not infinite by default any longer, but also finite and automatically renewable, discussions mainly focused on how to secure consultation of national experts without turning the new system into comitology (Council 2009b). Several member states insisted on including the following points in the Commission's communication. First, national experts should not only be consulted as a 'general rule', but systematically. Second, member states sought assurance that consultation of national experts in fact included *all* member states. Third, the expert groups should have sufficient time to give input to the Commission, and finally the Commission must summarize the main elements brought forward in the discussion, together with a preliminary reaction and an indication of the Commission's intentions on the basis of the member state experts' input. The Commission accepted all this, and in addition also agreed to send an explanatory memorandum with each adopted delegated act, providing information about its preparatory work including the consultation of experts. Furthermore, the Council was of view that a standard revocation or opposition time limit of three months was more appropriate than the proposed one plus two months, and that instances could be foreseen where delegation to the Commission would not be infinite, but not subject to automatic renewal either (Council 2009b and 2009c).

### ***The Commission's Second Move***

The Commission's Communication of 9 December 2009, thus, was not its first move. It was a second step, following consultation with the legislative institutions. Compared to its earlier non-papers, the Communication still expresses a strong preference for infinite delegation, but also considers that automatic renewal or expiry dates for delegated powers can be appropriate options for the legislator. Following the Council's concerns, the Communication also mentions the systematic consultation of experts from *all* member states, except - and this is a new element - in cases where there is no requirement for new expertise. All other points raised by the other institutions were taken on board by the Commission as well (Commission 2009).

### ***Reactions From The EP***

Taking advantage of his experience as rapporteur for the alignment of the acquis to the Regulatory Procedure with Scrutiny after 2006, the European Parliament's Legal Affairs committee appointed Mr. Szájer as rapporteur for both delegated and implementing acts. However, the first confrontation between the institutions took place in the context of Environmental affairs. The first new piece of legislation following the Lisbon Treaty in which a delegated act procedure was foreseen was on pet animals (European Parliament and Council Regulation 438/2010/EU). Since a common approach between the institutions was not yet in place, this regulation was seen as an important test case. Conflicts between the institutions centered on the periods of objection by the legislator (with the Commission favouring short deadlines and the Parliament long ones), duration of delegation, and the involvement of national experts (with the Council demanding this and the EP objecting to this).

Following dialogues, the institutions agreed on formulations that set an important precedent for the negotiations to come. First, the period of objection was set to 2+2 months. Initially, both the Council and the Parliament can use 2 months to decide whether to oppose a delegated act. If neither institution decides so, the Commission can adopt the delegated act. Otherwise, the Parliament and the Council can use an additional two months to make a formal

objection. Second, the duration of delegation was fixed to five years, but automatically renewable. Third, the Parliament succeeded in removing references to a privileged position for ‘national’ experts from the preambles, and replacing these with the more neutral wording “it is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level”. This, obviously, leaves more room to the Commission. Finally, the three institutions added a statement to this directive stating that the solutions found in this directive do not prejudice any future position on delegated act clauses. Unless in cases of urgency, the Commission also pledges to respect the periods of recess of the institutions (European Parliament and Council Regulation 438/2010/EU).

In contrast to the report on implementing powers (cf. below), only two parliamentary committees expressed their opinion on the Commission’s communication on delegated acts to rapporteur Szájer. His final report included several elements that are also found in the case of pet animals. First, the report stresses that the objection period of 2 + 2 months should be seen as a minimum, and that there be no formal role for national experts since they should be consulted in the capacity of being experts – in similar vein to civil society and even members of Parliament. Furthermore, the report argues for maximum freedom for the legislator in choosing instruments beyond opposition and revocation, freedom in fixing objection deadlines and the ability to be consulted by the Commission in preparing delegated acts. Also, the report expresses a desire to reach a common understanding with the other institutions on practical matters (EP 2010b). Although negotiations on this common understanding were already nearly complete in the summer of 2010, they were only concluded in December as part of a package with the new rules on implementing acts (cf. below). In the mean time, however, the Parliament did manage to strike a deal with the Commission on access to expert meetings. In the Framework Agreement between these institutions, which is revised after each new Commission assumes office, an agreement is included that members of parliament are also invited to preparatory expert meetings for delegated acts if representatives from all member states are also invited (EP and Commission 2010).

### ***Reactions From The Council***

The outcome of the trialogue on the pet animals directive was a serious setback for many member states in the Council, since they had tried to secure a privileged position for member state experts. Nevertheless this event did not kick the issue off the agenda. Although referring to ‘national’ experts in the recitals of basic acts was unacceptable to the European Parliament, in subsequent negotiations the Council insisted on keeping at least a reference to ‘experts’ in the recitals. Also, member states insisted on an explicit statement that a common understanding on delegated acts does not replace, but rather add on to the Commission’s original communication (which does explicitly refer to national experts). Since the new rules on implementing acts dominated discussions in COREPER (cf. below), the regime for delegated acts did not get a high priority.

The only exception to this stance was an incident that took place on September 29 2010, when the Commission adopted its first delegated acts on energy labeling. The Commission had adopted its acts after consulting first member state experts followed by civil society actors. This sequence caused Denmark, Germany and the United Kingdom to protest in COREPER by means of a non-paper, which was acclaimed by many other member states. Since the member state experts were consulted first – not last - these and other countries found that the member states had lost their privileged position: they would no longer be able to give a final opinion before formal adoption by the Commission. In the non-paper, the Commission was asked to express its consent to systematically consult national experts, with

draft delegated acts presented as formal agenda items with clear deadlines for reaction, after consultation of civil society but before final adoption of a measure. In COREPER, the Commission pledged to reflect on the sequence of consulting stakeholders. Although the Council did not use its political weapon of revocation in this case, it does testify to the distrust of some member states against the Commission when using its new prerogatives.

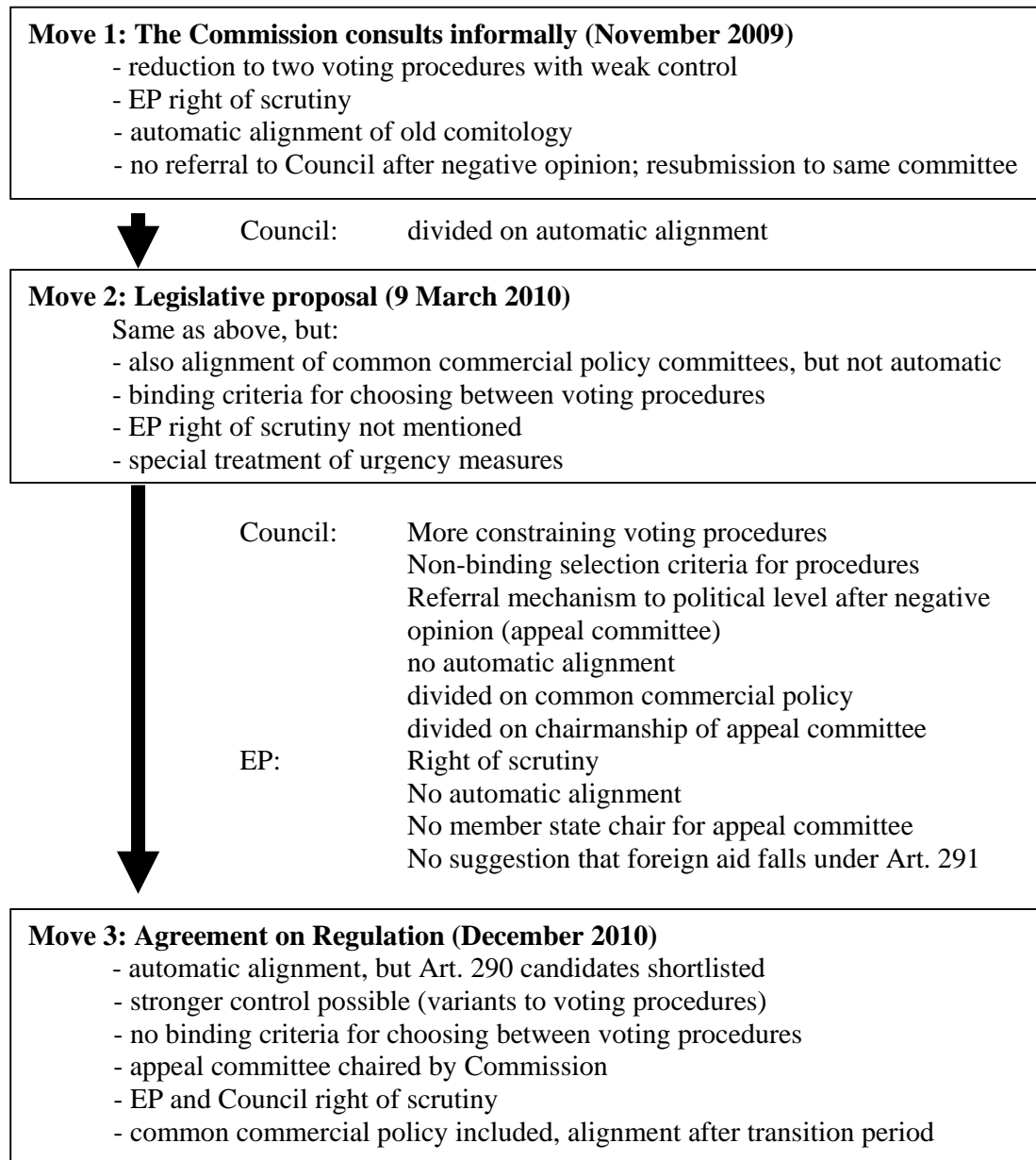
### ***Third Move: The Common Understanding***

The Common Understanding between the Parliament, Council and Commission on delegated acts went through the institutions together with the new regulation on implementing acts (cf. below). Its contents were hardly different from drafts circulated from the outset. The main issues include simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council, the carrying out of appropriate consultations at expert level, the choice between undetermined and determined delegation of powers which are tacitly renewable unless opposed by either of the institutions, a standard objection period of 2 + 2 months at least, no transmission of delegated acts during recess periods except in urgency, and standard recitals to be included in new basic acts to that effect. Also, the Commission made a statement pledging to prepare alignment of the *acquis* to delegated acts where appropriate, and to have this completed by 2014. The European Parliament's Conference of Presidents, as the responsible body for relations with the other institutions, formally adopted the Common Understanding on 3 March 2011.

### **Empirical Analysis: Negotiating The Control Of Implementing Acts**

The negotiations on the implementing acts regime under article 291 TFEU became particularly intense after the Commission presented its legislative proposal. A large number of issues were contested, and some issues that seemed settled in an early stage proved not to be later on. The diagram in Figure 2 below gives a brief overview of the contested issues and indicates the complexity of the negotiations and the institutional interests at stake.

**Figure 2. Negotiating the control of implementing acts**



***The Commission's First Move***

Following statements by the Council presidency that “all three institutions should reach agreement on the Commission’s forthcoming proposal” (Council 2009a), the Commission presented its views to the other institutions in non-papers in November 2009. It envisaged a thorough reform the comitology system.

First, allegedly trying to simplify the system, the Commission wanted to reduce the number of comitology procedures from three (advisory, management and regulatory) to two (advisory and a new examination procedure). The examination procedure would make use of qualified majority voting, after which in case of a negative opinion the Commission would

not be able to adopt the draft measure and in case of a positive opinion the Commission would, in principle, adopt the measure. In case of no opinion, the Commission would be free to decide whether or not to adopt, and in case of negative or no opinion the Commission would be able to resubmit the same or an amended measure to the same committee again. In essence, thus, the examination procedure initially proposed comes very close to the old management procedure albeit using different wording. The existing committee procedures were proposed to be aligned to the new system automatically, where all advisory procedures would remain intact and all regulatory and management procedures would become examination procedures. This exercise of automatic alignment was proposed to avoid lengthy omnibus processes (Ministerie van Buitenlandse Zaken 2010).

Second, given that Treaty article 291 refers to member state control as opposed to Council control, and that the two legislators are on an equal footing, the Commission abandoned the age-old principle of referral to the Council. Instead, re-submission of the same or an amended draft to the same committee was proposed.

Third, the Commission argued that both legislators needed to be continuously informed and to receive all documents in order to control the Commission. This could be regarded as a variant to the Parliament's existing right of scrutiny. Fourth, the Commission wanted stricter criteria for choosing committee procedures in basic acts. Finally, the Commission saw no need for reforming the regulatory procedure with scrutiny which it expected to be transferred to the delegated act system.

### ***Initial Response From The EP And The Council***

Until December 2009, discussions between the Council and the Commission focused on a transitional arrangement applicable after the entry into force of the Lisbon Treaty (including Article 291), but without there being a regulation implementing this Treaty article (Council 2009b and 2009c). The end result was a joint declaration by the three institutions to continue applying the old comitology decision except the regulatory procedure with scrutiny. This effectively provided the Council with a status quo that would continue to be valid after the entry into force of the new Treaty (Council 2009c). The first time the Commission's intentions regarding Article 291 were discussed was 15 January 2010 in a newly established Council 'Friends of the Presidency' group. Member states found the Commission's points of departure unacceptable. Several, but not all, member states opposed the idea of automatic alignment. Also, in the run-up to the publication of the final Commission proposal for a new regulation, the Council's legal service commented repeatedly that a new regulation would be superfluous, given that the legal context as regards the old comitology system (excluding the regulatory procedure with scrutiny) had not changed.

The European Parliament, too, put the highest priority on concluding an interim arrangement, also given that the Commission would present its legislative proposal for a new regulation at a later stage anyway. Nevertheless, actors within the Parliament stressed the need for a better and more complete flow of information between the Commission and the Parliament, and for maintaining the Parliament's ability to control the legality of implementing acts (EP 2010a).

### ***The Commission's Second Move***

On 9 March 2010, the Commission officially submitted its legislative proposal for a new regulation on implementing acts (Commission 2010a). The principles of automatic alignment and the workings of the newly proposed voting procedures were the same as in the earlier

non-papers, but the proposal was different in several important respects. First, the proposal explicitly mentioned the common commercial policy as a domain of application of the new regulation. In earlier alignments of committee procedures to the generic systems laid down in the 1987, 1999 and 2006 Decisions, the member states had managed to prevent the alignment of the procedures of numerous committees dealing with external trade in the Common Commercial Policy (see also Commission 2011). Article 291 (3) of the Treaty, however, explicitly states that the rules governing the committees that concern the control of implementing acts must be laid out in regulations. The Commission interpreted this clause in the Treaty as the necessity to make sure that all possible voting regimes, whatever they are, are in fact covered in the same, single, regulation, upon which the regimes of all implementing committees must necessarily be based.

Second, the Commission operationalised its preference for more clarity and rigour in choosing voting procedures in basic acts very strictly. It proposed to make the advisory procedure the general rule, and only to allow the use of the examination procedure in the domains of health, environment, and the common agricultural, fisheries and commercial policies, or in relation to implementing measures of general scope in other policy domains. These selection criteria were proposed to be binding. Third, the Commission proposed to move provisions on using a written voting procedure from the rules of procedure of the individual committees to the regulation itself. Fourth, the Commission wanted to be able to immediately adopt urgent measures and get a committee opinion later. But in certain cases, the Commission proposed to retain the right to keep those measures in force even after a negative committee opinion, after which it will reconsult the committee. Finally, the proposal mentioned access to information by the Council and the Parliament, but not a right of scrutiny. The information sent to the other institutions was to be the same as in the old comitology system, but the Commission also proposed that only the references to those documents, not the full information, should be made available to the general public (Commission 2010a).

### ***Negotiations In The Council***

The Commission's proposal was extensively discussed in a series of eight meetings in the Council's Friends of the Presidency group in March and April 2010 (Council 2010a). In the first meeting, nearly all member states expressed disapproval of the Commission's proposal. In particular, the member states objected to the weak position of the member states under the proposed examination procedure, to the binding nature of the criteria for choosing voting procedures, to the lack of a control mechanism at the political level (i.e. the Council) for sensitive measures adopted after 'no opinion' in the examination procedure, to the lack of involvement of the Council, and to the proposed automatic alignment. In addition, several member states preferred to exclude the common commercial policy from the regulation and to continue to decide committee procedures in each basic act. In response, the Commission indicated that it would be possible to keep the special regimes for commercial policy, as long as they were included in the new regulation. Also, it argued that the Treaty and several Court cases made it impossible to keep a role for the Council as an institution, since the formal competences lie with the member states. However, off the record the Commission launched the idea of establishing a 'super committee' of high level member state representatives to which salient issues could be referred. This committee, later to be dubbed the 'appeal committee', together with the issue of trade politics, was to stay on the Council's and EP's agendas for the remainder of the negotiations.

In the subsequent Friends of the Presidency meetings, all the above issues took further shape. All member states wanted to keep intact at least some of the special procedures in the common commercial policy, and the idea of a super committee gained broad support. This new appeal body would convene if the Commission would not be able to adopt an implementing measure, but would also not be willing to submit an amended version to the same committee. In this case, the appeal committee would decide on the original proposal by qualified majority. After a positive opinion, the Commission must adopt the measure and after a negative opinion it would not be able to do so. After no opinion in the appeal committee, the Commission would be free to adopt or not to adopt its original draft measure, although one of the introductory recitals to the draft regulation mentions that the Commission will not go against a predominant position of member states (i.e. a simple majority) in the appeal committee in particular policy fields.

Furthermore, nearly all member states found that automatic alignment would be acceptable only with stronger member state control under the examination procedure. This was arranged by adding a generic rule that a simple majority of member states would be able to block adoption of a Commission proposal. Also, extra clauses were added that in sum resembled the old regulatory procedure, but that were scattered through the articles on the examination procedure. These 'regulatory' clauses could optionally be triggered in specific instances where the basic act so provides. This, too, included a role for the appeal committee following a blocking minority. Interestingly, in this process also a generic referral to the appeal committee was included after a negative vote by a simple majority of committee members. Hitherto, agreements to that effect were made in the form of a unilateral Commission statement following the 1999 comitology decision stating that the Commission would seek a solution when a 'predominant position' would emerge in the committees. No conclusion on the matter could be reached in the Friends of the Presidency group, and by the end of May 2010 the dossier was forwarded to COREPER II (Council 2010a), after which the Belgian Presidency from July 1<sup>st</sup> moved the file to COREPER I.

From June onwards, however, two outstanding issues forwarded to COREPER and its preparatory Mertens-group turned out to be particularly tricky. The first was the chairmanship of the appeal committee. Much to the dissatisfaction of the European Parliament and the Commission, the Spanish Presidency proposed that the appeal committee be chaired by a member state as opposed to the Commission. The member states were divided on the issue, with a number of strong member states supporting the proposal and others not having strong preferences to this matter. In the end, also witnessing a rigid attitude on this matter at the side of the Commission and opposition at the side of the Parliament, a majority of member states agreed on Commission chairmanship.

The second issue was the common commercial policy. Carving out external trade was unacceptable to the Commission, whereas keeping it in the regulation lead to a stalemate in the Council. The discussion focused on the issues of anti-dumping and anti-subsidy measures on imports. Free-trade oriented Northern member states strongly favoured a committee procedure in which a simple majority could block the Commission, whereas the more protectionist Southern countries favoured the standard examination procedure (i.e. blockade by means of a qualified majority against). Since both camps had a blocking minority in the Council and since both were determined to find a permanent solution, this issue paralyzed the negotiations. Solutions were explored in all sorts of variants, but from September onwards the issue became somewhat less complicated following a letter from Trade Commissioner De Gucht, which stated that exceptions to the standard voting rules were under no condition acceptable to the Commission. Although this letter made a carve-out solution as well as special free-trade oriented voting schemes impossible, it did make the situation more clear



since it made the blocking minority at the side of the free-trade countries the only relevant obstacle to a final solution. This blocking minority was broken by making a special arrangement only for multilateral safeguard measures within the new regulation, which was the crucial issue for Germany to accept the remainder of the text. Together with including a blocking simple minority in the appeal committee for the first 18 months regarding countervailing or anti-dumping measures, this package secured a qualified majority in the Council.

Furthermore, a variation on the original automatic alignment proposal was agreed upon at the very last minute. Transfers from the old comitology regime to the new delegated act regime are to be examined on a case to case basis. The remaining advisory and management procedures will be aligned to, respectively, advisory and examination procedures in the new system, whereas the regulatory procedures will be aligned to examination procedures in which no opinion by the committee blocks the Commission as well. In sum, thus, the old procedures remain intact for existing committees, only with the appeal committee assuming the role previously played by the Council. There are no generic rules about the level of participation in the meetings of the appeal committee, even though its first meeting on 29 March 2011 was attended by the member states' deputy permanent representatives.

The EP's desire for a right of scrutiny, which was included in the original Commission non-papers but not any longer in the official regulation initiative, only came on the Council's agenda in September. Nearly all member states saw no problem granting this right to the EP and the Council.

### ***Negotiations In The European Parliament***

Formal decision-making in the European Parliament started in the Legal Affairs committee after the Commission officially presented its proposal on 9 March 2010. However, due to the discussions that took place on delegated acts in the same committee, some initial reactions could already be observed before this date. In the EP's report on delegated acts, a resolution states that 'parliament should retain a right of information concerning implementing acts, in as much as this would enable it to control their legality' (EP 2010b). To the letter, this statement does not go beyond the right of information already proposed by the Commission in its formal proposal.

However, as discussions in the Legal Affairs committee get under way, all other Parliamentary committees were invited to give their opinion to the Legal Affairs committee, and no less than twelve sent their initial reactions with proposed amendments to the Legal Affairs committee. Five of these (Agriculture, Fisheries, Transport and Tourism, Environment and Development) protested against automatic alignment, since they feared that comitology issues that previously did not fall under co-decision could now automatically fall under the implementing act scheme, without enabling the legislator to opt for a delegated act. The same five committees, but joined by the committees on the Internal Market and Consumer Affairs, International Trade, Economic Affairs and Constitutional Affairs, expressed a desire to maintain the *droit de regard* that Parliament enjoyed under the old comitology system, either unchanged or in an extended form. The committees on Environment, Regional Development, Economic Affairs, Transport and Tourism, Internal Market, Foreign Affairs and Development requested a more extended and more reliable flow of information from the Commission. Furthermore, some individual committees voiced some particular desires. The Environment committee proposed to apply the examination procedure as the default procedure for all environmentally-related issues, and the Civil Liberties committee did likewise for their policy

realm. The committee on International Trade, together with Development, Transport and Tourism and Economic Affairs, requested access to committee meetings. The Foreign Affairs committee, while rejecting the idea of a *droit de regard*, wanted to be involved in the decision-making related to implementing acts on development aid. The Development committee, finally, expressed its grievances of not having been able thus far to start using delegated acts for all measures relating to development by default.<sup>1</sup>

Szájer's draft report of May 20 mentioned the following as 'main issues'. First, automatic alignment could only have a temporal effect – if agreed to at all – so that for each file a new choice for either delegated or implementing acts can be made. In this process, priority should be given to files not falling under co-decision prior to the Lisbon Treaty. Second, information provision by the Commission was seen as crucial, including an obligation for the Commission to respond to statements made by the EP and the Council. Finally, the report questioned whether criteria for choosing comitology procedures should be binding. The draft report also proposed a *droit de regard* for both the Council and the EP, but the final report does not include this as a main issue (EP 2010d).

In the meantime, the Council started negotiations between the member states, and several actors within the EP had informal contacts with the Commission and the Council Presidency. Since the EP could only officially respond to the proposal sent to it by the Commission, the issues that were discussed between the institutions differed somewhat from the Parliament's official publications on the matter. During March and April, it was communicated to the Commission and the Council that the EP only had two red lines: no automatic alignment, and no re-introduction of the Council as an appeal body. On 5 July, since discussions in the Council focused on the appeal committee, the EP added the chairmanship of the appeal committee by the Commission and absence of additional constraints on the Commission in the appeal committee, as main points.

In September 2010, for the first time the *droit de regard* was put on the negotiation table, together with a proposal to evaluate the workings of the implementing act regime. In addition, the Parliament objected to the article stating that the examination procedure should be the default procedure for development aid (EP 2010c). Although the proposed regulation did not preclude a choice between delegated and implementing acts in basic acts, the Development committee in the EP saw this proposal as a political statement favoring implementing acts.

From then onwards, the negotiations moved from expressing demands to finding solutions. In a trialogue meeting held on 22 October 2010, the Parliament agreed to the formula on the common commercial policy that had dominated COREPER for several months. In addition, the Parliament could live with an appeal committee chaired by the Commission under the conditions of getting a *droit de regard* and alignment being settled within the new regulation. Finally, the Commission accommodated the EP on the issue of Development issues by means of a non-paper, stating that the Commission will 'associate the EP up-stream' in the making of broad strategic objectives and outcomes. On 1 December, the JURI committee accepts the full package as finally negotiated by the Council, including removing the time limits on the *droit de regard* and extending it to the Council, under the condition that the explicit referral to development aid issues in combination with implementing measures be deleted from the regulation (EP 2010e).

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<sup>1</sup> Opinions expressed: AGRI 25/3, FISH 12/4, ENVI 14/4, IMCO 19/4, INTA 20/4, AFET 7/5, DEVE 12/5, AFCO 17/5, REGIO 23/6, TRAN 1/6, ECON 15/6, and LIBE 24/6.

### ***Third Move: Agreement On The New Regulation***

On 16 December 2010 the European Parliament at its first reading formally adopted the compromise package with an overwhelming majority of 567 votes against four (18 abstentions). In the Council, the compromise was formally enacted as a first reading decision on 14 February 2011 with the Netherlands and the United Kingdom abstaining, after which the Regulation was numbered 182/2011 and published 2 days later in the Official Journal.

### **Evaluating The Actors' Proposals And Moves In Structural Choice Perspective**

The course of events in the negotiations on the post-Lisbon control system very clearly shows that the institutions and member states recognize the power emanating from a new control regime. Through the creative use of voting rules, veto powers, time limits and other modalities, the involved actors try to use the new system to pursue their own policy objectives. While creating opportunities, the new system also makes it harder to pursue certain other policy goals, as the issue of external trade has clearly demonstrated. The new system, thus, results from a control game in which the winners have secured more privileged positions than the losers, and can use those positions to their advantage. A summary of their original stances, and the eventual outcomes, is listed below in Table 5.

**Table 5. Contested points in the inter-institutional negotiations on the post-Lisbon system for control of delegated decision-making**

	Initial positions			Outcome
	Commission	Council	EP	
<i>Delegated acts (art. 290)</i>				
Duration of delegated powers	Unlimited	Case-by-case decision	Case-by-case decision	Case-by-case decision
Time limit for invoking right of opposition and revocation	Short	Long	Long	2+2 months
Controls on urgency measures	No objections possible	Standard regime	Standard regime	Standard regime
Do the rights of revocation and opposition constitute an exhaustive list of control instruments?	Yes	No	No	No
Consultation of national experts in preparation of acts	Broad	Systematic	Access, or no national experts	Systematic, EP has access
<i>Implementing acts (art. 291)</i>				
Number of procedures	Reduction to two	<i>not important</i>	<i>not important</i>	Reduction to two
Decision rule in examination committee	One standard similar to old management procedure	Variants specified according to sensitivity of proposal	<i>not important</i>	Variants specified according to sensitivity of proposal; by default stronger than management procedure
Effect of negative examination committee decision	Resubmission to same committee, no Council referral	Appeal body equivalent to Council referral	Anything but referral to the Council	Appeal body equivalent to Council referral
Application of examination procedure	Few areas	Many areas	Many areas	Many areas
Information to the EP and Council	Limited	<i>not important</i>	Extensive	Limited
EP's right of scrutiny	As under old system	<i>not important</i>	As under old system	Old system extended to Council
Criteria for choosing procedures	Binding	Not binding	<i>not important</i>	Not binding
Alignment of existing acts	Automatic	Case-by-case decision	Case-by-case decision	Automatic, with 290-candidates shortlisted for closer examination

It is evident from Table 5 that the Commission's attempt to reframe the system of delegated acts into a system that further increases its power has failed. Since there was no formal need for new rules implementing the delegated acts regime, the legislators were in a strong position not to compromise. As for the implementing acts regime, we indeed see that the final result is close to the Council's preferences. The only points that still reflect the Commission's original intentions are automatic alignment and a reduction of the number of procedures to two. Apparently its motivations for reduction were so strong that it accepted a very complicated set of variants, exceptions and exceptions to exceptions in voting rules, and even opposition by simple majorities in order to be able to maintain the formal reduction to two voting procedures and to subject external trade measures to the standard examination procedure.

The result, thus, is a Byzantine arrangement that could easily have been reformulated into more intelligible terms. But the apparent mess in the new regulation is not without its reasons. We modeled the negotiations on the new system as a structural choice game, and formulated a number of expectations on that basis. Most of these expectations came true. In accordance with our expectations, the Commission did make a bid for weak controls under article 291 by proposing the standard examination procedure only for a limited number of issues. Later during the negotiations on external trade, the Commission insisted on subjecting external trade measures to the normal examination procedure as well, which means that the Commission proposal is now only blocked when a qualified majority of member states votes against.

Simultaneously, however, we also hypothesized that the end result of the negotiations on the regime on implementing acts would be close to the Council's preferences. And although the Council would formally have needed a unanimous position in amending the Commission's proposal, indeed we do see that strong positions taken by the member states did find their way into the final text and that nearly all the adaptations of the Commission's proposal result from positions taken in the Council. For instance, the Council's preference for maximum control translated into the emergence of an appeal committee (which, interestingly, was proposed by the Commission to accommodate Council members), for which the member states are entirely free to decide whom to send to its meetings, including ministers. Also, the old regulatory voting procedure in which a blocking minority of member states can block Commission proposals was not proposed by the Commission, but did re-emerge during the negotiations as a variant to the examination procedure that can be applied 'where the basic act so provides'.

Again in accordance with our preferences, the common understanding that was reached on delegated acts for reasons of efficiency indeed is of a broad nature, hardly constraining the legislators at all. But interestingly, we found that the negotiations on applying Treaty article 290 went far beyond finding a common understanding. The discussions in the Council show that it tried to secure a privileged position for its member states' representatives in the Commission's expert groups. Although these do not quite substitute the old comitology system, some member states have tried to gain as much systematic influence as possible over the Commission's final delegated acts. Whereas the Commission seemed willing to accommodate the member states quite much during the preparations of its Communication on delegated powers, much to the dissatisfaction of some member states it turned less accommodating later on.

Contrary to our expectations, the European Parliament did have strong preferences regarding the implementing act regime; however, it did not have that many. It vehemently opposed presidency of the appeal committee by a member state, and during the negotiations it focused on keeping its existing right of *droit de regard*. Also, since the Development

committee strongly prefers external financing programmes to be decided through delegated acts, references to external aid were deleted from the final package.

Another not-expected finding is the extent of preference divergence between member states. Although we only found two cases of strong disagreement - the presidency of the appeal committee, and the voting regime for external trade issues - the disagreement on these issues was so intense that it blocked the decision-making process for months. Further, even though the status quo of comitology was favourable to many Council members, there was a not-expected willingness to avoid delay and conclude the matter in first reading.

## Conclusion

To the outside observer, the new system on delegated and implementing acts may give a messy impression. The new regulation on implementing acts first presents standard voting rules, but then it appears that there are complicated exceptions. The choice for a voting rule is first related to certain criteria, but then it appears they are not binding. Straightforward criteria for blocking Commission proposals in the old comitology system have been replaced by a list of partially overlapping criteria in the new system. The Treaty mentions criteria for including either delegated or implementing procedures in basic acts, but in practice there is a grey area between the two, as the discussion on foreign aid has shown. However, now that the final remnants of control through non-comitology committees have been integrated into the generic system, we can at least observe that the mess has been made complete.

Still, despite the messy appearance of the negotiations and the final regulation itself, it is striking to see how closely the structure of the new system of implementing acts is modeled on the old comitology system. Two out of the three old committee procedures continue to live on: the advisory procedure continues as-is, and the regulatory procedure is turned into a variant to the examination procedure. The examination procedure itself resembles the old management procedure, but here a simple majority suffices for referring the Commission's draft to the appeal body. Criteria for choosing procedures have remained non-binding as they were, the Commission continues to preside over the committee meetings as it always has, and the Parliament has retained its *droit de regard*. New, however, is that the *droit de regard* has been extended to the Council, and that it also applies to non-codecision files. The new procedure still includes an appeal body in the extraordinary event of a negative committee opinion, but this role is no longer assigned to the Council. The new appeal 'supercommittee' is chaired by the Commission, but member states may decide themselves whom to send to the meetings, including ministers. In short, thus, some important details have changed, but the general structure has been reinvented to resemble the old comitology system to a great degree.

We have also observed in this debate that political actors do not shy away from fighting battles on relatively isolated policy areas (e.g. external trade, foreign aid) over the design of a generic control system. There is, thus, some reason to expect this battle to continue in due course. After alignment to the new system has been completed in 2014 and some experience with controlling delegated and implementing acts has been gained, the implementing act system will be evaluated in 2016. Given the preference divergence and the intensity of the inter-institutional negotiations, it is likely that unresolved matters in the current regime have turned into political dynamite by then. For example, the blurred distinction between delegated and implementing acts has been left blurred. And in the area of external trade, the standard examination procedure has only been decided in relation to anti-dumping and countervailing measures. For new legislation on external trade, variants to the standard rules may be applied 'where the basic act so provides'.

Since the newly negotiated regulation on implementing acts is hopelessly complex with all its exceptions and even exceptions to exceptions on occasion, the regulation's evaluation in 2016 may give rise to calls for simplification. When the rules of the game are revised to that effect, there is no doubt that all hands are up for a new round of this control game.

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