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THE EXECUTION OF DELEGATED POWERS AFTER LISBON.  
A TIMELY ANALYSIS OF THE REGULATORY PROCEDURE  
WITH SCRUTINY AND ITS LESSONS FOR DELEGATED ACTS.

Michael Kaeding and Alan Hardacre



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
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## **Abstract**

The history of comitology – the system of implementation committees that control the Commission in the execution of delegated powers – has been characterised by institutional tensions. The crux of these tensions has often been the role of the European Parliament and its quest to be granted powers equal to those of the Council. Over time this tension has been resolved through a series of inter-institutional agreements and Comitology Decisions, essentially giving the Parliament incremental increases in power. This process came to a head with the 2006 Comitology reform and the introduction of the regulatory procedure with scrutiny (RPS). After just over three years of experience with the RPS procedure, and having revised the entire *acquis communautaire*, the Treaty of Lisbon made has made it redundant through the creation of Delegated Acts (Article 290 TFEU), which gives the Parliament equal rights of oversight. This article aims to evaluate the practical implications that Delegated Acts will entail for the Parliament, principally by using the four years of experience with the RPS to better understand the challenges ahead. This analysis will be of interest to those following the study of comitology, formal and informal interinstitutional relations, and also to practitioners who will have to work with Delegated Acts in the future.

## **Keywords**

European Parliament; Comitology; regulatory procedure with scrutiny; de facto right of amendment; right of veto



## Introduction

From obscure beginnings in the field of purely technical agricultural markets in the 1960s the comitology system has gained an ever-increasing importance in European Union decision-making (Franchino 2000 and 2007; Pollack 2003; Bergström 2005; Christiansen et al. 2009; Vos 2009). While 454 legislative acts were adopted during the sixth legislature under Barroso I (2004-2009), 14,522 non-legislative acts, i.e. implementing measures, were agreed upon. Understanding how the 266 comitology committees (Commission 2009, p 4) that were responsible for these measures work is crucial for a complete picture of EU policy-making. The importance of understanding how these measures are adopted has gained further necessity with the Treaty of Lisbon and the changes it is ushering in.

Whilst comitology has been about since the 1960s the European Parliament, however, has only recently gained a foothold in the comitology system. In explicit response to a number of the Parliament's claims concerning its involvement in the delegation of powers to the Commission (Bergström and Héritier 2007; Héritier and Moury 2009) it was subsequently given the following three powers: firstly, the right of information (Article 7 of the 1999 Comitology Decision); secondly the right of scrutiny (Article 8 of the 1999 Comitology Decision, known better by its French name of *droit de regard*), which is the right for the Parliament to pass a non-binding resolution if it considers that the Commission has gone beyond its implementing powers. By adding a fifth comitology procedure in 2006, next to the advisory, management, regulatory and safeguard procedures, the regulatory procedure with scrutiny (RPS) granted the Parliament a third power; the right of veto over individual measures. The creation of this procedure was symbolically very important because it granted the Parliament powers over comitology that more accurately reflected its powers in co-decision. It effectively increased democratic control over comitology decisions (Christiansen and Vaccari 2009) and brought the Parliament onto an almost-equal footing with the Council for all basic acts adopted under codecision.

The Treaty of Lisbon significantly changes the practice of comitology in a number of ways, two of which are worth expanding on. First it extends the co-decision procedure (ordinary legislative procedure) to 45 additional policy areas, meaning that the scope of Parliament involvement in comitology is extended. This role is important as over time implementing measures have evolved from simple technical agricultural measures, as they were in the 1960s, to substantial political, economic and financial measures across all policy areas. Secondly, Art. 290 TFEU takes the RPS category of implementing measures and gives it a separate legal base and a totally new procedure from standard Implementing Acts (Art. 291 TFEU): Delegated Acts. Next to a strengthened right of veto, Delegated Acts provide the Parliament with a fourth power in comitology: the right of revocation of the delegation to the Commission. Under this new situation the Parliament will thus have four main powers in comitology, and moreover, stand on an equal footing with the Council. The implications of this recent change are considerable and therefore require serious attention by the Parliament itself, the Council, the Commission and outside stakeholders.

This article takes up the call and offers a timely analysis of RPS and what this could mean for Delegated Acts. Based on the experiences from the last three and a half years in Parliament it is possible to draw a series of helpful lessons for these new Delegated Acts. As we will show RPS was used several times, but often in somewhat different ways to those originally foreseen. The Parliament, in particular, has gained experience with RPS that it will carry over into its work with Delegated Acts – principally in two ways: Firstly, through the negotiation of RPS into legislative acts in codecision through both the alignment of the *acquis communautaire* in 2008, and through open co-decision dossiers. Secondly, through the monitoring of, and objecting to, draft RPS measures that were forwarded to the Parliament.

The article is structured as follows: to start with it compares the “old” RPS procedure with the “new” Delegated Acts procedure to identify key similarities and differences, which will help to understand the lessons to be drawn for the future practise of comitology. Then, six questions with clear relevance for delegated acts frame the remainder of the article. First, we look into how the Council and the Parliament decided to introduce RPS into existing legislation. Assessing how far the criteria for “quasi-legislative measures” were clear enough for ‘technical’ application, or whether room for interpretation and therefore negotiation existed, has direct implications for the insertion of Delegated Acts into legislation in the future. The second and third questions relate to the effects of RPS on the administrative organisation and political procedures of the Parliament, which relate directly to its future ability and willingness to deal with Delegated Acts, a practise that should not be too dissimilar in internal organisation and political terms to how it had to deal with RPS measures. The fourth question addresses the usage of the RPS, which shows that the Parliament was not tempted to use its RPS powers too often, thus not frustrating the smooth implementation of legislation. The uses of the RPS highlight a number of interesting practises with direct relevance for the future of Delegated Acts, such as the notion that the Parliament should have the power to explicitly approve draft measures under RPS, despite the fact that this was not foreseen in the 2006 revised Comitology Decision. Whilst only a few examples of so-called “early approvals” were recorded, this practise proves interesting for the future. Another aspect of RPS usage concerns the fear that was raised, that the Parliament would lack the necessary expertise to deal with technical draft measures under RPS, and thus rely too heavily on lobbyists. The last years have clearly shown that these fears might have been arbitrary and the implications of Delegated Acts are important. Finally, we identify cases where the threat of a veto (“atomic bomb”) led to a “de facto right of parliamentary amendment” – an interesting development for the future adoption of Delegated Acts where the atomic bomb power of the Parliament is significantly increased. We conclude with the theoretical implications of our findings.

## **Regulatory Procedure with Scrutiny (RPS) and Delegated Acts (Art. 290 TFEU)**

Before looking at the lessons that we can draw from RPS for Delegated Acts it is important to outline the actual theory of both RPS and Delegated Acts.

### ***Regulatory procedure with scrutiny (RPS)***

Despite attempts to create a simplified procedure and increase transparency and public understanding of comitology, in line with the broader European Better Regulation agenda, the result of the 2006 comitology reform with the new RPS was rather convoluted.

Three conditions determined whether RPS should be used or not: firstly, the act was a co-decision act; second, the measure was of general scope; and finally, only quasi-legislative non-essential elements of the basic act were concerned. Having noted that the criteria were legally binding if present, determining their presence needed to be done on a case by case basis via negotiations in co-decision. This was particularly the case in determining the category of quasi-legislative measures, which was a notorious grey zone, which we will come back to. Once the procedure was included in secondary legislation the next important stage was that of the comitology committee and the vote on an implementing measure (see also figure 1). Here the Commission submits its draft measure to the committee for a vote at which point there are two possible outcomes:

1. In the case of a positive opinion<sup>1</sup> of the comitology committee the Commission forwards the measure to both the Council and the Parliament who then have up to three months to oppose the measure. If there is no opposition from either legislator the Commission can adopt the measure after the three month period has lapsed. In the case of opposition Article 5a stipulates that

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<sup>1</sup> A positive opinion of the committee requires a Qualified Majority Vote in favour, therefore at least 255 votes.

the European Parliament, acting by a majority of its component members, or the Council, acting by a qualified majority, may oppose the adoption of the said draft by the Commission, justifying their opposition by indicating that the draft measures proposed by the Commission exceed the implementing powers provided for in the basic instrument or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality.<sup>2</sup>

Council Decision 2006/512/EC

If opposition, based on these three criteria, is found, then the Commission needs to either re-submit to the committee or present a legislative proposal. The co-legislators therefore have the same three criteria on which to base their opposition. It should be made clear that this does not grant them the right to oppose a draft measure because they are generally not satisfied with (a part of) its content, but they can only oppose the whole measure on the basis of these strict legal criteria. It is also important to note that no provisions are put into the Decision to either allow for the adoption of an implementing measure within the three month period, or to amend the content in case of opposition. Therefore if either legislator opposes a single line in the implementing measure they have to oppose the entire measure. If they agree they simply have to let the time period lapse and the Commission in practise has to wait three months before adopting the measure.

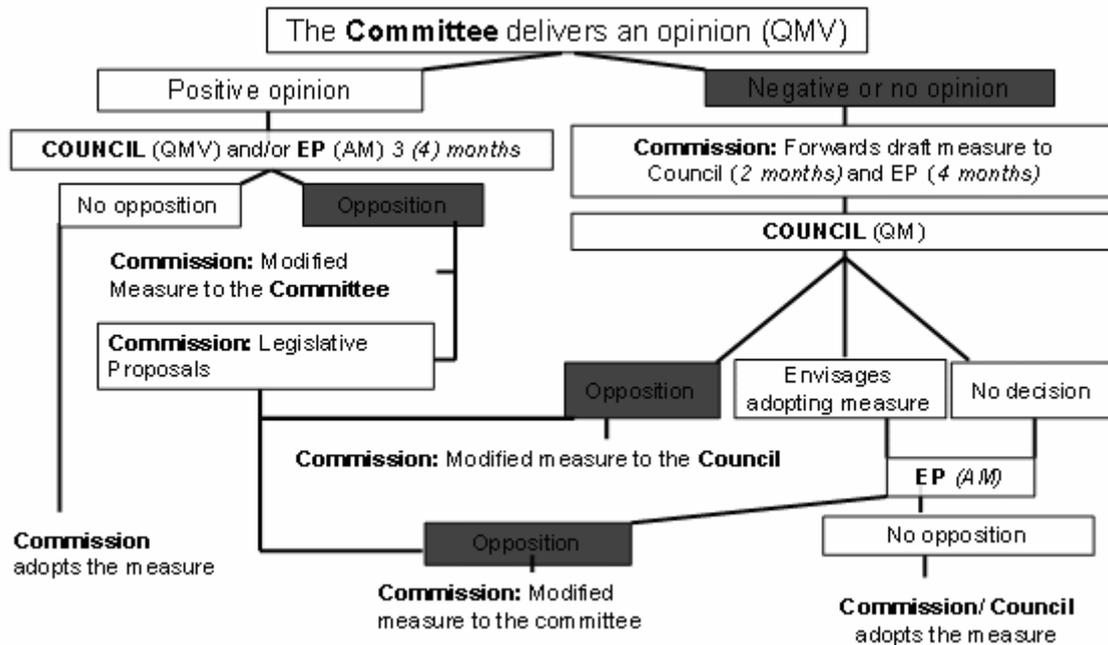
2. In the case of a negative, or no opinion<sup>3</sup> of the comitology committee the Parliament does not maintain its status of equality with the Council. The measure goes first to the Council who has three options; firstly to oppose the measure in which case the Commission could modify the proposal and re-submit to the Council; secondly to envisage adoption, in which case it forwards the measure to the Parliament or; thirdly it took no decision within the allotted time-frame, in which case the Commission forwards the measure to the Parliament. If the second or third option were taken then the Parliament enjoyed the same three legal criteria outlined above to make an objection.

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<sup>2</sup> Council Decision 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

<sup>3</sup> Negative opinions from comitology committees are very rare. In 2007 there were only 17 referrals (representing 0.7% of the total implementing measures), in 2006 5 (0.2%) and in 2005 11 (0.5%). These figures are often quoted to highlight the success and consensual operation of comitology.

**FIGURE 1 Regulatory procedure with scrutiny (RPS)**



Source: Own creation from Council Decision 2006/512/EC

**Delegated Acts (Art. 290 TFEU)**

Against the backdrop of the RPS procedure we now outline the new Article 290 TFEU on Delegated Acts to allow a direct comparison. Under Article 290 TFEU a legislative act may delegate to the Commission the power to adopt a non-legislative act to supplement or amend certain non-essential elements of the legislative act. The Treaty does not directly foresee a common approach to the application of this article, instead prescribing that the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. In addition the legislative acts shall explicitly lay down the conditions to which the delegation is subject, and the Treaty mentions two such possible conditions;

1. The Delegated Act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.
2. The European Parliament (by Absolute Majority) or the Council (by Qualified Majority) may decide to revoke the delegation.

Whilst, from this rudimentary Treaty base a number of details need to be fleshed out, five important innovations can already be highlighted (see TABLE 1).

**TABLE 1 Comparison of Regulatory Procedure with Scrutiny (RPS) and Delegated Acts (Art. 290 TFEU)**

<b>Regulatory Procedure with Scrutiny (RPS) (2006- December 2009)</b>	<b>Delegated Acts (Art. 290 TFEU) (as from December 2009 in force)</b>
A Common framework Article 5a of the Comitology Decision 2006	No binding common framework Conditions to be decided case by case
Necessity to obtain an opinion from a comitology committee	Comitology committees not foreseen Likely use of expert groups which will not give a legally binding opinion
Parliament and Council are not completely on an equal footing	Perfect equal footing between EP and Council
Limited grounds for the right of veto 1. Commission exceeds competences 2. The measure is not compatible with the aim or content of the basic act 3. The measure does not respect the principles of subsidiarity or proportionality	No limited grounds for the right of veto  A new right to revoke the delegation No limited grounds for the right of revocation

Source: Own data retrieved from Commission Communication from 9 December 2009 on Delegated Acts.

First, the modalities and conditions for Delegated Acts will be defined on a case by case basis, as opposed to being subject to a horizontal application. Hence, Art. 290 TFEU does not require the adoption of any binding instrument of secondary legislation to ensure its implementation. Second, there are no comitology committees foreseen under Art. 290 TFEU which is a sharp deviation from past practise. Third, there is an equal footing for the Parliament and the Council for veto and revocation, the second of which is a new power granted to the legislators as recognition of the sensitive nature of the delegation. Fourth, the right of veto over implementing measures occurs after adoption by the Commission and is discretionary, not subject to any legal criteria. This is also a major departure from the RPS and will create a significantly different procedure in practical terms.

It is important to highlight a practical element of the introduction of Article 290 TFEU, notably that it had immediate effect because it did not need secondary legislation to bring it into force. Therefore RPS was no longer usable in new basic acts, which as of December 2009 had to foresee the insertion of Delegated Acts. This said RPS, through insertion into open codecision dossiers between 2006 and 2009 and the revision of the entire *acquis communautaire*, continues to exist in a number of legal acts. This poses a rather practical problem of whether to again try an omnibus approach to switching from RPS to Delegated Acts, or to make the changes on a case by case basis as secondary legislation gets revised. Whichever approach is finally chosen RPS will soon be confined to the history books, the only issue being how quickly this happens.

This short section has highlighted that there are definite similarities between the RPS and Delegated Acts, notably in terms of application – but also that RPS and Delegated Acts have some very important differences. The next section, through a series of pertinent questions, will address the implications of the change from RPS to Delegated Acts whilst simultaneously looking at what can be learnt from our experience of RPS for the future practise of Delegated Acts.

## RPS in Practise in the European Parliament

### *How did Council and Parliament decide on the introduction of RPS in legislation?*

Article 2 paragraph 2 of the Comitology Decision 2006/512/EC clearly defines three criteria for the applicability of the regulatory procedure with scrutiny (RPS). Firstly, the act is a co-decision act, secondly the measures is of general scope, and finally, only quasi-legislative non-essential elements are concerned. Although one could imagine that applying the criteria would be a purely legalistic and technical matter, the codecision procedure still involved some genuine, and difficult, political negotiations between the institutions. Even if the arguments are legal, the three criteria for the application of the RPS are such that the legal services from the three institutions have had different interpretations, providing room for negotiation.

The introduction of RPS into the *acquis communautaire* took place through the so-called omnibus packages. The Parliament was represented by Mr. Szajer, rapporteur for the Legal Affairs committee (JURI), and the Council by the Slovenian and French presidencies. Four omnibus packages were agreed and introduced at the end of 2007 – and a fifth became obsolete with the introduction of the Treaty of Lisbon<sup>4</sup>(see also TABLE 2). As a consequence, most of the general alignment exercise took place in 2008 with a negotiation time ranging between 3.5 and 14 months. In addition, all four packages were concluded in first reading agreements.

**TABLE 2      General alignment of RPS through omnibus-packages**

<b>Omnibus proposal</b>	<b>Number of basic acts</b>	<b>Date of proposal</b>	<b>Date of adoption</b>
1 <sup>st</sup> package	59	23.11.2007	11.3.2008
2 <sup>nd</sup> package	47	19.12.2007	22.10.2008
3 <sup>rd</sup> package	4	19.12.2007	11.3.2009
4 <sup>th</sup> package	46	February 2008	22.10.2008
5 <sup>th</sup> package	2	30.3.2009	<i>Obsolete</i>

Source: Commission Reports on Committees (2008, 2009, 2010).

The way in which the omnibus packages were adopted was very similar to the overall patterns observed in the total number of 454 codecision files adopted under Barroso I (2004-2009). During the sixth legislature the average length of time for first reading agreements was 16.2 months (European Parliament 2009, p.13). In addition, the general trend of first reading agreements has continued and even been reinforced, as 72% of files were concluded at first reading (European Parliament 2009, p.8).<sup>5</sup> All in all, the negotiations of the four omnibus-packages followed the general trends observed in the 454 codecision files adopted between 2004 and 2009.

<sup>4</sup> Other parts of existing legislation were dealt with in a different manner, for instance in the form of a recast proposal or of a legislative amendment, mainly in cases where a codification or substantive amendment of the legal act was already foreseen before the comitology reform.

<sup>5</sup> For further details on 1st reading and ‘early’ 2nd reading agreements see Farrell and Héritier (2003), Héritier and Reh (2009) and Kaeding (2010).

In addition, this exercise gave all three institutions significant experience in applying the criteria for the use of RPS – which facilitated some precedent on when to apply RPS in certain circumstances. Experience shows that the Council, the Parliament and the Commission always came to an agreement on the insertion of RPS, even if became the subject of difficult discussions. There was no case where recourse to the Court of Justice was deemed necessary, despite the fact the use of RPS was obligatory when the three criteria were met. In this sense RPS simply became another element of negotiation in co-decision (Héritier and Moury 2009), but an important one especially for those areas of legislation that involve extensive delegation to the Commission, such as environment, transport and economic and monetary affairs.

This is good news for the upcoming codecision files that will need to foresee Delegated Acts. The first Delegated Act inserted into a legislative text since the entry into force of the Treaty of Lisbon was adopted on 9 March 2010 and dealt with animal health requirements applicable to the non-commercial movement of pet animals<sup>6</sup>. Despite a joint declaration that the wording found would not constitute a precedent the compromise text was only found after intensive discussions. Due to prior experience with RPS measures, however, it took the Parliament, Council and Commission only nine months to agree the file in first reading.

The main change that is likely to occur in the future when negotiating the insertion of Delegated Acts into legislative texts is that the conditions can be negotiated on a case by case basis – meaning that the duration and conditions to which the delegation is subject is likely to be different in different fields. The negotiation of Delegated Acts into legislative files will likely follow the patterns discerned with RPS, although given that Delegated Acts present the Parliament with considerably more power there are likely to be a few changes. In the past the negotiation of RPS into the text was a one-off negotiation because the procedure was already defined in the Comitology Decision – but the negotiation of Delegated Acts, once it has been agreed that they will be used, will have to find agreement on all the different elements therein. Whilst a standard model, along the lines of a common understanding, can reasonably be expected to prevail there will also likely be creative additions that could gain currency over time. A final aspect of the codecision negotiations is important to address, even if a definitive answer is impossible to find, and that is the existence of a grey zone with regard to the difference between Delegated Acts and Implementing Acts. It is clear that a Delegated Act is used when the tasks delegated relate to legislative power and an Implementing Act deals with implementing powers that would normally fall to the Member States – but there is a grey zone between the two where room for negotiation exists. The ultimate arbitrator of this grey one would be the European Court of Justice, but they have yet to be called on to decided where the line is, and even if they were to be required to judge on this issue it is unlikely they would issue a strong definitive ruling that would by definition touch on legislative prerogatives. The dispute between the Commission and Council early in 2010 over the recast Industrial Emissions draft directive highlights that this grey zone will continue to pose inter-institutional tensions<sup>7</sup>. Until now codecision has managed to find agreement on the insertion of RPS and Delegated Acts, but this is a fragile situation that could be broken at any moment.

### ***What were the effects of RPS on the administrative organisation of the European Parliament?***

When the RPS procedure entered into force in 2006 most actors involved understood immediately that applying the enhanced powers would effectively require two things: inter-institutional changes and a more thorough internal parliamentary screening of comitology draft measures sent by the Commission.

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<sup>6</sup> Published in Official Journal on 29 May 2010 under L 132/3

<sup>7</sup> COM(2010) 67 Final, 23 February 2010 – recast of 2007/0286 (COD)

*Inter-institutional changes:* The first requirement was linked to the need to adapt the practical inter-institutional arrangements in place such that the sending of documents by the Commission, and the receipt of documents by the Parliament, was robust and trustworthy. Some instances had shown previously that the agreement had failed to be respected, leading to increased dissatisfaction of the Parliament (Bergström 2005, p.230). In fact the Parliament had often felt frustrated by its dependence on the goodwill of the Commission to transmit documents, a practice which had been unpredictable and lacking in legal obligation. Most of these arrangements were laid down in a revised interinstitutional agreement between the European Parliament and the Commission<sup>8</sup> which entered into force on 3 June 2008. This was further reinforced by a revised framework agreement on relations between the European Parliament and the Commission from 29 June 2010 adapting the existing arrangements to the new Lisbon Treaty provisions. This 2010 agreement addressed, amongst other things, the comitology register, time limits, the availability of language versions, the taking into account of the parliamentary recess and the increased involvement of the Parliament with Delegated Act expert groups.

As for the register, the European Commission reformed its existing comitology register, which was put in place on 1 April 2008. More information about the history and outcome of comitology procedures has been added since. Aside from public access to the register, which contains only a limited number of documents, the Parliament was given preferential access to the system in order to have access to draft measures before their formal adoption. Despite the fact that the new comitology register is a very helpful instrument for the Parliament, some problems are still encountered. They relate mostly to the correct and timely uploading of information by the Commission services. This is probably a learning curve issue within the Commission's services, who were until recently mainly focused on getting draft measures prepared in time for comitology committee meetings, but not on informing the Parliament afterwards of the decisions taken. Raising awareness inside the Commission by means of circulars from the Secretariat General or training programmes may help to solve these problems. An issue for Delegated Acts in this respect is the question of how the Commission will involve the Parliament in the drafting process, because the Commission will not want to send the Delegated Act to the Parliament to exercise its scrutiny without having involved them earlier, to understand their concerns. This might involve forms of early warning using the register, but this remains to be seen.

A second inter-institutional issue arose very quickly in the practise of RPS the need, or possibility of having “early approvals” – because these were not foreseen in either the Comitology Decision or the revised 2008 interinstitutional agreement. Nevertheless, nothing could have prevented the Parliament from approving a draft measure, a practise which the Council has already taken on a regular, if not systematic, basis. Where measures were not controversial and not initially contested by the Parliament, the normal procedure was simply to do nothing and let time go by until the deadline lapsed, at which point the Commission could adopt the draft measure. The Commission, however, expressed in a number of cases the desire that the Parliament approve measures without waiting the full three months. This occurred mainly in ECON, with the last cases in May 2010 on International Financial Reporting Standards and UCITS. They led to the Commissioner responsible drafting a letter to the Committee Chair to ask if the Parliament could find a mechanism to provide an early agreement. In these cases it was up to the parliamentary committee concerned to decide how to deal with such a request. In some cases committees indicated that at a given stage no objection had been made, which could be read as an informal approval, but that it could only be legally formal once the deadline had lapsed, given that members had the right to object until the deadline passed. So, it was up to the Commission services to decide whether they took the risk of adopting the draft measure before the deadline. This is a good example of the learning process from RPS to Delegated Acts because the

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<sup>8</sup> Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Decision 2006/512/EC. Official Journal of the European Union C 143/1 of 10.06.2008.

report of the Parliament on Delegated Acts, adopted in March 2010, explicitly mentions the possibility of using early approval in Delegated Acts<sup>9</sup>.

*Changes to parliamentary internal procedures:* Next to the inter-institutional changes, the Parliament also made a number of adaptations to its internal organisation. Draft measures from the Commission come in at a central level to the Directorate General for the Presidency and are subsequently distributed according to subject to the parliamentary committees concerned. The committee secretariats then distributed draft measures to their members in differing ways, indicating applicable deadlines.

The twenty individual parliamentary standing committees have developed their own practices on how to inform their MEPs. It ranges from the simple direct forwarding of draft measures by email to grouping the draft measures in a regular comitology newsletter, with or without explanatory remarks and analysis. Although any member of a parliamentary committee has the right to ask for the tabling of a Resolution on a draft measure, many committees give, also for practical reasons, the role to the “coordinators” of the political groups in the committee. The role attributed to coordinators is to perform a preliminary assessment of the need to table a Resolution for objection to a particular draft measure.

In this process the committee secretariats have a pivotal role in the management of RPS measures. In order to ensure technical capacity they engaged a limited number of extra staff to deal with comitology measures. These experts regularly meet in a 'comitology network', coordinated by the Conciliations and Co-decision (CODE) unit, created to exchange experiences. The CODE unit, together with the Legal Service, functions as a helpdesk for horizontal issues on comitology and also has contacts with the other institutions on key issues. Experience with the RPS suggests, with the exception of some committees (such as ENVI and ECON) that no adequate horizontal solution was found in the Parliament to address RPS measures. When opposition was garnered on RPS measures it tended to be more by accident than by design, something that will need to be seriously looked at for Delegated Acts.

All in all, the administrative inter-institutional procedures between the Commission and the Parliament have adapted to RPS, but the results have been mixed. With regard to the Parliament's response to RPS we find that it relied too heavily on individual arrangements of committees, in particular on specific individuals within the committee such as party group coordinators, rapporteurs or secretariat staff. This is in line with scholarly findings arguing that formal legislative bodies may lose their legislative power by delegating responsibility to a small number of influential negotiators (Rasmussen and Shackleton, 2005).

### ***What were the effects of RPS on the political procedures of the European Parliament?***

To cope with the new RPS procedure, the Parliament also amended the relevant article in its internal rules of procedure on implementing provisions. The amended Rule 81<sup>10</sup> described the procedure to follow from the reception of a draft measure to the adoption of a Resolution objecting to a draft measure. The first paragraph of Rule 81 stated that the President of Parliament refers the draft measure to the committee responsible. It also stated that when the Parliament procedure for the basic legal act used associated committees, the lead committee shall invite each of the associated committees to communicate their view orally or by letter. It was not specified how, or to what extent, the lead committee should take these views into account. It was also not specified how other committees could

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<sup>9</sup> Szajer Report on the power of legislative delegation (2010/2021 INI)

<sup>10</sup> The amended Rule 81 was adopted in the European Parliament plenary of 14 December 2006 under number P6\_TA(2006)0588 which can be found on the Parliament's website [www.europarl.europa.eu](http://www.europarl.europa.eu)

express their views if they should wish to, meaning that members of these committees only got a chance to deal with the matter at the plenary stage.

The second paragraph of Rule 81 outlined that the committee chairman should set a deadline for Members to propose objections to the draft measure. The parliamentary committee could decide to appoint a rapporteur, who could draft a Resolution opposing the draft measures. The draft Resolution should then first be voted in committee, and if adopted at this stage it would go to plenary for a vote. Although the Parliament only had a veto right on the whole draft measure and did not have a right of amendment, Rule 81 stated that the motion for a Resolution should indicate the changes that ought to be made to the draft measures, according to the Parliament. In case of adoption, this would give an indication to the Commission and Member States in which direction they should “amend” the draft measure in order to satisfy the Parliament. This is interesting because RPS as such did not explicitly foresee any formal right of amendment. Experiences show, however, that an informal parliamentary right of amendment had evolved with clear implications for Delegated Acts and we come back to this later.

Although a general deadline of three months for expressing a veto may have seemed sufficient, the above mentioned procedure illustrates that this time period was clearly needed to adopt a Resolution in Parliament. In fact, this time period often proved to be rather short in practice. Parliamentary committees in general do not meet more often than once a month, and plenary meetings only take place once a month in Strasbourg, with an additional “mini-plenary” of two half days in between in Brussels. For this reason, Rule 81 foresaw the possibility of derogating from the full procedure, but only in cases of urgency or curtailed time limits. More specifically paragraph 4 stipulated that if the committee had not been able to meet before the next plenary that takes place before the deadline expired, a motion for an opposing resolution could be tabled for the plenary directly by the chairman of the committee responsible.

But it is exactly these curtailed time limits, or urgency situations, that posed the Parliament problems in terms of adopting an objecting resolution within short time frames. If for instance the Commission presents a draft measure to the Parliament just after a plenary session has taken place with a curtailed time limit of two weeks, the Parliament may have no chance to get to the next plenary at all. These clauses were usually subject to strict control by the Parliament in the co-decision phase, on occasion leading to some tense inter-institutional negotiations.

At the height of the financial crisis in autumn 2008, however, certain accounting rules had to be amended very quickly. The deadlines for the RPS had to be considerably shortened to enable the measures to be taken and implemented in the shortest possible period of time. This incident shows that it is very important for the Parliament that the urgency and curtailed time limit procedures<sup>11</sup> are only used for cases that really require such urgency. Rule 81 gave the Parliament a sufficient framework to deal with these comitology measures, whereby we note that for cases of curtailed time limits or urgencies specific individuals again benefit from increased powers, notably committee chairman. This was notably the practise in the ECON committee where the chairwoman, Pervenche Berès (France, PES), took a personal interest, and responsibility on behalf of the committee, to lead on a significant number of RPS measures. These examples on the parliamentary handling with RPS draft measures supplement the findings by Farrell and Héritier (2004) on the increased power of key individuals.

In July 2010 the Parliament modified its rules of procedure, creating two separate rules for Delegated Acts and Implementing Acts. Rule 88, concerning Implementing Acts, outlines the internal procedure to be followed upon reception of an Implementing or Delegated Act. This procedure is identical to the old Rule 81. The new Rule 87a concerns Delegated Acts specifically, but as yet is

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<sup>11</sup> These procedures are foreseen in the fifth and sixth paragraph of Article 5a of Comitology Decision 1999/468/EC as amended by Decision 2006/512/EC.

devoid of content, merely stating that the Parliament shall scrutinize the measure and may submit a motion for a resolution in accordance with the provisions of the legislative act.

### ***How often did the European Parliament oppose an RPS draft measure?***

One of the reasons why the Commission and Member States were never keen on giving a veto right to the Parliament, was their fear that the Parliament would be tempted to (ab)use the power too often. It is partly for this reason that the veto right given to the Parliament was limited to three legal criteria: not exceeding implementing powers, not in line with the aim or content of the basic act and not respecting subsidiarity or proportionality.

Experience with the RPS procedure indicates that the Parliament did not abuse its veto power, or frustrate the smooth implementation of legislation. Actually the first use of the RPS veto came not from the Parliament, but from the Council. In July 2008, the Council objected<sup>12</sup> to six draft measures that had previously been adopted by the comitology committee. What is interesting about this case is that the objection was based on a horizontal issue that had no relation with the content of the individual draft measures. It was namely the desire by Member States not to use correlation tables. The Parliament, on the other hand, only objected to three draft measures successfully (until summer 2010) in the areas of financial services (Capital Requirements Directive - CRD), energy (labelling of TVs) and food safety (Bovine and porcine thrombin) (see TABLE 3):

*Capital Requirements Directive:* A CRD RPS measure was opposed by the plenary in December 2008, on proposal of the parliamentary committee for economic and monetary affairs (ECON)<sup>13</sup>. The ECON Committee objected using the 'exceeds implementing powers' criteria. In fact the Parliament was not alone on this point as the Council also raised an objection using the same legal criteria. On the one hand, Council deemed that an obligation for correlation tables belonged in the basic act and not in the draft measure. The draft measure amended certain annexes of the directive, whereas the Commission had shortly before presented a proposal to review the CRD directive itself. Consequently, the Parliament felt that it could not approve a specific draft measure just before a more fundamental review under co-decision. The resolution for objection was voted on the 16 December 2008 with 627 in favour, 10 against and 16 abstentions.<sup>14</sup>

*Energy labelling of TVs:* On the 6 May 2009 the Parliament adopted its second resolution to object to an RPS measure, on the energy labelling of TVs. In this case the Parliament vetoed a new energy-rating labelling for TVs, proposed by the European Commission and approved by member states in the Eco-Design Regulatory Committee at the end of March 2009. The Parliament feared that the new system would confuse consumers and this was backed by 399 votes in favour (393 were needed for an absolute majority). This created, in itself, a rather confusing situation because in the same sitting the Parliament failed to object to a second RPS measure on the energy labelling of fridges that proposed the very same energy-rating labels. The fridges vote received only 389 votes in favour, some 4 short of the absolute majority, a situation that created confusion for the Commission as it tried to create a harmonised system across electrical products. This second Parliament objection was backed by intense lobbying, with the Parliament siding with the European Consumer Organisation, BEUC, in objecting to TVs and with fridge manufacturers in not objecting to the fridges measure. This issue of lobbying the Parliament on RPS measures will be taken up again later.

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<sup>12</sup> Minutes of JAI Council of 24-25 July 2008, p. 35-36

[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/102007.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/102007.pdf)

<sup>13</sup> The opposing Resolution was adopted in the European Parliament plenary of 16 December 2008 under number P6\_TA-PROV(2008)0607 which can be found on the Parliament's website [www.europarl.europa.eu](http://www.europarl.europa.eu)

<sup>14</sup> The opposing Resolution was adopted in the European Parliament plenary of 16 December 2008 under number P6\_TA-PROV(2008)0607 which can be found on the Parliament's website [www.europarl.europa.eu](http://www.europarl.europa.eu)

*Directive on food additives (bovine and porcine thrombin)*: The third successful resolution for objection was prepared by Åsa Westlund (Sweden, S&D) in the ENVI Committee before sealing the necessary majority in plenary by a very narrow vote (370 of 369 required votes for an absolute majority) on 19 May 2010 in Strasbourg. Based on the opinion of the European Food Safety Authority (EFSA), which had declared ‘meat glue’ safe, the Commission called for thrombin to be added to the list of authorised additives mentioned in the EU Directive on Food Additives. The Parliament voted to ban bovine and porcine thrombin used as an additive to bind separate pieces of meat together into one piece because meat glue has no proven benefits and advantages for consumers and might mislead them instead.

Apart from these three successful plenary votes, and one plenary failure, three further attempts were made to pass an objecting resolution, but all failed at the committee vote stage. These three cases all occurred in the ENVI committee, the first on the use of the *biocide diffeacoum*, the second on the eco-design of household lamps, and the third on substances and mixture. These objections and attempted objections are all presented in the following table:

**TABLE 3 Overview of parliamentary attempts to pass an objecting resolution**

<b>Result</b>	<b>Number of cases</b>	<b>Details of cases</b>
No-adoption in parliamentary committee (simple majority)	3	Biocide; Eco-design of household lamps; Substances and mixtures
No-adoption in plenary (absolute majority)	1	Energy labelling of fridges
Successful adoption in plenary (absolute majority)	3	Capital Requirement Directive; Energy labelling of TVs; Bovine and porcine thrombin

Source: Own data

This table suggests that the Parliament has rarely objected to RPS measures. Out of 71 (2008), 131 (2009) and 99 (2010) measures adopted according to RPS, the Parliament successfully objected to only three in plenary. This corresponds to a mere 1 %. In addition three failed at the committee stage and one was not adopted during the Strasbourg plenary.

This begs the question of why have there been so few objections by the Parliament? We can think of at least four possible answers: Firstly, there have not really been large-scale opportunities to do so, as the RPS procedure was only introduced into legislation as of 2006. Between 2008 and 31 July 2010 301 RPS measures were adopted, less than half of all codecision files adopted during Barroso I. It might have simply been a matter of time until the RPS was used more frequently, especially given that so much existing legislation was aligned to the RPS procedure, but this argument does not seem to be adequate. Secondly, the Parliament as a whole failed to fully grasp and understand the potential of the RPS procedure. The intricacies of comitology are not common knowledge in the Parliament, but with more time, and increased experience, it might have been expected that the Parliament use the RPS procedure more frequently. The seventh legislature is constituted by more than 50% new-comers in the plenary of 736 members, so they will require time to get acquainted with this highly technical and complex EU decision making instrument. This said simply having more knowledgeable and experienced MEPs would not automatically lead to more objections. Thirdly, it may be that the presented draft measures were simply not controversial and therefore not contested. RPS measures are

predominantly technical in nature and only a few come along with an important political dimension to which the Parliament will wish to object to.

Finally, as some of the examples have shown, even if a draft resolution for objection is presented, it will not necessarily be adopted. A vote in the parliamentary committee is taken by simple majority of the members present, whereas the vote in plenary is taken by absolute majority, i.e. majority of the Parliament's component members. Given the fact that frequently in plenary votes not all 736 Members are present, such an absolute majority (369) can not be taken for granted. The “thrombin” case is a good example. This high threshold represents a kind of “safety valve” on the Parliament’s use of the veto power. Not all members may agree with the grounds for objection, and sometimes members may simply withhold support because they do not want to use the “atomic bomb” and get the blame for blocking a draft measure only because of one particular aspect. The threat of using the “atomic bomb” however shadows over the negotiations between the institutions and may result in an unforeseen additional parliamentary tool to change the content of a draft measure, a so-called de facto right of amendment, which we return to later.

### ***How did the Parliament get information to oppose a draft measure?***

An additional fear on the use of RPS by the Parliament was that its members would lack the necessary expertise, and interest, to judge complex and sector specific draft measures. Therefore, it was argued, they would rely too heavily on lobbyists in taking their decisions to object to a particular measure. In essence this criticism could be applied more generally as it is not specific only to the practise of comitology, but it was felt that the Parliament, more than the other institutions, would have to rely on external expertise.

In the Parliament, whilst the committee secretariats mainly have a role of facilitation and transfer of information, they became key actors in issues related to RPS measures. The secretariat provides MEPs with expertise, for instance based on (scientific) knowledge from outside the institution and often drives an issue onto the agenda. A problem the Parliament is confronted with is that fact that a three month deadline evidently does not allow for in-depth external research, especially given the small numbers of secretariat and MEP support staff. This is where lobby organisations come in, as they have timely ready-made solutions having followed and monitored the issue. They can offer the required background information and detailed analysis within short periods of time.

Whilst it is undoubtedly true that the RPS gave lobbyists an extra power to influence the EP, normally lobbyists try to 'sell' their point of view not only to the Parliament, but to all political actors involved in the EU decision-making process. This means that the same lobbyists have already been talking to the Commission officials drafting the implementing measures, and the national representatives in the comitology committees before they knock on the Parliament’s door. In fact, all actors can be influenced by lobbyists and it is their own decision to decide to what extent they take on board the views of lobbyists. This element of lobbying can be illustrated by the transport committee (TRAN) when it discussed a draft measure on the use of so called 'loop belts' for children in airplanes. Although safety tests conducted in the 1990s had shown the potential danger of these belts to children's health, the competent comitology committee had never amended the applicable rules. Discussion of the comitology draft measure concerned, in the Parliament, led to the suspicion that no amendment had been made due to pressure from the airlines, which did not want to spend money on extra seats for children, preferring them to sit on an adults lap even if this situation was potentially dangerous. If this assumption is true, it was in this case not the Parliament that gave in to particular interests, but other actors in the decision making arena.

On the other hand the energy labelling cases discussed earlier, which saw the highest levels of lobbying mobilisation on an RPS measure, highlight that the Parliament is a direct target of lobbying when interests are at stake – and it is possible to influence the outcome. Lobbying the Parliament is an end-game strategy if all else has failed because the power of the Parliament is to veto the whole

measure, a veto that will probably only delay an outcome not stop it forever. MEPs, by definition, are politicians and they will judge draft measures from a political perspective. This perspective may be influenced by suggestions from lobbyists, journalists, experts, scientists or any particular group of people. MEPs will, however, always look at how the particular issue may fit with their personal views, the views of their political party or of the voters they represent, or from the point of view of the parliamentary committee of which they are a member, as far as there is a feeling of consensus there. Seen in this light it is no wonder that members of green political parties express themselves on environmental issues, as much in comitology as they do under the codecision procedure<sup>15</sup>.

Given that Delegated Acts give the Parliament more power in objecting to a measure it can be expected that lobbying of the Parliament will increase, but again only in the circumstances of trying to object to the whole measure.

### ***What alternatives did the Parliament have to opposing a draft measure?***

The last three years have also shown the Parliament's growing weight under RPS due to the emergence of a number of informal powers. Next to the formal adoption of resolutions blocking RPS measures according to the legal procedures a *de facto* parliamentary right of amendment has emerged, which may point at ways in which the Parliament will use its powers under Delegated Acts. This was seen in one case in which the Commission withdrew its draft RPS measure due to considerable parliamentary criticism, and two recent cases in which parliamentary committees drafted objecting resolutions that were withdrawn even before the vote in the parliamentary committee. This was done only after the Commission had indicated that the modifications required by the Parliament would be taken into account in a future revision of the implementing measures. It is worth looking at these informal powers in more detail.

*Commission's withdrawal:* The first case concerns "body scanners"<sup>16</sup> as a device to screen passengers at airports. The use of body scanners was one small part of a draft measure on aviation security. This draft measure was, according to the then Rule 81 of the Parliament's rules of procedure, referred to the transport committee. The TRAN committee did not intend to draft a resolution objecting to the measure. In the meantime, however, members of the civil liberties committee (LIBE) got hold of the issue and presented a "normal" parliamentary resolution, under Rule 108 of the Parliament's rules of procedure, to the plenary criticising the use of body scanners. Legally speaking, this Rule 108 resolution had no binding effect on the Commission. But, as the issue had raised significant media reaction and hence political responses in several Member States, the Commissioner responsible withdrew the draft measure.

The "body scanners" example shows us three things. Firstly, it illustrates that the horizontal coordination of implementing measures in the Parliament is not sufficient yet. Control mechanisms similar to those set up for the codecision procedure need to be established to facilitate the effective scrutiny of implementing measures by all members of the Parliament, not only those members in the responsible parliamentary committees. Second, the decision to withdraw the implementing measure was not based on the influence of a secretariat, lobbyist, or other group, but on the sensitivity of members involved in civil liberties matters. This highlights the fact that lobbyists, or the secretariat, can bring things to the attention of an MEP, but at the end of the day it is the member's political choice to proceed with an objection. And last, but not least, the mediatisation of technical implementing

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<sup>15</sup> Whereas the distribution of seats according to geographical and ideological lines in parliamentary committees mirrors perfectly the full plenary, the group of rapporteurs in each committee is biased towards policy outliers (Kaeding, 2004).

<sup>16</sup> The Resolution was passed on the 23 October 2008 by 361 votes for, 16 against and 181 abstentions, under the number P6\_TA-PROV(2008)0521 which can be found on the Parliament's website [www.europarl.europa.eu](http://www.europarl.europa.eu)

measures might further empower the Parliament, and help them to ask for further concessions from the Commission.

*De facto parliamentary right of amendment:* In two cases parliamentary committees drafted objecting Resolutions that were withdrawn even before the vote in the committee took place. In these cases the Commission indicated that the modifications required by the Parliament would be taken into account in a subsequent revision of the implementing measures. These cases occurred in the parliamentary committees for environmental affairs (on the use of animal testing) and for transport and tourism (on the use of seatbelts for children in airplanes). The intentions of the Commission were made in letters to the parliamentary committee concerned, after which the draft Resolution was removed from the agenda. This practice is particularly interesting, as it shows that the threat of a veto can lead to specific modifications, albeit in a future revision of the draft measure. In this way the Parliament developed a sort of “de facto right of amendment”, or a soft right of amendment. On the other hand, the concrete effect of this practice is yet to be evaluated, as the Parliament runs the risk that promises from the Commission are not kept and may even be forgotten if the time between revisions of implementing measures is relatively long, or new Commissioners or new Members of the Parliament are in charge. In such cases it may be up to the Parliament Secretariat to play the role of institutional memory.

A second element that was present in all three of the cases discussed above, and in the three cases where measures were outvoted in the committee (see TABLE 3), was the active lobbying and intervention of the Commission in support of its RPS measures. It was obviously in the interests of the Commission to support its measures, but the level and intensity of the support was at times rather unexpected.

## **Conclusions - Lessons to be drawn from the Regulatory Procedure with Scrutiny for Delegated Acts**

In light of the introduction of Delegated Acts, under Article 290 TFEU, the findings of this article on the practise of RPS are of particular practical and theoretical importance. Indeed this timely assessment of the RPS allows a number of preliminary conclusions to be drawn on how Delegated Acts can be expected to work in the future. After four years of experience with RPS a number of patterns have developed in the negotiation and use of the procedure, patterns that can be expected to continue.

The first aspect of interest concerns the negotiation of the insertion of RPS into legislative texts. It was seen that the institutions, notably through the alignment process, gained significant shared experience with where and when to apply RPS. Whilst conceding that a grey zone continues to exist in some cases as to whether a Delegated Act or an Implementing Act should be used the practise of RPS shows that these differences were simply absorbed into part of the codecision negotiation process. This is a pattern that can be expected to continue, although we note that the negotiation of a Delegated Act into a legislative text could be more difficult in certain cases due to the need to agree on all the details on a case by case basis. The fact that the Parliament has significantly increased powers under Delegated Acts will make it more attentive to the use of them, and to the exact conditions that are proposed. We would expect the experience of the RPS to serve as a very useful institutional learning curve for the insertion and negotiation of Delegated Acts.

The second key element we described in this article concerns the changes that took place within the Parliament itself. It is clear, from both the capacity and technical perspectives that major efforts were made to try and deal with the influx of RPS measures. This effort will have to continue for Delegated Acts because from both capacity and technical perspectives horizontal solutions were not adequately found. Currently each parliamentary committee is striving to find its own best practise in dealing with measures, and some committees, due to the increased number of measures they have to deal with, are

more advanced than others. This is a tendency one can imagine continuing in the future although there are important horizontal efforts to streamline best practise and deal with measures in a more uniform way. The real key in this sense is that it is vital to make sure that MEPs are fully briefed on the developments in the importance and use of Delegated Acts, so that they understand what it is and how they can use it. The amendment of Rule 81 of its rules of procedure gave the Parliament a framework to deal with RPS measures which has been replicated in the new Rules 87a and 88, so from a procedural point of view nothing has changed. The Parliament will use the procedure it created for RPS for Delegated Acts. From a procedural perspective we are likely to see a continuation of the trend of a few individuals driving the scrutiny of Delegated Acts within committees – the coordinators, Chairs and secretariat staff.

A further element of how the Parliament deals with Delegated Acts, outside of the organisation structure, is the level of understanding and interest of MEPs in engaging with this decision-making procedure. The Parliament is first and foremost a legislative body and MEPs are mainly concerned with this aspect of their work. It is very difficult for an MEP to get to grips with the intricacies of the procedure of Delegated Acts and the substance of the individual measures within such short deadlines. In addition there is the element of political interest in these detailed measures, which is usefully quite low from the perspective of an MEP with limited time and resources. Two changes from RPS to Delegated Acts could transform this situation. Firstly Delegated Acts give the Parliament much more power than RPS and the powers are much clearer than before. Secondly, and closely related to the first point, is the fact that the Parliament now has the right of objection on any grounds, no longer the three legal criteria. This will make it considerably easier for the Parliament to scrutinise measures and will open the door to more individual input from MEPs who have an issue with the content – and no longer need to understand how to apply three legal criteria. Once this is understood more MEPs could be expected to delve into detailed technical measures, meaning that whilst the procedural status quo from RPS to Delegated Acts will likely entail the continued importance of a few key actors in the Parliament, this easier understanding and use of the powers of objection could lead to a wider interest and involvement in Delegated Acts.

As regards the usage of the RPS procedure we noted the surprising fact that the Council was the first to use its veto, not the Parliament. The Parliament has been moderate in the number of objections it has tried to raise, although to what extent this is due to the fact that there have not been too many RPS measures and that the majority are still to come in the future, to members not being familiar enough with the RPS procedure and its full potential, to the non-controversial nature of the draft measures or because it is not easy to find a voting majority for resolutions, is rather unclear.

**TABLE 4 Summary of RPS activity since entry into force**

	<b>Number of cases</b>	<b>Details of cases</b>
Successful objection by Council (qualified majority)	6	Correlation tables, 1 within Water Framework Directive, 5 within Biocides Directive
Successful objection by Parliament (absolute majority)	3	Capital requirements directive; Energy labelling of TVs; Thrombin
Failed in Parliament Plenary (absolute majority)	1	Energy labelling of fridges
Failed in Parliament committee (simple majority)	3	Biocide; Eco-design of household lamps; Substances and mixtures
Withdrawn by Commission	1	Body-scanners

Source: Own data

In sum the Council rejected a set of six draft measures, whereas the Parliament rejected three draft measures out of a total number of eight attempts to exercise its right of veto according to RPS. Out of the five unsuccessful procedures, three were voted down in the parliamentary committee concerned and the other three led either to the Commission's withdrawal or were withdrawn by the Parliament itself before the committee vote, after promises had been made by the Commission. It is in this area of attempting to oppose a draft implementing measure that a series of unexpected developments arose. The most interesting of these, certainly for the future, was the experience of the Parliament being able to threaten with the RPS to extract a de facto right of amendment. This was often accompanied by heavy and intense lobbying by the Commission in support of its measures. These two trends are particularly relevant for Delegated Acts. Firstly Delegated Acts, like the RPS, do not allow for modifications, offering only a straight right of objection so the Parliament will likely be tempted to follow the same pattern in using the right of objection to an individual measure, or even the more nuclear option of revoking the entire delegation, to extract concessions and promises. We can expect this soft right of amendment to continue, and perhaps, given the increased powers of Delegated Acts, to actually increase in usage. Secondly the lobbying of the Parliament by the Commission is a trend that could also increase, depending on what mechanisms are put in place by the Commission to notify and engage the Parliament in the development of Delegated Acts before their formal transmission. The power to object to a Delegated Act on any grounds makes it vital that the Commission finds some early-warning or consultation mechanisms to engage the Parliament, otherwise it will find itself having to lobby the Parliament not to object to measures once they have been formally transmitted.

Consequently, our theoretical contribution is three-fold. Firstly, in line with Héritier and Moury (2009) comitology and more specifically RPS, has become an additional element of negotiation in codecision. Throughout the alignment process of RPS into the existing *acquis*, the Parliament sought to delegate as much as possible to the RPS, anticipating its relative gain of power under this procedure. These empirical findings therefore confirm a distributive institutionalist argument according to which the Parliament seeks to maximize its institutional power. In addition, they are in line with Franchino (2002, 2007) showing that the amount of delegation and discretion allowed to the Commission increases when the voting rule is qualified majority, and if the policy area at stake is

complex (see also Thomson and Torenvlied 2010). This is interesting in light of the extended use of codecision and qualified majority voting under Lisbon, especially for those areas of legislation that involve extensive delegation of implementing powers to the Commission, such as agriculture, energy, public health, commerce and humanitarian aid. This trend will almost certainly continue with Delegated Acts, which gives the Parliament even more power in the codecision procedure.

Second, experiences with RPS have shown that formal legislative bodies, such as the full parliamentary plenary or committees, may lose their legislative power by delegating responsibility to a small number of influential negotiators (Farrell and Héritier 2004; Rasmussen and Shackleton 2005). This group of influential negotiators with the RPS included party group coordinators and rapporteurs, who may not automatically mirror the full plenary composition according to geographical or ideological lines, but who can be biased towards policy outliers (Kaeding and Hurka 2010), i.e. members with a high demand for the policies in their jurisdiction. It is possible, however, that the new powers and more straightforward ability to object with Delegated Acts leads to an increased awareness and usage of the right to object by more MEPs.

Last but not least, our examples contribute to a better understanding of the relationship between formal and informal institutions, showing ‘how the two may be recursively related’ (Farrell and Héritier 2003, p. 577). The 2006 amendment of Council Decision 1999/468/EC and its introduction of the RPS, providing the Parliament with a right of veto (formal institutional change) has given rise to a number of important informal processes and practises, such as the de-facto right of amendment (informal institutions), which, in turn, affects the current negotiations of future Delegated Acts. Overall, next to an increasing role in the legislative process, the Parliament, through the strategic use of the relationship between formal and informal institutions, has been successful in advancing its interests over time in the decision-making process of non-legislative acts.

Given the growing importance of delegated powers to the Commission a full knowledge and understanding, by all institutions and actors, of how they can use the formal and informal procedures is essential. In this sense there is a form of information advantage for those who grasp the full consequences, intended and other, of how the RPS worked in reality and what this implies for the practise and reality of Delegated Acts. This article has provided useful and timely practical and theoretical insights into what will, without doubt, become a more and more researched and lobbied area of EU decision-making.

## References

- Alfé, M. and T. Christiansen. 2009. 'Institutional Tensions in the Evolution of the Comitology System', in T. Christiansen, J. M. Oettel and B. Vaccari (2009) *21<sup>st</sup> Century Comitology. Implementing Committees in the Enlarged European Union*, Maastricht: European Institute of Public Administration (EIPA), pp. 49-70.
- Bergström, C. F. 2005. *Comitology : Delegation of Powers in the European Union and Committee System*, NY : Oxford University Press.
- Bergström, C. F. and A. Héritier. 2007. 'Institutional Rule Five : Controlling the Implementation Powers of the Commission (Comitology)', in A. Héritier, *Explaining Institutional Choice in Europe*, Cambridge: Cambridge University Press.
- Christiansen, T., J. M. Oettel and B. Vaccari. 2009. *21<sup>st</sup> Century Comitology. Implementing Committees in the Enlarged European Union*, Maastricht: European Institute of Public Administration (EIPA).
- Christiansen, T. and B. Vaccari. 2009. 'The 2006 Comitology Reform: Problem Solved or Conflict Postponed?', in T. Christiansen, J. M. Oettel and B. Vaccari. 2009. *21<sup>st</sup> Century Comitology. Implementing Committees in the Enlarged European Union*, Maastricht: European Institute of Public Administration (EIPA), pp. 333-352
- Damen, M. and A. Hardacre. 2009. *The European Parliament and Comitology: PRAC in Practice*. EIPAScope 2009 (1): pp. 13-18.
- Farrell, H. and A. Héritier. 2003. Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe. *Governance* 16(4): 577-600.
- Farrell, H. and A. Héritier. 2004. 'Interorganizational negotiation and intraorganizational power in shared decision making', *Comparative Political Studies* 37(10): 1184-1212.
- Franchino, F. 2000. 'Control of the Commission's Executive Functions: Uncertainty, conflict and decision rules', *European Union Politics*, 1: 63-92.
- Franchino, F. 2002. 'Efficiency or Credibility? Testing the two logics of delegation to the European Commission', *Journal of European Public Policy*, 9(5): 1-18.
- Franchino, F. 2007. *The Powers of the Union: Delegation in the EU*, Cambridge: Cambridge University Press.
- Héritier, A. and C. Moury. 2009. 'Contested Delegation : The Impact of Codecision on Comitology', *EUI Working Paper RSCAS 2009(64)*.
- Kaeding, M. 2004. Rapporteurship assignment in the European Parliament. Distribution or Information?, *European Union Politics* 5(3): 353-371.
- Kaeding, M. and S. Hurka. 2010. 'Where are the MEPs from the accession countries? Rapporteurship assignments in the European Parliament after Enlargement', *Eipascope*, 2: 19-24.
- Pollack, M. 2003. *The Engines of European Integration: Delegation, Agency and Agenda Setting in the European Union*, New York: Oxford University Press.
- Rasmussen, A, and M. Shackleton. 2005. 'The Scope for Action of the European Parliament Negotiators in the Legislative Process: Lessons of the Past and for the Future', Paper prepared for the Ninth Biennial International Conference of the European Studies Association. Austin, 31 March – 2 April 2005.

- Thomson, R. and R. Torenvlied. 2010. 'Information, Commitment and Consensus: A comparison of three perspectives on delegation in the European Union', *British Journal of Political Science*
- Vos, E. 2009. '50 Years of European Integration, 45 Years of Comitology', *Maastricht Faculty of Law Working Paper*, 3.

### **Official Documents**

- European Commission (2010) Report from the Commission on the working of Committees during 2009, Luxembourg: Office for Official Publications of the European Union.
- European Commission (2009) Report from the Commission on the working of Committees during 2008, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2008) Report from the Commission on the working of Committees during 2007, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2007) Report from the Commission on the working of Committees during 2006, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2006) Report from the Commission on the working of Committees during 2005, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2005) Report from the Commission on the working of Committees during 2004, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2004) Report from the Commission on the working of Committees during 2003, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2003) Report from the Commission on the working of Committees during 2002, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2002) Report from the Commission on the working of Committees during 2001, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (2001) Report from the Commission on the working of Committees during 2000, Luxembourg: Office for Official Publications of the European Communities.
- European Parliament (2009) Activity Report 1 May 2004 to 13 July 2009 of the delegations to the Conciliation Committee, Luxembourg

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