BRIEFING

EU Legislation in Progress

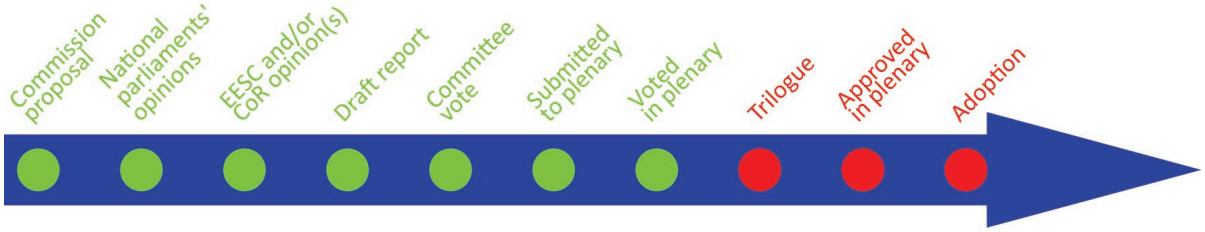
European Parliament

Reform of the Comitology Regulation

OVERVIEW

On 14 February 2017, the European Commission adopted a proposal amending Regulation (EU) No 182/2011 (the 'Comitology Regulation') in order to increase the transparency and accountability of the decision-making process leading to the adoption of implementing acts. The main elements of the proposal include amending the voting rules for the Appeal Committee (AC) in order to reduce the risk of a no opinion scenario and to clarify the positions of the Member States, providing for the possibility of a further referral to the AC at ministerial level if no opinion is delivered, and increasing the transparency of the comitology procedure by making public the votes of the Member States' representatives in the AC. Following the opinions of a number of committees, submitted in the previous and current terms, on 12 October 2020, Parliament's Committee on Legal Affairs adopted its report. It proposes to oblige Member States' representatives to give reasons for their vote, abstention or for any absence from the vote, and where particularly sensitive areas are concerned (consumer protection, health and safety of humans, animals or plants, or the environment), also case-specific detailed reasons for their vote or abstention. Other amendments concern better accessibility to the comitology register to increase transparency for citizens, and empowering Parliament and Council to call on the Commission to submit a proposal amending the basic act, where they deem it appropriate to review the implementing powers granted to the Commission. A partial first-reading report was adopted on 17 December 2020 in plenary and the file was referred back to the Legal Affairs Committee for interinstitutional negotiations.

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers		
Committee responsible:	Legal Affairs Committee (JURI)	COM(2017) 085 14.2.2017
Rapporteur:	*to be appointed following resignation of József Szájer (EPP, Hungary)*	2017/0035(COD)
Shadow rapporteurs:	Bettina Vollath (S&D, Austria) Pascal Durand (Renew, France) Marie Toussaint (Greens/EFA, France) Angel Dzhambazki (ECR, Bulgaria)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Next steps expected:	Appointment of new rapporteur and trilogue negotiations	



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Introduction

On 14 February 2017, the European Commission adopted a proposal to amend the Comitology Regulation. The aim was to boost the transparency, accountability and efficiency of the decision-making process leading to the adoption of implementing acts. The Commission considers that the Member States should assume greater responsibility in the decision-making process, especially in politically sensitive issues such as genetically modified organisms and genetically modified feed. It proposed amendments aimed at improving the functioning of the comitology procedures at the level of the Appeal Committee (AC), and relating to the calculation of the majority for adopting an opinion, a further referral to the AC at ministerial level, and a referral to Council for opinion.

Background

Under the Treaty of Lisbon, the concept of 'legislative acts' (Article 289(3) of the Treaty on the Functioning of the European Union (TFEU)) is limited to legal acts (regulations, directives, decisions) adopted in a legislative procedure (ordinary or special). A legislative act may, in turn, provide for the possibility of delegating certain law-making powers to the Commission. This means that a basic (legislative) act may provide for a delegation to enact (non-legislative) legal acts – in the form of **delegated or implementing acts**. According to Article 290 TFEU, a delegated act is a non-legislative act of general application that supplements or amends certain non-essential elements of the basic legislative act. In contrast, an implementing act may not modify anything in the basic act. According to Article 291(2) TFEU, 'implementing powers' (i.e. the competence to adopt implementing acts) may be conferred on the Commission by a basic act 'where uniform conditions for implementing legally binding Union acts are needed'. The Treaty of Lisbon explicitly requires (in Article 291(3) TFEU) that the 'rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers' be laid down in a regulation, adopted under the ordinary legislative procedure. Such rules are spelled out in the Comitology Regulation, discussed below. In contrast, there is no comparable horizontal act concerning the adoption of delegated acts.[1] In the case of delegated acts, the European Parliament may veto the proposed measures or even revoke the delegation, a power which it does not have in the case of implementing acts. The choice of the type of act is subject to judicial review by the Court of Justice and may lead to the annulment of the act if the criteria of Articles 290 and 291 TFEU are not fulfilled. According to the Court's case law,[2] while the EU legislature has discretion as to whether to confer a delegated or implementing power upon the Commission, it must exercise such discretion within the conditions laid down in the two aforementioned articles of the TFEU.

Inter-institutional agreement on delegated and implementing acts

On 18 June 2019, the European Parliament, the Commission and the Council concluded an inter-institutional agreement laying down **non-binding criteria for the application of Articles 290 and 291 TFEU**. It provides, inter alia, that 'the power to adopt rules entailing political choices falling within the responsibilities of the Union legislature, for example in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments, may not be conferred on the Commission', and that when adopting a delegated or implementing act, the Commission 'must fully respect the essential elements of the enabling act'. Concerning the distinction between delegated and implementing acts, the agreement stipulates that delegated acts 'may only be of general application', whereas implementing acts 'may be of individual or general application'. It also contains a number of detailed criteria for choosing implementing or delegated acts for specific subject-matters that are to be covered by such acts.

Existing situation

At present, comitology procedures leading to the adoption of implementing acts are regulated by 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 ('the regulation'). The Comitology Regulation

replaced the Second Comitology Decision (1999/468) previously in force which, in turn, had replaced the First Comitology Decision (87/373). The currently binding Comitology Regulation is based on Article 291(3) TFEU which regulates the issue of **implementing acts** of EU law. By contrast, the Comitology Regulation is not applicable to the adoption of delegated acts.

Comitology procedures

At present, there are **three types of comitology procedure**: the advisory procedure, the examination procedure, and the regulatory procedure with scrutiny. The first two are covered by the Comitology Regulation, as they apply to implementing acts. The **regulatory procedure with scrutiny** was created in 2006 (via an amendment to the Second Comitology Decision). Its novelty was that both the Council and the European Parliament can veto a proposal, even if the competent committee provides a positive opinion on the draft measure. This procedure is used to adopt 'measures of general scope which seek to amend non-essential elements of a basic instrument', and therefore, in the post-Lisbon comitology, it corresponds to delegated, and not implementing acts. This procedure can no longer be used in new legislation, but it still appears in many existing basic acts and will continue to apply to those acts until they are aligned'[3] with post-Lisbon comitology.

Within the Comitology Regulation, the type of procedure may be pre-selected in the basic act itself (Article 2(1)), but if that is not the case, Article 2(2) contains non-exhaustive list of cases in which the examination procedure applies (e.g. implementing acts of general scope, as well as acts concerned with programmes with substantial implications, the common agricultural and common fisheries policies, the environment, security and safety, or protection of the health or safety of humans, animals or plants, the common commercial policy, and taxation). All committees are composed of representatives appointed by the Member States (one each), and are chaired by a representative of the Commission without the right to vote. The chair plays a key role in initiating the procedure before a given committee as he/she submits the draft implementing act, adopted by the Commission, to the committee, convenes a meeting, and manages the timing of the procedure. Committee members may, in turn, table amendments and the chair may present amended versions of the draft implementing act. The regulation is designed to encourage committee members to find a compromise, rather than having a majority outvote the minority. Whereas meetings are conceived by the regulation as the standard way of proceeding, an alternative written procedure may be imposed by the chair. The written procedure can be aborted if the chair so decides or any committee member so requests; in that case, the ordinary meeting procedure must take place.

Existing committees and their activities

According to the latest available Comitology Report (2018), the overall number of committees was 267 in 2017, and 275 in 2018. 23 committees followed the examination procedure, 100 the advisory procedure, 21 the regulatory procedure with scrutiny, and 130 more than one procedure. In 2018, the committees met a total of 660 times, and 880 written procedures took place. This figure includes six meetings of the AC which, in 2018, did not organise any written procedures (it organised one in 2017). When it comes to output, in 2018 the committees adopted 1 633 opinions, 1 456 implementing acts and 90 measures under the regulatory procedure with scrutiny. The largest number of opinions were adopted by committees within the remit of the Commission's Directorate-General (DG) for Health and Food Safety (629 out 1633 opinions), in second place were committees within the remit of DG Research and Innovation (225 opinions) and in third place those in the area of DG Agriculture and Rural Development (146 opinions). The AC met six times during 2018, discussed 12 draft implementing acts (in the areas of health and consumer policy) but delivered no opinion in any of these 12 cases. As a result, the Commission decided to adopt 11 implementing acts following no opinion scenarios in 2018.

Advisory procedure

Under the advisory procedure (Article 4), votes are taken by simple majority (i.e. 14 out of 27 Member States). The committee's opinion is not binding on the Commission, although it is obliged to take the 'utmost account' of the opinion and conclusions of the discussions in committee.

Examination procedure

The examination procedure (Article 5) is characterised by the application of qualified majority voting (QMV), along the same lines as in Council (i.e. 55 % of the Member States representing at least 65 % of the Union's population, Article 238(3)TFEU). The **legal value** of the committee's position can be binding on the Commission, depending on whether or not the committee adopts an opinion by QMV. Three scenarios can be identified in that regard: (1) adoption of a **positive opinion** by the committee (endorsing the draft implementing act); (2) adoption of a **negative opinion** by the committee (rejecting the draft implementing act); (3) **no-opinion scenario** (lack of a qualified majority to support a negative or positive opinion within the deadline set). In the case of a positive opinion scenario, the Commission is bound by the opinion and is under a duty to adopt the draft implementing act it had submitted to the competent committee. A negative opinion also legally prevents the Commission from adopting the draft implementing act ('shall not adopt'). However, a negative opinion does not necessarily close the procedure. There are two further sub-scenarios possible: (i) submission of an amended version to the same committee, within two months of the delivery of the negative opinion, or (ii) referral to the AC within one month of the negative opinion. It is up to the committee chair, i.e. the Commission representative, to decide whether to amend the draft and resubmit it, or submit the same draft to the AC (Article 5(3)).

Given that, under the examination procedure, Council-style QMV applies, it may happen in practice that no qualified majority can be gathered around either a positive or a negative opinion. However, as Table 1 shows, this is relatively infrequent (0.03-0.04 % of cases, whereas 96-98 % of cases end with positive opinions. The **legal effects of a no-opinion** scenario are governed by Article 5(4)-(5) of the regulation. The general rule is that, in the case of a no-opinion scenario, the Commission has a legal right to adopt the draft implementing act. Given that adopting the act is the Commission's right, *a contrario* the Commission is not under a duty to do so and, in legal terms, may equally well amend the act or withdraw it.

Table 1 – Opinion scenarios in the committees (2009-2014)

Year	Opinions	Positive opinion		Negative opinion		No opinion	
		Number	%	Number	%	Number	%
2009	2 091	2 003	95.8 %	10	0.005 %	78	0.037 %
2010	1 904	1 783	93.6 %	0	-	121	0.063 %
2011	1 868	1 789	95.8 %	4	0.002 %	75	0.04 %
2012	1 923	1 845	95.9 %	0	-	78	0.04 %
2013	1 916	1 845	96.3 %	0	-	50	0.026 %
2014	1 889	1 838	97.3 %	0	-	51	0.027 %

Data source: Report on the implementation of Regulation EU (182/2011), COM(2016) 92 final, European Commission, p. 3.

Whereas the decision to adopt, amend or withdraw following a no-opinion outcome is, as a general rule, a matter for the Commission's **discretion**, the regulation envisages a number of situations when the Commission *may not* adopt the act if no opinion is given by the committee. These situations include the following: (a) the implementing act concerns taxation, financial services, the protection of the **health or safety of humans, animals or plants**, or definitive multilateral safeguard measures; (b) the basic act provides that the draft implementing act may not be adopted where no opinion is delivered; or (c) a simple majority of the component members of the committee opposes the draft implementing act. Therefore, if the implementing act were to govern any of the subject-matters enumerated under point (a), such as notably the 'protection of the health or safety of humans, animals, or plants' – it may be not be adopted under a no-opinion scenario. A basic act

may also require a positive opinion for an act to be adopted in other areas. Finally, if a simple majority of the members is against the act, it cannot be adopted – in any area, not only in the sensitive subject-matter areas. However, if the Commission considers the implementing act to be necessary, the chair has two options: either to submit an amended version to the committee within two months of the vote, or to **submit the implementing act to the AC.**

There are special rules concerning definitive anti-dumping or countervailing measures if the competent committee reaches no opinion (no-opinion scenario) *and* there is a simple majority against the draft implementing act. In such a case, the Commission is obliged to conduct consultations with the Member States. Fourteen days at the earliest and one month at the latest after the committee meeting, the Commission must inform the committee members of the results of those consultations and submit a draft implementing act to the AC.

Referral to the Appeal Committee

The Appeal Committee (AC) – a second-instance body – was an innovation of the Comitology Regulation, and replaced the appeal to the Council.[4] The AC should meet between 14 days and 6 weeks after the referral and should deliver its opinion within two months of the referral. The AC is attached to the Commission's secretariat-general, whereas the sector-specific (first instance) committees are attached to the Commission's directorates-general). The procedure before the AC is regulated in Article 6 of the Regulation. The AC, just like the examination committees, follows QMV. Until an opinion is delivered, any member of the AC may suggest amendments to the draft implementing act and the chair may decide whether or not to modify it. The chair is under a duty to endeavour to find compromise solutions, i.e. 'solutions which command the widest possible support within the' AC. Just as in first-instance committees, three scenarios are possible in the AC: (1) a **positive** opinion, adopted by qualified majority – which legally obliges the Commission to adopt the draft implementing act; (2) a **negative** opinion, likewise adopted by qualified majority – which legally prevents the Commission from adopting the draft implementing act; and (3) a **no-opinion** scenario – which gives the Commission the legal right to adopt, within the scope of its **discretionary power**, the draft implementing act, but does not create a duty to do so (this rule does not apply to definitive multilateral safeguard measures that, under a no-opinion scenario, may not be adopted).

Table 2 – Outcome of procedures before the Appeal Committee (2011-2018)

Year	Number of appeals	Positive opinions		Negative opinions		No opinion		Acts adopted by the Commission in no-opinion scenarios
		Number	%	Number	%	Number	%	
2011	8	1	12.5 %	2	25%	5	62.5 %	5
2012	6	–	–	–	–	6	100 %	6
2013	9	–	–	–	–	9	100 %	8
2014	13	2	15.4 %	–	–	11	84.6 %	11
2015	11	–	–	1	9%	10	91 %	10
2016	11	–	–	–	–	11	100 %	10[5]
2017	16	1	6.3 %	–	–	15	93.7 %	16
2018	12	–	–	–	–	12	100 %	11
Total	86	4	4.7%	3	3.5%	**79**	**91.9 %**	**67 (84.8%)**

Data sources: Commission's annual comitology reports for 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018.[6]

As can be seen from Table 2, the AC is seized only in a relatively small number of cases, ranging from 6 to 12 a year. The areas in which the AC is engaged usually pertain to the authorisation of genetically modified organisms (all cases between 2011 and 2014).[7] In the explanatory memorandum to the present proposal, the Commission notes that in the area of **genetically modified organisms** (GMOs) and **genetically modified food and feed** 'there has never been a qualified majority amongst Member States in favour or against a draft Commission decision' and as a result 'all votes resulted in so-called "no opinion" outcomes' with the same result being 'always repeated in the [AC] [...] As a consequence **decisions in this field had to be taken systematically without the support of a qualified majority of Member States** in the Committee'.[8] As it can be seen from Table 2, on annual average, the AC concluded the referral procedure with a no-opinion scenario in **92 % of cases** (total of 79 acts) in the aggregate of the years 2011 to 2018. This did not, however, stop the Commission from adopting an act under its own responsibility in 85 % of cases of a no-opinion scenario (a total of 67 acts adopted between 2011 and 2018). Nonetheless, the Commission considers such situations to be 'problematic' on account of the fact that such decisions 'often concern politically sensitive matters of direct impact on citizens and businesses, in particular in the field of health and safety of humans, animals and plants. While the Commission is empowered to decide in such cases, the Commission considers that, given the particular sensitivity of the issues at stake, Member States should, in these specific situations, **also assume their responsibilities in the decision-making process** to a greater extent.'[9]

Comitology and maladministration

In 2016, the **European Ombudsman** ruled on a complaint concerning delays in delivering authorisations for genetically modified products in the comitology procedure (case 1582/2014/PHP). The Ombudsman found that the delays affecting 20 applications were not justified. However, in the Ombudsman's opinion such delays reflected a systemic problem rather than being the result of matters specific to the particular authorisation applications. Concluding, the Ombudsman found that the delays constituted maladministration on the part of the Commission.

Recital 14 in the preamble to the regulation clearly states that 'when considering the adoption of draft implementing acts in particularly sensitive sectors, notably taxation, consumer health, food safety and protection of environment, the Commission, in order to find a balanced solution, will, as far as possible, act in such a way as **to avoid going against any predominant position** which might emerge within the [AC]'. The Commission itself claims that the 'flexibility [to adopt or not adopt the implementing act in case of a no-opinion scenario] does however not relieve the Commission from its obligation to take a decision in cases like those relating to requests for authorisation of the placing on the market of products or substances,' adding that since 'the producer that has filed an application for authorisation has the right to receive a decision on the request, the Commission **is obliged to adopt a decision within a reasonable timeframe**'.[10] In this context, the Commission refers to a judgment of the General Court of 26 September 2013 in Case T-164/10, *Pioneer Hi-Bred International Inc v Commission* which, nonetheless, was issued under the Second Comitology Decision previously in force. Under the latter, in the event of a no-opinion scenario, the Commission was under a clear legal duty to adopt the implementing act it had proposed (Article 5(4)), which is no longer the case under the currently applicable regulation.

Transparency and right of scrutiny

Article 9(2) of the regulation stipulates that the principles and conditions regarding public access to Commission documents are equally applicable to the committees. Article 10(1) provides that the Commission should run a register of committee proceedings including: (a) a list of committees; (b) the agendas of committee meetings; (c) summary records of meetings; (d) the draft implementing acts on which the committees are asked to deliver an opinion; (e) the voting results; (f) the final draft implementing acts following delivery of the opinion of the committees; (g) information concerning the adoption of the final draft implementing acts by the Commission;

and (h) statistical data on the work of the committees. Access to this register is to be given to the European Parliament and Council. The statistical data (h) as well as references of documents (a-g) are to be made public. Parliament or Council may 'at any time indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act'. If that is the case, the Commission is under a duty to review the implementing act and to inform Parliament and Council on its intent to maintain, amend or withdraw the implementing act in question.

Other rules

The regulation also contains rules on the adoption of implementing acts in exceptional cases (Article 7) and immediately applicable implementing acts (Article 8) that are not targeted by the current proposal.

Parliament's starting position

In 2014, Parliament adopted a resolution on delegated and implementing acts, arguing in favour of **the broader use of delegated acts** (where Parliament's powers are greater) rather than implementing acts (which fall under the regulation). In particular, Parliament wanted to see lists of authorised products or substances in annexes (to be amended by delegated acts) rather than being determined by implementing acts. In its resolution of 30 May 2018 on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making, Parliament noted that the delegation of power to the Commission was not merely a technical issue but could also involve matters of political sensitivity, of considerable importance to EU citizens, consumers and businesses. Concerning the regulatory procedure with scrutiny (beyond the scope of the regulation), Parliament argued that, as a rule, all cases where that procedure applies should be converted into delegated acts. It also warned against assimilating the procedures for the drawing up of delegated acts to those applicable to implementing acts as regards the role of national experts, 'especially as regards procedural prerogatives conferred upon those experts'. Parliament criticised Council for replacing references in legislative texts to delegated acts with references to implementing acts 'almost systematically', even when the criteria laid down in Article 290 TFEU were met and the act in question should be a delegated act, not an implementing one. Concerning politically sensitive elements, such lists or registers of products or substances, Parliament believed that they should be an integral part of the basic act, susceptible of being amended by delegated acts, rather than being laid down in implementing acts. Parliament urged the Commission to 'abide … genuinely and consistently' by the commitment to allow 'experts from Parliament and the Council' to have systematic access to the meetings of Commission expert groups to which Member States' experts are invited and which concern the preparation of delegated acts. In parallel, Parliament is working on two legislative proposals (2016/0400B(COD), 2016/0399(COD)) concerning the adaptation of a number of basic acts to the post-Lisbon system.

Plenary debate on comitology

On 5 January 2020, Parliament held a plenary debate on the **reform of the general principles of comitology**. Bettina Vollath (Austria, S&D) expressed full support for the proposal and underlined that the current lack of transparency allowed Member States to conceal their actual positions in the committees. Pascal Durand (France, Renew), pointed out that the Commission found itself 'between the hammer of the Council and the anvil of the big companies which say: *if you do not take a decision, we will sue the Commission and the European Union*. [The Commission] are therefore obliged to decide where the Council shows fearful cowardice'. Various speakers stressed that the comitology system was 'opaque' (Richard Corbett, UK, S&D), that it was 'utterly lacking' transparency and accountability (Martin Hojsík, Slovakia, Renew) and that 'few people in Europe' actually 'understand' comitology (Karen Melchior, Denmark, Renew). The distinction between delegated and implementing acts was also mentioned. Richard Corbett described the former as 'clear and simple', as well as 'transparent and democratic' (Richard Corbett), stating that they should be preferred to implementing acts. Jiří Pospíšil (Czechia, EPP) noted that it was 'very unfortunate that a large number of these acts have been left without the opinion of individual Member

Preparation of the proposal

The proposal was not preceded by any public consultations or impact assessments. It was only following the publication of the proposal that the Commission sought stakeholder feedback.

The changes the proposal would bring

The proposal would amend Articles 3 and 6 of the regulation, concerned with the AC and with transparency. A sixth subparagraph would be added to Article 3(7) stating that in the event of a no-opinion scenario in the AC, the chair may decide to 'hold a further meeting, at **ministerial level**'. The AC at ministerial level would deliver its opinion within three months of the date of the referral. Although not exactly an appeal to the Council (as was the case before the Comitology Regulation), an AC 'at ministerial level', i.e. composed of ministers of Member States' governments, would be comparable, in terms of its political weight, to the Council. A new subparagraph would be added to Article 6(1), stating that in **calculating the majority** in the AC, only votes of members present and not abstaining would count towards the qualified majority (sentence 1). An additional reference to Article 238(3)(a) TFEU would be inserted, whereby a qualified majority is defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States (sentence 2). This rule, read together with the rule that **only members present and actually voting for or against are taken into account**, would mean that the figures of 55 % and 65 % would not refer to the total number of Member States and their total populations, but only to the Member States whose representatives in the AC effectively vote for or against an opinion.[11] This way only those Member States that have a specific opinion on the draft (for or against) will have a say, without taking into account those abstaining from voting (by an abstention vote or simple absence). This should make it easier to reach a decision and avoid a no-opinion deadlock. However, a minimum **quorum** is provided for in sentence 3, whereby a vote in the AC would be considered valid only if at least a simple majority of Member States' representatives are present and vote for or against. The quorum rule follows the existing standard rules of procedure, prepared by the Commission. At the same time, the rule of Article 238(3)(a) second subparagraph TFEU on a **blocking majority** (i.e. Member States representing at least 35 % of the EU's population) would also apply.[12] If, notwithstanding the modified rules for attaining qualified majority, the AC nonetheless ended up with a no-opinion scenario, the Commission would be able to **refer the matter to the Council itself** (new paragraph 3a added to Article 6). It would not be possible for the Council to take a decision on the issue, but it would be able to express 'an **opinion indicating its views and orientation** on the wider implications of the absence of an opinion, including the institutional, legal, political and international implications'. The exact legal value of the Council's opinion is not spelled out explicitly in the text, the proposal stating only that the Commission would have to '**take account** of any position expressed by the Council within 3 months after the referral'. In terms of **increased**

Modified calculation of QMV: Examples

The practical significance of the amendment of Article 6 would be significant. Whereas currently for an opinion to be adopted it needs the support of 15 Member States (55 % of 27) representing 65 % of the EU population, under the new rules it would be sufficient for 14 Member States to vote for or against (quorum), and 55 % of those 14 Member States (i.e. eight Member States) would need to support the proposal (provided that they represented 65 % of the population of the 14 Member States that voted for or against). Dropping the minimum number of Member States needed to adopt an opinion from the current 15 to a possible 8 could be a practical way out of the deadlocks that the Appeal Committee regularly faces (where 85 % of votes end in no-opinion scenarios). In other words, the fact that the majority of 55 % would be calculated not with reference the total number of Member States (27), but only with reference to the total number of Member States actually voting for or against (without the abstentees), would translate into a smaller number of votes needed to reach the 55 % majority threshold to adopt the opinion. Even if the majority (55 %) remained the same, it would be easier to attain it (fewer Member States).

transparency on the votes expressed within the procedure, the rule on the **Comitology Register** would be amended requiring the votes of each Member State in the AC to be recorded (Article 10(1)(e)). Furthermore, Article 10(5) would provide that not only the annual comitology report would be made public, but also voting results (including Member States' positions in the AC), the final draft implementing acts following delivery of the opinion of the committees; information concerning the adoption of the final draft of implementing acts by the Commission; and statistical data on the work of the committees (the statistical data are already public currently).

Advisory committees

The advisory committees have not (yet) adopted any opinion on the proposal.

National parliaments

Back in 2017, contributions were received from three Member State parliamentary chambers. The French Senate expressed the view that draft implementing acts should be submitted to national parliaments for subsidiary checks, that the committee chairs should be appointed in a transparent process involving Council and Parliament, and that the proposed modification of the method of QMV calculation of is incompatible with the Treaties. The Czech Chamber of Deputies considered the proposal to be disproportionate, as the number of no-opinion deadlocks at appeal level was, in its view, very low; it questioned the Commission's view that no impact assessment was necessary; presented its opposition to the possibility of a referral to the Council considering that it would introduce unnecessary delays; and opposed the publication of Member States' vote in the AC considering that it would lead to the politicisation of comitology decisions. The Polish Senate issued a negative opinion, criticising the proposal for 'upsetting the institutional balance' laid down in the Treaties by involving the Council in the comitology procedures.

Stakeholder views[13]

In December 2020 a critical joint statement on the Commission proposal was issued by 14 organisations representing the agricultural and biotechnological sectors, which claimed that the changes proposed by the Commission 'would make the processes for product authorisations even more complex and less predictable'. The authors of the joint statement also addressed amendments 5, 7 and 6 proposed by Parliament's Legal Affairs Committee (see below).

Legislative process

European Parliament

On 1 March 2017, Parliament's Committee on Legal Affairs (JURI) was identified as the lead committee for the file. Following the last elections, on 24 July 2019, József Szájer (EPP, Hungary) was appointed rapporteur (he stepped down as an MEP at the end of 2020, and has yet to be repalced as rapporteur). The matter was discussed in JURI three times (on 9 January, 18 February and 15 June 2020), before being voted in October (see below). A total of 16 committees were asked for an opinion,[14] of which 11 decided not to submit one. **Five committee opinions were delivered** between March and June 2020 (by INTA, ITRE, AFCO, ENVI, and AGRI). INTA proposed amendments concerning deadlines, and especially their shortening. AFCO and AGRI were against the new method of calculating the qualified majority. AFCO, ENVI, and AGRI proposed to make the rule on ministerial level referral more flexible (ENVI and AGRI: 'appropriate political level, *such as* ... ministerial level'; AFCO: *'preferably* at ministerial level'). AFCO and AGRI proposed to strengthen the **precautionary principle**, by providing that in sensitive areas (human and animal health, environment) a no-opinion scenario should prevent the Commission from granting authorisation to a product or substance. ITRE proposed to delete the rules on the AC meeting at ministerial level. ITRE and AGRI were against the modified calculation of qualified majority and the additional referral to the Council. AFCO, ENVI and AGRI proposed amendments aimed at **increasing transparency**,

notably the actual reasons for which Member States' representatives adopted a given position in committee.

On 12 October 2020, the **Legal Affairs Committee** adopted its report on the proposal and tabled it for plenary. The report received an overwhelming majority in the committee (21 in favour, 2 against, no abstentions). It comprises a total of **25 amendments** to the Commission's text. In **amendment 7**, the report proposes to add a clarification in the preamble to the effect that 'Where the basic act concerns the protection of the health or safety of humans, animals or plants, and Member States are not able to reach a qualified majority in favour of the draft implementing act providing for the grant of authorisation for a product or substance, that authorisation should be deemed to have been refused'. Whereas this is currently the rule for the first-instance committees, it is not the case with the AC, and this would be modified by amendment 16, discussed below. In **amendment 10**, JURI proposed to add a motive in the preamble whereby whenever 'it appears that it would be difficult to obtain positive opinions from the Member States in relation to several similar draft implementing acts, consideration should be given to reviewing the implementing powers conferred on the Commission in the relevant basic acts'. **Amendment 14** concerns raising the AC to political level – JURI would give this power not only to the chair, but also to a majority of Member States, and would expand the notion of political level as comprising not only the ministerial level ('sufficiently high political level, such as ... ministerial level'). **Amendment 15** is concerned with the referral to the Council – JURI would provide for a joint referral to Parliament and Council, obliging the Commission to 'take account' of the positions of both institutions, and not only the Council as in the original proposal. JURI would also involve the European Economic and Social Committee in the process by sending the Parliament's and Council's opinions to that institution. **Amendment 16** would broaden the scope of the rule of Article 5(4)(a) to make it applicable not only to the examination procedure (in the competent committee) but also to the AC level. The new rule would provide that **following a referral to the AC, the Commission may adopt the act in question only in case of a positive opinion**. At present, Article 6(3) second subparagraph explicitly allows the Commission to adopt the act in a no-opinion scenario. Amendment 16 would, therefore, provide for a significant change in the Commission's scope of discretion following referral to the AC and, in practice, vest no-opinion scenarios with the same legal effects as negative opinions. As justification, the report claims that in cases of no-opinion scenarios the Commission is under 'legal pressure' and has, under the current rules, 'no real other choice than adopting the implementing acts'. **Amendment 17** would require Member States, when voting or abstaining in the AC, to 'provide reasons for their vote or abstention ... or for any absence from the vote' and, if the act concerns 'particularly sensitive areas, such as the protection of consumers, the health or safety of humans, animals or plants, or the environment', the Member State representatives in the AC would additionally have to 'provide **case-specific detailed reasons** for their vote or abstention'. **Amendments 18**-**23** would increase the **transparency** of the comitology procedures even further, obliging the Commission to publish in addition the draft texts that the committees were working on (and not only their agendas), as well as names of Member States' representatives present at the meetings (and not only their affiliations, as provided in the current rules) and the detailed reasons for votes or abstentions. All comitology documents, and not only their references (as under the current rules) would be made public. **Amendment 24** would strengthen the Parliament's and Council's right of scrutiny, by introducing a new rule whereby whenever the Parliament or Council considered it to be appropriate to review the conferral of implementing powers on the Commission in the basic act, any of them could, at any time, call on the Commission to submit a proposal to amend that basic act. At present, Parliament and Council can only request that the Commission review the draft implementing act, and it is up to the Commission to decide whether it intends to maintain, amend or withdraw the draft implementing act; it cannot be required to propose an amendment to the basic act.

On 17 December 2020, Parliament voted on the JURI report in **plenary**, **accepting all amendments proposed by the JURI committee**. Amendment 16 was singled out to be voted separately, and received 450 votes in favour and 224 against, with 21 abstentions. The remaining 24 amendments

received an overwhelming majority of 633 votes in favour (with only 36 against and 26 abstentions). The amended text of the proposal received 429 votes in favour, 85 against, and as many as 182 abstentions. Following the adoption of Parliament's first-reading position, the matter was referred back to the JURI committee for **interinstitutional negotiations** pursuant to Rule 59(4), fourth subparagraph of the Rules of Procedure of the European Parliament.

Council

Within Council, the proposal was presented in November 2017 (under the Estonian Presidency) to the dedicated 'Working Party on General Affairs + 1 (legal advisors)', also known as 'WP GAG (Comitology revision)'. At this meeting the working party decided to request the opinion of the **Council Legal Service** (CLS) on several issues relating to the proposal, in particular on its compliance with the proportionality principle. On 2 March 2018, an opinion of the CLS was presented to the delegations; an abridged version – encompassing only 3 out of 18 pages – has been published in the Council register. Parts of the documents that were made available indicate that the CLS took issue with (at least) two aspects of the proposal. First, they oppose referral to the Council because this would, in their view, 'go beyond the role for the Council envisaged by the Treaties and would be in breach of the principle of institutional balance'. They also argued that it would also 'encroach on the competence of the Member States as foreseen by the Treaties'. Second, they consider that convening the AC at ministerial level 'unnecessarily encroaches upon the national political structures of the Member States protected by Article 4(2) TEU and goes against the principle of sincere cooperation'. Apparently the CLS also expressed reservations on the modified methods of calculating qualified majority (redacted paragraph 48, mentioned in the presidency progress report). Following the legal opinion, under the Bulgarian Presidency three meetings of WP GAG (Comitology revision) took place. During these meetings the draft regulation was discussed article by article, with the corresponding recitals. Following the meetings, the Bulgarian presidency drew up a progress report in June 2018 taking stock of the discussions on specific rules in the proposal. Concerning the **ministerial-level AC**, delegations essentially agreed with CLS and were against this amendment. Concerning the **method for calculating a majority**, most delegations opposed the proposed amendment but it emerged that several delegations were flexible and open to discuss alternatives mentioned in paragraph 48 of the CLS opinion (the paragraph is not publicly available). As far as the **referral to Council** is concerned, a 'vast majority of Member States' were against, supporting their position with the legal opinion. As a result, the Bulgarian Presidency 'provisionally concluded that there was no support for this amendment.' Concerning **stepping up transparency in the AC** 'many delegations conveyed positive views' but not necessarily intending to follow the Commission's method of achieving this goal. They wish to explore alternatives, such as through the amendment of the AC rules of procedure. Other delegations were reluctant, and in conclusion the Presidency found that 'there was no sufficient support for this amendment'. In April 2018, a general discussion on the proposal took place, with 'a couple of delegations' raising arguments of political and legal nature against the proposal, which were shared by 'many Member States'. In April 2018, the Bulgarian Presidency lodged a written consultation which led to the presentation of a 'common non-paper' representing the position of 15 Member States. The non-paper is critical of the proposal, questioning its necessity and added value, alleging that the Commission made a positive evaluation of the existing framework in its implementation report on the regulation.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Mańko R., Amending the Comitology Regulation, EPRS, European Parliament, December 2020.

Remáč M., Parliamentary scrutiny of the European Commission, European Implementation Assessment update, study, EPRS, European Parliament, July 2019.

Tilindyte L., Adapting legal acts to Articles 290 and 291 TFEU, EPRS, European Parliament, April 2019.

OTHER SOURCES

Mechanisms for control by Member States of the Commission's exercise of implementing powers: implementing acts at appeal committee level, Legislative Observatory (OEIL), European Parliament.

ENDNOTES

1 M. Chamon, Dealing with a Zombie in EU Law: The Regulatory Comitology Procedure with Scrutiny, *Maastricht Journal of European and Comparative Law*, Vol. 23(4), 2016, p. 716.

2 See ECJ judgments in cases: C-427/12, ECLI:EU:C:2014:170; C-88/14, ECLI:EU:C:2015:499; C-286/14, ECLI:EU:C:2016:183; C-263/14, ECLI:EU:C:2016:435; C-658/11, ECLI:EU:C:2014:2025.

3 Comitology Report for 2018, p. 6.

4 G.J. Brandsma, *Controlling Comitology: Accountability in a Multi-Level System*, Palgrave, 2013, p. 6.

5 Of the acts voted in the AC in 2016, nine were adopted by the Commission in 2016, and one the following year.

6 At the time of writing (February 2021), the comitology reports for 2019 and 2020 were not yet available.

7 Commission implementation report on Comitology Regulation (2016), pp. 4-5.

8 Explanatory memorandum, pp. 2-3.

9 Explanatory memorandum, p. 4.

10 Explanatory memorandum, p. 5.

11 Explanatory memorandum, p. 7.

12 Ibid., p. 7.

13 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

14 AFET, DEVE, INTA, ECON, EMPL, ENVI, ITRE, IMCO, TRAN, REGI, AGRI, PECH, CULT, LIBE, AFCO, and FEMM.

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