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Date of publication in the **EI*oP***: 3 Apr 2008

Keywords: accountability; comitology; legitimacy; European Parliament; European Commission

Full Text: HTML

Abstract

The European Commission plays a major role as regulator in the process of implementation of European legislation. Just looking at the figures of implementing measures one will find that the Commission adopts more than 2.500 such legal acts per year. As is well known the Commission is not alone in this process of regulating the implementation process but is assisted and controlled by 'comitology' committees composed of civil servants from the administrations of the Member States.

The system has been under pressure for reform almost from its inception, where especially the European Parliament (EP) has been highly critical of the complex system. It is noteworthy that the system has partly been reformed in 2006. From the side of the EP this most recent reform of comitology is characterised as a great breakthrough in parliamentary control over EU legislation and seen as improving accountability of the whole Community system.

This paper wants to come in here and probe into the question whether the latest Decision on Comitology actually does alleviate the current accountability deficits of comitology.

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Taming the "Trojan Horse" of Comitology?
Accountability issues in Comitology and the Role of the European Parliament

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European Integration online Papers (EIoP) Vol. 12 (2008) N° 1;
http://eiop.or.at/eiop/texte/2008-001a.htm

Date of Publication in **European Integration *online Papers***: 3.4.2008

| Abstract | PDF |

Contents:

Introduction

Ever since the 1960s the European Commission plays a major role as regulator in the process of implementation of European legislation. Just looking at the most recent figures on implementing measures one will find that the Commission adopted more than 2.500 such legal acts per year. As is well known, the Commission is not alone in this domain of regulating the implementing process, but is assisted and controlled by "comitology" committees composed of civil servants from the administrations of the Member States. The system has been under pressure for reform almost from its inception. Especially the European Parliament (EP) has been highly critical of the complex system and of - as it claimed - the undemocratic procedures involving two levels of bureaucrats, who to make matters worse, can under certain circumstances, refer measures to the Council (European Parliament 1961). One has to note that the call for reform of the system, notably from the EP but also from the European Commission, has not been unheard: first it was reformed in 1999 and just recently in 2006.

In this context a new regulatory procedure has been agreed upon, which from the side of the EP is described as "a huge breakthrough in parliamentary control over EU legislation" and as "improving accountability (…) of the whole Community system."(1) This is also echoed in the literature, where the inclusion of Parliament is seen to "increase the democratic legitimacy of 'quasi-legislative' measures and thus contributes to a better acceptance of European legislation by citizens" (Schusterschitz and Kotz 2007, p. 89).

This paper wants to come in here and probe into these assumptions. More concretely the question to be examined is whether the latest decision on Comitology actually improves parliamentary control, as it claimed here it has to be replaced by it, and as such alleviates the "accountability deficits of comitology", that have been diagnosed elsewhere (Brandsma 2007). As we have as of yet no concrete experiences with the 2006 Decision this evaluation will be made (partly) based on the insights gained from the exercise of parliamentary control according to the provisions of the 1999 Decision. It goes without saying that the 2006 provisions go beyond those of 1999 but certain observations can still be made.

In this quest the article will be structured as follows: First an overview of the system of comitology will be given, followed by a subsequent analysis of accountability issues in comitology. Based on these insights the problematique of holding comitology committees accountable to the EP will be analysed before and after the most recent reform. This builds the basis for a brief analysis of when to exercise parliamentary control in comitology,

before the article closes with some concluding remarks.

1. The development of comitology committees: respective legal stipulations and the work

Comitology committees have developed – based on an ad hoc basis – without any clear legal stipulations in the Treaties guiding their development. Even though they have been the object of much institutional controversy, they have become an intrinsic feature of the EU system of governance. The actual genesis of these committees, controlling and assisting the Commission in the implementing phase of EU legislation, dates back to the early hours of the Common Agricultural Policy (CAP).

These initial steps, at the beginning of the 1960s, already required extensive and detailed technical regulation. The Council, (the then one and only) legislator, not only lacked not only the relevant insight, but also the resources to respond to the needs of day-to-day management in this area, which included the ability to take quick action. However, it did not wish to delegate the implementation of the acts it adopted to the Commission without retaining some form of control over these measures (Demmke, Eberharter, Schaefer, Türk 1996, p. 61f.). Several proposals were put forward as to how this could be achieved. The rather unorthodox solution that was finally found provided for the creation of committees known as management committees. These were (and still are) comprised of representatives of the governments of the Member States whose task was, to put it simply, to advise and control the Commission in the implementation of Community law (Neuhold 2006, pp. 140) (2).

As further Community policies outside the agricultural field were established, different procedures for their implementation were created. Due to a growing conviction among several Member States that the existing procedures allowed the Commission too much leeway, the Council's control over Commission implementing measures was strengthened by introducing the so called "regulatory procedure"(Hofmann and Tuerk 2006, p. 77f.). One must note that it was not until the Comitology Decision of 13 July 1987 (3) that these procedures were finally legally codified.

It would go beyond the scope of this paper to provide a detailed analysis of both the Comitology Decision of 1987 and its revised version of 1999. At this point it suffices to say that the decision issued subsequently to the Single European Act (SEA) of 1987 led by no means to a simplification. The Council maintained not only the three procedures proposed by the Commission (4), but added two variants to the management and regulatory committee procedures and foresaw the possibility of safeguard measures. Within the regulatory procedures mechanisms were foreseen, which at least on paper, provide the Member States with the most effective control over the Commission. The reform of the very complex procedures in 1999 led to a certain amount of streamlining insofar as the number of procedures was reduced and the variants abolished. Accordingly to the 1999 decision (5) three types of procedures were retained: the advisory, the management and the regulatory procedure. It is important to note that under the management and regulatory procedure the comitology committees have to only refer the measure to the Council – and not to the EP – for a final decision if no consensus can be found at committee level (6).

One also has to stress the fact that the system has - yet again - just very recently been subject to reform. In July 2006 a new Council Decision amending the 1999 Comitology Decision came into force (7). This decision, which introduced a regulatory procedure with scrutiny, giving the European Parliament for the first time a possibility to call back implementing measures, will be examined below.

1.1. A brief overview of the functioning of comitology committees

When examining the work of comitology committees we see that they contribute to a constant flow of implementing legislation. According to the Annual Report of the Commission on the workings of committees issued in 2005, 250 comitology committees were contributing to the output of implementing legislation (Commission of the EC 2006). In the same year the number of implementing measures adopted by the Commission reached a staggering 2.654 and, as shown below, consensus is usually found at committee level.

Table 1

In this context one has to stress that only a very small number of implementing measures adopted by committees are actually referred to the Council (less than 0.5%, see table 2), and those that result in a referral are predominantly the more politicised and quite often highly mediatised issues. It is interesting to note that although relatively speaking only a few number of legal acts are adopted within the field of environment these issues seem to be of a more conflictual nature as these issues are more frequently referred to the Council.

Table 2

As a study carried out by the European Institute of Public Administration for the EP has revealed (European Parliament 1999, p. 21), these committees mostly deal with matters that require a high degree of technical expertise. This study has covered 204 implementing acts, mainly from the environmental sector and from economic and monetary affairs. These are sensitive areas where one could assume that infringements of the legislative and the budgetary rules would occur more regularly than in other areas.

In a majority of the cases studied, it became apparent, however, that the committees dealt with highly "technical" issues that did not give rise to any political controversy, such as the establishment of the ecological criteria for the award of the Community Eco-label to single-ended light bulbs (8).

Nevertheless one has to stress the fact that representatives in these committees deal not only with matters that require detailed expertise such as laying down recommendations "to publish best-practice in interconnection (telephone) pricing" but with issues which are both highly technical and are strongly politicised such as problems of biotechnology, BSE and dioxins. More often than not the boundary between purely technical issues and those with political implications is far from clear. This is one of the reasons why accountability of these committees to democratic institutions is such a salient issue.

2. Accountability issues in comitology

Before examining the issue whether the most recent Comitology Decision actually improved accountability of the current system one should try to establish what is actually meant by the term. As Brandsma rightly put it "there seem to be as many definitions of accountability as there are scholars" (Brandsma 2007, p. 9). He then settles for the definition of Marc Bovens who defines accountability as a "relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences" (Bovens 2006, p. 9).

Another definition, along the same lines, is provided by Bealey who states: "to be accountable is to be in a position of stewardship and thus to be called to order or expected to answer questions about one's activities. Second, accountable means censurable (…)" (Bealey 1999, p. 2).

For this purpose of this paper both definitions are very useful as accountability is conceived as a process of interaction between an actor and a larger group of actors (*the forum*) that hold the former to account. Actors failing to account for their measures may incur consequences. This description thus could at least at first glance easily be applied to the problematique of holding members of comitology committees accountable to Members of the European Parliament (MEPs).

This paper wants to go beyond the mere question whether an "accountability deficit" Brandsma (2007) is prevalent in comitology and how this deficit manifests itself but more importantly how it could be overcome. This is closely linked to the question raised in the introduction: to what extent are the problems at stake are solved by the enhancing the EPs role within the system?

When probing into the literature on comitology we find that the question of accountability is usually not examined in great detail but that other issues that could be subsumed under what seems to have become a "catch all term";

that of the "democratic deficit" have been explored (9).

On the one hand there is a set of literature that tries to open the "black box" of comitology committees by examining the functioning of the committees themselves. Here some conclusions are drawn as regards the deliberative processes in committees that may contribute to consensual and correct decisions which are seen to make up an "inherent part of democratic governance" (Eriksen and Fossum 2001, p. 7; Eriksen and Fossum 2002; Joerges and Neyer 1997; Joerges 1999).

In somewhat the same vein comitology committees are described as arenas where national and Community actors "pool their respective sources of legitimacy" in order to improve the acceptance of the system to the groups involved and to the population at large" (Wessels 1999, p. 26; Wessels 1998). Another approach taken to probe into "democratic" aspects of comitology committees is by way of case studies, notably in the sphere of health and consumer protection, for example in the field of GMOs and BSE (Toeller and Hofmann 2000, Blumann and Adam 1997).

Other authors put the system of comitology into a wider context by focusing on the problematique of transparency in comitology (esp. Tuerk 2003) and on their role in the institutional system at large by for example probing into the question their relationship with the European Parliament (esp. Hix 2000). In this context it is notable that although the question of accountability is not addressed in great detail but rather a comparative approach to parliamentary oversight of executive rule-making is advocated, Hix (2000) comes to the following conclusion:

> "Executive power in the EU needs to be more accountable. In designing a system of parliamentary control of the EU executive, rather than "make it up as we go along", there is a depth of theoretical and empirical knowledge about parliamentary oversight and legislative-executive relations from which we can draw. Only by doing so will the EP be able to learn from the successes and failures of other parliaments' attempts to constrain run-away governments." (Hix 2000, p. 78)

In the following we will i.a. examine whether this call for making executive power more accountable by enhancing parliamentary-oversight (based on theoretical and empirical insights) has been translated into the practical political process.

3. Accountability of comitology committees to the European Parliament

The EP has adamantly criticised the system of comitology for the following main reasons:

- The committee structure was considered as in-transparent and committees were regarded as resembling "Trojan horses." This metaphor was as chosen national interests were seen to be "carried into" the implementation process of community law. The EP was thus effectively bypassed and unable to exercise its power of parliamentary scrutiny (Toeller 1999, p. 342);
- Comitology was seen as a strategy of the Council to devalue the participation of the EP within the (co-) legislative process by reaching agreements in the implementation process, which could lead to a distortion of the legislative decision. This being the case, MEPs could no longer be held accountable for their decisions reached within the legislative process since the decision taken could be substantially modified within the implementing process;
- The EP feared that a transfer of decision making powers of the Commission to the committees could undermine its possibility to hold the EU executive accountable (Toeller 1999);
- The intransparency of the committee proceedings: although the Comitology Decision of 1999 gives the EP a right to information, committee meetings themselves take place behind closed doors (Tuerk 2003) (10).

The EP expressed its opposition to comitology committees even before these fora were formally established, notably in December 1961 (European Parliament 1961). During the course of time the EP has resorted to several instruments to try to get across its demands. Examples include the blocking of the budget for committees and

bringing annulment proceedings against the Comitology Decision of 1987 before the European Court of Justice (ECJ).

The conflict came to an all time high after the Maastricht Treaty (1993) placed the EP on an (almost) equal footing with the Council in the legislative process, while the implementing measures remained unchanged. The main demand of the EP was that it should have the same rights to review, approve and veto proposed implementation measures as the Council. For the practical political process this would mean that when executive measures adopted under co-decision were referred to the Council by the respective comitology committee, they should also be forwarded to the EP (for scrutiny and possibly to be vetoed) (European Parliament 1993).

Due to the fact that these demands of the EP were not met, the EP vetoed legislation under co-decision due to "inadequate" comitology procedures, for example in 1994 in the context of the directive on Open Network Provisions (ONP) to voice telephony. Here the Council demanded that a regulatory procedure be foreseen, whereas the EP pushed for the instalment of an advisory committee (Neuhold 2006) (11).

According to the 1999 Comitology Decision the situation of the EP was improved insofar as the Commission was from then on obliged to inform the legislative body of the work of the committees and to send it all draft implementing measures based on basic legal acts adopted according to the co-decision procedure so that the European Parliament could exercise its right of scrutiny (12)

An evaluation of the implications of this scrutiny right for the EP reflects that the involvement of the EP boils down to a so called *ultra vires control*. This is to ensure that drafts for implementing measures do not *exceed* the implementing provisions foreseen in the basic instrument by both legislators according to co-decision.

According to Brandsma, the EP is somewhat of a "toothless tiger" (Brandsma 2007, p. 7). Indeed, if the EP finds that implementing powers that were laid down under co-decision, have been exceeded, it can indicate its view by way of a resolution to the Commission or according to the regulatory procedure to the Council as well. It is then somewhat dependent on the goodwill of the other institutions. The Commission can just continue with the procedure (13) and the Council may act by qualified majority "as appropriate in view of this position" (14). It is noteworthy , however, that if the institutions do not adapt the measure subsequent to a parliamentary resolution, the EP can take them before the Court of Justice, a measure it already resorted to in the practical process (see below).

In order to apply the provisions of the 1999 Comitology Decision within the practical political process the European Parliament and the Commission concluded an inter-institutional agreement in February 2000 (15). It is noteworthy that the EP, giving its cumbersome working procedures, agreed that except in emergencies it would have only one month to pass a resolution in plenary when it deemed that an implementing measure went beyond the stipulations foreseen in the basic legislative act.

One has to stress the fact in the first five years of the 1999 Decision being in force the EP adopted six resolutions, which is a miniscule fraction compared to the 10.000 implementing measures adopted during that period (Lintner and Vaccari 2007).

It would go beyond the scope of this paper to examine each of these six cases in detail (16) but instead two of the most recent resolutions adopted will be focused upon, as they are also very illustrative of some of the issues and problems at stake.

In 2005, the European Parliament adopted two resolutions (17) in which it claimed that the Commission went beyond the implementing powers conferred on it when adopting implementing measures within the environmental sector. This concerned *directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment* (RoHS Directive) in the field of waste policy.

It might come as somewhat of a surprise that in its response to the first resolution the Commission did not focus

on the allegations of the EP, i.e. did not comment on whether it had indeed gone beyond the implementing powers conferred on her. It reasoned on the other hand that, in its view, justification for granting exemptions from the requirements established by the directive was actually outside the scope of the European Parliament's right of scrutiny (Commission of the EC 2006, p. 3).

To back up this claim the Commission re-examined the work underpinning the draft decision and conducted a study, held a stakeholder consultation and carried out discussions in the Technical Adaptation Committee. It must be underlined that after having resorted to this expertise – provided for within the networks of the Commission – the European executive came to the conclusion that the adoption of the draft measure was indeed in accordance with the provisions of the directive (Commission of the EC 2006).

This process is very illustrative of the confined powers of the EP according to the 1999 Decision on Comitology. First of all the scope of its right of scrutiny is very limited as it can not focus on the substance of the draft implementing measures but only whether a transgression of implementing powers has occurred, i.e. whether the measure goes beyond the implementing provisions laid down in the basic legal act (18).

Secondly, the Commission can refuse to acknowledge the validity of such a claim raised by the EP by putting forward legal reasoning (this case apparently being outside the EP's right of scrutiny) and resort to its own networks of expertise to back up this notion.

Furthermore this case also brings another problematic feature to the fore: namely the transmission of documents of the Commission to the EP. Here one has to note that in the practical process since December 2003 the Commission departments upload a draft implementing measure into a register on comitology giving the references of all documents sent to the European Parliament under comitology procedures.

One has to stress the fact that the Commission added a repository as an additional transparency measure, making many (but not all) documents communicated to the European Parliament directly available to the public. Whereas the register indicates the existence of a document and its references, the repository contains the document in downloadable format. The EP demanded, however, a continuous transfer of documents to its own services as well (Christiansen and Vaccari 2006).

In the resolution on the RoHS Directive the EP had thus also called on the Commission to undertake a careful review of all transmissions of draft implementing measures (19). The Commission had to admit that as she called it "in certain well-defined policy sectors, a limited number of anomalies had occurred (20)." These "anomalies" concerned 50 draft measures and as such amounted to only 1% of the total number of documents adopted during the year 2005. Nevertheless one has to stress that these fell into policy domains of great political sensitivity: environment, health and consumer protection. In all of the cases of the anomalies detected, the Commission proposed an 'ex-post' control to the European Parliament, which gave the parliamentary committees concerned the possibility of examining the implementing measures in question. The Commission also offered to repeal any measure the European Parliament so requested. It actually did this with regard to Commission Decision (21) amending Annex II to the Directive on end-of-life vehicles (22). At the end of the day one could thus speak of effective parliamentary control, but at considerable costs.

The second resolution adopted on 6 July 2005 (23) related to the same draft Council decision adopted by the Commission. What was at stake here was the amendment of the annex to the RoHS Directive where in the comitology committee one agreed upon exempting a hazardous substance (24) from the restrictions of this directive. The European Parliament considered that the Commission had exceeded its implementing powers, because, in its opinion, a legislative proposal adopted under the co-decision procedure would have been needed for such a measure.

Since a qualified majority was not reached in the Council the original draft decision was finally adopted by the Commission despite the Parliament's resolution. This in turn led to the European Parliament to bring an action before the European Court of Justice against the Commission to declare the Commission decision invalid (25). One has to stress the fact that in this case not only did the EP claim that the Commission exceeded its

implementing powers but had also wrongly assessed the scientific evidence. It is notable that the Commission defended its position before the Court where the case is pending (Commission of the European Communities 2006, p. 5).

This example is again yet illustrative of several critical features of the system:

- First it reflects the complexity of some of the comitology procedures. Even if a matter is referred to the Council, the Commission can actually take the decision at the end of the day, given that the needed majority can not be found by the legislator;
- it also sheds light on the role of the EP according to the Comitology Decision of 1999. The Commission can refuse to acknowledge the validity of objections raised by the EP and resort to her own networks of expertise to back up its opinion;
- this in turn can i.a. give rise to inter-institutional conflict which can end before the European Court of Justice;
- furthermore it also sheds light on the assessment of scientific evidence. Although the Commission found this evidence sound enough to grant the exemption of a toxic substance from the scope of this directive, this was questioned by the EP. This brings to mind the previously highly mediatised issue of BSE and the (ab) use of scientific advice (26), which at the end of the day led to a transformation of the system of scientific advisory committees in the Commission (27). The issue nevertheless does not seem to be settled entirely (Neuhold 2006, p. 150);
- and last but not least it reflects the significance of amending annexes to legal acts as it can be stipulated within an annex that a dangerous substance should in fact be excluded from the scope of the directive for example. This in turn complicates parliamentary control.

4. Overcoming accountability problems by way of the 2006 reform of Comitology?

As mentioned above the system of comitology has recently been subject to reform. It has to be stressed that the Commission put forward its proposal for a new Comitology Decision in already in December 2002 (28). According to article 202 of the EC Treaty, consultation of the European Parliament and unanimity are required within the Council to revise the Comitology Decision of 1999.

The Council consulted the EP in January 2003 where the EP proposed nine amendments reinforcing its role and improving the provisions on transparency (29). The negotiations on the Comitology Decision in the Council came to a provisional halt however as the focus was on the negotiations of the Constitutional Treaty and it did seem wise to come out with a new decision before its conclusion.

It was thus not until the second half of 2005 – after the Constitutional Treaty was put into “cold storage” – when COREPER set up a “Friends of the Presidency” group in September 2005 take up the discussion on the proposed comitology reform (Schusterschitz and Kotz 2007, p. 79). This group met regularly under both the British and the following Austrian Presidency of the Council (30). It is notable that the European Parliament mandated two of its Members to conduct political talks with the Council Presidency and the Commission (31).

The EP formally only needs to be consulted, but seems nevertheless to have had a real impact on the negotiations. At the end of the day a deal on a new Comitology Decision was concluded surprisingly rapidly under the Austrian Presidency in summer of 2006 by the three institutions: Council, EP and Commission (Christiansen and Vaccari 2006).

Part of this agreement was the fact that the Council would agree to a new regulatory procedure “with scrutiny”, and the EP would in turn support the fact that so called sunset clauses would no longer be resorted to in the future. Here one has to note that prior to the 2006 Comitology Decision, MEPs had the possibility to limit the Commission’s implementing powers by laying down maximum periods (“sunset clauses”) for it to adopt implementing measures. These provisions stem from the financial services sector where not only a more complex

consultation procedure was foreseen for the adoption of implementing acts but a four year time-limit applied to the delegation of implementing powers to the Commission (Christiansen and Vaccari 2006). The Comitology Decision of 2006 foresees however that MEPs would only be able to confer implementing powers on the Commission for an indefinite period except in exceptional cases (Euractiv, 6 July 2006).

A main pillar of the 2006 Comitology Decision is the above mentioned regulatory procedure with scrutiny. This new procedure will have to be chosen by the legislators in order to implement "measures of a general scope" designed to amend, delete or add new "non-essential" elements of basic legal acts adopted under co-decision (32). These non-essential elements have been described by the Commission as executive measures with a "legislative substance" in her original proposal (33) and now are often referred to as "quasi-legislative measures" (European Parliament 2006, p. 8 and Commission 2006).

This might seem somewhat paradoxical and misleading given that if something is "non-essential" one would think that this would by no means have any implications on the legislative process. However it is noteworthy that the Council, the Commission and the EP have already agreed during the negotiation process on the Comitology Decision of 2006 that some legal acts will be *retroactively* defined as being "quasi-legislative" and that the new regulatory procedure with scrutiny will thus apply to these measures. These 25 legal instruments have been published in the Offical Journal. A large bulk of these measures falls into the sector of food and health safety and the financial services sector, implying that these are very sensitive areas where the legislators want to retain some form of control (34).

The most important provision in the new decision from the perspective of the EP is that it will be put on a somewhat equal footing with the Council in the new regulatory procedure for matters that fall under co-decision (35). As such it will be able to block the quasi-legislative implementing measures by an absolute majority of MEPs (36). This veto right is not un-limited however. It can only be exercised if one (or more) of the following three conditions are present:

> If the draft exceeds the implementing powers provided for in the basic legal instrument;
>
> If the draft is incompatible with the aim or content of that instrument (37);
>
> Or if it violates the principles of subsidiarity and proportionality.

Given that one of these criteria is present and that one (or both) of the legislator(s) have managed to block the issue, the Commission cannot enact the measures and has to propose either an amended draft decision or a new legislative proposal according to the co-decision procedure (38).

One has to stress the fact, however, that contrary to the Council the veto right of the EP is conditional as the EP can only exercise its right of veto immediately if the comitology committee has a positive opinion. Given that the comitology committee has a negative opinion or no opinion is delivered the EP is initially only informed, i.e. shall receive a proposal by the Commission relating to the measures to be taken (39). It is then the Council and not the EP that can block the proposed measures within the next two months. The ball is then back in the court of the Commission who then submits either an amended proposal to the Council or a new legislative proposal. It is only *if* the Council envisages to adopt the measures or does not act that the EP receives these draft legal acts for scrutiny and can then eventually block them. It has to be noted that the time constraints are immense; the EP has maximum four months to oppose the measures and has to muster more than half of its component members in order to do so successfully.

It has to be stated that the information rights of the EP are to be improved by going beyond the current provisions (40) by stating that particular attention will be paid to the provision of information to the European Parliament on the proceedings of committees in the framework of the regulatory procedure with scrutiny, so as to ensure that the European Parliament takes a decision within the given deadline.

At this stage three main observations can be made as regards to this new procedure:

1. Due to the fact that the legislators, i.e. Council and EP, have to determine when this new procedure applies this could imply that forces are somewhat concentrated within the legislative process. The EP would have an interest for the new procedure to be enforced whereas the Council might want to opt for the regulatory procedure according to the 1999 Decision on Comitology, where the EP after all has no veto right. This might lead to disputes (reminiscent of the conflicts after the enforcement of the Maastricht Treaty) over which comitology committee is to be chosen to implement co-legislative acts. This might in turn lead to the involvement of the European Court of Justice as last resort; being called upon if one of the legislators feels that this procedure has not been followed although the criteria were in fact present (Christiansen and Vaccari 2006, p. 15).
2. For the first time, according to the regulatory procedure with scrutiny, the EP has the possibility of exercising a veto within the comitology framework. This veto is however not *ex post* but would enable the "legislative authority to scrutinise measures before they are adopted" (41). For the practical political process this implies that the EP can, given that certain criteria are fulfilled (42), oppose to implementing measures proposed by the Commission within the comitology framework. As Hix points out this practice differs from that of selected states. The German *Bundestag* is allowed an ex post veto, but only as far as issues of special political sensitivity are concerned and *after* executive instruments have been enacted (43). The US Congress has also found that extensive oversight over federal agencies is extremely costly, and to rely on private interests to challenge decisions can not only be cheaper, but more effective (Hix 2000, p. 77).
3. The new procedure does not mean however that the EP is to be involved in overseeing *all* implementing measures, but will together with the Council have to find a modus to ensure that it is clear when the new regulatory procedure is to be applied, possibly by concretising the rather vague criteria by way of an inter-institutional agreement. Furthermore the EP might want to build up a network with other actors to ensure that it is aware of which measures might indeed be of a quasi-legislative nature, i.e. politically highly sensitive in order to avoid that it has to scrutinise more than 2.000 draft implementing measures to that avail. It also has to be stressed that the Comitology Reform of 2006 is not (although it might sometimes be conveyed as such) an overhaul of the Comitology system, but *adds on* one new procedure. Significant problems that the EP had according to the 1999 Decision as such remain, for example that the Commission overrules its resolution and its concerns as it did in the RoHS Directive.

5. Where to go from here? When to exercise parliamentary scrutiny powers in comitology in practice?

As illustrated the EP now has a veto right as regards to quasi-legislative matters and since 1999 the possibility of exercising the "ultra vires" control (44). The question remains however how the EP is made aware *when* to exercise these powers, i.e. which draft implementing measures are of special sensitivity or where implementing measures exceed the implementing powers provided for in the basic instrument. Hix (2000) proposes that the EP could pass on the costs of scrutiny to "private actors that are subject of executive actions" (Hix 2000, p. 78).

Toeller and Hofmann go a step further by arguing that the representatives of various interest groups should be invited to attend comitology meetings which in turn would improve the access of civic interest representation, of so called "diffuse interests" such as representatives of consumer- or environmental organisations (Toeller and Hofmann 2000, p. 47).

Opening committee doors, be it only to a selected public, would send the signal that committees have in fact nothing to hide. Currently, acting behind an aura of secrecy this gives the impression that decisions of high importance are taken in these committees, where in fact most of these measures are of a routine nature. In order not to sacrifice efficiency a possibility would be that the "outside" experts would not attend all committee meetings, but would have to place a request to the committee chairman (Toeller 1999).

More importantly, as Toeller and Hofmann argue, this could enhance democratic accountability. Political control of comitology by "alternative technical experts and a technical partial public" would effectuate an "intelligence of democracy". Moreover these experts could liaise with MEPs in such a way as to perform a "fire alarm" function. For the practical political process that would imply that MEPs would be informed whenever issues of great

political sensitivity come up and the EP could thus resort to its control functions under comitology (Toeller and Hofmann 2000, p. 47f).

One has to note however, that important questions do remain unsolved such as how these representatives of civic interests are selected and on what grounds. Furthermore it is far from clear why they would have an interest to perform a "fire alarm" function for the EP, *i.e.* to what extent MEPs could actually rely on these representatives.

The EP itself proposed to solve this problem (already in the mid-1990s) by advocating the idea of MEPs *themselves* should attend comitology committee meetings rather than having to rely on other actors. MEPs thus tried to push this idea again during the negotiations on the new Decision of 2006. This was rejected by the Commission and Council based on the fact that these committees are to be seen as executive bodies and parliamentary presence is as such incompatible with the role of the EP as co-legislator. The view held by the Presidency was then that enhanced information rights might solve the problem (Schusterschitz and Kotz 2007, p. 85).

As illustrated above the Commission agreed to improve the general information system and went even further in the financial sector. Here the Commission committed itself to ensure that the Commission official chairing committee meetings informs the Parliament, at its request, after each meeting, of the discussions concerning draft implementing measures that have been submitted to the committees and gives an oral or written reply to any questions regarding the discussions concerning draft implementing measures submitted to comitology committees (45). This is a step forward for the EP as opposed to the 1999 Decision, as for the first time selected committee members are to be answerable to the EP but it is deplorable that this limited to a certain policy field.

6. Concluding remarks

Ever since the instalment of comitology committees in the 1960s they have been the cause of inter-institutional conflict and have as thus several times undergone piecemeal reform, *i.a.* to allow for more parliamentary control. The most recent reform of comitology of 2006 has to be judged in the same vein. It can definitely not be seen as a general overhaul of the system but concentrated on *adding* one procedure, the (highly complex) regulatory procedure with scrutiny.

Let us revisit the judgment of the parliamentary rapporteur on the issue who sees this most recent reform of comitology as "a huge breakthrough in parliamentary control over EU legislation" and judges this as "improving accountability (…) of the whole Community system" (http://www.europarl.europa.eu/news).

The new decision has indeed improved parliamentary control insofar as the EP is for the first time able to call back implementing measures, but this parliamentary control is limited to the regulatory procedure with scrutiny and to co-decided acts. Moreover, as mentioned, even under the new procedure the EP is not put on a completely equal footing with the Council. Its veto right is conditional and somewhat dependent on a positive opinion in the comitology committee. Given that Member States are represented in both comitology committees and the Council one could thus imagine that a decision is blocked in committee in order to try to circumvent the EP.

Furthermore the veto right itself is also conditional as the legislators have to prove (in co-decision) for example that the draft implementing act is incompatible with the aim or content of that legislative act or that it violates the principles of subsidiarity and proportionality. In the practical political process one can envisage that the EP will for the most part concentrate on objecting on grounds of violation of the draft being incompatible with the objective or content of the legislative act as the principle of subsidiarity is difficult to operationalise in the practical political process (46). It also has to be noted that as a trade-off for these competences the EP had to give up some just recently acquired powers, those of setting sunset clauses.

What is very important to note, however, is that contrary to the 1999 Decision the EP can already in its (co-) legislative function decide which implementing acts are to be defined as 'quasi-legislative' measures. This implies that it can at least to some extent indeed concentrate its forces on the legislative process, which is after all one of its main functions as (co-)legislator. One could also argue that due to the fact that the EP can scrutinise selected

"quasi-legislative" instruments before they are adopted it will gain enhanced oversight powers over committee members (including the Commission). This could in turn drive members to motivate their decisions and act in a more transparent fashion and answer to parliamentary concerns. This has somewhat been institutionalised in the financial sector as the Commission has committed itself that the official chairing comitology committee meetings informs the Parliament, at its request, of debates in comitology committee meetings and replies to any questions submitted by the EP: be it orally or in writing.

The information rights of the EP are also to be enhanced insofar as the new decision foresees that particular attention will be paid to providing the EP with information on the proceedings of committees working according to the new regulatory procedure. If any lessons are to be learnt from the implementation of the 1999 Decision, the provision of information to the EP worked rather well, despite some anomalies (in politically sensitive domains).

When assessing the new decision as regards to whether it has been designed based on empirical examples of parliamentary oversight as advocated by Simon Hix we find that the new decision is rather unusual as the EP does not boast an *ex post* veto like the German Parliament (the Bundestag) for example but can veto draft executive legislation *before* it is implemented. The procedure is, however, not completely different from that of the Bundestag as it does not apply to *all* implementing measures but those that are judged to be politically sensitive insofar as they are deemed to have implications on the (co)-legislative process. We might thus see that the EP will concentrate on exercising its newly acquired scrutiny and veto powers as regards to measures in certain policy areas such as those of health and consumer protection and environment. These are fields that are comparatively more conflictual at (comitology) committee level. If we examine the recent data we find that here, relatively speaking, a rather high number of measures resulted in referral to the Council.

Moreover one has to stress that experience with the 1999 Comitology Decision – where the EP boasted only an "ultra-vires" control – has reflected that the EP uses its controlling powers very selectively. This could give some indication as regards to the implementation of the new decision. One can thus depart from the assumption that the EP will not use its controlling powers as regards to a majority of the implementing acts coming out of the "comitology machinery". The new decision will nevertheless have a considerable impact on the organisation of the EP if it wants to exercise its powers effectively within the very tight time-limits.

Experience with the 1999 Decision on Comitology has also shown that when the EP uses its powers of scrutiny within the field of comitology it tries to capitalise upon these functions. This has been illustrated within this article by focusing on two resolutions the EP adopted in the field of the environment. Here the EP not only focused on the content but examined the transmission of draft implementing measures of the Commission to the EP and took the Commission to Court at the end of day, *i.a.* questioning the way the Commission assessed scientific evidence. If any lessons are to be learnt from the first years of experience with the 1999 Decision we might also see that the EP uses its powers selectively but might try to interpret legal stipulations to the highest possible degree and its favour. Even so, the EP remains to be dependent on Council and Commission according the 1999 Decision and can not object to the implementing measure according to substance but based on rather legalistic stipulations.

Overall we can thus conclude that the Comitology Decision of 2006 has indeed improved parliamentary control over comitology but with considerable limits.

When assessing the new decision as regards to accountability one has to stress the fact that the new procedure does little to improve accountability of comitology committees when we examine this in terms of definitions coined in this context. Members of comitology committees are not called to justify their conduct before the EP (or any other forum for that matter) and called to order, sanctioned or even censured for their behaviour (Bovens 2006, p. 6; Bealey 1999, p. 2). One could of course argue that vetoing implementing decisions is a sanction in itself but as mentioned even the use of this tool is limited. A small step forward in direction of more accountability is the fact that committee chairs have to be ready to answer questions by the EP but this is limited to the financial sector.

The new decision also falls short of exploring other sources of accountability (besides the EP) to hold committee members accountable, by for example opening the committees to a technical partial public sphere by integrating

"*alternative technical experts*" into policy implementation. This could have, as Toeller and Hofmann argued, increased democratic accountability and political control of comitology (Toeller and Hofmann 2000, p. 48). One has to note, however, that certain questions in this context such as the rationale of appointing these experts remain unanswered.

Overall one can thus conclude by saying that this piecemeal reform can be seen as a step in the right direction for the EP in the quest of "taming the Trojan horse" of comitology. It falls very much short of a general overhaul of the system however and due to its complexity it remains to be seen whether it does not create new stepping stones on the new avenue that has just been opened.

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Endnotes

(1)By one of the 2 EP rapporteurs on Comitology http://www.euractiv.com/en/opinion/parliament-strengthens-control-commission/article-156620

(2)Before the end of the transition period for which the management committees had actually been established (on 31 December 1969), the Council decided to maintain the committees on a permanent basis. Management committees eventually came to be used for the entire agricultural field. By 1970 there were already 14 such committees, and seven years later the number amounted to 18.

(3)Official Journal (O.J.) 1987, L 197, p. 33.

(4)Guided by what had been the practice since the 1960s, the Commission proposed three types of committee procedure: an advisory committee procedure, the traditional management committee procedure and a regulatory committee procedure with a filet.

(5)Official Journal (O.J) 1999, L 184, 17.July.1999, p. 23-26.

(6)According to the management procedure the comitology committee has to block the Commission by qualified majority whereas under the regulatory procedure the Commission needs a qualified majority or has to otherwise pass the measure onto the Council.

(7)Council Decision 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 2006, 22. July 200, p. 11-13. For a detailed overview

on the negotiations of the 2006 Decision, see: Christiansen and Vaccari (2006).

(8)European Commission (1993): Document n° XI/200/93 - Rev.1.

(9)Here Brandsma (2007) is an exception.

(10)The EP has a right to receive documents such as agendas of committee meetings, results of voting and draft implementing measures and lists of the authorities to which the members of the comitology committees belong.

(11)OJ C 263, 12.10.1992 : 20 - 31). Another example would include the proposal for amending two directives in the security sector (OJ L 141, 11.06.1993 : 1 and OJ L 141, 11.06.1993 , p. 27).

(12)As enshrined in Article 8 of Decision 1999/468/EC.

(13)The Commission can also submit a new draft to the committee or submit a legislative proposal to the EP and Council.

(14)Article 8 of Decision 1999/468/EC.

(15)OJ L 265, 10.10 2000, p. 19.

(16)For an overview of these six cases see Linter and Vaccari 2007, p. 208 - 211.

(17)The first on 12 April 2005 (B6-0218/2005) and the second on 6 July 2005 (B6-0392/2005).

(18)This applies to basic legal acts adopted according to co-decision.

(19)Since the register went into production in December 2003.

(20)Commission communication dated 20 July 2005.

(21)Commission Decision 2005/63/EC of 24 January 2005.

(22)Directive 2000/53/EC.

(23)B6-0392/2005.

(24)This concerns DecaBDE of the family of polybrominated diphenyl ethers (PBDE).

(25)Case C-14/06

(26)In this specific case the Commission was assisted by the Scientific Veterinary Committee. In the words of a scientist from the Stuttgart-Hohenheim University, who spoke at the subsequent inquiry conducted by the European Parliament, the advice given went against all 'standard microbiological practices and borders on the irrational' (Agence Europe, No. 6847, 6 November 1996, p. 13).

(27)A scientific steering committee was established in 1997 as a coordinating body for the many specialized scientific committees. Members of scientific committees are now selected in a way that ensures a high degree of transparency. Advertisements for available positions on a scientific committee are placed on the internet, where the selection criteria are also clearly outlined (http://ec.europa.eu/food/fs/sc/index_en.html)

(28)Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission COM (2002) 719 final, adopted 11.12.2002.

(29)Resolution adopted on 2.9.2003 (P5- TA(2003)0352)

(30)The Austrian Presidency took place during the first half of 2006.

(31)Joseph Daul (FR/PPE, Chair of the Conference of Committee Chairmen) and Richard Corbett (UK/PSE, rapporteur on comitology in the Constitutional Affairs Committee (AFCO)).

(32)Amendment of article 2, Council Decision of 17 July 2006, OJ L 200/11.

(33)In page 3 of the Explanatory Memorandum.

(34)Statement by the European Parliament, the Council and the Commission concerning the Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers on the commission (2006/512/EC), OJ C 255/1, 21.10.2006.

(35)Richard Corbett one of the rapporteurs on comitology called the compromise "a significant step forward for the European Parliament… if the EP objects, the Commission cannot enact its measures - though there are limits: it applies only to co-decision matters." (European Parliament, Legal Affairs Committee, 21. June 2006)

(36)The Council can block these measures by qualified majority.

(37)This relates to the "ultra vires control" that the EP already boasted according to the 1999 Comitology Decision.

(38)Article 5a of the procedure, Council Decision of 17 July 2006, OJ L 200, p. 11.

(39)Art 5a (3), Council Decision of 17 July 2006, OJ L 200, p. 11.

(40)The 1999 Decision foresees i.a. that the Commission should inform the EP on a regular basis of committee proceedings and that the Commission should transmit to it documents related to activities of committees and inform it whenever the Commission transmits to the Council measures or proposals for measures to be taken (Art. 7).

(41)Article 1, Recital 7a, Council Decision of 17 July 2006, OJ L 200/11.

(42)The measures have to be proposed according to the regulatory procedure with scrutiny and have to implement measures that have been adopted by way of the co-decision procedure. Furthermore one or more of the criteria stipulated in recital 2 have to be fulfilled (see also pg. 14 of this paper).

(43)The German Federal Constitutional Court argued in favour of participation of the Bundestag as it stated that: "because the regulations to be made can be of considerable economic and political importance it is justified if the legislature reserves for itself a right to participation" (BverfGE 8, 274, pp. 319-22, in: Hix 2000, p. 68).

(44)This is to ensure that implementing measures do not exceed the implementing provisions foreseen in the basic instrument by both legislators.

(45)Council Statements to be entered in the Council minutes of 17 July 2006, OJ 2006/C 171/02.

(46) The third condition according to which the veto right can be exercised is if the draft exceeds the implementing powers provided for in the basic legal instrument. This form of ultra vires control for the European Parliament was already foreseen in the Comitology Decision of 1999.

Table 1

Total number of comitology committees and predominant policy sectors

2004	2005	Predominant Policy Sectors in 2005
245	250	Transport/Energy (38), Enterprise (32), Environment (32) and Agriculture (31)

Source: Commission of the EC 2006

Table 2

Number of implementing measures and measures referred to Council (2005)

Implementing measures*	Matters referred to Council	Policy Sectors
2637	11 (less than 0.5 %)	Health and Consumer (5), Environment (4), Europe Aid (1), Statistics (1)

* Adopted und the management or regulatory procedure.

Source: Commission of the EC 2006
