

*How to cite?*

Christiansen, Thomas & Mathias Dobbels (2012): 'Comitology and delegated acts after Lisbon: How the European Parliament lost the implementation game', *European Integration online Papers (EIoP)*, Vol. 16, Article 13, <http://eiop.or.at/eiop/texte/2012-013a.htm>.

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DOI: 10.1695/2012013

## Comitology and delegated acts after Lisbon: How the European Parliament lost the implementation game

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**Abstract:** The European Parliament is frequently seen as the 'big winner' of the Lisbon Treaty, given the fact that several changes have significantly extended its powers, such as the extension of co-decision as the ordinary legislative procedure, and the introduction of the assent procedure to international agreements. The reform of comitology (Article 291) and the introduction of the new instrument of delegated acts (Article 290) are generally seen in the same light, marking the culmination of a long-standing quest of the EP to gain equal rights to the Council in this area. This article questions the view that the Parliament has had unconditional 'success' by examining in detail the way the new provisions have been implemented. It argues that Member States in the Council managed to claw back influence on delegated powers through the manner that the new treaty articles have been put into practice. We identify the EP's timing and selective attention with regard to this domain as the main explanations for this outcome. Our analysis demonstrates the need to study the actual implementation of treaty provisions before coming to a conclusion about the identity of 'winners' and 'losers' of treaty reform.

**Keywords:** European Parliament, comitology, co-decision procedure, Lisbon Treaty, implementation, European Commission, Council of Ministers, treaty reform

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<sup>1</sup> The author was working at the Belgian Permanent Representation to the European Union between 2009 and 2011. This article is written in a personal capacity.

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## Introduction

The European Union relies to a large extent on the delegation of implementing powers to the European Commission. Starting from the early 1960s onwards, this practise of delegation has involved setting up hundreds of committees to oversee the way that the Commission makes use of these powers. The practice known as comitology is by now well-established, producing usually more than 2000 implementing acts every year, but has also been the bone of much contention among the institutions. In particular, the European Parliament, ever since acquiring a legislative role, has demanded a greater role in a process that has hitherto been dominated by the Commission and Member States.

The changes concerning implementing and delegating acts in the Lisbon Treaty – contained in Articles 290 and 291 of the consolidated treaties – were the culmination of more than 20 years of struggle by the EP to have a genuine say in the matter of delegated decision-making, and have been widely considered as a success for the EP. Not only did the European Parliament gain genuine equality with the Council with regard to control over delegated acts, but also the horizontal decisions setting out standard procedures for overseeing implementing acts – the so-called ‘Comitology Regulations’ – will now for the first time be made under co-decision. The European Parliament has had to be fully involved in the negotiations establishing the new comitology procedures after the Lisbon Treaty.

Among most observers, both academics and practitioners, the initial assessment of the Lisbon changes was therefore to declare that the EP improved its position significantly in this

domain, at the expense of both the Commission and the Council (Neergaard, 2011; Craig 2010: 58; Watson, 2012). This assessment of EP ‘success’ in the area of delegated powers is in-line with the more general view that, in terms of inter-institutional relations, it was the Parliament that benefited most as a result of the Lisbon Treaty. Given the expansion, indeed generalisation, of co-decision powers in the legislative process, the requirement of parliamentary assent for international treaties and a strengthened position in appointment procedure for the European Commission, the European Parliament has been widely seen as the ‘winner’ in this round of treaty reform. Indeed, this ‘success’ of the EP is generally regarded as a further stage in a much longer process of the ascendancy of the Parliament in the course of 25 years of almost continuous treaty reform in the European Union. Starting from the innovations brought about by the Single European Act and the subsequent introduction of the co-decision procedure at Maastricht, these powers were then expanded in each of the following instances of treaty reform: Amsterdam, Nice and Lisbon all added further policy-areas in which the EP and Council would have equal status as co-legislators. As a result, the “EP is the winner” slogan has become something of a familiar feature of late in the assessment of treaty revision.

The views expressed about the EP’s new powers under Articles 290 and 291 are in line with this more general assessment. It also fits into the narrower trajectory of growing parliamentary involvement in the scrutiny of comitology, which began with a number of inter-institutional agreements in the 1980s and 1990s, followed by the introduction of non-binding information and scrutiny rights in the 1999 reform and by limited veto powers in the 2006 reform. Whereas these latter two reforms involved legislative change on the basis of the cooperation procedure, the Lisbon Treaty enshrines for the first time the equality between the EP and the Council by referring the setting of control mechanisms to the ordinary legislative procedure. As a consequence, the Lisbon Treaty more generally, and the new provisions on delegated powers specifically, appear as major advances for the European Parliament in its inter-institutional relations vis-à-vis Council and Commission.

However, the view of EP as a ‘winner’ is very much based on the formal agreement contained in the treaty itself. While there is no denying the significance that these treaty changes have for the ‘balance of power’ among the legislative institutions, the exclusive focus on the treaty text ignores the need to analyse how formal changes in the treaty are actually implemented in subsequent legislation and indeed in practice. Existing research on policy-implementation as well as the literature on the follow-up to treaty revision has demonstrated that it is necessary to analyse empirically if and how formal legal changes actually determine the actual conduct of policy-making. The message from this wider literature on implementation is that there is significant potential for variation between the stipulations of the legal text and the subsequent practice.

The potential tension between treaty text and actual practice provides the starting point for an analysis of the way that the adoption of the new treaty articles 290 and 291 was followed by subsequent legislative and administrative action. It is our contention that while the EP gained significant new powers in the treaty, these did not translate into a correspondingly strong position in the follow-up to the treaty ratification. Indeed, as the subsequent discussion will

show, the EP ended up with practical arrangements for comitology and delegated acts that fall short of the potential influence that the treaty promised to the Parliament.

This unexpected outcome warrants a close examination of the reasons that led to it. It also constitutes an expression of a wider ‘problematique’: How is it that very general, and indeed incomplete agreements contained in the treaty are often being translated into subsequent legislation, soft law arrangements and ultimately political and administrative practice? As such, the present analysis can be seen as a case study of the degree to which the *formal* treaty provisions are not necessarily matching the *actual* outcome of inter-institutional relations. Our identification of the factors that best explain this discrepancy is advanced as a hypothesis of a more general explanation of the EP’s ‘under-performance’ in inter-institutional relations when compared to its extensive powers as stipulated in the treaty. It also echoes the demand by Blom-Hansen (2010) to focus in the analysis of comitology not only on the ‘first level’ (treaty provisions), but also on the ‘second level’ (legislative developments) and ‘third level’ (daily practice).

The present analysis seeks to explain this puzzle by paying close attention to three key factors, which, we argue, were crucial in this context:

1. the resources available to the Parliament in its inter-institutional relations with Council and Commission, in particular the time and scope available for internal parliamentary opinion-formation;
2. the degree of politicisation – and hence political attention – that a Commission proposal receives in the legislative process; and
3. the responsiveness of MEPs to the negotiations taking place among member states in the Council.

Taken together, these factors provide the analytical frame for an assessment about the strengths and weaknesses of the EP in its negotiations with the Council. In conducting our research, we have relied on qualitative data-collection that involved a range of methodologies: analysis of both official documents and unpublished or internal papers, participant observation during certain stages of the negotiations as well as two in-depth interviews with policy-makers involved in the process.

This article proceeds by identifying the three key factors that are important for understanding the EP’s role in the establishment of the new system for implementing and delegated acts. Subsequently, we examine the course of the post-Lisbon decision-making in Articles 290 and 291 in the light of these factors in order to explain the ultimate outcome of this process. The background for this analysis is provided by a brief review of the historical evolution of the comitology system – demonstrating that the EP’s quest for greater influence in this area has been long-standing and sustained - before we examine in greater detail the decisions taken on the application of the new rules arising from the Lisbon Treaty.

## 1. Three crucial factors for implementation

Based on the literature we identify three crucial factors to assess the European Parliament's role in the implementation game: resources, the degree of politicisation and the responsiveness of MEPs to negotiations in the Council. The first factor, resources, should be understood as "assets that make it possible for individuals to do (or be) things" (March and Olsen, 1995: 93). Resources thus enable an institution to exercise its competences and have a direct impact on the ability to influence the outcomes of negotiations. Influence is related to the size of and access to resources as they limit or facilitate the capacity to act (Egeberg, 2006). As Busby (2011) shows in her ethnographic work on the European Parliament, time is a crucial resource for MEPs. The first factor therefore concerns both the (limited) *time* that MEPs had available in order to develop a strategy on the way that Articles 290 and 291 would be put into practice, but also the *timing* of the proposals that needed to be considered, and the way that these were at odds with the EP's own set of priorities and resulting schedule. Recognising the issue of timing as important – and potentially detrimental – to the EP's influence in the negotiations is in line with scholarship that has demonstrated the wider relevance of the time element in the context of European integration.

While this first factor is more structural, confronting the actors in the Parliament with opportunities and difficulties that affect their response in a largely unavoidable manner, is , the second point concerning politicisation, and is more about the choices actors took in response to the challenge of inter-institutional negotiations. The degree to which an issue is politicized is also linked with the degree of actual involvement of MEPs in a certain dossier (Dobbels and Neuhold, 2012). In dealing with this domain, the EP found itself dealing with representatives of the Commission and the Council – on the whole civil servants with significant technical expertise in these matters. One way that the EP might improve its standing in such circumstances is to politicize the issue, and thereby gain political leverage vis-à-vis non-elected decision-makers.

The third factor to be considered is the question whether MEPs are actively following the course of negotiations in the Council, and make use of any opportunities that might present themselves as a result of different member state positions. Intergovernmental bargaining in the Council has its own dynamics, and the resultant compromise has the potential to shift the ground for subsequent inter-institutional decision-making. The challenge for the EP here is to form its own position in the knowledge of, and in juxtaposition to, the emerging Council position, so as to avoid marginalisation in the 'endgame' of co-decision.

Before analysing the implementation of the new system on delegated and implementing acts, it is useful to briefly review the evolution of the European Parliament's role in comitology over the past few decades.

## **2. The evolution of comitology: The European Parliament's long quest for influence**

The genesis of comitology in the 1960 was closely tied to the search of an ad hoc solution for the difficulty of regulating the economic and social life of the Community while relying exclusively on legislation. The need to address changing economic and societal circumstances quickly and effectively led Community legislators to a course of action well-known at the domestic level: the delegation of implementing powers to the executive. In the absence of treaty reform – a far-fetched idea in the 1960s – and faced with increasing difficulties in the legislative process ('Empty Chair crisis' and Luxembourg compromise), delegating implementing powers for routine measures to the Commission was an attractive solution, but required a degree of administrative innovation: implementing powers were delegated to the Commission, but also the supervision of the Commission's use of these powers through committees composed of member state representatives was spelt out in each individual legislative act (Bergstroem, 2005; Alfe and Christiansen, 2009).

It was on this basis that comitology then developed rapidly through the 1970s and 1980s. What was initially a limited solution that came up with the problems concerning the implementation of the Common Agricultural Policy (CAP), quickly became a success story in many sectors of Community policy-making. Before long, many other areas of legislation such as environment policy, consumer protection, transport and energy or single market regulation also involved delegation of powers and the arrival of comitology committees. Indeed, the growth of comitology was such that it became an issue as soon as the treaties were being reformed for the first time with the Single European Act. The subsequent decision (Council of the European Union, 1987), laying down the procedures for the exercise of implementing powers conferred on the Commission, provided, for the first time, a range of systematic procedures that the Commission would have to follow in consulting implementing committees.

With the appearance of co-decision procedure in the Maastricht Treaty, a reform of the comitology system was required, in particular in order to satisfy the EP's demands (Bradley, 1997). It took the form of Decision 1999/468 of the Council, a milestone in the evolution of comitology and the legislative base for the procedures governing the relationship between the Commission and implementing committees. The 1999 decision simplified the system by reducing the number of procedures from 7 to 4. It increased the role of the European Parliament by granting it the right to scrutiny on co-decided measures and a more general right of information. Additionally, it improved transparency by obliging the Commission to set up a register of comitology committees, to publish a list of Committees and, every year, a report on the working of comitology committees.

Even though the 1999 decision represented an important shift in the history of comitology, it did not prevent further inter-institutional tensions, especially between the EP and the other institutions regarding the new rights gained by the EP (Bergstroem, 2005; Christiansen and Vaccari, 2006). In the light of the limited powers gained under the 1999 decision, the EP

pushed for further parliamentary involvement in the control over the Commission's delegated powers – pressure that increased further when it became evident that the Commission had not always respected the EP's prerogatives (European Parliament, 2005). In this context, the post-Nice process – the creation of a European Convention and the drafting of the Constitutional Treaty – provided a new opportunity to address also Parliament's long-standing grievances in the area of comitology. In fact, the Constitutional Treaty did provide for a substantial reform of delegated powers, and as such envisaged a major increase in the powers of the EP in this area.

However, when the failed ratification of the Constitutional Treaty appeared to bury parliamentary hopes for an equal status with the member states in regard to controlling the Commission's delegated powers, the EP renewed its pressure on Commission and Council and as a result of brinkmanship on the part of the Parliament, a new decision was adopted in July 2006 (Council of the European Union, 2006). At the heart of the 2006 decision was a new procedure to be followed in the adoption of so-called 'quasi-legislative' implementing acts – the "regulatory procedure with scrutiny (RPS). As an addition to the existing procedures, the RPS procedure introduced an intricate mechanism that was significantly more complex than the 'old' regulatory procedure. The addition of a new procedure of such high complexity was somewhat ironic considering that the initial proposal from the Commission was couched in terms of a simplification of the system, and also presented in the context of the effort towards 'better regulation' that arose from the European Commission's White Paper on European Governance published in 2000.

In some ways the 2006 changes went beyond the text of the adopted decision as they included undertakings from Commission and Parliament that formed part of the compromise. The main element of the 'ceasefire deal' that was reached at the end of the Austrian Presidency, which took place in the first half of 2006, among Council, Commission and European Parliament was the emphasis that the basis for the entire reform was the introduction of the above-mentioned distinction between quasi-legislative and non-quasi-legislative implementing measures. Having established this new category of implementing measures, a new 'regulatory procedure with scrutiny' was created for those quasi-legislative acts that arise from co-decided basic acts.

Thus, beyond the power of (non-binding) scrutiny, the EP had gained the right to *veto* the adoption of those measures that are submitted to it under the new procedure. Although this did not establish complete equality between the two institutions and implied further tensions down the line (Bradley, 2008), it was a substantive increase in parliamentary powers compared to the limited rights the EP has had since 1999. Despite the added complexity and the long process required for its introduction, the RPS procedure worked rather smoothly, and the concerns among some observers about the possible decrease in efficiency of the post-2006 comitology regime turned out to be unwarranted (Hardacre and Damen, 2009)

### 3. Negotiating the post-Lisbon framework: ‘Winners’ and ‘losers’

Against the background of the previous decades of inter-institutional tensions, the Lisbon Treaty constituted a new and far-reaching reform that promised to ‘finally’ put the EP on par with the Council in the control over the Commission’s delegated powers (Mayoral, 2011). However, it would be simplistic and ultimately misleading to regard the Parliament as a ‘winner’ solely on the basis of the new passages in the treaty text. The real ‘test’ should not be the letter of the law, but the way that this has been put into practice, especially in an area such as this one where much was left to more detailed arrangements to be agreed after the Lisbon Treaty come into force. In order to provide such an analysis, this section will look in detail at the way that both Article 290 (delegated acts) and Article 291 (comitology) have been implemented following the coming into force of the treaty.

We ought to preface this analysis by pointing out that although the Commission has stated repeatedly the two instruments do not overlap (European Commission, 2009: 3; European Commission 2011b: 9), the treaty does not actually bring about a clear-cut distinction between delegated and implementing acts. Both instruments are being provided for in the treaty, but without explicit guidance on when either instrument ought to be applied. As Hofmann (2009: 496) pointed out, “both [articles] have very different wording and do not seem to be written in the same style and approach”. Indeed, the criteria of 290 and 291 are not mutually exclusive: the provisions on delegated acts are clearly formulated in terms of scope and consequences while the implementing acts article is defined on the basis of the rationale behind it, i.e. the necessity for uniform conditions to apply. As will be discussed below, a horizontal political debate to spell out the difference in the use of these instruments was refused by both Council and Commission as most actors realised that this would be a mission impossible (‘EU lawyers struggle with new ‘comitology’ rules’, 2011). In the absence of a clear distinction, decisions on whether a basic act is to be implemented through delegated or implementing Acts are made on a case-by-case basis in the context of legislative bargaining.

#### 3.1. Delegated acts: A common understanding

Looking first at the procedures that have been set up for delegated acts (DAs), the actual negotiations on this began in the same month of the entry into force of the Lisbon Treaty when the Commission published its *Communication on the implementation of article 290 TFEU* (European Commission, 2009). Although as a “Communication” this was a unilateral statement from the Commission, the document had been discussed with member state representatives in the Council under the Swedish Presidency. It includes sections on the process of preparing delegated acts, provisions for an urgency procedure, explanations on the right of revocation and opposition, and, most significantly, so-called ‘model articles’ to be used in basic acts with time limits for the right of opposition and the urgency procedure. Even though the Swedish Presidency and the Commission asserted at the time that the EP had been involved in the preparation of this Communication, this claim has been refuted by EP (Interview 1).

Despite these consultations in the context of the Commission's *Communication*, however, a spirit of loyal cooperation between the Council and the Commission was lacking at this early stage: already in early 2010, negotiations on several legislative proposals became blocked on the issue of delegated acts. At this point it was not the choice between delegated acts versus implementing acts (comitology) that was a bone of contention – as would later be the case. The sticking point here was the manner in which the Commission proposed to involve the co-legislators in the adoption of delegated acts at the drafting stage. Although in its *Communication* the Commission had stated that “[e]xcept in cases where this preparatory work does not require any new expertise, the Commission intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted” (European Commission, 2009: 6)

A majority of Member States in the Council wanted the inclusion of a recital in *every* future basic act. This recital would state that the Commission would consult *national* experts in the preparation of delegated acts. The Commission considered this unnecessary for two reasons: first, it would give the impression that the Council was trying to introduce comitology through the backdoor by adding a formal deliberating stage with national experts before the submission of the delegated act, and, second, not all delegated acts might actually require expert input in the preparation phase. The European Parliament, on the other hand, objected to the inclusion of such recitals as well, unless its own experts were also included here.

In the event, a regulation on the non-commercial movement of pet animals, (European Union, 2010b: 2) which was under time pressure to be adopted, forced a decision through the introduction of a sentence in a recital reading “It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level”. The word “national” had been deleted from the Council's recital, implying that any expert - including those designated by the European Parliament - could be consulted.

Representatives of the EP, however, remained dissatisfied with the way that the Commission's *Communication* had come about and consequently did not consider the EP bound by it. The practice established in the first few basic acts containing provisions for the adoptions of delegated acts was seen by the Parliament as a temporary arrangement awaiting a formal agreement among the three institutions. (European Union, 2010b). For this reason, when the Commission introduced its proposal on a new comitology regulation in March 2010 (see below), the idea of an inter-institutional agreement on delegated acts was being floated by the EP. As the two other institutions considered the established practice to be sufficient, Parliament proposed the adoption of a *Common Understanding*, i.e. a ‘gentlemen's agreement’ between the three institutions laying down an agreed procedure for the adoption of delegated acts. In order to push through this demand, the Parliament established a linkage with the on-going negotiations on the comitology regulation: there would be no new regulation until a *Common Understanding* was also agreed upon.

Although the Spanish Presidency, which chaired the meetings in the first half of 2010, led discussions at the working group level regarding a new comitology regulation, the proposed

*Common Understanding* was not discussed in the Council until the Belgian Presidency, who chaired in the second half of 2010. It was at this point that Commissioner Sevcovic declared that the Commission was willing to negotiate such an agreement in the June 2010 meeting of the EP's JURI Committee (JURI Committee, 2010a). It became evident a swift agreement on a new comitology regulation depended on all three institutions also negotiating a *Common Understanding*. However, the fact that Parliament was the *demandeur* for this put both Council and Commission in a stronger negotiating position. As it happened, the text of the proposed *Common Understanding* was never discussed at the political level or even in trialogues, but only among 'technical contacts' – frequently by email – between Council, Commission and Parliament. It is therefore not surprising to see that the *Common Understanding* ended up being little more than a consolidation of the established practice, building on the Commission's original *Communication*. It is worth noting at this point that the attempted linkage of the *Common Understanding* with the new comitology regulation was after all not effective: the *Common Understanding* was only adopted long *after* the new comitology regulation had been agreed upon.

### **3.2. Implementing acts: The new comitology regulation**

As the above discussion shows, negotiations on the implementation of Article 291 took place in parallel to these debates about delegated acts, and to some extent became linked to these. The Commission's initial proposal for such a new regulation, issued on 3 March 2010 (European Commission, 2010), was regarded as more of a discussion paper rather than a 'genuine' legislative proposal. After all, the Commission proposed to give itself considerable leeway by bringing all aspects of comitology, including trade defence measures - under qualified majority voting (meaning that QMV against a Commission proposal would be required in order to stop the adoption of a proposed implementing act), removing the referral to the Council in the absence of an opinion from the committee, and proposing automatic alignment from previous comitology procedures to the new system. Controversially, the Commission also included broadly defined exceptions that would allow it to go against the opinion of the committee. In the course of the negotiations in the Council, the text was revised quite substantially on a number of key issues that ultimately define the nature of this round of comitology reform.

It was in the negotiations in the Council that a so-called Appeal Committee was introduced, composed of senior member state representatives, to which proposals where no opinion emerged from an ordinary comitology committee would be referred. Effectively, the purpose of this Appeal Committee is to replace the previous referral to the Council, which is indeed absent from the new system. It also brought in a wording on the procedure obliging the Commission to strive towards the largest possible majority in the Committee and take account of views and opinions expressed. While an agreement was reached in the Council on most issues by the end of June 2010, two highly political problems remained on the agenda, namely that of trade defence policy and the voting arrangements in case of sensitive matters.

Because the Appeal Committee was not formalised in the political agreement in the Council, none of the reports of the Parliament's committees mentioned it. However, it was to be

expected that the EP was not willing to accept a referral to member state representatives, or else it would demand similar provisions for Parliament in line with the equality between the institutions promised by the treaty. The fact that the ENVI Committee did put a referral to the Council back into the draft regulation must therefore be seen as an *accident de parcours*, as discussed in more detail below (ENVI Committee, 2010: 5). The EP eventually gave its formal opinion on the creation of the Appeal Committee when the rapporteur, MEP Szajer, stated in his report that this committee “does not look or (...) work under the same rules as other committees (...)” (Szajer, 2010b: 2). Especially the provision that a member state representative would chair the meetings rather than a representative of the European Commission was highlighted as problematic. Remarkably, this wording was a lot less confrontational than what was said in the June 2010 meeting of the JURI Committee, when MEPs strongly opposed the very concept of such a committee (JURI Committee, 2010b). In the end, however, the Appeal Committee has materialised, operates under its own Rules of Procedure, and is of a different level than the normal committee<sup>2</sup>, while being chaired by the Commission. Only this last aspect could be seen as a victory for the Parliament, but in fact it is rather one of the European Commission, supported in this instance by the EP, which had defined it as a breaking point for a first reading agreement.

Regarding the Commission’s proposal of an automatic alignment of the existing *acquis* with the new procedures, the EP favoured instead the idea of so-called “omnibus regulations”. The EP considered these necessary so that it would be able to scrutinise every field in order to determine whether any provisions should be dealt with through delegated rather than implementing acts (see for instance Commission AGRI, 2010; Commission PECHE, 2010; IMCO Committee, 2010). As explained above, Parliament considered delegated acts to be of a larger scope than the measures covered by the Regulatory Procedure with Scrutiny introduced in 2006. Moreover, it highlighted priority areas that since the entry into force of the Lisbon Treaty now fall under the co-decision (e.g. agriculture, fisheries, some parts of justice and home affair). As a new co-legislator in these areas, the Parliament demanded a full review of the existing *acquis* in these areas to make sure that its rights were respected. In the end, however, the provisions on automatic alignment remained in the regulation, and the EP had to be satisfied with a Declaration in which the Commission committed itself to a review before the end of the current Parliamentary term (European Commission, 2011a).

By contrast, the developments in the area of trade defence measures turned out to be an unexpected highlight of this regulation. Under the Spanish Presidency, the Council had been

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<sup>2</sup> At the first meeting of the Appeal Committee on 29 March 2011, when its Rules of Procedure were adopted, almost all 27 member states sent their Deputy Permanent Representative to the Albert Borschette Conference Centre where most comitology meetings take place. The second meeting of the Appeal Committee took place in October 2011 and discussed the approval of a pesticide. At the meeting held in the Berlaymont building, 19 member states were represented by their Deputy Permanent Representative, two by their attaché and the remainder by civil servants from the capital (mostly director-generals). The outcome of the meeting was not different from that in the committee: no qualified majority was found on either side and the Commission proceeded to adopt the measure. According to a Member State official (Interview 2), it is very likely that the number of attachés will increase further in meetings to come.

unable to adopt a general approach due to a stalemate among the member states ('UK, Germany resist attempted EU power grab on trade,' 2010). The Commission had wanted to integrate regulations concerning trade defence (e.g. anti-dumping, safeguards, and anti-subsidy instruments) that previously did not fall under comitology into the regulation. In the eyes of most observers this constituted a 'mini-revolution' - one that had already been advanced by Peter Mandelson during his tenure as Commissioner, but had failed to come about on that occasion. After all, such a change would mean that the Commission would gain significant new powers since member states would then require a qualified majority in order to be able to stop a trade defence measure from being adopted by the Commission (rather than the simple majority needed under the old system). The Council was split almost 50-50 between 'free-traders' opposed to this change and 'protectionists' in support of the Commission's proposal.

The INTA committee of the Parliament however, had asked for a so-called 'carve out' in its report, a demand also supported by 'free traders' in the Council (INTA Committee, 2010: 6-7). The 'carve out' would mean that the regulations not falling under the 1999 decision would be discussed separately and would not automatically be governed by the new QMV rule. The committee's proposal was later seen as another *accident de parcours*, as the mood was more in favour of qualified majority voting for trade defense. Remarkably, the working document of the EP's rapporteur did not mention anything on trade. When the Belgian Presidency finally managed to find agreement on this issue in the Council, the deal was accepted unchanged by Parliament (Hardacre, 2011). The final deal was evidently a victory for the Commission and the 'non-free trade camp'. After a transition period of 18 months (a sweetener for the 'free traders'), trade defence measures will now be dealt with under the QMV rule, making it harder for third countries to lobby member states' votes ('EU lawmaking reform gives Brussels more power on trade' 2010). The change in voting arrangements is considered revolutionary, and even though the changing position of the INTA committee might have helped the 'non-free traders', the Parliament barely had a concrete impact on the final outcome.<sup>3</sup>

Overall, one cannot but notice that on the defining aspects of the new comitology regulation, the Parliament was either 'absent' or had a marginal impact on the final outcome. Furthermore, the draft reports of the European Parliament focused on a number of issues that

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<sup>3</sup> Another issue that was not resolved by the Spanish Presidency concerned voting arrangements for sensitive measures such as taxation, financial services, and health or safety of humans, animals or plants (i.e. GMOs). Remarkably, in his first report, Szajer had written an amendment that said that in absence of an opinion in the Committee, the Commission could not adopt a draft measure (Szajer 2010a: 9). This went even further than what some member states in the Council were asking, and was later corrected by Szajer in his working document where he wrote: "It appears from the system laid down in the Treaties that the majority needed by the Member States to control the Commission when it exercises implementing powers should not be harder to reach than the majority needed by the Council to control a delegation of legislative power" (Szajer 2010b: 3). In the end, the regulation contains language in a recital that urges the Commission in sensitive areas not to go against a predominant position in the appeal committee in absence of an opinion (European Union 2011, recital 14). This was another compromise found in the Council that was taken aboard by the European Parliament without any changes.

were not even considered by the other institutions. Each of these reports called for a right of objection for both Council and the Parliament that would be binding on the Commission. Other demands were an observer status in the committees, full information on voting behaviour of member states, and a clear distinction between the use of delegated and implementing acts.

However, when the Belgian Presidency concluded the negotiations with the EP, the final deal included not only the ‘mini-revolution’ on trade (in which the Parliament had had no say), but also contained:

- no reference on the distinction between delegated or implementing acts
- no binding right of objection but a non-binding right of scrutiny (confined to the matters adopted under the ordinary legislative procedure)
- an automatic alignment with a post-hoc evaluation of matters that since the entry into force of the Lisbon Treaty newly fall under the ordinary legislative procedure (i.e. agriculture policy and certain matters of justice and home affairs)
- no observer status for the European Parliament

Given the ‘victory’ the EP had at Lisbon, and given also the general view that in the area of comitology the new provisions would be much more favourable to the Parliament, this apparent failure of translating treaty gains into legislative success comes as a puzzle. In the subsequent section we seek to identify the reasons that may explain the EP’s poor performance in the implementation stage of this comitology reform.

#### **4. The post-Lisbon regime for comitology and delegated acts: Explaining the European Parliaments’ ‘failure’**

As the previous discussion has demonstrated, the EP does not seem to have capitalized fully on the hand it was dealt in the treaty. Whereas its starting position was quite favourable with newly obtained powers and co-legislatorship on the new regulation, the EP turned out to have only limited impact during the negotiations following the coming into force of the treaty. The detailed arrangements that have been agreed for both implementing and delegated acts fall far short of the potential influence that the treaty promised the EP.

In seeking to understand this apparently paradoxical outcome of the implementation process, we examine three factors outlined at the outset of this article in order to which can be considered to having an impact during the negotiations on the new comitology regulation. Taken together, we believe that this combination of structural elements and weak agency can explain to a large degree the lack of success of the EP in this process.

##### **4.1. Resources – or the lack of them: The (non)availability of time**

Article 291 TFEU requires the adoption of horizontal regulation(s) for its implementation. However, the Treaty does to mention a transitional period between the entry into force of the

Treaty and that of a new regulation. In the event the initial ‘No’ in the first Irish referendum on the Lisbon Treaty created a high degree of uncertainty and, more importantly, made practical preparations anticipating the ultimate coming into force of the treaty impossible. The subsequent objections raised by the Presidents of Poland and the Czech Republic had a similar effect. The impact of these developments was that, in the end, once the final agreement on the Lisbon Treaty had been reached and preparations could start in earnest, less than two months remained until it entered into force.

Therefore, policy-makers had to face the fact that in the period immediately after the treaty coming into force, transitional arrangements had to be made ad hoc. In the case of comitology this meant that in December 2009 the three institutions adopted a joint declaration stating that they:

*undertake to endeavour to achieve speedy agreement on the new regulation, with a view to its entry into force already during the Spanish Presidency. In the meantime, Council Decision 1999/468/EC of 28 June 1999 continues to apply, with the exception of the regulatory procedure with scrutiny, which is not applicable.* (European Parliament, Council and Commission, 2009)

The declaration was later adapted to read: “have agreed to continue using, where appropriate and for a period which should not exceed one year, Council Decision 1999/468/EC of 28 June 1999 (...)”. The three institutions had thus set themselves first an ambitious deadline of 6 months, then of one year to conclude the negotiations on a new comitology regulation. This is remarkable given that this was the most fundamental overhaul of the regulatory framework since 1987 and for the first time had to be negotiated under co-decision. Yet it is even more remarkable that just nine months after the Commission’s presentation of its proposal, COREPER concluded its negotiations on the matter by 1 December 2010 and the European Parliament, subsequently approved it during the plenary session of 16 December 2010 with only 4 votes against, and 567 in favour (‘EU lawmaking reform gives Brussels more power on trade’, 2010).

One of the reasons why the European Parliament had such a limited impact on the negotiations was presumably because it came late into the game, at a time when the compromise being agreed in the Council started to determine the final result. However, already in the period between the ‘Yes’ vote in Ireland and the entry into force of the Lisbon Treaty, the European Commission had outlined its views on the new system of delegated and implementing acts in a working document. When it finally came with its proposal on 3 March 2010, Member States almost immediately started discussing the text in a Friends of Presidency Group consisting of legal advisers. By contrast, the EP’s rapporteur only published his draft report on the 20 May, at which point the Council had already held 7 meetings to discuss the matter.

Coming late into the ‘game’ did not prevent the Parliament from sticking to its commitment of going for a first reading agreement. However, by May 2010 certain politically sensitive issues such as the Appeal Committee were already considered ‘*acquis*’, even by the Commission. It was also clear that the Council would not accept any more changes to the

compromises it found on the two most political problems of trade and voting arrangements, which left very little for the Parliament to fight for. In the end, the final agreement was reached in only a couple of trialogue meetings, giving the impression that negotiations with the Parliament had been unproblematic.

#### **4.2. The (non-)politicisation of the comitology and delegated acts dossiers**

The EP has traditionally attached great significance to issues of big political significance or principle – such as the expansion of co-decision in the legislative process – but rather less attention to apparently technical (but no less political) questions such as comitology. Rather than a general matter of the Parliament, this had in the past been an issue in which a minority of MEPs had taken an interest, and had taken responsibility in formulating an opinion on behalf of the body. In addition, some of these key players who had traditionally championed the Parliament's rights under comitology (such as Richard Corbett) had left the institution at the previous election.

It should therefore not come as a surprise that in 2009-2010 the comitology dossier raised little interest among MEPs. As already explained above, the *Common Understanding* on delegated acts was regarded as more of a technical project, and was therefore mainly dealt with by civil servants. The same observation can be made with regard to the new comitology regulation. Apart from the rapporteur, only the MEP of the Greens/EFA group was present and active in the trialogue negotiations. Neither the S&D group nor the ALDE group in JURI showed much interest in the comitology file. Among the accessory committees, the chairs of the INTA and AGRI committees raised concerns on the issues of trade defence and automatic alignment, respectively. The INTA committee members, having made a U-turn in not insisting on a 'carve-out' but instead inclining towards a more protectionist position on trade defence measures, opposed the transitional period agreed by the Council. The AGRI committee, under the impetus of MEP De Castro (S&D) in turn demanded guarantees that the *acquis* on agriculture would be reviewed entirely, so that provisions on implementing measures could be brought in line with the Lisbon Treaty. However, this demand seemed to come too late as the rapporteur concluded the file before these committees really came to grips with it, ultimately settling for the Council compromise on trade and declarations by the Commission on automatic alignment. On 16 December 2010 the EP adopted – with an overwhelming majority – the new comitology regulation, approving a deal in which it gained very little of what it had initially sought.

#### **4.3. Responsiveness to Council negotiations**

As examined in the previous section, the EP had focused its amendments on enhancing its own role in the new comitology system: demands had included observer status, a right of opposition, full access to information, including on voting behaviour, and a case-by-case alignment of the *acquis*. Yet from the very beginning both Council and Commission took the line that the system of implementing acts was one for *member states* to control the Commission, not the *Council* or the *Parliament*. After all, the provisions on delegated acts

foresaw control by the two institutions for “non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act” (European Union, 2010a: 172). The European Parliament did not get a role in the new comitology regulation apart from a non-binding right of scrutiny, something that it already obtained in the 1999 reform. One could, of course, argue the Council too has no longer a part to play in the new comitology procedure, yet the new appeal committee seems to be a replica of COREPER, but chaired by the Commission.

Many amendments made by the different Committees in Parliament were not even considered by the Rapporteur, let alone by the Council or the Commission. It could have been a defining player in brokering the trade deal, had it become involved earlier when the Council was still divided on the issue. Equally, it could also have had a decisive impact on the question of voting rules or procedural arrangements in the committees that will determine GMO policy in the future, or it could have been firmer on refusing automatic alignment and preserving its role in making the distinction between delegated and implementing acts. Yet there was too little interest and will to get involved in these discussions in the face of the time pressure to conclude the file.

## **Conclusion**

From the European Parliament’s point of view, the story of the 2011 comitology reform is clearly one of unfulfilled promises. Whereas the initial battle-lines were drawn along the familiar lines predicted by the literature (Blom-Hansen, 2011: 613), the actual performance of the EP fell short of what one might have expected based on its constitutional powers and gains in the treaty revision process. Instead, the Council managed to change the Commission’s initial proposal considerably as Brandsma and Blom-Hansen show (2011), although the end result is rather similar to the old system. The Commission thus saw its project of simplifying the procedures somewhat thwarted, but still managed to retain its strong position in the driving seat of comitology. Its representatives also chair the Appeal Committee and it obtained the reform on voting procedures for trade defence instruments it had long sought. This leaves the Parliament somewhat empty-handed. As Héritier and Moury (2011: 146) pointed out, the Parliament obtained veto right “over whether to legislate or to delegate and the choice of procedure” with the introduction of co-decision. In the same vein, one would have expected the Parliament to fully play its role in shaping the new procedures as co-legislator on the comitology regulation. Yet, it clearly put a lot more energy and hope in the use and implementation of Article 290, rather than fully playing out its role as co-legislator on the regulation regarding the implementation of Article 291.

Practice will tell how frequently co-legislators will refer to delegated acts, but initial observations show the Council eager to limit the scope and use of delegated acts, and the Parliament often dropping its insistence in return for amendments on the substance of

regulations.<sup>4</sup> One of the main rationales for the Council to avoid the use of delegated acts is that Member State representatives in the comitology committees have more time to control and more possibilities to amend decisions than under the ex-post rights of revocation and opposition under delegated acts. As Hofmann (2009) predicted, the distinction between delegated and implementing acts will be ground for inter-institutional battles for some time to come, while Kaeding and Hardacre (2010) expect that the EP will put greater emphasis on the use of delegated acts post-Lisbon. It will therefore be interesting to see how delegated acts are prepared in the future and how frequently the co-legislators make use of the mechanisms of revocation and opposition<sup>5</sup>.

The preparation of delegated acts in particular is something to look out for (Hardacre and Kaeding, 2011). When the Commission adopted its first delegated acts on the regulation concerning energy efficiency labelling, a row between Council and Commission erupted, because the Commission had consulted national experts together with other experts. A number of member states in the Council reacted by stating that the Commission should invite member state experts *separately* and *after* they consulted other experts. Moreover, the Commission should also provide drafts of delegated acts and explain which comments it will take into account and which not. The Commission reacted by saying that in the future it will communicate more clearly on the preparation for delegated acts but that it refuses to establish a comitology light procedure. Yet in a working document providing guidelines for its Directorate Generals the Commission clearly states that “services should systematically consult experts” and that consultations “must involve experts from all 27 Member States” (European Commission, 2011b: 23). It is clear that there is a fundamental lack of trust on the Council’s side in delegating powers to the Commission without the control member states used to have under the old comitology rules. From the Parliament’s side it will be interesting to see how and if they are involved in the preparatory process, and which experts they are sending. The working document of the Commission states that “[i]f so requested (...) the Commission may also invite Parliament’s experts. (...) Parliament’s experts may be any persons appointed by the EP.” (European Commission, 2011b: 24). Another issue is that of the alignment from PRAC/RPS to the new system. Both the Parliament and Council agree that there should not be an automatic alignment from PRAC/RPS to delegated acts, yet the Parliament considers the scope for delegated acts to be much broader, while the Council is of the opposite opinion. Adaptation of the 300-something acts is currently on-going and should be wrapped up by the end of 2013.

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<sup>4</sup> See for instance Oeil on the Remit regulation <http://www.europarl.europa.eu/oeil/file.jsp?id=5888822>, on the regulation concerning the Single European Railway Area <http://www.europarl.europa.eu/oeil/file.jsp?id=5872762>, on the regulation concerning the Labeling of textile products <http://www.europarl.europa.eu/oeil/file.jsp?id=5742632>, on the regulation concerning Food Information to Consumers <http://www.europarl.europa.eu/oeil/file.jsp?id=5592852>, and Europolitics on the regulations concerning external financial instruments <http://www.europolitics.info/external-policies/financial-instruments-meps-accept-compromise-art316803-44.html>

<sup>5</sup> Opposition can now be exercised on any ground, a clear expansion from the situation under RPS/PRAC.

The functioning of the Appeal Committee is another interesting prospect. The main question discussed during its first meeting, when the Rules of Procedure were adopted, was how the Commission should coordinate the date, venue and most importantly the level of representation with the Member States. Indeed, who will sit in the Appeal Committee will to a large extent determine the character of this body. Will it be a genuine political body where ministers come to express their opinions on GMOs, just like the Council in the past, or will it be on a more technical level and an extension of the base committee with director generals or deputy permanent representatives? Another interesting element will be the frequency of meetings of Appeal Committees. Will referral to the Appeal Committee become more frequent than it used to be with Council referrals, or will it remain at a rate of less than 1% of all proposed measures?

Even at this point, the implementation of Articles 290 and 291 remains a work in progress, and it will take time for these reforms to filter through in terms of changing practices and, perhaps, changing outcomes. What is striking to observe, however, even at this stage, is the discrepancy between the ‘victory’ of the EP in the treaty negotiation – its achievement of institutional equality with the Council in the area of implementing and delegated acts – and its comparatively poor performance in the subsequent stage of treaty implementation. For a number of reasons – time pressure, selective attention, poor focus – the EP did not manage to translate its new powers into making a strong impression on the new legislative framework.

This finding has a wider significance for our understanding of EU governance in a number of ways. First, it demonstrates with respect to a particular domain the argument made previously in a more abstract sense; namely that treaty reform is not complete with the signing of a new treaty, nor even with the ratification and its coming into force (Christiansen and Reh, 2009). Treaty reform is better seen as a continuous process that frequently involves “incomplete bargains” that require further interpretation (Spruyt, 2009), and only reveal their ultimate meaning when the new treaty provisions are put into practice. The present case of comitology reform does appear to be a classic case of this sort, given the way in which its impact on inter-institutional relations appears to be quite different at this stage than it did when the treaty was signed. Moreover, one has to take into account that the European Court of Justice, might still have its say on the implementation of the new system – for instance on the distinction between the use of Articles 290 and 291 TFEU, which could further change the inter-institutional relations.

Second, our study of implementing the treaty provisions on comitology and delegated acts has shown how significant the timing – or, to be more precise, the lack of time - can be for the outcome of decision-making. This drives home a wider point about the role of time in EU governance that has been made earlier by Ekengren (Ekengren, 2002) and, more recently, by Goetz and Meyer-Sahling (Goetz and Meyer-Sahling, 2009). These scholars have argued convincingly that ‘time matters’, and that the way in which decision-making processes are structured in terms of their timing can have a profound impact on outcomes. Goetz and Meyer-Sahling make the point that “political time is intimately connected to power, system performance and legitimacy,” and the present study has demonstrated this with regard to all

three points. This drives home the need to consider the role of political time even at the micro-level of negotiations between institutions in the legislative process.

Third, we have observed in the present case how the European Parliament may ‘underperform’ in inter-institutional relations due to a lack of political interest. For the EP to actually come out of such negotiations as the equal of the Council, it formally requires not only a high degree of expertise, information, and knowledge on both the substantial and the procedural aspects of the dossier, but also political interest. As our research has shown, political decision-makers in the EP lacked insight and will to engage into crucial aspects of the comitology file, leaving the Commission and member states to determine the outcome to a large extent.

These observations help to put the specific findings in the case of comitology reform and the relative position of the EP into a wider context of the EU’s inter-institutional relations. It also serves to put into perspective the widely-held view of the EP as the ‘winner’ of the Lisbon Treaty and confirms the need to study and evaluate the outcome of treaty reform until the process has run its course, reaching a point at which the outcome may be very different from the initial appearance.

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