Daniel Guéguen

3rd edition updated

COMITOLOGY

HIJACKING EUROPEAN POWER?

European Training Institute
ESL & NETWORK
ETI

EUROPOLITICS
Since 1972

Comitology: Hijacking European power?

by ***Daniel Guéguen***

European Training Institute

ESL & NETWORK

ETI

The Number One in Brussels for European affairs training

- **Open enrolment seminars:**
  - Brussels in a Day
  - Masterclass EU Lobbying
  - Communication and Media
  - Comitology Reform
  - EU funds
- **Customised Seminars:**
  - For companies
  - For associations
  - For public administrations
- **Personal coaching**

A permanent training center in the heart of the EU district

www.e-t-i.be

European Training Institute (ETI)
Rue Froissart 57 | B-1040 Brussels (Belgium)
Tel: +32 (0)2 400 77 30 | Fax: +32 (0)2 732 75 25 | info@e-t-i.be

European Training Institute (ETI)

rue Froissart 57
B-1040 Brussels
Tel.: +32 (0)2 400 77 30
Fax: +32 (0)2 732 75 25
info@e-t-i.be
www.e-t-i.be

Europolitique

rue d'Arlon 53
B-1040 Brussels
Tel.: +32 (0)2 737 77 00
Fax: +32 (0)2 732 67 57
abonnements@europolitique.info
www.europolitique.info

1st edition, February 2010

3rd edition, February 2011

ISBN: 978-2-930586-00-7

Daniel Guéguen's bibliography

Published by Europolitics & ETI:

- Comitology: Hijacking European Power? - February 2010
- The comitology reform with Vicky Marissen - September 2007
- European lobbying - February 2007 (translated into 9 languages)
- A practical guide to the EU Labyrinth - June 1991
  (translated into 20 languages)

Published with Europe Information Service

- The Euro: Europe's Construction or Destruction?
  With Juan Carlos Gonzalez Alvarez - December 2004

By Editions Apogée

- L'Europe à contre-sens - April 1996
- Le Parlement européen pour une Europe des citoyens - January 1994
- Les Ecus de l'Europe with Roxanne Feller and Bernard de Galembert
  - May 1993
- Euro-subventions : mode d'emploi with Bernard de Galembert
  - June 1992
- Clés pour le Parlement européen with Dominique Lund - January 1992

By Editions Dervy

- Les bijoux Rose-Croix (1760-1890)
  With Robert Vanloo and Philippe Klein - May 2003

Translation and French adaptation

- Le drame yougoslave de Mihailo Crnobrnja - September 1992
- Europe l'étrange superpuissance de David Buchan - June 1993

To

Patrice Allain-Dupré and ***Pierre Daurès***

Foreword

The word ‘comitology’ has made its mark in the last couple of years. In Brussels and in the EU’s national capitals, it conveys the sense of a higher, mysterious and non-transparent power.

The European Union would be at a standstill without comitology. But, over time, it has changed from being a solution to becoming a problem. It has become a problem in terms of transparency, governance and in terms of the balance of power between the Commission, the Parliament and the Council.

As part of my research for this book, thirty subject specialists were happy to meet me to exchange views – Commission officials, European Parliament officials, Council Secretariat officials, MEPs, law professors and top officials from big European lobbying organisations. All of them expressed their views extremely competently, with great confidence and of course on a personal basis. That is why I would like to thank them all as a group and express my sincere gratitude to them.

Vicky Marissen and Yves de Lespinay contributed their technical support for the writing stage. Post-Lisbon comitology has become so complex that this book would be less credible in its arguments without their checking, approval and proof-reading.

•

Comitology is a hot subject. Therefore each new edition of the book will be updated. Any contributions, comments and corrections will be gratefully received.

Feel free to contact me at:

dg@clanpa.eu

Summary of contents

page

English translation: *Julian Hale* and *Jacques Lovell*

Illustrations and page design: *Lino Hernández*

This is not a legal essay!

This book is about a very topical and highly controversial issue in Brussels. Some expert readers will point out that something or another is imprecise or even inaccurate. Well, that's deliberate! Close reading of the text will reveal some caricatures of reality and even some technical approximations. These have also been included on purpose.

Dealing with the subject of comitology from a legal perspective effectively reduces one's audience to a very small circle of experts. But that is not the aim. The aim here is to address comitology from a political perspective, that of a balance of powers between the political and administrative domains. Who is the master of whom? The legislator or the European civil servant?

Comitology has assumed such importance since the July 2006 reform that it makes sense to understand it before debating it. What does it consist of? What do these 'implementing measures' correspond to? Who decides? Does it introduce an occult power into the European Union? And why do member states leave so much power to the Commission? Who will benefit from the new comitology reform brought in by the Treaty of Lisbon? Will the Commission - as is its ambition - be allowed to further expand the scope of its quasi-legislative powers?

It is not therefore about law or at least is not just about law. It's about transparency, governance and democracy. That's why this book is written for the largest possible readership - in order for them to understand, debate and then act.

Let's be open about it - this book's aim is to open up a public debate on this tedious but essential issue and to have an influence on negotiations that will take place in 2010 for a new reform (another one!) of comitology, without knowing at this stage what direction it will be going in.

At a time when people are not interested in Europe (look at the last European elections), where member states prioritise - rather hypocritically - their national interests, it is essential to bring back simplicity, transparency and balance into the functioning of the Union and the three institutions that give life to the EU.

The minor European civil servant is the master of the Union

The architecture of power is universal in space and time, from Egypt to Babylon; from the Mughal empires to the Château of Versailles. Look at Paris, its National Assembly, the Senate, the Elysée Palace. Volumes, spaces, columns, sculptures. Everything exudes THE power here. And what about the Capitol in Washington? Has there ever been anything more complete in terms of urban planning and in terms of being a visual depiction of power: a legislator on the hill, visible for everyone, embodying the primacy of the citizen over the executive, which is housed lower down and, more modestly, in the White House. And between the two of them you have the Mall, the huge citizen's area personifying the nation through the omnipresent vision of the Capitol and the Congress.

Size does not have a role to play in the architecture of power. Look at London and 10 Downing Street, which is a very small house in a very small street. But this is a mythical place where, for a multitude of reasons, everything exudes power. Age doesn't come into the equation either. Look at Brasilia. The result, of course, is disappointing: too big, too cold and too distant… but at least the Brazilian authorities have tried to give their new capital the feel of a capital by choosing one of the greatest architects in the world, Oscar Niemeyer, to build it.

In Brussels, the European District is deplorable but what's worse is that nobody has ever really got upset about it or has tried to make it better. The

term 'brusselisation' made its way into the dictionary as spoiling residential buildings by turning them into office spaces. That says it all really!

A century ago, Brussels was, with Vienna, one of the two most beautiful towns in Europe with a Rue de la Loi that symbolised Belgium's success in the worlds of industry and the arts. Starting from the Palais Royal, the Rue de la Loi was lined with stately townhouses and came out at the Cinquantenaire (French architect Charles Girault), followed the Avenue de Tervuren and the Mellaerts pond, crossing the magnificent Soignes Forest to end up in the grandiose Esplanade de Tervuren with the castle of the same name, almost enough to make one nostalgic for the age of Leopold II.

Today, the Rue de la Loi is nothing but a monstrosity that is so polluted by day and at night that the buildings on either side need to be renovated every thirty years. The European District is in keeping with that too: offices, offices and more offices… For forty years, the European District has been turning its back on the three criteria of the architecture of power: it is not based on any urban planning design, it ignores the cultural dimension of urban space and it rejects the citizen who is deemed to be undesirable in this jungle of technocracy.

What strikes you in Brussels' European District is not how ugly the buildings are. Some work pretty well and, in recent years, a desire to rehabilitate and renovate some has grown. Taken individually, the Berlaymont, the Justus Lipsius (what kind of a name is that!) and the Charlemagne are not ugly but they sit there as if at random. What is striking is the lack of an overall plan. None of the buildings has an aesthetic link with its neighbouring building or any functional relationship with its environment. In this respect, Schuman roundabout is symptomatic of what must not be done.

Until very recently, the Belliard/Froissart crossroads located in the heart of the European District, a hundred metres from the Council, two hundred metres from the Commission and three hundred metres from the Parliament, was merely an industrial ruin spread over 10,000m². Out of Christian kindness, we will not go into the painful issue of the Borschette Centre, a sort of sinister bunker where various committees meet, or the Beaulieu District that has been handed over to DG Environment or still less the despair of services that have been moved to the plateau of Kirchberg in Luxembourg. All of that would put you off the European project for good !

Nowhere can you see a piece of art, a sculpture or a tangible record of the founding fathers of the Union. There is no memorial to Jean Monnet. There

is nothing which reminds you of the glorious history of the Union in its pro-active years. Nor are there any shopping galleries or festive areas or any reason for locals to venture into the European District unless they have to go there. Basically, there is nothing that brings Europe and the citizen closer together. The serious point is not that such a situation exists but that it continues to exist because of disinterest, indolence and helplessness.

On the request of goodness knows who, a plan to redesign the European District was presented by the French architect Portzamparc. But the project is so ambitious that its level of ambition condemns it to being no more than an academic exercise. To make it come to life, it would require no more nor less than to raze the whole sector to the ground and rebuild it from scratch. And in the meantime, new constructions and renovations are coming into being without any overall guiding plan.

One of the only places where there is much life in the European District is the Parliament, close to the Place du Luxembourg. It is beautiful modern architecture, no doubt a bit cold, but open to the outside world. Lobbyists are welcome there and buses and visitors come by every day. It's the exception that proves the rule. Alas, the European Parliament is not a 'real' Parliament because - contrary to all the Parliaments in the world - it does not have the right to propose legislation. This power does not belong to the member states either. It is in the hands of the European Commission, the only institution entitled to propose and draw up laws or regulations.

The European Union in Brussels has given itself the technocratic image which very precisely corresponds to what it has become: a technocracy for which the masters are European civil servants.

The European Commission: a power concentrate

A number of words come to mind to describe the Commission and European civil servants: competent, honest, nationality-neutral, pro-European, defenders of the general interest, multilingual, multicultural, purposeful, pro-active, arrogant, ambitious, frustrated… A good portrait would be a mixture of these adjectives.

But one word is missing: POWER. The European Commission is where power is concentrated. It's worth recalling that 75% of national laws come from the Community. This already considerable percentage rises to 83% for environmental regulations.

Over the years, and especially since 1 January 1993, when the Single Market came into force, power has slid from the national to the European level. With the powers delegated to Brussels and to the World Trade Organisation, what are the member states left with? Not much if we add to that the loss of monetary sovereignty for eurozone countries: respect for convergence criteria, debt and deficit ceilings, interest rate set by the European Central Bank, the loss of the ability to devalue… member states are left with precious few powers.

It's difficult to admit that in Paris , whether you are the Prime Minister or the elected President of the Republic, the bulk of the power lies in Brussels. All the rest is peripheral.

But where is power exercised when it comes to the Commission? Is it located in the highest echelons of the Community's administration (Director Generals) or of the Commission in its guise as political college (the Commissioners)? Or is it located at more operational, more technical - let's dare to say it - junior levels.

There's nothing better than an anecdote to get your message across. Having managed the European sugar lobby and then the European farmers' lobby, I decided, in early 1996, to create my own company. A few months later, I was visited by the Brussels representative of one of the main global soft drinks companies. "Can you draft for me a list of the ten most important people for our Group in Brussels?" he asked.

The top name on my list was a certain Gilbert Mignon. The name generated a considerable amount of confusion right up to the US headquarters of the company. Who was this Gilbert Mignon, what did he do and why choose him rather than his Director, his deputy Director General, his Director General or his Commissioner?

In reality, Gilbert Mignon was the key man in the 'Sugar Division' (but without being the boss), a unit like many others within the Agriculture Directorate General (known as DG VI at the time and as DG AGRI nowadays). The 'Sugar Division' dealt with all the sugar issues in the European Union at the technical (exports, imports, ACP, refunds, stocks, invitations to tender etc.) and political levels (price, Community preference, production quotas etc.).

Within the 'Sugar Division', Gilbert Mignon was a humble 'desk officer' (a civil servant at the bottom of the ladder) and then a Principal Administrator

(a jumped up title for a civil servant who is still low down the ladder). He finished his career as deputy Head of Unit but, through his knowledge of the dossiers, his strategic vision, his credibility vis à vis professionals in the area, his convictions about the policies to pursue, his personal authority and his capacity to go see his Director General to defend his cause and get his way, he was de facto 'Mr Sugar' at the European Commission.

The fact that ordinary civil servants acquire for themselves powers that are well beyond their place in the hierarchy is not something brand new. In spite of the criticisms, the European administration continues to be an example. It is a very small-scale administration (1,000 civil servants to manage European agriculture!), a very structured and very competent one. The Commission has hundreds if not thousands of Gilbert Mignons today. One of the key criteria of influence in Brussels is competence quite simply because civil servants are themselves competent. They do not tolerate approximations, bla bla or generalisations.

Usually nationality-neutral, they strive to defend the general interest. Individually, they do have their own personal convictions but are generally loyal in defending the roadmap set out by their hierarchy. On the negative side, they have in recent years tended to refer to the Commission when they express themselves. Instead of saying "I think that…" or "Our Directorate General thinks that…" it is much more comfortable and even more satisfying to say "the Commission thinks that…". It's simplistic, no doubt effective and certainly arrogant.

This new found arrogance of a substantial number of Commission civil servants is underscored by their affirmation that they are superior to other institutions. In the past, the Commission delegated a Director to defend each dossier examined by the Economic and Social Committee. Then it became a Head of Unit, then a deputy Head of Unit and then a Principal Administrator.

The same goes for the Parliament, which the Commission somewhat fears but that it basically scoffs at often for its supposed lack of powers, its propensity to get involved in everything and its political opportunism.

This recent drift by the Commission (and by extension European civil servants) towards a form of arrogance, of technical superiority, of a propensity to see itself as the defender of the general interest are at the heart of the way in which comitology is derailing.

This book is the story of an administration that has major virtues but which, by withdrawing into itself, confiscates power delegated by the member states and organises things it as it wishes. It neglects the democratic control of legislators as if the Council and Parliament - who must remain the masters of the Union - have to subject themselves to the decisions of an administration that has become the predominant force.

Reform after reform, the democratic control of the Commission by those who have given it its mandate has ebbed away. This change has been accelerated by the lax control of member states who are more interested in the return to national interests than in developing the Union. Things have come to a point where, in certain circumstances (fortunately very limited ones), the Commission - even a single civil servant when they are not reined in by their hierarchy - can impose a decision unless it is countered by the Council of Ministers acting UNANIMOUSLY as 27 member states!

The European Parliament is not a 'real Parliament', the Commission is not a Government

I have the greatest respect for the European Parliament. It has history on its side. For a long time it was merely an advisory body made up of MPs appointed by national parliaments. But now it is one of the three main institutions of the Union on an equal footing with the Council of Ministers and the Commission: one of the three corners of the 'Institutional triangle'.

Over the years and each time that the Treaties were reformed - the Single Act of 1987, the Maastricht, Amsterdam, Nice and Lisbon Treaties - the European Parliament has gained in both legitimacy and powers.

It gained in legitimacy with the election of Members of the European Parliament by direct universal suffrage (1979) and with the new status acquired by MEPs. The time when those excluded from the national scene were put forward for the European Parliament is over. Today, the commitment of most MEPs is real, their knowledge of the issues recognised, their openness to civil society uncontested and their willingness to engage in cross-party dialogue quite remarkable.

The same spirit of conquest applies to their powers. Treaty after Treaty, codecision, which puts the Parliament and the Council of Ministers on an equal footing, has become the rule. That has also been the case for the Common Agricultural Policy, which has been the exclusive preserve of

member states for half a century. But, however important this legislative activity may be, it is only one facet of the European Parliament's multiple powers.

Leaving aside minor powers such as the right to ask written and oral questions, to hold public debates, to vote on recommendations and resolutions, the European Parliament has - in addition to its colegislative power - three other extremely important powers:

- Budgetary power (the right to discuss the budget, to vote on it and to approve its execution). Up until the Lisbon Treaty, budgetary primacy belonged to the Council of Ministers. With Lisbon, the two institutions are on an equal footing overall: with a slight advantage to the Council for the five-year programming and a slight advantage to the Commission for the execution of the annual budget.
- Assent is one of the most important powers of the Parliament, which nobody apart from the legal experts (and not all of them either!) knows about. This power enables the Parliament to refuse the enlargement of the Union to one country or another once accession negotiations have been completed. Similarly, the Parliament can veto the signing of any international trade agreement "of significant importance" with non-EU countries. It can thus, for example, oppose the ratification of agreements reached by the European Union at the World Trade Organisation.
- The last of the "big powers of the European Parliament" - in which area it is close to a national parliament - is the right to a motion of censure, which allows it to "dismiss the College of Commissioners" through a vote with a two thirds majority and a quorum of 50% of votes.

The problem with the European Parliament is that it does not exercise the full range of powers, that it exercises them conservatively, as if it did not dare to! Which is surprising for a legislative assembly.

Let's go back to each of these main powers in turn.

- First the motion of censure. This is a power that the Commission particularly fears. Several motions of censure took place in 1972, 1977, 1993, 1997, but with no result. The resignation of the Santer Commission in 1999 was not the result of a vote of censure but of the fear of such a vote. In 2004, the withdrawal by Mr Barroso, appointed as President, of Mr Buttiglione (the Commissioner-designate put forward by Italy) because of sexist remarks, was down to this same fear of seeing the Parliament exercise its 'no confidence' vote against the whole of the Commission.

- This conservative use of powers also applies to the EU's budget, where the Parliament has often fought with the Commission or the Council, especially when refusing the budget in 1979 and 1984. For ten years now it has been more appropriate to refer to skirmishes, to little budgetary battles where everyone marks out their territory without taking each other on head on. In short, here again the Parliament has exercised its budgetary power as it exercised its power of censure: conservatively.
- The power of Assent, or rather refusing assent, is a major power. It has - as far as we know - never been applied simply because there was no need for it, given the European Parliament's political positions in the last 20 years: favourable to any enlargement of the Union to new member states and broadly in favour of free trade agreements negotiated at the World Trade Organisation, the Parliament has let a key power go unused. In a macro-economic sense, the European Parliament has shown itself to be extremely laissez-faire by allowing itself to be blown along by the free trade winds of the 2000s instead of shaping things as it could have done thanks to the power of assent.

As for legislative power, this is in reality a colegislative power. It is exercised in some increasingly rare cases by the Council of Ministers alone (consultation procedure); and in the so-called ordinary cases where the Council of Ministers/European Parliament tandem act on an equal footing, applies generally.

But this colegislative power is not really one because neither of the two colegislators - Parliament or Council - has the capacity to lodge a draft law or regulation. This power belongs only to the European Commission.

This is a key point.

Only the Commission, not the European Parliament, has the right of initiative

Let's sum up the concept in another way. Every legislative initiative comes from the Commission, which has, in addition, "drafting power", i.e. the right to draft the text. Everyone knows how important it is to have pen in hand when one wants to set out an idea.

Of course the Commission - I mean its composition and the choice of President - are in the hands of the member states. Via the choice of the President and the assignment of portfolios, the member states give the College a road map

for a five year period. One cannot therefore say that the member states have nothing to do with setting the tone of a mandate. They are associated with it from the word go. This is not the case for the Parliament, which is very indirectly associated with the choice of the President of the Commission and the Commissioners.

Thus, neither the European Council nor the Councils of Ministers nor the European Parliament can impose a legislative initiative on the Commission either in codecision or comitology.

In the past, this rule that has never been challenged - not by the Treaty of Lisbon either - and was left undisturbed for the simple reason that the Council of Ministers was first among equals in the EU's legislative mechanism: the Common Agricultural Policy, the only integrated European policy depended on it, codecision was not widespread and comitology was mainly restricted to the agricultural management committees which were highly dependent on the member states.

With the comitology reform of July 2006 and the ratification of the Lisbon Treaty, everything changed: codecision became the rule (such that codecision measures are called "ordinary laws") and comitology became widely used in all policies, including energy, the environment, financial services etc. Of course the Parliament has been involved in implementing measures since the July 2006 reform but, in comitology, the rule is straightforward: power is with the body that is in control of the procedure. And only the Commission meets that criterion.

Balanced in the past, the Commission/Parliament/Council institutional triangle now shows a growing imbalance in powers: with the monopoly on initiating legislation, the right to draft legislation and control comitology, the Commission has surreptitiously become the leading power. The 'technostructure' has won the day over the political side of things.

The Commission is not a Government

This shift of power from the member states and from the Parliament to the Commission is all the more worrying in that the Commission is not a Government but is a hybrid structure: half political body and half administration.

When we refer to the Commission, we're talking about two distinct structures: the College of Commissioners (with a mainly political orientation) and the

administrative services (with a mainly technical orientation).

In reality, the situation is more nuanced and has, over time, evolved towards a stronger administrative orientation to the detriment of the political orientation.

The Commission is no longer a College

One of the unresolved problems of the Union concerns the composition of the Commission. Up until 1995 (an EU of 15 countries), the rule was to have two Commissioners for the big countries and one for the others, i.e. a total of 19 Commissioners. That was already too many. The Treaty of Nice took away the second Commissioner from the big member states. Today there are 27 countries = 27 Commissioners. That's far too many.

The Treaty of Lisbon envisages reducing the College by a third in 2014. To please Ireland and to encourage voters to vote in the right direction, an agreement was however reached to stick with the rule of one Commissioner per country. That means 35 Commissioners once the EU has expanded to include the Balkans and Iceland (with seven Commissioners just for the former Yugoslavia!).

The allocation of one Commissioner per member state regardless of how many member states there are has completely changed the nature of the denationalised and neutral College of Commissioners, which is in charge of the general interest under the terms of the Treaties. With their primary concern being the European interest, Commissioners remembered their country's priorities from time to time, but this was exceptional. Concern for national interest has become more common since the last big wave of enlargement in 2004.

It is not to put down countries from Central and Eastern Europe if one stresses the importance of THEIR Commissioner to defend THEIR national interests. How could a Commissioner known for being first of all a defender of his/her national interests have authority over European civil servants in charge of the Community interest?

The obesity of the College of Commissioners has led to the disappearance of its collegiality. According to the Treaties, each Commissioner has a double responsibility: a sector responsibility (in this sense each Commissioner is in charge of a Directorate General) and a collective responsibility for all the issues submitted to the authority of the College.

At the weekly meeting on Wednesday, each Commissioner can speak on any issue and, in addition, the cabinets of the Commissioners are constituted in such a way that they can follow the dossiers of the 26 other Commissioners on a daily basis. With the enlargement and the reform of the Treaties, the dossiers have become more numerous, more technical and more complex. Each Commissioner now restricts him/herself to his/her area. Collegiality is dead, which is serious because it removes a political filter and thus gives free rein to the services.

The President: a crisis manager becomes a diplomat

A second political filter is disappearing: the President of the Commission. It's worth recalling that Mr Barroso is the head of the Commission but does not have any extra voting weight. All the decisions voted on by the College are voted on by a majority. Even in the case of a tie, the President's vote never counts double.

The aim here is not to compare Mr Barroso to his predecessors but it must be recognised that the nature of his tasks have taken a U-turn since 1995, the year when the third Delors Commission ended. At the time, the President of the Commission rested on structural alliances (the Franco-German duo), was quick to fight his corner when necessary, relied on a very solid cabinet and controlled the Directorate Generals via the natural application of the principle of collegiality.

Today, as was already the case in 2004, the President of the Commission is chosen by the "prevailing wind" to apply a consensual policy based on the smallest common denominator from among the 27 member states. Mr Barroso has become a super-diplomat who flies from a G8 to a G20 and is such a diplomat that the distribution of portfolios of the new Commission has not been criticised at all by any member state nor by any party represented in the European Parliament. Yet being the boss of the Commission - one of the top jobs in the world - is based, in our understanding, more on the capacity to take decisions and manage conflicts than on the capacity to avoid them.

Commissioners/Director Generals, who is who's boss?

Describing some Commissioners during the 2004-2009 mandate, some discourteous observers have sometimes taken the view that they were "the spokespeople of their Director General". This is an extreme caricature but, like any caricature, it carries some truth.

As we have already said, in the Commission there are "super civil servants" in terms of expertise and authority. That has always been the case and is to remain so. But for some years we have seen a lack of political direction which has been felt right down to the lowest levels of the Commission.

As we have said, the Commission is not a government. That is one more reason to give it some shape. Equipped with considerable powers, it must act in an objective way and not in a subjective way. The Commission has become the master of comitology but it exercises this power with political guidelines that are much too weak. Hence the danger of poor governance, opaqueness and subjectivity, whereby in the end democracy will suffer.

•

In this first overview of the three main institutions we see powers that are working together, fighting each other and fearing each other. At the slightest expression of Parliament's discontent, the Commission is quick to retreat! And when member states come together around a consensus what can the Parliament and the Commission do?

But in practice the member states and the Parliament are constantly slowed down by the search for consensus while the Commission can go ahead more easily. It's like water poured into a container. It occupies the space. Treaty after Treaty, the Community decision-making process has become so complex that only the Commission masters it, which gives it a fearsome comparative advantage compared to the Council and Parliament.

This is particularly striking for comitology.

Comitology in the EU decision-making process

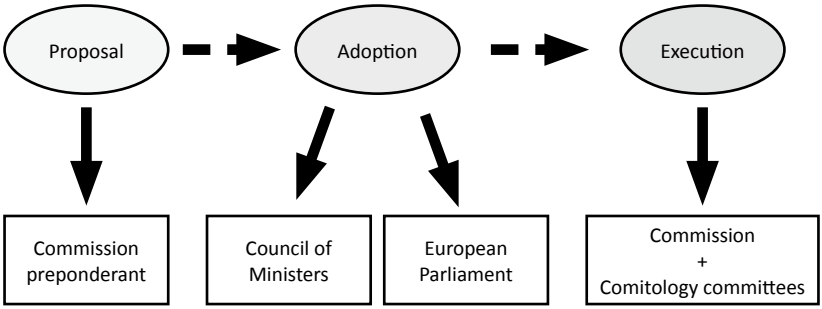
Although it may seem a bit academic, it's worth briefly recalling where comitology fits into the EU three-stage decision-making process:

- The proposal stage when the Commission has the most influence as it is the only body that can propose legislation;
- The adoption stage: once a legislative proposal has been voted on by the College of Commissioners, it is submitted for adoption either in the Council of Ministers (consultation procedure) or in the Council and the European Parliament (codecision procedure);
- The execution stage: most of the Union's legislative acts are framework laws delegating the Commission a whole series of technical implementing measures. Comitology covers all these implementing measures.

Comitology thus corresponds to a kind of secondary, derived or delegated legislation. In France, they would be called "décrets d'application".

Regulations adopted "in comitology":

- Must be applied immediately throughout the EU, as distinct from directives whose application can be put back in time and even tailored from one Member State to another;
- Have nothing to do with the transposition of European directives at the national level. They are new rules, directly applicable in the EU of 27 Member States



The first comitology measures date back to 1962

The paragraphs below are extracts from a conference by Mr Paolo Ponzano, the Principal Administrator on 'institutional matters' in the Commission's Secretariat General.

"Since the 1960s, the Commission has adopted over 80,000 measures via comitology. In 2006, 12,000 implementing regulations were still in force!

The first comitology committees (called management committees) were set up in 1962 following the adoption by the Council of Ministers of the first basic agricultural regulations (cereals and meat in particular).

The system of management committees allowed the Commission to quickly take urgent agricultural management measures as long as a qualified majority of the representatives of Member States did not oppose the Commission's proposal. In the case of disagreement, the Council of Ministers took over the dossier and could amend it with a qualified majority.

The system of committees has been gradually extended to other areas (customs union management, trade policy, transport, the Single Market etc.). The regulatory committee was conceived, obliging the Commission to bring together a qualified majority of representatives of Member States on its project, failing which the matter is referred to the Council."

This slightly modified system is still in force but it is only a secondary part of comitology as the most important part (the quasi-legislative acts or delegated acts) now involves the European Parliament following the July 2006 reform.

Comitology: an essential tool in the functioning of the Union

The rise of comitology is related to the European Single Market, which, along with the reform of the institutions (the Single Act of 1987), was the second main priority of the Delors II Commission.

What is it all about? When Jacques Delors became President of the Commission in 1985, the EEC (European Economic Community) was in a bad state with the institutions blocked by the excessive recourse to votes by unanimity.

From his two backers, Germany and France, who had close relations, Delors received a twin mandate: firstly to reform the institutions with four key measures:

- Returning, as indicated above, to qualified majority voting;
- Involving the Parliament in the legislative power up until then devolved exclusively to the Council (through putting in place the cooperation procedure which prepared the ground for codecision);
- Granting the Commission sole right of legislative initiative;
- Delegating the Council of Ministers' power of execution to the Commission.

The second part of the mandate was to bring about the Single Market. The two parts are closely linked since the Single Act is the instrument that makes the creation of the Single Market possible. By Single Market, we mean the free movement of goods, people, services and capital within the borders of the EEC.

To achieve that, over 300 directives will be worked on and about 270 adopted. This is a fantastic legislative work in progress which industrial sectors have been very closely involved in via their European professional associations.

It goes without saying that these 300 directives covered a considerable number of issues. One example is the totally disparate food laws from one Member State to another.

To standardise packaging rules, weight ranges, composition, labelling, use of additives, health claims etc. requires lots of directives, which must be accompanied by technical rules. This was the role assigned to comitology.

The essential nature of comitology is obvious today because, with the EU diluted into 27 Member States, Community directives are becoming less precise. The directives are frameworks (or rather framework directives), setting out some general principles and leaving it to implementing measures - i.e. comitology - to resolve the technical details. The word "detail" is completely inappropriate because beneath these "details" are hidden key issues in terms of the economy, production, consumption, health, prices etc.

The more precise the directives were, the less important comitology was. The more the directives have become imprecise, the more comitology has become essential.

Today, without comitology, the EU would quite simply be at a standstill. Where does the political level stop and the administrative start?

It is important to know that Member States also adopt implementing regulations complementing their national legislation via technical provisions.

The issue is always about knowing who controls these implementing decrees. Where is the border between the legislative and administrative side of things? Looking at it closely, each Member State of the EU has its own system:

- In France, under the Vth Republic, the implementing decrees are in the hands of the government, which can - according to the political opportunity - speed up their publication, delay it or never publish them. In France, over 200 laws have been voted on between 1981 and 2007 that are legally in force but are not applicable in practice because they lack implementing decrees! The French Parliament plays a particularly minor role in the adoption of implementing decrees: it checks on their adoption, checks if they correspond to the spirit of law and publishes its possible criticisms without any other consequence.
- The situation is the opposite in the United Kingdom where delegated bills are submitted to the Parliament which can approve them or reject them (right of veto) but not amend them. Three specialised parliamentary committees have been created for this purpose: the Joint Committee on Statutory Instruments, which brings together MPs from the House of Commons and the House of Lords; the House of Lords Committee on the Merits of Statutory Instruments and the House of Commons Standing

Committee on Statutory Instruments. It is to be noted that one of the three committees is common to the two houses.

- In Germany, the system is very regionalised with a strong approval role reserved for the Bundestag for federal dossiers (defence, immigration, justice etc.). For regionalised policies (taxation, education, police, health, environment, industry, pensions etc.), this approval role belongs to the Bundesrat and the Parliaments of the Länder. At any time, the Bundesrat or the regional parliaments can take over.

These three examples show that the power of execution is strictly managed at national level either by the government or by the parliament or parliaments. In addition, the administration is never free to act as it likes.

With regard to the European Union, the issue is about knowing where to put the cursor. In our opinion, the system has become totally out of balance because the implementing measures have come to +/- 2,500 per year while only about fifty directives have been adopted during the same period!

In other words, comitology represents 98% of the regulatory activity of the Union in a year. And this 98% is the Commission's competence, insufficiently overseen, in our view, by the Council of Ministers and the European Parliament.

Comitology: power delegated to the Commission by the Council

Who controls comitology? This question does not need much analysis. It is the Commission, as Article 202 of the Treaty indicates: "The Council shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down."

In the spirit of the 1987 Single Act, implementing measures are a full part of the powers of the Council of Ministers, the main legislative body, but for reasons of convenience it delegates the power to implement to the Commission, which is regarded as being in a better position to have complex and often subordinate technical measures adopted rapidly.

Comitology worked in this way until the reform of July 2006, with two main types of committee: the management committees (which manage the agricultural markets in particular) and the regulatory committees (which regulate technical measures related to the Single Market).

The two types of committee are made up of national civil servants (one for each of the 27 Member States) just like the expert groups from the Council but there is a considerable difference between these two structures:

- The Council groups of experts are chaired by the national civil servant of the country holding the six-monthly EU presidency;
- By contrast, the comitology committees, whose composition is often the same, are chaired by a civil servant from the Commission (with rank of Director or Head of Unit).

This shows that, for comitology, the Commission is in the lead.

Management committees the Member States always say "Yes" to the Commission

The management committees were hugely important at the time of the Common Agriculture Policy. The pace of work of the working groups of COPA-COGECA (the trade union of European farmers) was set by the management committees at a time when I was the Secretary General. And the main part of COPA's lobbying was done via these same management committees. Export refunds, weekly tenders, storage, export certificates etc.,… most of the regulations concerning the income of the farmer, processor or trader went via the management committee.

The Commission proposal was followed by the committee vote. For the management committee to oppose a proposal, it must generate a qualified majority. There is a small problem as that never happens!

What do you mean never! Yes, never. For years, 20 management committees (crops, pork, wine, sugar, tobacco, bananas etc.), some of which meet every week, have been called on to take decisions on +/- 1,500 Commission draft regulations EVERY YEAR without ever rejecting a single one!

To be precise, in recent years, the management committee for the common organization of agriculture markets did on one occasion oppose the Commission. On 15 October 2009 it opposed a Commission proposal on levies for production in the sugar sector, but this is an exception rather than the rule.

Why does such a situation arise? Why do Member States give the Commission total freedom to adopt a considerable number of regulations? The explanation is simple and is very much open to criticism. The farming community is as

closed a community as there is. Everyone knows everyone and news travels very quickly. As soon as a draft regulation that has to be submitted to the management committee is announced, the agricultural world stirs, questions the ministries, lays siege to the Commission and everyone negotiates in the corridors BEFORE THE MEETING. When the meeting begins, it is generally enough to take note of the consensus around the table.

So it is not about a lack of control by Member States but about old lobbying practices which are still going on.

The regulatory committees: when they say "No", the Council takes things back in hand … up to a point!

As we have seen before, the procedure for regulatory committees is markedly different from the procedure for management committees. For management committees, the absence of an opinion means agreement and you need a qualified majority against a measure to reject it. Here, you need a qualified majority in favour of a measure to adopt it. So it is a lot more binding.

The number of cases when the regulatory committee (there are 83 of them in all) has opposed a Commission proposal is very limited. On average there are seven of these cases per year out of some 1,500 votes.

Let's focus on the seven cases where the Commission has been in the minority. In this scenario, the Council of Ministers takes things back in hand. That's what is called the "call back right". The Council says to the Commission: "We delegated a power to you. You have failed to execute it. We will take over."

The Council therefore takes over, facing 4 possible scenarios:

- The Council of Ministers disavows its regulatory committee and adopts the initial draft regulation by qualified majority; the Commission may also decide to amend its initial proposal to take account of the political message expressed by the regulatory committee;
- The Council of Ministers, which has three months to express its view, allows the deadline to pass. The Commission's proposal is adopted.
- The Council of Ministers expresses its opposition to the Commission's proposal and intends to amend it. This option is possible but it requires the unanimity of the 27 Member States
- The Council of Ministers rejects the Commission's proposal by a qualified

majority, confirming the position expressed by its regulatory committee.

Let's stick with the third option for a moment: the Commission is defeated by the regulatory committee and refuses to hear the political message that it expresses. It therefore sticks to its initial proposal. If the Council of Ministers wants to amend it, it can do so, but must get all 27 Member States to agree to that.

Here we have an unacceptable drift in the institutions where the Council must be unanimous to have its way over the Commission. The same is true when the Council wants to impose an amendment on the Commission for the codecision procedure.

•

Let's sum this up in a nutshell:

- 98% of EU regulations are decided via comitology;
- Comitology is controlled by the Commission, which chairs the management and regulatory committees.
- To impose on the Commission an amendment to a draft regulation in comitology, the Council of Ministers must decide UNANIMOUSLY with all 27 Member States!
- Up until the July 2006 reform, the European Parliament, one of the two legislators of the EU, was totally excluded from the major power that is comitology.

Comitology: an ongoing battle between the Commission and the European Parliament

Since it was created in 1962, comitology has given rise to minor rifts and major clashes between the Commission, the Parliament and the Council. Institutional balance is a subjective and not an objective concept though. It varies in space and time depending on where power lies within the three institutions and on the institutions' aspirations to gain more or less power:

- The legislation adopted towards the end of the 1970s and in the first half of the 1980s has therefore seen the Council strengthen its hand at the expense of the Commission which, one has to accept, has led to the EU (known as the EEC at the time) being much less effective;
- By contrast, the period from 1995 to 2009 is when the Parliament made its move and, as colegislator, made sure that it was fully involved in the implementing measures, which were to become very important as from 2006;
- The Commission has always wanted to stay in control of comitology. This was very clear during the three major reforms of comitology in 1987, 1999 and 2006. It is even clearer today with the upcoming fourth reform.

The 1987 reform: injecting some dynamism back into Europe

Let's travel back in time to 1985. When the Delors team came on the scene, Europe had ground to a halt. The Single Act of 1987 was designed to get the machinery moving again in order to create a Single European Market by

1993.

Apart from adding areas in which qualified majority voting applied and strengthening the Parliament's role, the Single Act established the Commission's leading role by granting it:

- the exclusive right of initiative,
- control of implementing measures (delegated to it by the Council as a general rule),
- the simplification of implementing measures.

Overshadowed by the Council and the member states, often reduced to the Council Secretariat, blocked by unanimity voting in the 1980s, the Commission's role took off as from 1987. The result was unbelievable.

But, at the time, the institutional triangle only existed on paper. Since 1987, the Parliament had been complaining about being kept totally out of implementing measures and had very little clout. There were just two key players: the Commission and the Council.

The situation changes in 1992 with the adoption of the Maastricht Treaty, which modifies the balance of powers by making the institutional triangle a reality. Under Maastricht, the Commission proposes and executes while the Council and Parliament are colegislators. Since then, the Parliament has been demanding more involvement in implementing measures in the same way as the Council of Ministers.

As the Parliament's demands to be associated in comitology procedures were ignored both by the Commission and the Council, MEPs began to bang their fists on the table.

- Their first show of exasperation came in 1994 when the Parliament rejected a draft Directive on voice telephony because the text envisaged implementing measures which the European Parliament was not involved in.

- In 1995, the Commission proposed a draft interinstitutional agreement involving the Parliament in the control of implementing measures but the Council opposed that! A lowest common denominator agreement to "better inform" the Parliament was agreed on. When it saw that no progress had been made, the Parliament was quick to block the budgetary headings for the comitology committees!

The 1999 reform: a small-scale reform that increased the European Parliament's frustrations

Another reform of comitology finally came along in 1999. The 28 June 1999 inter-institutional decision gave Parliament a right to information in comitology and the right to express an opinion. The information right gave the Parliament more information on implementation (the agendas of committees, reports of meetings, draft regulations etc.); whilst the right to express an opinion allowed the Parliament to vote on a resolution if the Commission went beyond and abused of its comitology powers.

These pretty small-scale rights only led to what the Commission's Principal Administrator Paolo Ponzano described as "a temporary truce", because the Parliament quickly realised how little influence it had on implementing measures. These were markedly growing in number, including in the area of financial services with the so-called Lamfalussy process.

The application of the 1999 decision was frustrating for Parliament on a number of counts:

- Between 2000 and 2006, the European Parliament only expressed objections on six occasions to the 5,000 or so draft implementing measures put forward by the Commission!
- In only one or two cases - notes Mr.Ponzano - did 'the European Parliament challenge [the Commission] for going beyond its powers whilst in four or five others the Parliament's objections referred to the content of the draft and not to abuse of power';
- 'This explains why the Commission practically never follows up the European Parliament's objections in a favourable way.'

Based on this rather poor record, should we regard the European Parliament as negligent or incompetent? Or is it insufficiently informed by the Commission, which does not always play fair in that it often forgets to send information to Parliament or drags its feet too much in doing so?

In a 12 April 2005 resolution, the Parliament expressed its discontent. This resolution concerned a draft decision on dangerous substances in electrical and electronic equipment. In this case, the comitology committee concerned voted on the draft on 10 December 2004 but the Parliament was only informed about the measure on 28 January 2005. In its resolution, the Parliament observed that it had been kept out of the dossier completely

as it had virtually never received any information from the Commission or the committee. Taking the view that this was not an isolated case, the Parliament asked the Commission to carry out a root and branch assessment of all the cases where the 1999 reform had not been respected in 2003, 2004 and 2005.

The results of that overall evaluation were presented in a Commission Communication in July 2005. The Communication indicated that, since November 2003, the Commission omitted to inform the Parliament fifty times out of a total of around 2,000 implementing acts!

- These omissions were mainly situated in the environment sector (19), the public health and consumer protection sector (18) and the humanitarian aid sector (10).
- In the environment sector, the omissions mainly concerned the activities of the CITES committee (protection of wild flora and fauna), the 'Habitat' committee (conservation of natural habitats), the 'Waste' committee and the 'Ozone depleting substances' committee.
- In the public health sector, the omissions were situated in the activities of some subgroups of the Standing committee on the food chain and animal health.

Another comitology reform via the draft Constitutional Treaty

In the long list of EU institutional reforms, it was now the 2001 Nice Treaty's turn. The Nice Treaty extended the number of areas in which codecision applied but did not introduce any change for comitology where the provisions adopted voted on in 1999 continued to apply.

In 2002, the Commission proposed a revision of the 1999 comitology decision that envisaged identical treatment for both the Parliament and the Council. The proposal envisaged:

- joint control by the Council and Parliament over the Commission's powers of execution,
- a reduction to two types of committees (revised regulatory procedure for acts with a general scope and simple consultative procedure for administrative and procedural acts),
- in this proposal, the Commission retained the last word if the two other institutions expressed reservations. This latter provision generated

objections from member states.

The discussions on this draft decision were suspended by the Council as the saga of the draft Constitutional Treaty started. Its 'creation' was delegated to a Convention. With 130 members (representing the European institutions, member states and national parliaments) and chaired by Valery Giscard d'Estaing, this Convention unexpectedly managed to reach a strong consensus although its achievements were diluted by the subsequent intergovernmental conference.

In short, the draft Constitutional Treaty:

- clearly strengthened the Parliament's role in the area of comitology
- set out a significant distinction between primary legislative acts, delegated acts and implementing measures (in other words, the draft Constitutional Treaty introduced a third category of legal acts between legislation and the implementing measures),
- confirmed the power of execution delegated by the Council to the Commission but fixed it on a case by case, directive by directive basis (in practice the Council can limit the powers of execution of the Commission for each legislative act in time and space),
- allowed the Council of Ministers and the European Parliament to oppose the adoption of a delegated act under the conditions set out by the basic legislative act.

This beautiful piece of architecture came crashing down when the French and Dutch said 'no' in the referendum on the draft Treaty and that is the reason why - instead of a stillborn Treaty - the three institutions agreed on an ad hoc reform of comitology, which was eventually adopted in July 2006 in a totally untransparent way.

The July 2006 reform: the European Parliament (nearly) gets what it wants

In February 2004, I published a book with Caroline Rosberg - or rather a technical study - entitled 'Comitology, committees and groups of experts'. In early 2005, the possibility of republishing it came up. Clearly we followed institutional matters in the Convention and then the Intergovernmental Conference on a daily basis. Then came the time for national ratifications. This was done by Parliament in 22 EU member states and via a referendum in Luxembourg, Spain, France, the Netherlands and Ireland. As we know, the latter three countries all said 'no'.

The comitology reform went down the drain with the draft Constitutional Treaty. The Parliament, Council and Commission resumed discussions to save comitology from being shipwrecked. Observers in the know were well aware that a reform was being worked on but nothing was filtering through and no-one was talking about it. That is why in September 2006 I was extremely surprised to discover that the comitology reform was in force. Adopted in July, it had already been in force for three months!

On the morning of 7 September, I received a phone call from a client: "I've been hearing talk of a possible revision of qualified majority for comitology. Can you find out about it?".

That very evening I met Joseph Daul at a conference given by Nicolas Sarkozy in the Hilton hotel. Daul and I go back a long way. As a former farmer and

President of COPA's bovine meat working group, he then became a European Parliament Vice-President and was one of the two negotiators appointed by the Parliament to negotiate the new reform of comitology. The other negotiator was Richard Corbett.

In response to my question about where things stood with the reform of comitology, Daul said that "it has been adopted". "Go and see the Director of the European Parliament's legal service, Mr Ribera d'Alcala, and he will explain all the details to you."

So it was that, a week later, on 14 September 2006, Mr Ribera d'Alcala spent an hour explaining to me the details of a major reform that no-one knew about.

The July 2006 reform can be explained in three key points

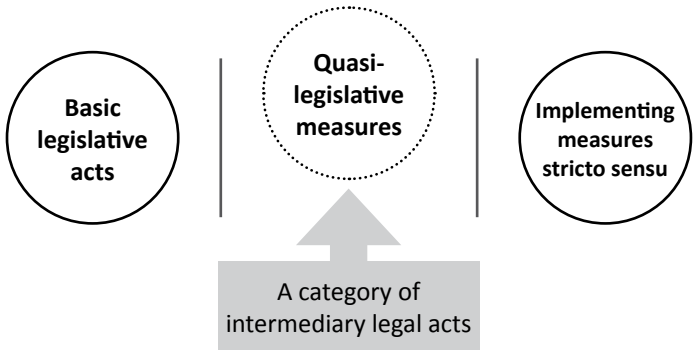
1. The implementing measures are divided into two categories: comitology stricto sensu (or traditional comitology) and quasi- legislative measures.

2. The European Parliament and the Council have a right of veto for quasi-legislative measures through the creation of a new procedure called the Regulatory Procedure with Scrutiny (RPS).

3. The distribution of implementing measures between comitology in its strictest sense and quasi- legislative measures is carried out via major revision (screening) of the Community's acquis [the full body of EU law].

Quasi-legislative acts and comitology "stricto sensu"

The 2006 reform introduced a new category of legal acts between basic legislative acts and traditional comitology: quasi-legislative acts.



The 2006 reform provides a very imperfect definition of quasi-legislative acts and comitology stricto sensu . In short:

- Quasi-legislative measures correspond to general measures - i.e. not individual ones - intended to amend non-essential elements of legislative acts adopted via codecision;
- By contrast, comitology stricto sensu corresponds to administrative measures which are often individual and have no political impact.

The distinction - although not totally precise - seems to be clear. We will soon see that it is nothing of the sort!

Nothing changes for comitology stricto sensu

The procedures described above continue to be in force and remain the same. The management committees and regulatory committees stay and vote on Commission proposals.

When the committee expresses a negative opinion on a Commission proposal, the proposal is sent to the Council of Ministers (this is called a call back right), which, depending on the circumstances, can approve, reject or amend the Commission's proposal (see pages 31-32).

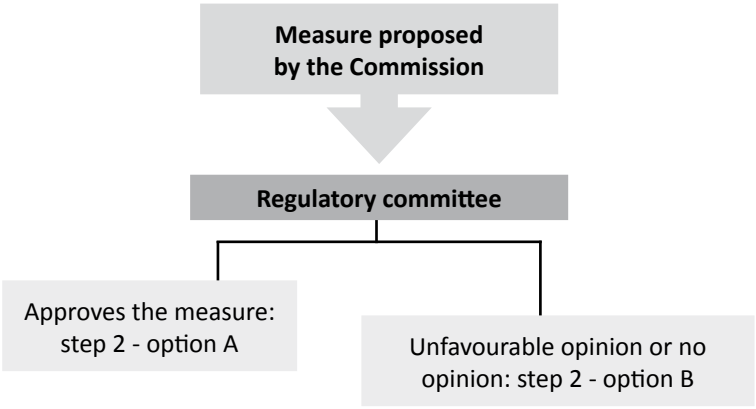
All the implementing measures related to agriculture remain the competence of management committees. The implementing measures sent to the regulatory committees are split into two categories: stricto sensu and quasi-legislative.

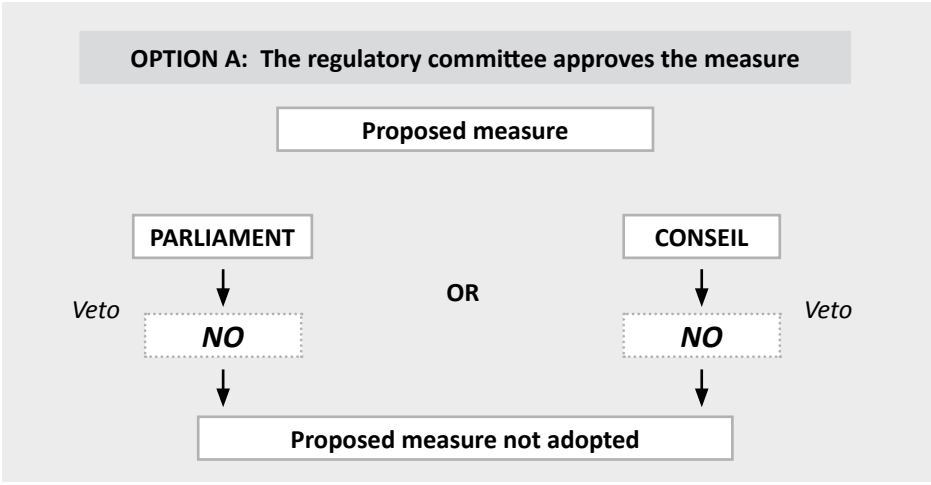
Regulatory Procedure with Scrutiny (RPS)

This procedure, which only covers quasi-legislative acts, gives the Council of Ministers and the European Parliament a right of veto.

The procedure is made up of several stages:

- The Commission writes a draft regulation,
- There is a vote in the regulatory committee by qualified majority,
- The draft is examined by the Council and the Parliament,
- The Council can wield its veto if it has a qualified majority and the Parliament can do so with an absolute majority of seats.





The 'screening' problem, i.e. how to set apart quasi-legislative acts from comitology stricto sensu ?

The task is a huge one because it entails revising the whole "acquis communautaire", i.e. around 250 directives. In theory this should not be too problematic since there should be little doubt on what is comitology stricto sensu (of an individual nature and particularly technical) and quasi-legislative measures (more general although not essential).

In practice, it will be a lot more complicated because, once again, each one of the institutions is pushing and shoving each other :

- The Commission wants as many measures as possible to be comitology stricto sensu because this does not involve the Parliament,
- By contrast, the Parliament wants as many quasi-legislative measures as possible to strengthen its influence at the Commission's expense.

Launched in autumn 2006, the screening process was meant to last a few months and be over by the summer of 2007 at the latest. In reality, it lasted for three years concluding in November 2009 with the Parliament vetoing the last group of texts to be screened.

'Screening' may turn out to be a titanic operation in practice. It entails: :

- revising 250 directives,
- this revision requires codecision for each basic legal act,
  - there are two aims behind this revision:
  - to redefine the scope of implementing measures for each directive,
  - to divide them into comitology stricto sensu and quasi-legislative acts.

To make the task easier, the 250 directives to be revised will be divided into six blocks: one that corresponds to priority dossiers (priority screening) and five others called 'omnibus'.

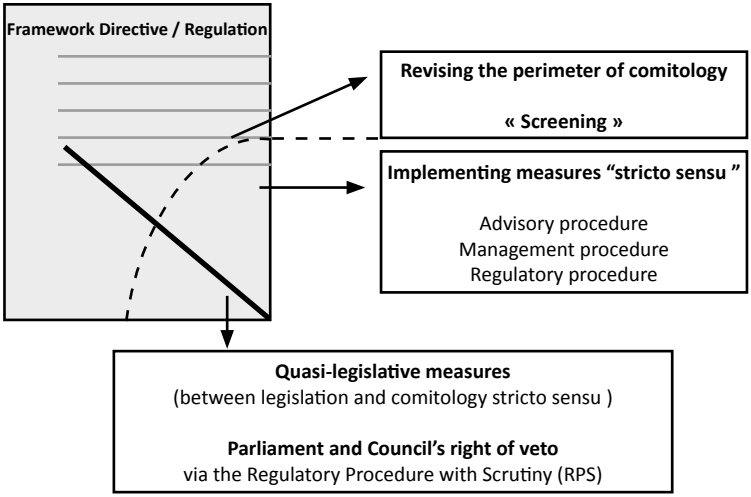
1. **Priority screening:** Priority screening: 26 legal acts covering key dossiers (electronic waste, financial services, health claims, moneylaundering, Genetically Modified Organisms etc.). The Commission, Council and Parliament reached an agreement on 11 March 2008 after 14 months.
2. **Omnibus 1:** made up of 59 legal acts, screening started on 23 November 2007 and ended on 22 October 2008. Duration: 11 months.
3. **Omnibus 2:** 47 legal acts. Screening started on 19 December 2007 and ended on 11 March 2009. Duration: 14 months.
4. **Omnibus 3:** four legal acts. Screening started on 19 December 2007 and ended in October 2008. Duration: 10 months.
5. **Omnibus 4:** 46 legal acts. Screening started on 11 February 2008 and ended in June 2009. Duration: 16 months.
6. **For Omnibus 5,** the procedure was launched in September 2008 but things got complicated because, according to the Parliament, 14 texts

were still to be revised and only two according to the Commission. On top of that comes the prospect of the Lisbon Treaty which, once ratified, will generate another comitology reform. For all these reasons, the Parliament rejected Omnibus 5 by a large majority on 24 November 2009.

Two examples give us a sense of who, out of the Commission, Parliament and Council, is winning the battle over comitology:

- **The issue of nutrition and health claims.** These are clearly individual measures but which, given their impact on consumers, generate a lot of political interest. After a long battle, the Parliament got its way: health claims, including their individual applications, will come under the category of quasi-legislative acts!
- The same goes for **the authorisation of genetically modified seeds.** Despite the undeniably individual nature of the measures, the Parliament has balked at the idea of not being involved with them given the extremely sensitive nature of the dossier. By contrast with the previous example, it was defeated on this one because the 11 March 2008 regulation does not provide the Parliament with a right of veto for authorisations of foodstuffs and genetically modified feed for animals.

As the 2006 reform was anything but straightforward, let's sum it up using some boxes:



Comitology in action: MEPs, civil servants and lobbyists face implementing measures

Rosé wine, pesticides, financial services, energy, CO2 emissions, labelling - comitology impacts on every European policy area. But perhaps 'impacts' is not the right word as it is too weak. It would be better to use 'surrounds' or even 'shapes' as comitology is everywhere, finds its way into everything and controls everything.

The figures speak for themselves. The EU decision-making process has become like an iceberg, with a small part that you can see and a big part that you can't:

- The part that you can see corresponds to the basic legislative acts (in simple terms, codecision), i.e. around 50 acts per year,
- The part that you can't see corresponds to implementing measures with around 2,500 acts per year! Around 2,000 of these are regulations in comitology stricto sensu and 500 quasi-legislative measures.

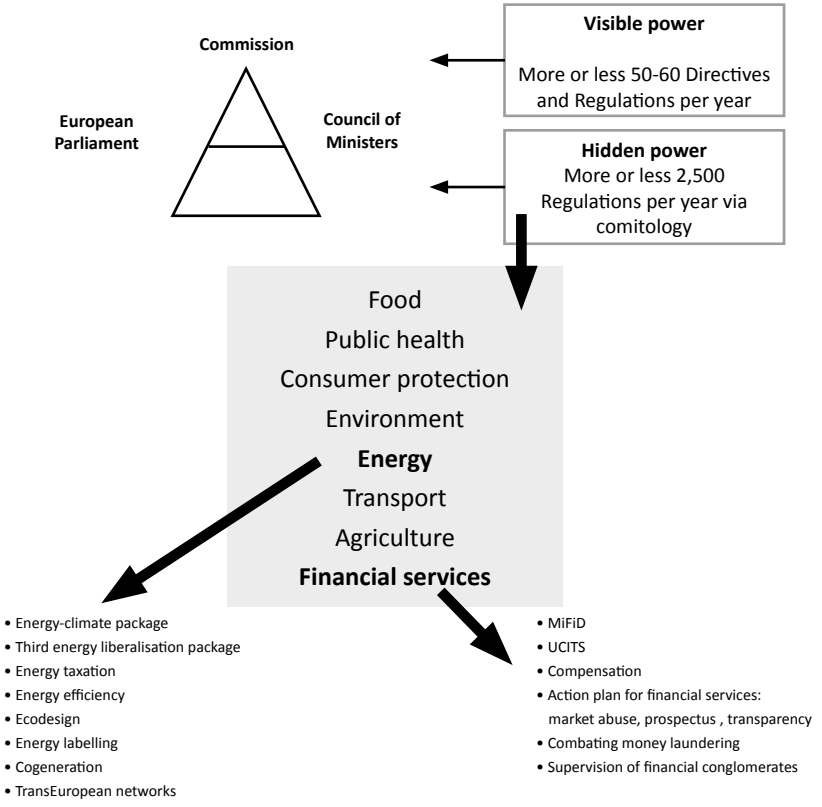
This difference is surprising and it highlights the lack of European political project and the fact that the EU is sliding towards inversed subsidiarity. The big projects are given to the member states and the technical details left to the European Union. That's exactly the opposite of the spirit of the Treaties!

Worse still, whilst codecision takes place in what is often a remarkably transparent environment bringing together civil servants, MEPs and lobbyists, comitology is completely the opposite. The list of committee members is not public and the agendas and minutes are published either late or not at all. An imbalance has therefore been created between the 'happy few' who understand the system and can take action in the comitology process and all those who do not understand it and are de facto excluded. This is clearly moving things in an undemocratic direction.

This direct assertion is shared by the whole of civil society represented in Brussels (professional associations, companies, NGOs, trade unions) and is also why I have written this book.

Comitology is everywhere but there is a lack of transparency

We have chosen two examples to give a clear picture of the situation: financial services and renewable energies.



The same demonstration could be given for all the other areas of European Union activity: environment, transport, agriculture, food legislation, pharmacy etc. No area escapes the clutches of comitology. Comitology is everywhere.

The Commission as the master of comitology

The word 'comitology' has become part and parcel of Community terminology in the last couple of years. That is how it is for Brussels. There are few European associations or NGOs that have not assessed the importance of implementing measures. But it's also true for member states. In Paris, Berlin, Bratislava and Warsaw for example, the word 'comitology' is well known and is roughly equated with the idea of being a higher, mysterious and non-transparent power.

But there is a gap between the intellectual understanding of what comitology is and the way in which it is put into practice on a daily basis. From 2008 to 2009, the European Training Institute gave comitology training to 1,500 European affairs practitioners. That's a lot. But comitology is a particularly tricky system. After three hours of training, you understand how it works but a week later you've forgotten the most important parts of it.

You need to work with comitology every day to get a grip of what it is all about. Apart from the Commission and specialised Council and Parliament officials, a limited number of lobbyists (perhaps a few hundred) can take effective action in the comitology process. But a few hundred out of 15,000 European lobbyists is not many and certainly not enough!

This lack of expertise also applies to the European Parliament. How many MEPs understand comitology? "I don't know any, but I could be mistaken," said a Parliament official. "Five or six at most," said another. The situation is better within the Parliament's administration but not much better. The ITRE (industry, research, energy) Committee has five civil servants who are well trained in comitology. So that's a maximum of 100 experts for 20 parliamentary committees. That's hardly anything and far too little.

The same can be said for the national administrations and permanent representations of the member states in Brussels. The Secretariat of the Council of Ministers has more comitology specialists but they work in a closed circuit. In this respect it is extraordinary to see how the Council and member states have underestimated the impact of the Lisbon Treaty on comitology. In the interviews I did before writing this book, I was extremely

surprised to note how far the negotiators of the Lisbon Treaty failed to assess the consequences of what they were signing, as we will see in the following chapter.

Thus everything is coming together to make the Commission the master of comitology, with which it is delighted. Without a political project, the Community's activities are sliding from being political to being technical. In that kind of system, influence is based on competence.

Already equipped with vast amounts of power, the Commission is increasing this power because only its civil servants have a full understanding of comitology. MEPs, national civil servants and lobbyists cannot fight this. The institutional balance has been destroyed, as has dialogue with civil society that is now unable to play its important role as a counterweight to this power.

Comitology in action: four examples

❶ Rosé wine

Here we are dealing with traditional comitology stricto sensu. This issue, which was widely covered in the media, got going in March 2009. Rosé wine producers from Provence discovered a Commission draft Regulation authorising mixtures of white wine and red wine to be called 'rosé wine'. That created an uproar in France.

The rosé wine case is worth recounting in detail. In 2007, I was involved in drafting the information dossier on the completely new wine reform (Common organisation of the market for wine). It was in particular about promoting "new oenological practices", i.e. blending, wood chippings, fruit wines, irrigation etc. You just need to quickly scan the Regulation to find all these sorts of information.

Eighteen months later, on 10 March 2009, a request came from France: "Can you advise us of a lawyer in Brussels to oppose this Commission proposal?" Paris was already at the litigation stage when it intuitively seemed to me that it would be possible to act via comitology.

I was given four days and a token budget to try to get to grips with the issue. A rapid analysis confirmed that a management committee was involved, which made the task difficult if not impossible because opposing the Commission in

a management committee requires a qualified majority of member states. After spending the whole of the Easter weekend on the issue, we discovered that the Commission decision does not hang on one comitology committee but on two:

- A regulatory committee to authorise the principle of blending;
- A management committee to allow the use of the 'rosé wine' label on blended wines.

Defeating the Commission in the management committee is difficult because you need a qualified majority of member states. It is easier in the regulatory committee where a simple blocking minority is enough for the decision to be transferred to the relevant Council of Ministers.

The discovery of this 'providential' regulatory committee - which no-one knew about until then - has changed the balance of power between the Commission and the member states in favour of the latter. Threatened with a blocking minority and a return to the Council of Ministers where wine-producing countries could oppose it, the Commission decided to withdraw its proposal a few weeks later.

This rosé wine case is symptomatic of the habit of professionals to act too late, i.e. too defensively. The dossier was known back in 2007 but it was only in 2009 and with their backs to the wall that wine producers started making their move! This is also a good example of how untransparent the system is and how complex the procedure is. It also shows what margins for manoeuvre comitology offers when people know how to use it.

The rosé wine dossier also confirms - if it were necessary - that influence in Brussels is based much more on technical competence than on political pressures.

❷ Body scanners

The body scanners dossier shows that pressure from the European Parliament can make the Commission back down. Here we are not talking about comitology stricto sensu but about a quasi-legislative measure using the Regulatory Procedure with Scrutiny (RPS).

In autumn 2008, the relevant regulatory committee (Civil Aviation Safety Committee) approved a series of technical measures proposed by the

Commission to be added to the basic common norms for safety in civil aviation.

As set out in the Regulatory Procedure with Scrutiny, the draft Regulation adopted by the regulatory committee is then sent to the European Parliament's Transport and Tourism Committee. After scrutiny, the members of the committee did not oppose the measures proposed.

But, unexpectedly, the Committee for Individual Liberties, Justice and Internal Affairs took on the dossier and would not allow body scanners to be included in the Commission's proposal because using them would, according to the Committee, infringe individual freedoms.

Short-circuiting the Regulatory Procedure with Scrutiny, MEPs from the Liberties Committee lodged a straightforward oral question in the plenary session of Parliament to put the dossier in the public domain.

This oral question had no legal value because only a veto by the Parliament can block a Commission proposal. But due to the file's sensitive nature, it generated a press campaign that was broadly hostile to body scanners as well as remarks from several member states that were along similar lines.

The result was that, without being forced to do so, the Commissioner in charge of the dossier, Mr Tajani, decided to withdraw the draft measures on 20 November 2008 and undertook to put forward, in January, a new draft Regulation that would not include body scanners.

This new proposal was never to see the light of day and it was only following the incident on the Amsterdam-Detroit flight that the issue of body scanners became a hot issue again.

There are some important lessons from this case. When the Parliament bares its teeth, the Commission backs down, even when it is in a legally strong position. The case also showed that the complexity of procedures opens up numerous tracks to influence it alongside the traditional decision-making process.

❸ The energy labelling case

Directive 92/75 on energy labelling authorises the European Commission to adopt technical implementing measures for a series of household equipment, especially fridges, ovens and TVs. These technical measures come under the

category of quasi-legislative acts where the European Parliament has a right of veto.

Just when the Parliament - via the ITRE Committee (industry, research, energy) - was preparing to revise Directive 92/75 (recasting) via codecision, the European Commission proposed implementing measures running counter to the Directive's revision! According to the Parliament, this initiative, a strange one at the very least, was designed to get round the reexamination.

To oppose this manoeuvre perceived as unfair, the European Parliament proposed adopting a resolution rejecting, via a majority of MEPs (with 393 votes out of 785) the implementing measures proposed by the Commission in application of Directive 92/75.

Two votes took place, on the same day, with a gap of a few minutes between them: the first to reject the Commission's implementing measure for fridges and the second one on TVs:

- In the first vote, the European Parliament used its right of veto and adopted the resolution by 396 votes, i.e. three more than the required absolute majority;
- In the second vote, the outcome was the opposite! The resolution secured 388 votes, i.e. five less than the required majority.

Thus, in two very similar and nearly simultaneous votes, the Parliament voted in two different directions. The first reaction of observers was to think that it was "the traditional margin of error for a vote in plenary". The eight vote gap might correspond to mistakes in the voting box and to MEPs who might have left the session or might have come back in between the two votes.

The European Parliament was not convinced by this explanation and decided to look into the result of the two votes more closely and look at how each MEP voted. It discovered to its amazement that it was not eight MEPs who changed the way they voted but 50! And the change in the way these 50 MEPs voted goes in both directions: some voted 'for' and then 'against' while others voted 'against' and then 'for'. It was not possible to find any logic or coherence to explain these changes.

Parliament officials who I contacted gave me the following explanation: "The system has become so complex that MEPs no longer understand what they're

voting for. In this particular case, it was even worse because they needed to vote for a resolution that would go against a Commission implementing measure. In other words, you needed to vote 'FOR' to decide in reality to vote 'AGAINST'.

In addition to this complexity, the energy labelling case sheds light on the ongoing battle between the Commission and the Parliament, a battle in which neither side pulls its punches! In an ethical sense, the Commission does not come out of this business at all well.

❹ Genetically modified organisms (GMOs) and pesticides

The extension of the use of comitology into all areas of Community activity has its origins in the July 2006 reform and in the lack of a European political project limiting basic legislative acts to simple framework agreements needing countless implementing measures.

In addition to these two reasons, there is a third, which relates to pesticides and GMOs in particular: the principle of precaution. In Paris, where it is set out in the Constitution, as well as in Brussels where it concerns a considerable number of legislative acts, the principle of precaution is a factor that must be taken into account in drafting and putting into practice a piece of legislation.

With regard to comitology, the principle of precaution has only added to the confusion in the interplay between the institutions, which is already overly complicated. For one of my interviewees, "the principle of precaution is paralysing politicians, who send the decision to an official who covers his back through an opinion issued by subtly chosen scientists".

Should we conclude that there is a form of subjectivity in the Community decision-making process? Are consultations done on the basis of what one wants to hear? The answer here is yes, not always yes but still yes.

Whether it be impact assessments, public consultations or scientific opinions, we see a growing number of rough estimates, of untransparent processes and of analyses carried out to cover people's backs.

The dossier on biofuels is enlightening in this respect, as is REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals), with

various impact assessments that cancel each other out. And what can one say about relations between the European Commission and its Food Safety Agency (EFSA) whereby each party passes the buck to the other.

These considerations are true for the dossier on pesticides and the one on GMOs, where subjectivity is very much at issue. For reasons that have not been clarified, DG SANCO (Directorate General for Health and Consumer Affairs) is a priori in favour of GMOs and against pesticides. Here, we are a long way away from the Commission's principle of the collegiality.

This means that, when a phytosanitary company has to defend authorising a pesticide in the annex of Directive 91/414, it is a major struggle that starts with an initial 'no' from the desk officer in charge of the dossier in DG SANCO through to his head of unit, his director and right up to the top of the hierarchy.

When you are faced with the determined opposition of a desk officer on recording a molecule, you are practically beaten before you have started. You will then need to fight on in the comitology committee, obtain a blocking minority and then convince the Council of Ministers to challenge the Commission. This never happens in practice because ministers, even when prepared by their officials, are a million miles from these microproblems.

Lobbying in comitology: a real obstacle course

- The first step is easy for a specialist: the identification of the comitology committee or subgroup concerned.
- Obtaining the meeting dates for the subgroup and committee is not much of a problem either. It is a little harder to get hold of the agendas.
- Meeting minutes are confidential. Getting hold of them is a difficult exercise. You can always wait for them to be published - often in a sanitised form - a few weeks or a few months later.
- Getting hold of the conclusions is all good and well but then you need to know who is taking part in the meetings so that you can meet them. This is where a problem arises because the Commission refuses to divulge the list of participants in comitology committees on the basis that it can change from one meeting to another.
- Lobbyists are forced to work in the dark to obtain information, identify members and then contact them. Industry has the handicap of generally being against DG SANCO and NGOs lack expertise about comitology.

Once the basic information has been obtained, the hardest thing still has to be done…

- Members of comitology committees are generally open to discussion and like to debate with experts from the private sector. It is therefore possible to raise their awareness, even to persuade them and to lead some to vote against the Commission's proposal to secure a blocking minority.
- As opposed to codecision, which is about persuading blocs (political groups), lobbying in comitology is much more one-to-one and based on technical credibility.
- When the Commission is faced with a blocking minority from the comitology committee, the draft Regulation goes to the Council of Ministers and its preparatory groups: the relevant Council working group and CoRePer I (Committee of Permanent Representatives I). Faced with a political message addressed to it by the comitology committee if it opposes the Commission's proposal, the Commission can either amend its text or decide to stick with it and to force it through.
- If the Commission amends its text in response to member states, the Council of Ministers can approve it by qualified majority. But if the Commission does not listen and wants to stick with its proposal, member states must be UNANIMOUS to impose their amended text on the Commission and on the original desk officer.
- All of this confirms the title of our first chapter, 'The minor European civil servant is the master of the Union'.

The 'call back right' system has its advantages because it is a sort of court of appeal but how can you ask ministers to deliver a detailed judgement on measures as specific as the authorisation of a pesticide?

Lisbon, another comitology reform: heading towards organised chaos

Remember the extremely opaque adoption of the July 2006 reform. History always repeats itself. Not that this new reform of comitology was a surprise; it was on the cards. But nothing suggested that it would be so radical, so opaque and so complex.

One thing is certain: the word comitology will disappear from a legal perspective. The only term to provide some common understanding of the subject will be barred from our vocabulary. From now on, we will speak of delegated acts (replacing quasi-legislative acts) and implementing acts (replacing stricto-sensu comitology).

For the rest of it, what a mess! When covering comitology, the Lisbon Treaty still leaves a lot of work to do when entering into force in December 2009. Delegated acts are regulated by Article 290, but Article 291 on implementing acts is nothing more than an empty shell. Indeed, it leaves the Commission, the Parliament and Council with the job to define - via a specific regulation - the procedure which will be applied to them.

It is only once the Lisbon Treaty was ratified that the Member States understood what they had signed. Germany was the first to measure the Member States' loss of power on delegated acts. In France, high-level civil servants also hastily took account of the Commission's new powers for delegated acts, but kept it under wraps, having been ordered by the

President's office not to criticise the Lisbon Treaty: it was, after all, considered as a linchpin to re-launch European integration.

Governments, national administrations, Ambassadors to the Union… at this stage, nobody understood that Management Committees and Regulatory Committees would disappear. Alone the European Parliament - or rather the three quarters of the Assembly following the issue - was euphoric, firmly believing in its victory given by this incredible redistribution of powers which nobody had seen coming!

If we take into account the full *acquis communautaire,*
four distinct comitology systems
shall apply in 2011:

- The old RPS system - Regulatory Procedure with Scrutiny - applies to legislative acts adopted before the entry into force of the Lisbon Treaty (see pages 41 and 42);
- The new procedure for delegated acts;
- The procedure for implementing acts which, once adopted, will absorb the old stricto-sensu comitology system;
- Last but not least, a transitory period for legislative acts tabled by the Commission before the entry into force of the Lisbon Treaty but not yet adopted by the Council and the Parliament.

Yes, really, organised chaos!

Back to the draft Constitutional Treaty

The draft Constitutional Treaty provided for an in-depth reform of comitology aiming to put the Council of Ministers and the European Parliament on a strictly equal footing for execution measures.

The July 2006 reform stops halfway down that path. It gives the same right of veto to the Parliament and Council for quasi-legislative acts but it excludes the Parliament for comitology stricto sensu.

Provisions and articles on comitology envisaged by the draft Constitutional Treaty have clearly found their way into the Lisbon Treaty, except for the classification of legal acts.

A new classification of legal acts

Contrarily to the Treaty of Nice, the **draft Constitutional Treaty** provided a hierarchy of legal acts:

- European laws and framework laws,
- Delegated European Regulations,
- Implementing acts.

Three categories of legal act coexist in the **Treaty of Nice** (which remained in force because the draft Constitutional Treaty had not been ratified) and the 2006 reform:

- Basic legislative acts,
- Quasi-legislative measures,
- Implementing measures.

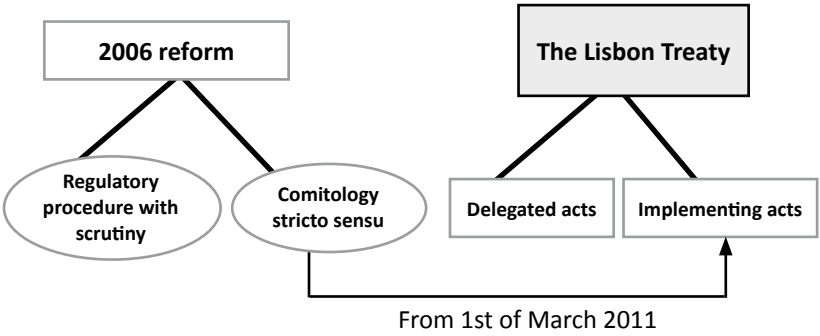
The **Treaty of Lisbon** returns to the hierarchy of legal acts proposed by the draft Constitutional Treaty but uses different names:

- Legislative acts,
- Delegated acts,
- Implementing acts.

This classification seems relevant to us because it is clear:

- Legislative acts correspond to basic acts;
- Delegated acts to quasi-legislative measures;
- Implementing acts to comitology stricto-sensu.

New Comitology: a three-tier architecture



Tier n°1: The Regulatory Procedure with Scrutiny (RPS) remains in application for legislative acts adopted before the Lisbon Treaty

For the *acquis communautaire*, i.e. legislative acts adopted before the entry into force of the Lisbon Treaty, the Regulatory Procedure with Scrutiny (RPS) will still be applied for "quasi-legislative acts".

This system functions according to the diagram on pages 40 to 42: the Commission submits a regulatory proposal to a Regulatory Committee composed of one representative per Member State and chaired by an EU official. Once examined by the Regulatory Committee, the regulatory project is submitted to the Council of Ministers and to the European Parliament, who have the possibility to veto the regulation respectively by qualified majority or by an absolute majority.

Regulatory Committees shall remain active, but only for this type of procedure. However the "call-back right", which allowed the Council to take over if the Regulatory Committee voted against or failed to take a decision on the Commission proposal, disappears.

This procedure, which covers several hundreds of quasi-legislative acts every year, will remain in force over the next years. Nevertheless, its perimeter will tend to shrink.

In fact:

- When the basic legislative act will be the subject of a revision, its comitology dimension shall be shifted to the post-Lisbon regime. This will be the case, for example, for REACH;
- Some European policies could be the subject of a re-examination of implementing acts or a "screening" aiming to align their comitology provisions with the Lisbon Treaty. This will notably be the case for the Common Agricultural Policy, Common Market Organisations (CMOs) and connected measures (prices, quotas…). When it comes to agriculture, one can expect an avalanche of delegated acts.

It would seem reasonable to assume that from then on, the Regulatory Procedure Scrutiny (RPS) will remain in application during the 2011-2014 period, but with a gradually receding perimeter which would justify a harmonisation of pre- and post-Lisbon comitology procedures in 2015.

Tier n°2: delegated acts: Decision-making power belongs to the Commission

How do you define delegated acts? According to Article 290 of the Treaty of Lisbon, delegated acts "are non-legislative acts of general scope that complement or amend certain non-essential elements of the legislative act".

That roughly covers the definition of quasi-legislative measures introduced by the July 2006 reform. But **the Treaty of Lisbon clearly amends the balance of power between the three institutions:**

- With the Treaty of Nice, the Council of Ministers holds the power of execution that it delegates to the Commission. The July 2006 reform confirms this principle but offers the Council and Parliament a right of veto for quasi-legislative acts;
- With the Treaty of Lisbon, the situation is very different: from now on the power of delegated acts lies with the Commission with a **subsequent control** by the Council and Parliament according to conditions set out on a case by case basis in each basic legislative act.

Each basic legislative act establishes the perimeter and the modalities of adoption for delegated acts: A democratic system on the surface

- Under the Regulatory Procedure Scrutiny (RPS) procedure, modalities are constant: the Commission proposes a quasi-legislative act, which is submitted to the Regulatory Committee, and can then be vetoed by the Council or the Parliament. There are no derogations to this system. The new procedure for delegated acts is diametrically opposed to the RPS (where the same procedure always applies) because its modalities can vary from one basic legislative act to another.

- Legislators (by principle the Council and Parliament for basic legislative acts adopted under the Ordinary Legislative Procedure, formerly known as codecision) will in fact set out which measures fall under comitology for each basic legislative act, as well as the repartition between implementing acts and delegated acts. The basic legislative act will also define the terms and conditions of the Commission's mandate: duration, scope, possible mandate removal, Council and Parliament's exercise and modalities for application of the veto, …

- We assessed the complexity and the ongoing battles that the system is going to give rise to. What is striking here is that the conditions of the mandate are going to be essentially subjective. They will depend on the issue, on the political sensitivity of the dossier, on the good will of the actors and on the general institutional climate.

- The Commission (essentially the Secretariat-General) can sweep objections away by preparing a series of models or templates of mandates that can apply to all the different scenarios. As for the length of the mandate, the Commission wants an undetermined length, or, failing that, an unlimited renewal of its mandate!

- This system appears to be democratic : the perimeter of comitology for each basic legislative act, the duration of the Commission's mandate, veto right exercise modalities, … all of this must be accepted by the Council and the Parliament acting as co-legislators.

- Practice will be different. Under the new system, the Commission proposes delegated acts and adopts them. Scrutiny and revocation can only take place afterwards. As the only body to fully understand these complex procedures, and without the oversight of the Regulatory Committees (as

we will see), the Commission will have a free assembly line to propose and adopt delegated acts. This tendency is already undeniable.

Member States and Parliament hardly consulted for the establishment of delegated acts

- The Commission communication of 9th December 2009 which interprets Article 290 envisages consulting "the experts from the national authorities of all member states in due time and in a systematic way so that they can provide a useful and effective contribution". The Secretariat-General informed us that "the Commission can consult national experts, but on a case by case basis and with no vote". In this communication, the Commission ignores the Parliament, which it intends to inform but not consult!
- All our interviewees in the Commission and the legal service of the Institutions confirmed to us that "the Commission can do without consulting national experts and the European Parliament for delegated acts. If they are consulted, no vote is organized. All of our interlocutors confirmed that, "if the Commission went to the Court of Justice on this point, it would win".
- Our interviewees - who on this very technical aspect are all Commission or Parliament officials - think "that the national committees of experts (i.e. comitology committees) will not intervene for delegated acts. By contrast, national experts will be consulted as an informal network to express their views"!
- Following the negotiations between the three Institutions, it appears that stakeholders will be consulted during workshops. These working groups will be constituted on an ad-hoc basis, with the Commission free to choose their composition from an extremely broad panel of potential members: a few national civil servants, one or two Members of the European Parliament, two or three lobbyists and a handful of experts representing diverse interests.

  In other words, the Commission will do as it pleases when it comes to consulting stakeholders.

It is important to note that provisions summarised in this section are "auto-sufficient", that is to say of immediate application. Most interinstitutional dialogue will take place when adopting the basic legislative act, through the definition of a more or less restrictive mandate delivered by the Council and Parliament to the Commission. Lobbying on delegated acts will require early

upstream intervention, during the elaboration of the basic legislative act. Otherwise, it will already be too late.

Tier n°3: Implementing acts, Who is in charge? The Member States or the Commission?

According to EU civil servants, post-Lisbon comitology will not affect the balance of powers between the three main Institutions.

For delegated acts, they argue that comitology modalities for each act are established under the Ordinary Legislative Procedure (codecision) and that every delegated act can be vetoed by the Council or the Parliament. This theory will not resist to practice. The Parliament and the Member States are incapable of keeping track on a daily basis of the hundreds of delegated acts which will be adopted every year.

When it comes to implementing measures, the Commission's reasoning is more subtle. It is based on the first paragraph of the Lisbon Treaty's Article 291, which states: "Member States shall adopt all measures of national law necessary to implement legally binding Union acts."

The Commission believes that this article means that the Member States are - if one may say so - the Masters of implementing acts. They forget to mention the second paragraph of the same article, according to which; "Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, …"

Despite the fact that Article 291 contradicts itself between its first and second paragraph (!), things are clear: the Commission is in charge of delegated acts and likewise for implementing acts.

What differences are there between delegated and implementing acts?

Their legal definitions are very imprecise. Let's simply say that basic legislative acts, which are usually Directives or Framework Directives, regulate the essential provisions, or in other words the political and general aspects.

Delegated acts also cover measures of a general nature, but non-essential. Delegated acts can modify the non-essential provisions of basic legislative acts or establish ensuing non-essential provisions.

Inversely, implementing acts cover more limited measures: of a non-general and non-essential nature, but individual, administrative and without any political incidence.

European legislation can thus be placed into clear categories:

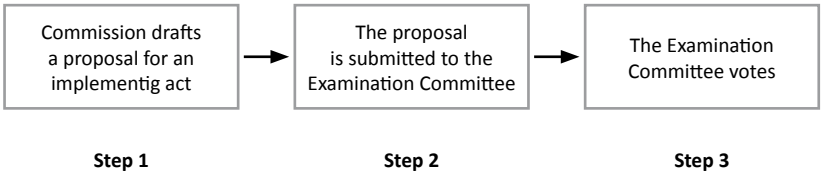
- Category 1 acts (basic legislation),
- Category 2 acts (delegated acts)
- Category 3 acts (implementing acts)

The adoption procedure for implementing acts: extreme complexity

In March 2010, the Commission proposed a regulation establishing the adoption procedure for implementing acts. This project submitted to the co-legislators - Council and European Parliament - was the object of a political agreement in January 2011. The final text has not yet been published in the Official Journal.

What is striking in the adoption procedure is its extreme complexity combining derogations, exceptions and transitions.

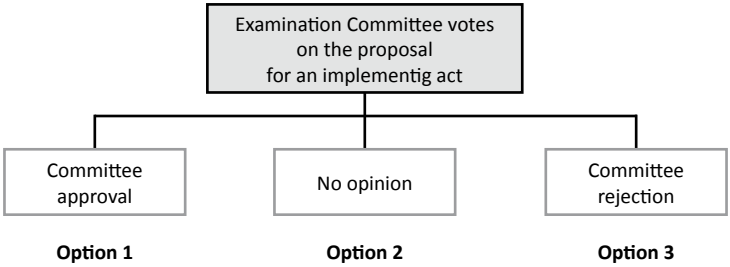
To put it as simply as possible, the procedure will be organised as follows from the 1st of March 2011 onwards:



Step 1: The Commission prepares a regulatory proposal (the same applies for basic legislative acts and delegated acts; only the Commission can propose and draft an implementing act);

Step 2: The proposal for an implementing act is then submitted to an examination Committee (replacing the Regulatory and Management Committees). This Committee, composed of one representative per Member State and chaired by an EU official, examines the proposal.

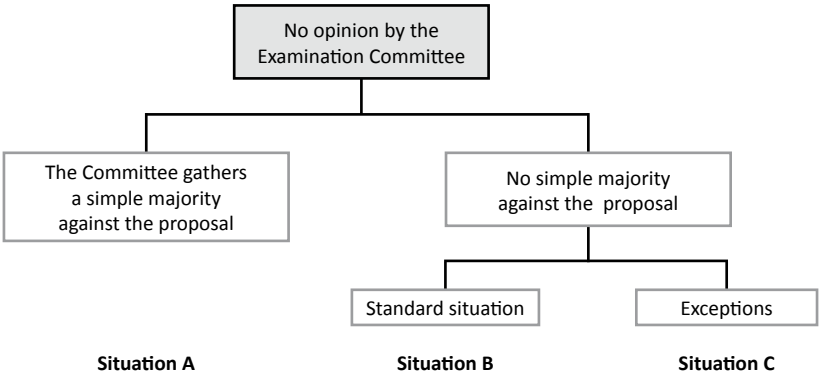
Step 3: Following the examination, the examination Committee votes by qualified majority. At this stage there are three options:



Option 1: The examination Committee approves the Commission's proposal by qualified majority. The implementing act is adopted.

Option 2: The examination Committee rejects the Commission's proposal by qualified majority. The Commission can then either modify its proposal and start the procedure again from scratch; or it can appeal to a Committee composed in the same way but at a higher hierarchical level. The examination Committee must approve the proposal by qualified majority or it is definitely rejected.

Option 3: The examination Committee gives no opinion, that is to say it is incapable of establishing a qualified majority in favour or against. This is where the real difficulties start with different situations!



Option 3 - Situation A: The Committee puts together a simple majority against the Commission's proposal (at least 14 members out of 27). In this case the Commission lodges an appeal like it does for Option 2.

Option 3 - Situation B: The examination Committee cannot set a simple majority against the Commission's proposal. In other words, the Committee's opposition is weaker than in Situation A. In this case, the Commission can adopt its proposal (unless the exceptions described in Situation C arise).

Option 3 - Situation C: For some sensitive issues (taxation, financial services, health, security, animal and plant health), the Commission cannot adopt its proposal when the examination Committee has not gathered a simple majority, contrarily to Situation A. The Commission must in this case either modify its proposal or lodge an appeal.

A special case for trade agreements: Implementing acts for trade agreements fall under a special regime with derogations and transitional periods which are so complex that it is not worth going into the detail, unless the reader wants to be given a good reason not to finish this book!

This system is quite simply unmanageable. Considering the extremely high number of implementing acts - in the range of 2,000 annually! - it would be an illusion to think that the Member States have any means to control the Commission, which is acumulating four levels of power:

- It has the initiative (only the Commission can propose an implementing act),
- It holds the pen and drafts the proposals,
- It chairs the examination Committee, for which it sets the agenda and calendar of meetings,
- The European Parliament is excluded from implementing acts (one could have imagined a seat for the Parliament in the examination Committees, which is not the case).

Delegated acts and implementing acts: each one of the Institutions at war with the other two to maximise its powers!

One can believe that the Commission would be satisfied with the gain of power it has received courtesy of the comitology reform. But this is not the case. It still needs more!

Thanks to the Lisbon Treaty, the Commission is now in control of delegated acts which it can propose and adopt. Implementing acts also award the best share to the Commission at the expense of the Parliament and the Member States.

But instead of playing the card of institutional balance, each Institution plays its own partition with a view to maximise its influence:

- The Member States, which only became conscious of their loss of power over delegated acts at a very late stage, will favour implementing acts, because their voice will still be heard in the examination and appeal Committees (at least that is what they think);
- To this date, the European Parliament still has not taken full measure of the comitology system's underlying logic. Although it is disappointed to be left out of implementing acts, it believes that it can supervise the Commission for delegated acts. The Parliament will thus favour delegated acts to implementing acts.
- Once again, the Commission is more subtle. It has fully understood that the Parliament and Council's veto powers will be very difficult to use in practice, in fact they will almost be virtual. Theoretical. However it believes that the examination and appeal Committees reduce its margin for manoeuvre. The Commission - like the Parliament, but for diametrically opposed reasons - will prefer delegated acts to implementing acts.

This tendency can already be observed since a few months under the first applications of the new comitology system. The Directive on the energy efficiency of buildings (Directive 2010/31/EU) sets up all its comitology measures around delegated acts without mentioning implementing acts.

This is also the case for the RoHS Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment, where delegated acts are preponderant.

A Pyrrhic victory for the Commission

The first edition of this book was published in January 2010. One year later, its title is more appropriate than ever. Comitology hijacking European power. It is exactly that.

This institutional drift - which the Member States did not see coming when they ratified the Lisbon Treaty - raises serious concerns:

- First of all, it puts into question the Council/Parliament/Commission institutional balance, with the latter a clear winner.
- This improper solicitation of implementing acts is all the more significant when one considers that they represent 98% of acts, regulations and directives adopted every year by the Union. Remember the numbers: 50 Directives adopted every year under the Ordinary Legislative Procedure (codecision) against 2,500 comitology regulations!
- With successive enlargements, the Union is so diluted that it increasingly depends on the lowest common denominator. Directives become framework Directives which only set a few broad principles and delegate most provisions to comitology and thus to… the Commission.
- The essential political filters set up to supervise and control the Commission have disappeared: the prerogatives for proposal and adoption awarded to the Commission for delegated acts combined with the suppression of Regulatory Committees; a high level of autonomy for the Commission with implementing acts and no implication for the European Parliament.
- Worse still, the Commission's gain of power is not desired by the Member States. They will have to endure it. And it does not apply to the political level of the Commission, but to the lower levels, the bureaucrats, who become "the true Masters of the European Union".
- The Parliament and Commission's tendency to prefer delegated acts rather than implementing acts will turn out to be particularly counter-productive. Choosing to qualify, for the simple sake of political opportunism, a measure as a delegated act when it is legally speaking an implementing act will lead to an increasing number of appeals to the European Court of Justice.
- Finally, what will lobbyists do when facing such an avalanche of procedures? First they will need to understand them, which will already take some time. But what will happen when a lower-tier civil servant will get a delegated act adopted without even consulting stakeholders and the other Institutions, even if he has a good reason? This comitology reform is also a denial of European civil society which - via European trade associations - had such an important part to play during the creation of the European Internal Market.
- Objectively, one must recognise that some of the Commission's Directorates General work with civil society in an open and transparent way, whilst others breed secrecy and consult selectively.

This being said, the fact that Directorates are open or closed to dialogue will do little to heal the harm done by post-Lisbon comitology.

The status quo is unsustainable: thoughts on how to adjust Community decision-making

Should we put forward proposals for a reform of the institutions? Yes, because we need to express ourselves. But in whose name? And how legitimate are these proposals? Some thoughts, which are modest ones by definition, are appropriate here and can serve as a basis for discussion.

But first of all I must point out something that I am convinced of. The financial crisis, environmental challenges, employment policy, the distribution of income etc. are among the major problems for which a solution must be sought at the EU level. We must not return to defending national interests. Today we do not need less Europe but more Europe.

And yet for ten years now the EU has seen itself being watered down. By enlarging, when it needed to deepen, it has turned into a big market. There is no political project and no leadership any more. The result is that it has slid from being political to bureaucratic.

That is how comitology (delegated acts and implementing acts) have come to account for 98% of the EU's regulatory activity. Thus Community Directives, which made the Single Market a success, have become just framework laws.

The reform of comitology introduced by the Treaty of Lisbon puts the finishing touches to this vicious circle. It breaks the balance of powers and invents the

concept of inversed subsidiarity. Economics and politics is up to the Member States while standardisation and technical application regulations are up to the European Commission.

From my interviews, a sentence from a Parliament official keeps coming back to me: "Deep down, in this matter, no-one has been up to the task." That is what it is all about. But we should not give up just because of that because "there is no need to hope to be entrepreneurial, nor to succeed to persevere".

1. Top priority: Give the Commission a political boost

This demand does not require any reform of the Treaties. I am not happy with Mr Verhofstadt who, as an expert in European affairs and a personality with a high reputation, restricts himself to handing out lessons. He was an undeclared candidate to be the President of the Commission but he let things happen without intervening and without ever presenting an alternative project to the programme of continuity set out by Mr Barroso.

Ultimately there are too many diplomats and not enough decision-makers in the European Union. The choice of new EU leaders has not helped make that criticism go away. Mr Barroso and Mr Van Rompuy, Ms Ashton and Parliament President Mr Buzek are first and foremost diplomats before being decision-makers.

Of course, the EU of 27 requires compromises, respect for the others and the ability to listen. But now is a time when not to act would be a mistake. The first quality of the appointed high officials is not to be diplomats but to be people who come up with solutions and, where necessary, people who can manage a crisis.

What is happening on the international and European stages provides countless opportunities to give the EU some momentum: major works, research and development, new forms of energy, education, harmonisation of social welfare systems, etc. It is about giving a soul back to Europe and involving citizens, who are still mostly pro-European despite the ups and downs. And it is about fending off inversed subsidiarity.

2. Give priority to the Commissioners above the 'technostructure'

One of the essential contributions of the Treaty of Lisbon was to substantially

cut the number of Commissioners. For the EU of 27, the number of Commissioners was due to be cut from 27 to 18 by 2014. Unfortunately, the second Irish referendum put paid to this measure.

Officially, in the politically correct language which couches everything concerning Europe, the reason was to appease Irish voters so that they voted the right way.

In reality, keeping a Commissioner has never been a key factor for the Irish voter. The real reason was the Member States, none of which could contemplate losing "their Commissioner".

Now Commissioners are nationality-neutral. They cannot in any way represent their national interests. Worse still, the Commission's top heavy structure is counterproductive. The more Commissioners, the less the Community's executive has shape and direction. It's ironic but that's how it is.

The 'one Commissioner per country' rule is not tenable. Its extension beyond 2014 has not yet been ratified by the Member States and I have no doubt that it will be reconsidered before then.

3. Challenge the Commission's sole right to propose legislation

In 1987, the Single Act gave the Commission the sole right to propose legislation. It alone can table draft Regulations and Directives. This monopoly - confirmed by the Treaties of Maastricht, Amsterdam, Nice and Lisbon - covers all the regulatory procedures of the EU: consultation, codecision and implementation.

In any democratic state, the right to propose legislation belongs to both the executive and the Parliament. Usually the executive proposes more legislation. But while the European Commission can be described as "an executive body", it cannot be compared to a Government.

Granting the sole right to propose legislation to the Commission is an anomaly that it is worth reviewing. The European Council (a body providing momentum if there ever is one) and the European Parliament must over time - and according to particular conditions to be determined - be able to table a draft law.

4. Replace unanimity with a superqualified majority to impose an amendment on the Commission

Not only does the Commission enjoy the sole right to propose law but it has a supervisory capacity - even acting as a kind of guardian - over the Council of Ministers and the European Parliament during the adoption of legislation.

This guardianship is so important that the Commission can legally oppose any amendment voted on by the Parliament or the Council without having to justify its position. Thus, for codecision, the Council of Ministers has to obtain the unanimous agreement of all 27 Member States to impose on the Commission an amendment that it has rejected.

In comitology, the same goes for the 'call back right' when the Commission, rejected by a regulatory committee, sees its comitology proposal sent to the Council of Ministers. Here again, if, although defeated, the Commission refuses to amend its proposal, the Council must do no more nor less than secure the unanimous agreement of all 27 Member States to impose its point of view.

Such a system is not acceptable because it once again gives primacy to the administrative side of things over the political side of things. Here we could imagine the principle of a 'superqualified majority' within the Council + Parliament duo to impose an amendment on the Commission.

5. Reduce the subjectivity of decisions and consultations

I have experienced the Community decision-making process in all its forms during my 35 years as a European affairs practitioner.

- I have always - but especially in the last ten years or so - been struck by the rough and ready nature of consultations. The Commission does consult but it does so as it sees fit. The agricultural advisory committees are even an example of an 'anti-consultation'. And what about the groups of experts who are in charge of helping the Commission at the drafting stage? Their members and their work area are like an impenetrable black box and are the opposite of the objectives of transparency advocated by the Secretariat General.
- The impact assessments and public consultations are an important element in the preparation of Community legislation. But we often note a lack of rigour in the formulation of questions and the use of replies, making the

work, which should be objective, subjective and open to challenges.

- The allocation by the Commission of significant funding for studies to be carried out, subsidies granted to some trade unions, to some NGOs, to some foundations or think tanks, to some press bodies and to some university researchers is not to be criticised per se but merits greater transparency and stricter controls.

6. Transparency, training and simplification

For a European affairs practitioner, a national MP, a head of a company, comitology is a real obstacle course. It is not acceptable that there is such a lack of transparency for such an important subject.

The management of delegated acts laws and implementing acts must quickly become as transparent as codecision. The list of committees, agendas, minutes, proposed amendments, committee members must all be immediately put on line on the Community information websites.

DG SANCO's initiative to make comitology more transparent via its 'Comitology planner' is worth highlighting. Similarly, some recent Directives (Ecodesign) envisage involving professionals in the drafting of draft Regulations in comitology. This is only a small step in the right direction.

Training people is also a requirement because in Brussels influence comes with competence. The Commission owes its strength to its full understanding of the Community decision-making process. By contrast, the European Parliament, national parliaments, national and professional administrations often lack expertise, especially in the comitology phase.

Finally, there is simplification. Here a lot needs to be done and significant improvements can be made, for example in the naming of structures. Why give the same name to groups working in the proposal phase and in the implementing phase when they have neither the same members nor the same competences? How do you find your way? And what is meant by the 'Friends of the Presidency' or 'Antici Group' or 'Mertens Group'? Even those well versed in what is going on find themselves getting lost.

Simplification can be achieved if you want to achieve it. At one time, codecision took three readings. To simplify things, the third reading was replaced by a conciliation committee in a smaller group. This saved time and increased efficiency.

7. Reduce the number of delegated acts Involve the Parliament and the Council in the preparation phase for delegated acts

- Out of the 2,500 implementing acts adopted every year, 500 are said to correspond to quasi-legislative measures, or, according to the new terminology, delegated acts.

  The explanation is simple. The more Directives are of a general nature, the more the number of delegated acts rises. Lacking in political will and perseverance, colegislators stick to framework agreements and pass on their responsibility to the implementing phase, i.e., to the Commission.

  Restoring the importance of Directives and substantially reducing the number of delegated acts and implementing acts are additional ways to strengthen the weight of the EU at the expense of its bureaucratic aspects.

- As we have seen, the Treaty of Lisbon gives the Commission the power to adopt delegated acts. Of course, the Commission consults the 'network of national experts' in the drafting stage of these acts. That is not enough.

  It seems to us essential - and this would not go against the Treaty - that the Parliament is involved in the preparatory phase. It would be better if the Parliament and Member States agreed to set up restricted conciliation committees that could issue a joint opinion on a draft law.

  By restricted conciliation committees we mean joint Parliament/Council committees with a more limited number of members than traditional conciliation committees.

8. Give Parliament a role in implementing acts

In general, the Commission and lawyers in the institutions think that the Parliament should not be involved - even as a second tier player - in the implementing acts that constitute administrative or technical measures.

The Commission's intention to bring together management and regulation committees seems opportune to us as is the elimination of the 'call back right' but it would be worth - here too - involving the Parliament in the same way as the Council because both are colegislators.

To do so, one could imagine establishing similar types of restricted conciliation committees whose negative vote (if they have a majority, which still needs to be defined) would force the Commission to reexamine its proposal.

If you are not a professional working in EU affairs, perhaps you have, during your trip within the Institutions, a new take on the EU.

2010-2011 will no doubt be decisive years. Will we continue the slide towards a soft Europe or are we going to react by giving it some momentum? The latter must necessarily come by restoring some institutional balance. The choice of the major political direction would be up to the Member States and the Parliament and the responsibility - clearly framed - of putting that in practice would be up to the European Commission.

Your take on lobbying will no doubt also have evolved. In the complex institutional set-up that we have described, influence is not related to manipulation or money but competence. And this lesson is particularly positive because it lifts our profession up to the level of being a counterweight in an economic and democratic sense as well as with regard to citizens.

If you liked this book and if you think it appropriate to have it published in another language, please feel free to contact me via my email address:

dg@clanpa.eu

EUROPOLITICS

THE EUROPEAN AFFAIRS DAILY

The centrepiece of EU news

www.europolitics.info

Printed in Belgium by IDENTIC s.p.r.l.

Brixtonlaan 5
1930 Zaventem
Tel.: +32 (0)2 737 52 22
Fax: +32 (0)2 737 52 23
info@identic.be
www.identic.be

With technical support from
Vicky Marissen
and ***Yves de Lespinay***

The Member States have signed up to an infernal system

"It's like a detective story, an Agatha Christie, ..."
Jiri Havel, MEP

"An enormous eye-opener"
Peter Kramer, European Business Review

Daniel Guéguen

On the Brussels lobbying scene for 35 years, he knows all the ins and outs of the complex EU machine. His many books have been widely published throughout Europe. He teaches at Georgetown, Harvard, Monash, ULB, EDHEC, Collège d'Europe, HEC, London Metropolitan, George Washington University, ...

Daniel is a federalist and a supporter of a Europe of citizens.

ISBN 978-2-930586-01-4
9 782930 586014

Price: €10