

Comitology and Parliamentarisation: Strong Causality and Weak Interaction

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Abstract

The comitology procedures have been an integral part of the European Union legislative decision-making process. The negotiation of the legal framework of the comitology procedures, as well as the administrative practice of the European Commission in drafting implementing acts, is relevant to the legal research on the evolution of European integration. This article studies the dynamic relationship between the process of regulation and implementation of comitology procedures, and the process of parliamentarisation of the European Communities and later of the European Union. Two hypotheses are tested. The first hypothesis claims that there is a clear causal link between the use of newly acquired budgetary and legislative powers of the European Parliament, and the limitation of control by Member States on the Commission by the comitology committees. The second hypothesis claims that a weak system interaction exists between the notion of parliamentarisation and the reform of the comitology system.

Keywords

Comitology; Parliamentarisation; Feedback loop; Community method; Politicisation

THE AIM OF THIS ARTICLE IS TO ANALYSE THE POTENTIAL LINK BETWEEN TWO DISTINCT aspects of institutional change in the European Union (EU) that have implications for the future debate on the institutional nature of the EU: the parliamentarisation of the EU and the evolution of the comitology procedures. The two processes are both determinative for the transformation of the institutional mechanism of the EU. When exploring the discourses on the EU's institutional future, the unique features of the comitology procedures must be taken into account. Though the non-transparency of the procedures has attracted much criticism (Neuhold 2001: 22), the deliberative quality of the procedures has been acclaimed¹. On the other hand, the link between the parliamentarisation of the EU and the regulation of comitology procedures is relatively understudied. That is why the focus of this article will be to explore and explain the potential link between these two processes, how they communicate, correspond and interrelate to shape the institutional nature of the EU. For the aim of this article, parliamentarisation is understood as the ambition to establish and the gradual evolution towards a system of government at the European level with a strong priority-setting and policy-planning input from the European Parliament (Lehmann and Schunz 2005: 6). The main objective of the article is to examine whether the two institutional transformation processes are linked – and if they are, how strong these links are. Furthermore, the article will explore whether these two processes correlate, what the extent of correlation is and whether there a causal link between them. This main objective is explored by two hypotheses.

¹ For a short overview of the academic debate see Vos 2009: 24-27 and the literature cited there.

The first hypothesis is that there is a strong causal link between the process of parliamentarisation of the EU and the reform of the comitology procedures. The assumption is that having obtained new budgetary and legislative powers, the European Parliament (EP) extends those powers specifically to reduce the level of control of Member States over the process of implementation of Community law by the European Commission. It is important to explore the cases where such causality is revealed and, if possible, to trace the mechanism of causality. The main tool for studying the possible causal link between the two processes is the study of formal amendments of relevant primary and secondary EU legislation. The time sequence of the amendments is also important to examine. The amendments of EU legislation that provide new budgetary or legislative powers to the EP should be prior to the amendments of the comitology procedures. These amendments of the comitology procedures should also limit or otherwise dilute the level of control of Member States on the implementing powers of the Commission. In addition to the timing sequence, the historical record should provide ample evidence that in discrete cases the EP used its newly obtained powers as part of a focused strategy to force Member States to reduce the level of control on the Commission through the comitology procedures. The field of validity of this hypothesis should also be explored. The first hypothesis may be rejected if one claims that the two processes are correlated, but not necessarily causally linked – i.e. that the EP was not instrumental in the process of reform of the comitology procedures. In that case the relevant case studies should be considered in order to evaluate the extent to which the newly acquired powers of the EP were used directly and successfully in order to limit the control of Member States through the comitology committees, and whether the EP is interested in participating in the comitology procedures itself.

The second hypothesis is that a weak system interaction exists between the notion of parliamentarisation of the EU and the gradual moderation of the control exercised by Member States through the comitology procedures. While the general assumption is that the parliamentary system embodies a model of democratic governance (Gerrin, Thacker and Moreno 2005), the gradual strengthening of the executive on the national level due to the loss of veto power of national parliaments and the increasing scope of supranational powers leads to a need to compensate this loss through the empowerment of a supranational parliamentary body (Rittberger 2005). In that case the weak interaction should lead to the objectification of the notion that parliamentary control is superior to comitology in checking the implementing powers of the European Commission. One possible venue for this objectification would be through a process of rhetorical action and social influence (Rittberger and Schimmelfennig 2007). However, one can argue that the weak interaction may not be that easily traceable in individual acts of political players, and may be more evident in long-term trends of institutional reform stemming from pressures for inertia and continuity in western democracies (Kaase, Newton and Scarbrough 1997). When thinking in terms of constitutional options statist analogies about representative democracy prevail (Kohler-Koch 1999). Self-expression values, typical for the societies of the EU Member States, can be interpreted as conducive to the development of democratic institutions at the supranational level (Inglehart and Welzel 2005: 171). That is why the second hypothesis should be explored through low-resolution, long-term analysis of the alterations of the institutional mechanism of the EU that reveals the possible parameters of that interaction. The second hypothesis could be rejected whereas the Commission's implementing powers are further restricted either by the introduction of stricter means of control by the Member States, or by the creation of independent executive bodies. The politicisation of the Commission through the provision and expansion of instruments of political control by the EP must also be taken into account (Wille 2010: 72).

The testing of both hypotheses will be performed through a non-doctrinal, interdisciplinary socio-legal approach (McConville and Chui 2007: 5). The essence of this

approach is to study the process of adoption, implementation and amendment of relevant legislation, and to supplement the analysis of the legislative dynamic with insight from other social sciences. More specifically the description of Tallberg 2002: 24 of the four-step casual chain of supranational delegation will be used². The approach, however, remains focused on the legal institutional perspective of the subject³. This broad historical account allows for the parallel exploration of both hypotheses. The approach enriches the conclusions about the vector of change of the institutional mechanism of the EU with insight and explanations stemming from relevant political science and sociology literature, but also taking into account law as an institution and thus containing normative visions concerning the mix of relationships between the EU and Member States (Armstrong 1998: 156).

The next section will explore the institutional dynamics of the EU both in terms of empowerment of the EP and the reform of comitology procedures during the last three decades. The third section will compare the main findings with the two preliminary hypotheses. The fourth concluding section will explore the implications of the findings for the normative debate on the institutional future of the EU, and will outline prospects for future discussion.

Comitology and parliamentarisation in perspective: powers and reforms

This section will present a parallel review of the institutional development of the comitology procedures and the process of parliamentarisation of the EU.

The battle for power, the battle for comitology

The institutional battle for power in the European Communities (later the EU) is interwoven with the process of revision of the Treaties. This sub-section will present an overview of the most important developments that shaped both the process of parliamentarisation and the comitology procedures during the three most active decades of the institutional reform of the European Communities.

The Single European Act

When on 16 September 1983 the EP refused to release part of the financing of the European Commission, by claiming insufficient information on the effectiveness of the comitology procedures and appealed to the European Commission to provide more information to this effect, as well as to future rationalisation of the procedures⁴, this marked the first time when the EP used its budgetary powers to gain influence on the comitology procedures. Following this interference, the Commission presented a specific Report on Committees and Groups of Experts⁵ and partially reviewing the number and composition of committees⁶. This leads to a release of the funding by the EP⁷. Ever since this first occasion, the EP utilized its positions to gain further control over comitology.

² See also the contribution of Pierson 2000 on the four features of path dependent political processes – multiple equilibria, contingency, a critical role for timing and sequencing, and inertia.

³ See also Eskridge 1994: 48-80 on the dynamic statutory interpretation approach that takes into account the dynamics of political conflict and balance.

⁴ Resolution on the cost to the EC budget and effectiveness of committees of a management, advisory and consultative nature. OJ C 277/1983.

⁵ Commission Report on Committees and Groups of Experts. Communication from the Commission to the European Parliament. COM (84) 93 final, 21 February 1984.

⁶ *ibid*, p. 6 – p. 26.

Another tool used by the EP to expand its powers and to gain control over comitology was the drafting of a Treaty on the EU⁸. One of the important proposals in the draft treaty was for joint legislative powers of the Council and the EP. The draft also included a clear hierarchy of legal acts, divided into two groups – laws and implementing acts. The implementing acts would be adopted by the Commission, having an obligation to notify them to the double legislature⁹.

The most debated issue during the IGC was the principle of qualified majority voting (QMV) in the Council (Tsebelis and Kreppel 1997: 17-18). The second problematic issue was the cooperation procedure for adopting the legislation concerned with the completion of the common market. The Single European Act (SEA)¹⁰ for the first time effectively included the EP in the decision-making by the cooperation procedure (Article 149 EEC (1986) due to the concerns for the widening democratic legitimacy deficit of the Community (Rittberger 2003, pp. 218-220).

Regarding comitology, SEA modified the text of Article 145 EEC (1957) and provided for an act of the Council that would regulate the comitology procedures on the proposal of the Commission and after a consultation with the EP. The question of delegation of implementing powers to the Commission was for the first time positively regulated in primary Community law. However, the Member States considered the new version of article 145 TEEC (1986) not only as a restriction of the participation of the EP in the regulation of comitology, but also as an opportunity to circumvent the cooperation procedure by delegating more powers to the Commission (Lodge 1986: 216). The events that followed proved that the Member States wanted to keep the full and unconditional control over the definition of principles and rules for delegation of implementing powers (Pollack 2003: 123).

Shortly after signing of the SEA, the European Commission proposed a draft regulation for the exercise of implementing powers conferred on the Commission¹¹. This proposal suggested a codification of the procedures, without providing any criteria for selection; the Commission aimed at a speedy adoption of the regulation (Bergström 2005: 191-192). In its resolution on this proposal¹², the EP demanded the abolition of the regulatory committee procedure; a right for the EP to initiate a consultation procedure on the choice of comitology procedure, and an obligation for the Commission to present a report on the activity of the committees. The Council adopted Decision 87/373/EEC laying down the procedures for the exercise of implementing powers conferred on the Commission¹³ in June 1987. No role whatsoever was provided for the EP. This decision evidenced the will of the Council to keep the comitology procedures *in statu quo ante*. The comitology procedures were indeed *numerus clausus*, but that did not render them more transparent (Kietz and Maurer 2007: 31). The comitology system was not simplified (Neuhold 2008). On a more general level Decision 87/373/EEC did not resolve the controversy among the Community institutions on that issue (Vos 2009: 10; Bradley 1997: 236).

⁷ Resolution on the rationalization of the operations of management, advisory and consultative committees, groups of experts and similar bodies financed from the EC budget. OJ 127/1984.

⁸ European Parliament, Resolution concerning the substance of the preliminary draft Treaty establishing the European Union (14 September 1983). OJ C 277/1983.

⁹ *ibid*, art. 22 and 23.

¹⁰ Single European Act (1986). OJ L 169/1987.

¹¹ Commission Proposal of 3 March 1986 for a Council Regulation laying down the procedures for the exercise of implementing powers conferred on the Commission (COM (86) final).

¹² European Parliament Resolution closing the procedure for consultation of the European Parliament on the proposal from the Commission to the Council for a regulation laying down the procedures for the exercise of implementing powers conferred on the Commission, OB C 297/94/1986.

¹³ Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission. OJ L 197/1987.

The reactions of both the Commission¹⁴ and the EP were strongly negative. The EP was much more active in its opposition. The first line of attack was the decision of the EP Bureau¹⁵ to systemically replace in draft acts under the cooperation procedure the referral to the regulatory committee procedure with a referral to the management committee procedure, and in the area of the common market – with the consultative procedure. The regulatory committee procedure could only be adopted at second reading in its less restrictive variant IIIa, but not in the area of the common market.

Second, the EP used its influence on the European Commission to negotiate with it its first interinstitutional agreement (IIA) on comitology in March 1988 (the Plumb-Delors agreement)¹⁶. The IIA provided for the EP to be duly informed about all draft implementing acts that contained normative (quasi-legislative) texts and could in this way restrict the newly acquired powers of the EP. The Commission accepted this agreement because it needed the cooperation of the EP (Kietz and Maurer 2007: 12-13). The third instrument of the EP was the direct contestation of Decision 87/373/EEC before the Court of Justice of the EEC on the basis of Article 173, para. 1 EEC (1986) and Article 145 EEC (1986). The Court in its decision¹⁷ denied *locus standi* to the EP. This decision can only be characterized as unconvincing (Hartley 2007: 373-374).

The interinstitutional battle on comitology

The Maastricht Treaty

Apart from its principal objections to Decision 87/373/EEC, the EP witnessed the poor implementation of the Plumb-Delors agreement. The European Commission sent too few documents to the EP. In this atmosphere of tension over comitology, the European Council in Rome on 27 and 28 October 1990 decided to convene two IGCs on the Economic and Monetary Union and the Political Union¹⁸. The conclusions of the European Council foresaw the strengthening of the role of the EP. More notably the European Council asked the IGC on the Political Union to consider developing co-decision procedures for acts of a legislative nature, “*within the framework of the hierarchy of Community acts*”¹⁹. This sentence deserves special attention. First, the European Council practically envisaged the granting of substantial legislative powers to the EP. Second, it placed this new power within a concept for the hierarchy of Community acts – a concept that, as will be seen, had far-reaching consequences.

The EP took notice. In its second resolution²⁰ on the IGCs the EP proposed a new approach for revising the Treaties – a constitution based on the 1984 EP draft Constitution of the EU. On its part the Commission proposed a clear division between legislative and regulatory

¹⁴ Bulletin of the European Communities 6-1987, cited in Bergström 2005, p. 202.

¹⁵ Formally adopted by the EP, 'Resolution on the executive powers of the Commission (comitology) and the role of the Commission in the Community's external relations', OJ C 19, 28/01/91, p.274. See also Bradley 1997: 236.

¹⁶ See SG (88) D/03026; European Parliament-Dok.123.217, in European Parliament, Conference of Committee Chairmen: The Application of the *modus vivendi* on Comitology: Practical Guidelines for the European Parliament's Committees, 7 July 1995.

¹⁷ Case 302/87 European Parliament v Council of the European Communities. ECR [1988] 5615

¹⁸ European Council (Rome, 14.-15.12.1990) - Presidency Conclusions (Part 1), SN 424/1/90. Brussels: Council of the European Communities, December 1990.

¹⁹ Ibid, p. 1.

²⁰ Parlement européen, Résolution sur la Conférence intergouvernementale dans le cadre de la stratégie du Parlement européen pour l'Union européenne: doc. A3-166/90, in Journal officiel des Communautés européennes (JOCE). 17.09.1990, No C 231, p. 97.

measures²¹, as well as between normative and individual administrative acts, and advocated for the abolition of the regulatory committee procedure.

The Maastricht Treaty²² left the text of Article 145 EEC (1986) untouched. A declaration on the hierarchy of Community acts²³ was attached to the Treaty that instructed the IGC in 1996 to examine whether might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy.

The first acts of the EP and the Council under the co-decision procedure were adopted in 1994. Of 30 co-decision drafts in 1994, only one common position of the Council was rejected by the EP with absolute majority²⁴, one of the main reasons being the argument over the comitology procedures (Corbett 2001: 347-349).

The characteristics of a sharp interinstitutional conflict were apparent (Hummer 1998: 83). This conflict also influenced the discussion on the reform of the co-decision procedure itself (Steunenberg and Thomassen 2002: 4). The imperative position of the EP led to a compromise solution. The European Commission proposed an IIA, making a distinction between acts containing legislative measures and implementing acts. The regulatory committee procedure was excluded altogether. The proposal was rejected by the Council on the grounds that even acts adopted under the co-decision procedure were indeed acts adopted by the Council in the sense of Article 145 EEC (1992) (Bergström 2005: 226).

The interinstitutional conflict on comitology now threatened to cause a long-term blockage of the decision-making process. This threat motivated the EU institutions and the Member States to reach a compromise (Kietz and Maurer 2007: 33). The governments of the Member States proposed first, that the question of implementing acts for acts adopted under the co-decision procedure would be reviewed during the IGC in 1996, and second – that in the remaining period a *Modus Vivendi* for the remaining period could grant to the EP some opportunity for control of the comitology procedures. The EP was initially satisfied with this development (Bradley 1997: 239).

This *Modus Vivendi* was signed on 20 December 1994. However, the European Commission practically suspended its implementation. It did not present sufficient information to the EP, nor forwarded all draft measures in due time (Bradley 1997: 240). That is why the EP resorted to delaying co-decision procedures (Bergström 2005: 231). Additionally the EP contested implementing acts before the European Court of Justice (ECJ)²⁵.

More importantly, the EP again used its budgetary powers to secure a report from the Commission on the activity of comitology committees²⁶. The Commission responded with a report containing 1918 pages, which the EP found unsatisfying²⁷. After the introduction

²¹ Commission Opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union, COM (90) 600 final. Brussels: Commission of the European Communities, 23.10.1990.

²² Treaty on European Union. OJ C 191, 29 July 1992.

²³ Declaration (No 16) on the hierarchy of Community acts. Declarations annexed to the Final Act of the Treaty on European Union.

²⁴ Proposal for a COUNCIL DIRECTIVE on the application of open network provision (ONP) to voice telephony. COM/92/247FINAL. OJ 1992 C 263- 20.

²⁵ See Case C-156/93 European Parliament v Commission of the European Communities ECR [1995] I-2019, and Case C-417/93 European Parliament v Council of the European Union ECR [1995] I-1185.

²⁶ Resolution on the draft general budget of the European Communities for the 1995 financial year - Section III (Commission) modified by the Council. OJ 1995, C 18-145.

²⁷ Resolution on the Commission's response to Parliament's request for information on the 1994 activities of executive committees (following the decision in Parliament's budgetary resolutions of 27 October 1994 and 15 December 1994 to place funding in the reserve) OJ 1995, C 308-133.

of new budgetary constraints by the EP, in September 1996 a new agreement was reached (known as the Samland-Williamson agreement)²⁸.

The Treaty of Amsterdam and the Second Comitology Decision

The preparation for the IGC in 1996 showed the deep divisions among Member States (Goybet 1995). This division was also evident in the “Westendorp” report²⁹ on the question for the introduction of hierarchy of Community acts. The main argument of the opposition against the hierarchy of acts was that it would introduce a notion of separation of powers in the EU, which was considered inappropriate and unnecessary³⁰. The EP, however, supported the idea for introducing a hierarchy of legal acts³¹. The EP suggested that the whole responsibility for the implementing measures should be transferred to the Commission³².

In spite of the heated debate, the question about a hierarchy of legal acts was not discussed during the IGC (Griller 2000: 26). On the other hand the EP gained substantial new powers both in terms of the replacement of the consultation procedure with the co-decision procedure, extension of the scope of the co-decision procedure, and a reform of the co-decision procedure itself (Nentwich and Falkner 1997: 2-3). The final text of the Treaty of Amsterdam was signed on 2 October 1997³³. A declaration³⁴ was attached that called on the Commission to submit to the Council by the end of 1998 at the latest a proposal to amend Decision 87/373/EEC.

In its initial assessment of the Treaty of Amsterdam the EP took notice of its newly extended powers, but also reminded to the Commission that the EP should be involved in the drafting and adoption of the new decision on comitology³⁵. The Commission made a proposal³⁶ aimed at the simplification of the comitology procedures, the introduction of common rules of procedure for the committees, the abolition of the variant IIIb of the regulatory committee procedure, and the introduction of transparency measures. The EP also gained new rights of information on all acts implementing acts adopted under the co-decision procedure³⁷.

In the end Council Decision 1999/468/EC (also known as the Second Comitology Decision)³⁸ did not diverge substantially from the Commission proposal. The EP received a qualitatively new prerogative towards the implementing acts within the regulatory committee procedure. In case the EP believed that the Commission has drafted the proposal for implementing act *ultra vires*, it could notify the Council³⁹. The EP acquired the same *droit de regard* also towards the management committee procedure in the cases

²⁸ Resolution on the draft general budget of the European Communities for the financial year 1997 - Section III – Commission. OJ C 347-125, para. 72.

²⁹ Reflection Group's Report. [ON-LINE]. [Brussels]: European Parliament, [s.d.]. 07.10.2005. Available on http://www.europarl.eu.int/enlargement/cu/agreements/reflex1_en.htm Accessed on 12 June 2010.

³⁰ *ibid*.

³¹ Resolution on Parliament's opinion on the convening of the Intergovernmental Conference; and evaluation of the work of the Reflection Group and definition of the political priorities of the European Parliament with a view to the Intergovernmental Conference, in Bulletin of the European Union. March 1996, No 3, pp. 136-146.

³² *ibid*, p. 21.6.

³³ OJ 1997, C 340.

³⁴ Declaration No 31 relating to the Council Decision of 13th July 1987 (2 October 1997). *Ibid*, p. 137.

³⁵ European Parliament, Resolution on the Amsterdam Treaty (CONF 4007/97 – C4-0538/97). OJ.1997, C 371-9.

³⁶ Proposal for a Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission. COM (98) 380 final. OJ, 1998, C 279-5.

³⁷ *ibid*, art. 7.

³⁸ Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission. OJ 1999, L 184-23.

³⁹ Decision 1999/468/EC, art. 5, para. 5 and art. 8.

when the basic act was adopted under the co-decision procedure⁴⁰. Decision 1999/468/EC was followed by the “Fontaine-Prodi” agreement⁴¹ between the EP and the Commission. The agreement regulated some procedural aspects of the new powers conferred to the EP.

The Treaty of Nice

The Treaty of Nice⁴² will only be mentioned here in its stipulations extending the scope of the co-decision procedure, which expanded further the legislative powers of the EP.

New dawn for comitology

The European Convention

The Laeken declaration of the European Council⁴³ called in December 2001 for the summoning of a Convention on the Future of Europe. The main issues to be discussed included the simplification of the EU's legislative instruments, the maintenance of inter-institutional balance and an improvement of the efficacy of the decision-making procedure.

The European Convention began its work on 28 February 2002. In September 2002 it was decided that a specific working group would be responsible for providing a model for simplification of the legislative procedures and instruments⁴⁴. The deliberations of the Working Group (IX) on simplification began on 19 September 2002⁴⁵ and only two months later the result was presented in a final report⁴⁶.

The Working Group proposed that legislative acts should be adopted in the form of “laws” and “framework laws”. More importantly, the report made a distinction between “delegated” and “implementing” non-legislative acts. The main difference, however, was not their qualitative differentiation, but rather a different way of exercising the political supervision over these acts (Bergström and Rotkirch 2003: 54). Thus the important question was about the differences in the exercise of political control over the two types of non-legislative acts. The delegated acts were subject to three types of control mechanisms: call-back rights, a period of tacit approval, and sunset clauses. Comitology would continue to apply for implementing acts.

The working group's proposal was accepted almost in full by the Convention. The newly constructed hierarchy of legislative and non-legislative acts, and delegated and implementing non-legislative acts, was reproduced in Articles 33-36 of the final text of the Draft Treaty establishing a Constitution for Europe⁴⁷. Only a few changes were made to the Working Group proposals.

⁴⁰ *ibid*, art. 4, para. 3.

⁴¹ Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission. OJ 2000, L 256-19.

⁴² OJ C 80-2001.

⁴³ Presidency Conclusions of the Laeken European Council (14 and 15 December 2001): Annex I: Laeken Declaration on the future of the European Union, in Bulletin of the European Union. 2001, No 12, pp. 19-23.

⁴⁴ Mandate of Working Group IX on the simplification of legislative procedures and instruments. 17/09/2002 CONV 271/02.

⁴⁵ The theoretical discussion among the three legal experts in the working group - Jean-Claude Piris, Michel Petite and Koen Lenaerts is reviewed in Bergström and Rotkirch 2003, pp. 48-51.

⁴⁶ Final report of Working Group IX on Simplification. 29/11/2002 CONV 424/02.

⁴⁷ Draft Treaty establishing a Constitution for Europe, OJ C 169-2003.

The Constitutional Treaty⁴⁸ can be truly characterized as a victory for the EP. Its long-sought equal status with the Council in the area of delegated decision-making was almost achieved (Blom-Hansen 2008: 15). This was matched by the introduction of the co-decision procedure as the ordinary legislative procedure which largely extended the legislative powers of the EP (Article III-396). Moreover, the abolition of the pillar structure and the provision of *passerelle* clauses for treaty amendment without ratification further enhanced the powers of the EP. The powers of the EP were also increased in respect of the EU budget, international agreements, and the scrutiny and appointment of the executive (Rittberger 2005: 179). However, the referenda for the ratification of the Constitutional Treaty in France on 20 May and in the Netherlands on 1 June 2005 failed.

The 2006 comitology reform

The EP started using its new powers of scrutiny under art. 8 of Decision 1999/468/EC, but maintained its pressure on the Commission and the Council in order to secure a new reform of the comitology system. In 2002, the Commission proposed a revision of the Second Comitology Decision⁴⁹. The proposal, which was amended after consultation with the EP⁵⁰, aimed at placing the two branches of the legislature on an equal footing (Schusterschitz and Kotz 2008: 73). Due to the signing of the Constitutional Treaty the negotiations on the draft comitology decision were suspended.

In 2005 an investigation by the EP into possible non-transmission of documents from the Commission showed that in some 50 cases the required documents had not been made available to the EP in time (Christiansen and Vaccari 2006: 11). Because of this, and after the failure of the referenda in the Netherlands and France, the EP decided to take up again its struggle against the institutional “imbalance” in comitology and to secure a reform of the comitology procedures. This was done by blocking the adoption of two single market directives (Schusterschitz and Kotz 2008: 76). The Council conceded. It was decided that a new procedure would be established for “quasi-legislative” implementing measures where the basic instrument was adopted under Article 251 EC (2001). The EP in turn had to agree to a “ceasefire” on inserting sunset clauses in legislation. In June 2006 a new ‘regulatory procedure with scrutiny’ was introduced in Decision 1999/468/EC in a new Article 5a. The EP received the right to object to the adoption of draft measures submitted to it not only if it considered the measure *ultra vires*, but also if it believed that the measure were not in line with the aims of the basic act, or on the grounds of subsidiarity and proportionality.

In terms of the institutional battle on comitology the assessment of Christiansen and Vaccari 2006: 16 that the 2006 comitology reform put the EP on the map in terms of scrutinising the way in which the Commission is using its delegated powers appears quite accurate.

The Treaty of Lisbon

After the failure of the ratification of the Constitutional Treaty, the Berlin Declaration⁵¹ set a goal for a new reform of the Treaties before the EP elections in 2009. The Treaty of Lisbon⁵²

⁴⁸ Treaty establishing a Constitution for Europe. OJ C 310-2004.

⁴⁹ Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final.

⁵⁰ Amended proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (presented by the Commission in accordance with Art. 250(2) of the EC Treaty), COM(2004) 324 final.

⁵¹ Declaration on the Occasion of the Fiftieth Anniversary of the Signature of the Treaties of Rome. Informal Meeting of the Heads of State and Government. Berlin, 24-25 March 2007.

entered into force on 1 December 2009. To a large extent this treaty replicated the texts in the Constitutional Treaty, but merged those into the TEU and EC (now called Treaty on the Functioning of the EU, TFEU).

The rules about the typology and hierarchy of legal acts of the EU were put in Articles 288-292 TFEU. The terminology of “laws” and “framework laws” was abolished. A four-level hierarchy of acts was established. The treaty provisions formed the first level. The second level – legislative acts, was formed by acts adopted under the co-decision procedure, and special legislative procedures where provided for (Article 289 TFEU). The third level was delegated acts (Article 290 TFEU). The fourth level was for implementing acts (Article 291 TFEU).

Delegated acts were subject to revocation or *ex ante* control. More importantly, the implementing acts could be made subject to comitology procedures, but the rules governing these procedures should be adopted by the ordinary legislative procedure, that is – co-decision by the EP and the Council (Article 291, para. 3 TFEU).

A deserved criticism of the provisions can be made towards the criteria for distinction between delegated and implementing acts (Bergström and Rotkirch 2003: 21; Lenaerts and Desomer 2005: 764; Hofmann 2009: 494-499). But it is not so evident that the new provisions entail a reinforcement of the “executive federalism” trend (Hofmann 2009: 497). On the contrary, one could argue that the whole process of regulation of the Community implementing acts since the SEA is a clear proof of the importance of those acts for the Member States (Schütze 2005: 13).

In December 2009 the Commission issued a communication on the application of Article 290 TFEU⁵². The Commission aimed at defining a very broad criterion for delegated acts that would include all acts with normative content “*which change the framework of the legislative act*”. The Commission reiterated its intent to continue to use the counsel of representatives of the public administrations of Member States, but they would have a consultative role.

In March 2010 the Commission also proposed a draft regulation on the mechanisms for control by Member States of the Commission’s exercise of implementing powers⁵⁴. The proposal provided for two committee procedures - the advisory procedure, mirroring the existing advisory procedure, and a new “examination” procedure, which would replace the existing management and regulatory procedures. In the examination procedure the Committee could only prevent the adoption of the draft measures by the Commission if a qualified majority of Member States voted against the proposal. The Commission also wanted to abolish altogether the old comitology procedures for implementing acts in force, with the exception of acts under art. 5a of Decision 1999/468/EC. The EP thus could win a co-equal role in setting the mandate for delegated regulations as well as for implementing acts. That is why comitology is likely to lose much of its field of application to the new delegated acts. At the same time the gains of powers for the EP in the Constitutional Treaty were largely kept intact in the Treaty of Lisbon.

⁵² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. OJ C 306-2007.

⁵³ Implementation of Article 290 of the Treaty on the Functioning of the European Union. Brussels, 9.12.2009 COM(2009) 673 final.

⁵⁴ Proposal for a Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers. Brussels, 9.3.2010, COM(2010) 83 final.

Comitology in the institutional debate: some implications

Comitology and parliamentarisation: is there a causal link?

There is strong evidence to state that the powers of the EP have expanded significantly from 1970 to 2010. The expansion of powers of the EP has been dramatic (Magnette 2001: 292-293). Evidence shows that this process has been conducive to the overall parliamentarisation of the EU (Lindseth 1999: 674). Furthermore, the very constitutionalisation of the EU as a whole follows the path of gradual and limited parliamentarisation (Rittberger and Schimmelfennig 2007).

A substantial literature (Rittberger 2001, 2003, 2005, 2006; Judge and Earnshaw 2003; Maurer 2003; Kietz and Maurer 2007) clearly supports this claim. From the viewpoint of political science literature, arguments may arise about certain aspects of the co-decision procedure (Tsebelis 1994, Scully 1997, Tsebelis and Garrett 1997). However, from a legal and constitutional perspective, one may derive evidence that there is, indeed, a process of parliamentarisation of the EU. This process can be explained by two complementary notions - the cascade-like parliamentarisation of the EU's decision-making mechanism (Maurer 2007: 2), and the existence of critical junctures that define a process of parliamentary path dependence (Magnette 2001: 295). The explanations may have alternative logic in political science, but they fit well when suggested to illustrate how Member States delegated powers to the EP. But the focus of this article has been set on the link of parliamentarisation and the regulation and implementation of comitology procedures. Thus the finding of Kietz and Maurer 2007: 40 that the EP's growing influence in comitology is a clear function of its growing influence in decision-making should be thoroughly supported by empirical observations.

Temporal criterion

The first criterion for determining whether a causal link exists is based on the timing sequence. The amendments of EU legislation that provide new budgetary or legislative powers to the EP should be prior to the amendments of the comitology procedures. If one plots together the treaty reforms and the gradual inclusion of the EP in the comitology procedures, one will notice that, *with some delay*, the EP has indeed succeeded in transforming its decision-making powers into influence over the comitology procedures (see Table 1).

Table 1: The increase in the legislative and budgetary powers of the EP and the reforms of comitology procedures

Period	Increase in the legislative powers of the EP	Increase in the budgetary powers of the EP	Reform of comitology procedures
1970-1975		EP may propose amendments of the budget; to reject the budget en bloc; grants an annual discharge to the Commission.	
1986 – 1987 (Single European Act)	Introduction of the assent procedure and the cooperation procedure		First Comitology Decision
1991-1992 (Maastricht Treaty)	Introduction of the co-decision procedure; expansion of the scope of the assent procedure		
1994			Modus Vivendi
1997 (Treaty of Amsterdam)	Reform of the co-decision procedure and expansion of its scope		
1999			Second Comitology Decision
2000 (Treaty of Nice)	Expansion of the scope of the co-decision procedure		
2006			Introduction of the Regulatory Procedure with Scrutiny
2009 Treaty of Lisbon	The co-decision procedure becomes ordinary legislative procedure; expansion of its scope	Suppression of the distinction between compulsory and non compulsory expenses; constitutional status for the multiannual financial framework	Introduction of a hierarchy of EU legal acts; separate legal procedures for adoption of delegated and implementing acts

The temporal sequence of legal amendments supports the hypothesis for the existence of a causal link between the growing powers of the EP and the subsequent reforms of comitology. However, a closer case by case analysis is needed to justify the causal link.

Case by case analysis

The regulation of the comitology procedures after the initial empowerment of the EP can be divided into discrete case studies that test the first hypothesis about the EP using its newly obtained powers as part of a focused strategy to force Member States to reduce the level of control on the Commission through the comitology procedures.

The period after the adoption of the First Comitology Decision witnessed the concerted action of the EP to advocate less restrictive committee procedures in proposed legislation (Bradley 1997; Corbett 2001). The EP was not successful in its attempts, but it is difficult to justify the claim that the EP wanted mainly to minimise the extent of delegation itself (Bergström, Farrell and Windhoff-Héritier 2007: 354-355). The empirical accounts show that the EP has preferred to limit delegation rather when it implies executive discretion on the national level (Franchino 2007: 294).

After the adoption of the Maastricht Treaty the EP managed to use its newly acquired legislative powers to secure the negotiation of the *Modus Vivendi* by a credible threat to cause a long-term blockage of the decision-making process. This is the first case where the EP used its powers purposefully to try to secure a new principled solution on comitology by the introduction of a reference to the 1996 IGC and the need to re-examine the legal regulation of the comitology procedures. In this model of causality the pre-Amsterdam IGC in 1996 itself clearly stands out as a substantial delaying factor of comitology reform.

The adoption of the Second Comitology Decision is the most important discrete case where there is a strong causal link between the use of powers by the EP and the reduction of the level of control imposed by the regulation of comitology procedures. In the period before the adoption of the Second Comitology Decision the EP clearly used its powers to try to sway the institutional reform with limited success – in the end the Council agreed to a limited simplification of the management and regulatory committee procedures, but refused to abolish the more restrictive variants (Bergström, Farrell and Windhoff-Héritier 2007: 360).

The delay of comitology reform after the Treaty of Nice may be explained by the expectation of the results from the work of the Convention. The 2006 introduction of the regulatory procedure with scrutiny cannot be viewed as directly serving the parliamentarisation agenda; it provides additional means of control for the EP over the adoption of implementing measures by the Commission, but does not limit the existing control mechanisms and the use of regulatory committees in particular. That is why it cannot be considered as directly supporting the first hypothesis.

With the Constitutional Treaty and its heir – the Treaty of Lisbon, the EP succeeded in winning the battle for equal treatment of the two-armed legislature over delegation and implementation of Community legislative acts (Vos 2009: 16). It is not so easy to distinguish strong causality in this case given the specifics of the drafting procedure in the Convention; it may be implied, though, that the threat of future resistance by the EP may have prevented any opposition of certain Member States to the notion of hierarchy of legal acts.

In conclusion, there are at least two discrete cases where the EP has successfully managed to use its newly acquired powers in order to try to limit the control exercised by Member

States on the exercise of implementing powers by the Commission. The negotiation of the *Modus Vivendi* was the first case where the EP managed to secure a specific commitment by Member States to reconsider the legal regulation of comitology procedures. The adoption of the Second Comitology Decision is the second, and more important, case, where the EP managed to some extent to limit the control of Member States exercised through the legal regulation of the comitology procedures. Given the whole history of the comitology this may not look like a significant achievement. However, one should keep in mind that the formal Treaty texts on delegation provided far less scope for creative reinterpretation than did the texts governing legislative decision-making (Bergström, Farrell and Windhoff-Héritier 2007: 363).

Comitology and parliamentarisation: weak interaction?

The second hypothesis of this article has been that a weak system interaction exists between the notion of parliamentarisation of the EU and the gradual moderation of the control exercised by Member States through the comitology procedures. This weak interaction is more difficult to prove based on the research of discrete events. That is why a less granular examination of the institutional dynamics of both comitology and parliamentarisation is needed in this case. However, from the perspective of political science the specificity of the weak interaction mechanism precludes the use of short-term case studies. The history of parliamentarisation shows that it often took considerable time before breaks of legitimacy promoted parliamentary government (Von Beyme 2000: 16-37).

It has been shown in the previous section that the EP's strive has gone beyond securing its own influence on comitology and delegated lawmaking. Indeed, the EP's aversion to the system of comitology spans the entire period of its existence (Bradley 1997: 254). By using its powers, the EP has attempted to systematically strengthen the executive role of the Commission (Franchino 2007: 284). This is also evident from the fight of the EP against the regulatory committee procedure. In other words there is ample evidence that the EP has indeed used the instruments of rhetorical action and social influence (Rittberger and Schimmelfennig 2007) in an attempt to limit the scope of control of Member States. More importantly, the representatives of Member States have always shunned from engaging in open debates with the EP over the comitology procedures. Instead the Member States have basically ignored as much as possible the demands of the Parliament, without providing any meaningful justification for their preference. This is a significant observation given the otherwise quite divergent views of the EP and the Council, and the importance of the comitology procedures for the functioning of the Community. The lack of debate may well be a sign of ideological weakness.

The only significant proof of the existence of such weak system interaction remains the adoption of the text of the Constitutional Treaty, and later – the Treaty of Lisbon. Given that the texts are practically identical, the conclusions are valid for both treaties.

There are three main parameters of institutional change in the Treaty of Lisbon that are important for the second hypothesis. First, the European Commission becomes the principal executive body. Only in "*duly justified specific cases*" the Council may adopt implementing acts (Art. 291, para. 2 TFEU), but not delegated acts. Second, a whole category of implementing acts – called "*delegated acts*" is unconditionally exempt from comitology control (Art. 290 TFEU). Third, the new instrument regulating the comitology procedures for implementing acts must be adopted by the ordinary legislative procedure (art. 291, para. 3 TFEU). Additionally, the hierarchical subordination of implementing acts under delegated regulations will further enhance the importance of the Commission as an executive organ vis-à-vis the Council (Schütze 2005: 18).

For the first time in the history of European integration the European Commission has acquired a substantial level of discretion over the substance of implementing acts at supranational level. This new institutional setting has objectified the long-held belief of the EP that the Commission should be relieved as much as possible from the control of comitology committees. The existing historical evidence does not show substantial or heated debate on the introduction of a hierarchy of EU legal acts. More or less tacitly the Working Group (IX) on simplification and the Praesidium of the European Convention promoted the most radical variant of the hierarchy that included the new category of delegated acts and paved the way to towards a clear-cut separation of powers (Bergström and Rotkirch 2003: 47-59). This is particularly surprising given the presumed opposition of Member States against the notion of separation of powers on the supranational level. The second ratification process of the same texts in the Treaty of Lisbon rejects the argument that these reforms were swept under the rug and were left unnoticed by Member States.

It is very difficult to explain this institutional shift outside of the weak interaction hypothesis. There is obvious concentration of executive power in the European Commission that might have been easily diluted by creating conditions for truly independent executive agencies at EU level. It is true that the subsidiarity principle, the new powers of the European Council, and the involvement of national parliaments (art. 69 TFEU) may further limit the discretion of the Commission; however, from a legal institutional perspective it is evident that the Commission has obtained significant relief from the control of Member States.

One possibility to reject the hypothesis would be that the EP is only a competence maximiser – i.e. that it will seek to ensure that policy will be enacted through procedures which maximise its own degree of control over the process of policy-making, and not through procedures where it has little or no control (Bergström, Farrell and Windhoff-Héritier 2007: 342). Indeed, it is in no way apparent that the EP should seek to limit the level of control of Member States without seeking relevant involvement in the comitology procedures. The careful analysis of the historical record shows that the EP has been quite focused on relieving the Commission from the stricter forms of comitology controls, but has not made symmetrical demands for direct participation in the comitology procedures. The 2006 comitology reform is not a deviation from this principled position especially in the light of the extremely rare use by the EP of its new powers (Hardacre and Damen 2009).

In this sense it is useful to remind the finding of Dehousse 2003: 806 that the new division of labour – with the EP acquiring the real power to *politically* supervise the process of implementation of legislation – corresponds to the respective functions of parliaments and democracies in modern societies. This may lead to the conclusion that the process of parliamentarisation influences the comitology procedures in a larger framework of an attempt to strengthen the executive role of the Commission, in other words an attempt for the progressive parliamentarisation of the Commission itself (Chiti 2002: 28).

Conclusion

This article aimed to test the validity of two hypotheses that have implications for the future institutional change of the EU. First, it was argued that at least in two specific cases there is a clear causal link between the use of newly acquired budgetary and legislative powers of the EP, and the limitation of control on the Commission by the comitology committees. Second, a weak systemic interaction is considered to exist between the notion of parliamentarisation and the reform of the comitology system. This weak interaction was vocalised by the EP in the one-sided institutional debate on comitology during the last decades, but it was truly objectified at the last stages of institutional reform

with the Constitutional Treaty and the Treaty of Lisbon. The net result of this weak interaction has been the partial relief of control by Member States on the Commission through the comitology committee system. This relative loss of control has not been compensated for by the dilution of executive powers away from the Commission, for example by the creation of truly independent executive agencies. The institutional *status quo ante* has not been preserved; the politicisation of the Commission has accelerated, and the EP has generally restrained from demanding direct participation in the comitology procedures.

These developments should be considered bearing in mind the limitations of the parliamentarisation model for a supranational legal order, as described by the substantial normative objections in the academic literature against such further parliamentarisation of the EU (Mancini and Keeling 1994, Lindseth 1999, Yataganas 2001, Majone 2002, Dehousse 2003, Haltern 2003, Jacque 2004, De Búrca 2006, McCormick 2006). It remains to be seen how the Council, the EP and the Commission will negotiate the relevant rules and procedures for the adoption of delegated and implementing acts under the Treaty of Lisbon. This, along with the empirical observation of the process of agenda-setting and the role of the European Council in it, will provide further evidence for the exact direction and relative impact of the process of parliamentarisation.

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