Implementing and Delegated Acts after Lisbon - Towards the Parliamentarisation of Policy-Implementation?


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Abstract

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

1. Introduction

The European Union relies to an enormous extent on the delegation of implementing powers from the legislative institutions to the executive, the European Commission. Starting from the early 1960s onwards, this practise of delegation has involved the setting up of hundreds of committees to oversee the way in which the Commission makes use of these powers. The practice known as comitology is by now well-established, producing some 2500 implementing acts every year, but has also been the bone of much contentions among the institutions. In particular, the European Parliament, ever since acquiring a legislative role, has been demanding a greater role in a process that has hitherto been dominated by Commission and Member States.

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

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European Parliament thus had to be fully involved in the negotiations establishing the new comitology procedures in line with the Lisbon Treaty.

Among most observers, the initial assessment of the Lisbon changes was therefore to declare the EP the ‘winner’ in this domain, at the expense of both Commission and Council. In this article we examine to what extent such a view is sustainable in the light of developments after the coming into force of the Treaty. As it happens, the ratification of the Treaty was not the final stage of this process, but rather required extensive negotiations and a host of secondary decisions in order to put the new treaty provisions into practice – an example of the wider phenomenon of treaty change not being complete with the bargaining in the Intergovernmental Conference or the signature of the Heads of State and Government, but rather a continuous process that extends into the implementation of new rules and provisions.

It is our contention in this article that while the EP clearly gained significant new powers in the treaty, these did not translate into great success in this implementation period. The EP played a string card badly and ended up with practical arrangements for comitology that fall short of the potention for influence that the treaty promised. As we will argue, this outcome is the result of a mixture of poor negotiation strategy, limited attention being paid to the comitology dossier among a newly-elected cohort of MEPs and the lack of technical resources and expertise available to the EP in comparison to Commission and member state administrations.

In this article, we first take a brief look at the historical evolution of the EP’s struggle for greater influence in comitology, before then examining in greater detail the negotiations and their outcome in the aftermath of the Lisbon Treaty coming into force. We subsequently analyse the reasons for this state of affairs and, by way of conclusion, provide an outlook towards anticipated future developments in this area.

2. The evolution of Comitology: the EP’s long quest for influence

The genesis of comitology in the 1960 was closely tied to the search of an ad hoc solution to the difficulty of regulating the economic and social life of the Community while relying exclusively on legislation. The need to address changing economic and societal circumstances quickly and effectively led Community legislators to a course of action that is well-known at the domestic level: the delegation of implementing powers to the executive. In the absence of treaty reform – a far-fetched idea in the 1960s – and faced with increasing difficulties in the legislative process (‘Empty Chair crisis’ and Luxembourg compromise3), delegating implementing powers for routine measures to the Commission was an attractive solution, but required a degree of administrative innovation: implementing powers were delegated to the Commission, but also the supervision of the Commission’s use of these powers through committees composed of member state representatives was spelt out in each individual legislative act.

This was the ‘birth’ of comitology. It was a development that satisfied both the search for greater efficiency and the desire by member states to maintain a degree of control over the process. Even though it occurred outside the letter of the Rome Treaties, the European Court of Justice was satisfied when comitology was for the first time tested in the Courts: comitology committees did not upset the institutional balance of the Community as they were only tasked with providing opinions rather than actually taking decisions4. And the separation between executive and legislative powers was maintained as only decisions about non-essential elements of the legislation were delegated to the Commission. According to the ECJ, the rights and duties of the legislator were not infringed through delegation and comitology.

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4 See Case Law C:25/70 Köster (1970) ECR p.1161
It was on this basis that comitology then developed rapidly through the 1970s and 1980s. What was initially a limited solution that came up with the problems concerning the implementation of the Common Agricultural Policy (CAP), quickly became a success story in many sectors of Community policy-making: before long, many other areas of legislation such as environment policy, consumer protection, transport and energy or single market regulation also involved delegation of powers and the arrival of comitology committees. Indeed, the growth of comitology was such that it became an issue as soon as the treaties were being reformed for the first time with the Single European Act. The subsequent Decision 5, laying down the procedures for the exercise of implementing powers conferred on the Commission, provided, for the first time, a range of systematic procedures which the Commission would have to follow in consulting implementing committees.

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

The procedures laid down in the 1999 Decision determined the way for the committee to deliver its opinion on a draft measure proposed by the Commission. The first procedure was the advisory procedure, in which Member States vote by simple majority and deliver an opinion to the Commission that would however not be binding. The management procedure was mainly used for the implementation of agricultural measures and financial support programmes. The Commission could adopt the implementing measure only if there was no qualified majority against the proposal. In case this threshold was met, the matter was to be referred to the Council, who had the opportunity of adopting a different decision.

Under the regulatory procedure, instead, measures could only be adopted by the Commission if a qualified majority of Member States was in favor. Otherwise, the act had to be forwarded to the Council who could ultimately adopt the act. This procedure, used for all implementing measures having a 'legislative impact', especially in the field of health and safety of persons, foresaw also the possibility for the EP to exercise its right of scrutiny in case of lack of positive opinion within the Committee.

Following the adoption of the 1999 Decision, furthermore, another step towards systematization in comitology has been the adoption by the Commission of standard rules of procedure (SRP) for the comitology committees 6. Art 7.1 of the Decision, in fact, states that the rules of procedure of each committee shall be adopted on the basis of the SRP. They lay down rules for convening a meeting, drawing up the agenda, transmitting documents to Committee members and to the EP. As for procedures during the meeting, the SRP define voting rules, the quorum, the eventual use of written procedure, and other issues related to how to conduct the meeting. Finally, they regulate the representation of members, the possibility to set up working groups and to admit third parties to the meeting but, strangely enough, they don’t mention working languages of the comitology committees.

5 Decision 87/373/EEC of the Council

Even though the 1999 Decision represented an important shift in the history of comitology, it did not prevent further inter-institutional tensions, especially between the EP and the other institutions regarding the new rights gained by the EP\(^7\). In the light of the limited powers gained under the 1999 decision, the EP pushed for further parliamentary involvement in the control over the Commission’s delegated powers – pressure that increased further when it became evident that the Commission had not always respected the EP’s prerogatives\(^8\). In this context, the post-Nice process – the creation of a European Convention and the drafting of the Constitutional Treaty – provided an opportunity to address also Parliament’s long-standing grievances in the area of comitology. In fact, the Constitutional Treaty did provide for a substantial reform of delegated powers, and as such envisaged a major increase in the powers of the EP in this area.

While there were prospects for a fundamental reform of the Treaty, neither EP nor Council were concerned with further legislation on comitology. This situation changed, however, when the failed ratification of the Constitutional Treaty appeared to bury parliamentary hopes for an equal status with the member states in controlling the Commission’s delegated powers. At that point, the EP renewed its pressure on Commission and Council via the Lamfalussy process\(^9\) – a tactic that proved to be very effective in getting the member states to negotiate about expanding the powers of the EP. In late 2005, towards the end of the UK Presidency, Coreper set up a Friends of the Presidency Group – a designated working group to prepare the Council response to a Commission proposal for a new comitology decision that had already been submitted to Council in late 2002. With Art. 202 being the treaty base of this legislative proposal, this decision on this matter required unanimity in Council – another factor that explains why the reform of this system is fraught with such difficulty. And yet, despite the two years of inactivity after the original proposal had been submitted by the Commission, and even though the initial positions among the member states differed quite considerably from one another, negotiations were intense under the Austrian Presidency and progressed rather swiftly towards the adoption of the decision on the new ‘regulatory procedure with scrutiny’ – technically an amendment of the original 1999 Decision.

A new decision was adopted in July 2006 (Council Decision 2006/512). At the heart of this ‘2006 Decision’ was a procedure to be followed in the adoption of so-called ‘quasi-legislative’ implementing acts – a development that foreshadowed the later introduction of ‘delegated acts’. As an addition to the existing procedures, this one spelled out an intricate mechanism that is significantly more complex than the ‘old’ regulatory procedure. The addition of a new procedure of such high complexity was somewhat ironic considering that the initial proposal from the Commission was couched in terms of a simplification of the system, and also presented in the context of the effort towards ‘better regulation’ that arose from the White Paper on European Governance.

In some ways the 2006 changes went beyond the text of the adopted Decision as they included undertakings from Commission and Parliament that formed part of the compromise. The main

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\(^8\) In April 2005, on the occasion of a Resolution adopted on the basis of its right of scrutiny, the EP has asked upon the Commission to publish a list of all cases of not respect of provisions concerning transmission of documents to the EP. See, European Parliament Resolution on a draft Commission decision amending the Annex to Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substance in electrical and electronic equipment (B6-0218/2005 / P6-TA-PROV(2005)0090).

\(^9\) The Lamfalussy process has been used to adopt and implement some acts in the financial services sector, and it was characterized by a more structured use of comitology and a major role for the European Parliament. See B. Vaccari, « Le processus Lamfalussy : une réussite pour la comitologie et un exemple de ‘bonne gouvernance européenne’ » Revue du droit de l’Union européenne. 4 (2005), p. 803-821
element of the ‘ceasefire deal’ that was reached at the end of the Austrian Presidency among Council, Commission and European Parliament has to start by emphasising that the basis for the entire reform was the introduction of the above-mentioned distinction between quasi-legislative and non-quasi-legislative implementing measures. Having established this new category of implementing measures, a new ‘regulatory procedure with scrutiny’ was created for those quasi-legislative acts that arise from co-decided basic acts.

This procedure is actually quite complex. The Commission submits its draft measures to the comitology committee, as usual. But unlike in the existing regulatory procedure, the Commission has to submit its draft implementing measures to the Committee to both Council and EP even if it receives a positive opinion from the committee. Both institutions have the possibility to block the adoption of the proposed measure, sending the Commission back to the committee.

Thus, beyond the power of (non-binding) scrutiny, the EP now gained the right to veto the adoption of those measures that are submitted to it under the new procedure. Although this did not establish complete equality between the two institutions, it was a substantive increase in parliamentary powers compared to the limited rights the EP had had since 1999.

3. Negotiating the post-Lisbon framework: Who won?

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

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

Looking first at the procedures that have been set up for delegated acts, the actual negotiations on this began in the same month of the entry into force of the Lisbon Treaty when the Commission published its Communication on the implementation of article 290 TFEU (European Commission, 2009). Although as a “Communication” this was a unilateral statement from the Commission, the document had been discussed with member state representatives in the Council under the Swedish Presidency. It includes sections on the process of preparing delegated acts, provisions for an urgency procedure, explanations on the right of revocation and opposition, and, most significantly, so-called ‘model articles’ to be used in basic acts with time limits for the right of opposition and the urgency procedure. Even though the Swedish
President and the Commission asserted at the time that the EP had been involved in the preparation of this Communication, this claim has been refuted by EP (Interview 1, 2010)

Despite these consultations in the context of the Commission’s Communication, however, a spirit of loyal cooperation between the Council and the Commission was lacking at this early stage: already in early 2010, negotiations on several legislative proposals became blocked on the issue of delegated acts. At this point it was not the choice between delegated acts versus implementing acts (comitology) that was a bone of contention – as would later be the case. The sticking point here was the manner in which the Commission proposed to involve the co-legislators in the adoption of delegated acts at the drafting stage. Although in its Communication the Commission had stated that

> [e]xcept in cases where this preparatory work does not require any new expertise, the Commission intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted (European Commission 2009, p. 6)

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

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

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

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

**Implementing Acts: the new comitology regulation**

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

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

Because the Appeal Committee was not formalised in the political agreement in the Council,
none of the reports of the Parliament’s committees mentioned it. However, it was to be expected
that the EP was not willing to accept a referral to member state representatives, or else it would
demand similar provisions for Parliament in line with the equality between the institutions
promised by the treaty. The fact that the ENVI Committee did put a referral to the Council back
into the draft regulation must therefore be seen as an *accident de parcours*, as discussed in more
detail below (ENVI Committee 2010, p. 5). The EP eventually gave its formal opinion on the
creation of the Appeal Committee when the rapporteur, MEP Szajer, stated in his report that this
committee “does not look or (...) work under the same rules as other committees (...)” (Szajer
2010b, p. 2). Especially the provision that a member state representative would chair the
meetings rather than a representative of the European Commission was highlighted as
problematic. Remarkably, this wording was a lot less confrontational than what was said in the
June 2010 meeting of the JURI committee, when MEPs strongly opposed the very concept of such
a committee (JURI committee 2010). In the end, however, the Appeal Committee has
materialised, operates under its own Rules of Procedure, and is of a different level than the
normal committee\(^\text{10}\), while being chaired by the Commission. Only this last aspect could be seen

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\(^{10}\) At the first meeting of the Appeal Committee on 29 March 2011, when its Rules of Procedure were
adopted, almost all 27 member states sent their Deputy Permanent Representative to the Albert
Borschette Conference Centre where most comitology meetings take place. The second meeting of the
Appeal Committee took place in October 2011 and discussed the approval of a pesticide. At the meeting
held in the Berlaymont building, 19 member states were represented by their Deputy Permanent
Representative, two by their attaché and the remainder by civil servants from the capital (mostly director-
as a victory for the Parliament, but in fact it is rather one of the European Commission, supported in this instance by the EP which had defined it as a breaking point for a first reading agreement.

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

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

The INTA committee of the Parliament however, had asked for a so-called ‘carve out’ in its report, a demand also supported by ‘free traders’ in the Council (INTA Committee, 2010: 6-7). The ‘carve out’ would mean that the regulations not falling under the 1999 decision would be discussed separately and would not automatically be governed by the new QMV rule. The committee’s proposal was later seen as another *accident de parcours*, as the mood was more in favour of qualified majority voting for trade defense. Remarkably, the working document of the EP’s rapporteur did not mention anything on trade. When the Belgian Presidency finally manage to find agreement on this issue in the Council, the deal was accepted unchanged by Parliament (Hardacre 2011). The final deal was evidently a victory for the Commission and the ‘non-free trade camp’. After a transition period of 18 months (a sweetener for the ‘free traders’), trade defence measures will now be dealt with under the QMV rule, making it harder for third countries to lobby member states’ votes (Euractiv 2010b). The change in voting arrangements is considered revolutionary, and even though the changing position of the INTA committee might have helped the ‘non-free traders’ Parliament barely had a concrete impact on the final outcome.\(^\text{11}\)

\(^{11}\) Another issue that was not resolved by the Spanish Presidency concerned voting arrangements for sensitive measures such as taxation, financial services, and health or safety of humans, animals or plants
Overall, one cannot but notice that on the defining aspects of the new comitology regulation, Parliament was either ‘absent’ or had a marginal impact on the final outcome. Furthermore, the draft reports of the European Parliament focused on a number of issues that were not even considered by the other institutions. Each of these reports called for a right of objection for both Council and Parliament that would be binding on the Commission. Other demands were an observer status in the committees, full information on voting behaviour of member states, and a clear distinction between the use of delegated and implementing acts.

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

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

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

4. The Post-Lisbon regime for comitology and Delegated Acts: Why the Parliament lost

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

In seeking to understand this apparently paradoxical outcome of the implementation process, we identify in the following three factors which appear to have hampered the Parliament’s ability to have a serious impact during the negotiations on the new comitology regulation: first, the timing of the decisional process, and in particular a tight time-frame within which decisions were taking; second; a very selective political interest among MEPs; and, third, a focus among EP decision-makers on non-essential issues. Together, this combination of structural elements and weak agency explains to a large part the poor performance of the EP in this process.

[i.e. GMOs]. Remarkably, in his first report, Szajer had written an amendment that said that in absence of an opinion in the Committee, the Commission could not adopt a draft measure (Szajer 2010a, p. 9). This went even further than what some member states in the Council were asking, and was later corrected by Szajer in his working document where he wrote: “It appears from the system laid down in the Treaties that the majority needed by the Member States to control the Commission when it exercises implementing powers should not be harder to reach than the majority needed by the Council to control a delegation of legislative power” (Szajer 2010b, p. 3). Another *accident de parcours*. In the end, the regulation contains language in a recital that urges the Commission in sensitive areas not to go against a predominant position in the appeal committee in absence of an opinion (European Union 2011, recital 14). This was another compromise found in the Council that was taken aboard by the European Parliament without any changes.
Timing

Article 291 TFEU requires the adoption of horizontal regulation(s) for the implementation of this article. However, the Treaty fails to mention a transitional period between the entry into force of the Treaty and that of a new regulation. In the event the initial ‘No’ in the first Irish referendum on the Lisbon Treaty created a high degree of uncertainty and, more importantly, made practical preparations anticipating the ultimate coming into force of the treaty impossible. The subsequent objections raised by the Presidents of Poland and the Czech Republic had a similar fact. The impact of these developments was that in the end, once the final agreement on the Lisbon Treaty had been reached, and preparations could start in earnest, less than two months remained until it entered into force.

Therefore, policy-makers had to face the fact that in the period immediately after the treaty coming into force, transitional arrangements had to be made ad hoc. In the case of comitology this meant that in December 2009 the three institutions had adopted a joint declaration stating that they undertake to endeavour to achieve speedy agreement on the new Regulation, with a view to its entry into force already during the Spanish Presidency. In the meantime, Council Decision 1999/468/EC of 28 June 1999 continues to apply, with the exception of the regulatory procedure with scrutiny, which is not applicable. (European Parliament, Council & Commission, 2009)

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

One of the reasons why the European Parliament had such a limited impact on the negotiations was presumably because it came late into the game, at a time when the compromise being agreed in the Council started to determine the final result. However, already in the period between the ‘Yes’ vote in Ireland and the entry into force of the Lisbon Treaty, the European Commission had outlined its views on the new system of delegated and implementing acts in a working document. When it finally came with its proposal on 3 March 2011, Member States almost immediately started discussing the text in a Friends of Presidency Group consisting of legal advisers. By contract, the EP’s rapporteur only published his draft report on the 20 May, at which point the Council had already held 7 meetings to discuss the matter.

Coming late into the ‘game’ did not prevent the Parliament from sticking to its commitment of going for a first reading agreement. However, by May 2010 certain politically sensitive issues such as the Appeal Committee were already considered ‘acquis’, even by the Commission. It was also clear that the Council would not accept any more changes to the compromises it found on the two most political problems of trade and voting arrangements, which left very little for the Parliament to fight for. In the end, the final agreement was reached in only a couple of triilogue meetings, giving the impression that negotiations with the Parliament had been unproblematic.

Selective Political interest

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

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

**Thematic focus**

As examined in the previous section, the EP had focused its amendments on enhancing its own role in the new comitology system: demands had included observer status, a right of opposition, full access to information, including on voting behaviour, and a case-by-case alignment of the acquis. Yet from the very beginning both Council and Commission took the line that the system of implementing acts was one for member states to control the Commission, not the Council or the Parliament. After all, the provisions on delegated acts foresaw control by the two institutions for “non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act” (European Union, 2010a, p. 172). The European Parliament did not get a role in the new comitology regulation apart from a non-binding right of scrutiny, something which it already obtained in the 1999 reform. One could, of course, argue the Council too has no longer a part to play in the new comitology procedure, yet the new appeal committee seems to be a replica of Coreper beit chaired by the Commission.

Many amendments made by the different Committees in Parliament were not even considered by the Rapporteur, let alone by the Council or the Commission. By focussing their amendments on non-essential issues - aspects which were not crucial in the negotiations between EP and Council – the Parliament may have made several tactical errors. It could have been a defining player in brokering the trade deal, had it become involved earlier when the Council was still divided on the issue. Equally, it could also have had a decisive impact on the question of voting rules or procedural arrangements in the committees which will determine GMO policy in the future, or it could have been firmer on refusing automatic alignment and preserving its role in making the distinction between delegated and implementing acts. Yet there was too little interest and will to get involved in these discussions in the face of great time pressure to conclude the file. The lack of technical resources and expertise available to the EP in comparison to Commission and member state administrations adds to the observation that Parliament lost the opportunity.
5. Concluding Remarks

From the European Parliament’s point of view, the story of the 2011 comitology reform is clearly one of unfulfilled promises. The Council managed to change the Commission’s initial proposal considerably as Brandsma and Blom-Hansen show (2011), although the end result is very similar to the old system. The Commission thus saw its project of simplifying the procedures somewhat thwarted, but still managed to retain its strong position in the driving seat of comitology. Its representatives also chair the Appeal Committee and it obtained the reform on voting procedures for trade defence instruments it had sought for long. This leaves Parliament somewhat empty-handed. As Hérétier and Moury (2011: 146) pointed out, Parliament obtained veto right “over whether to legislate or to delegate and the choice of procedure” with the introduction of co-decision. In the same vain, one would have expected Parliament to fully play its role in shaping the new procedures as co-legislator on the comitology regulation. Yet, it clearly put a lot more energy and hope in the use and implementation of article 290, rather than fully playing out its role as co-legislator on the regulation regarding the implementation of article 291. Practice will tell how frequently co-legislators will refer to delegated acts, but initial observations show the Council eager to limit the scope and use of delegated acts, and Parliament often dropping its insistence in return for amendments on the substance of regulations.12 As Hofmann (2009) predicted, the distinction between delegated and implementing acts will be a ground for inter-institutional battles for some time to come. It will also be interesting to see how delegated acts are prepared in the future and how frequently the co-legislators make use of the mechanisms of revocation and opposition13. The preparation of delegated acts in particular is something to look out for (Hardacre & Keading, 2011). When the Commission adopted its first delegated acts on the regulation concerning energy efficiency labelling, a row between Council and Commission erupted, because the Commission had consulted national experts together with other experts. A number of member states in the Council reacted by stating that the Commission should invite member state experts separately and after they consulted other experts. Moreover, the Commission should also provide drafts of delegated acts and explain which comments it will take into account and which not. The Commission reacted by saying that in the future it will communicate more clearly on the preparation for delegated acts but that it refuses to establish a comitology light procedure. Yet in a working document providing guidelines for its Directorate Generals the Commission clearly states that “services should systematically consult experts” and that consultations “must involve experts from all 27 Member States” (European Commission 2011, p. 23). It is clear that there is a fundamental lack of trust on the Council’s side in delegating powers to the Commission without the control member states used to have under the old comitology rules. From the Parliament’s side it will be interesting to see how and if they are involved in the preparatory process, and which experts they are sending. The working document of the Commission states that “[i]f so requested (…) the Commission may also invite Parliament’s experts. (…) Parliament’s experts may be any persons appointed by the EP.” (European Commission 2011, p. 24). Another issue is that of the alignment from PRAC/RPS to the new system. Both Parliament and Council agree that there should not be an automatic alignment from PRAC/RPS to delegated acts, yet Parliament considers the scope for delegated acts to be much broader, while the Council is of the opposite opinion. Adaptation of the 300-something acts is currently ongoing and should be wrapped up by the end of 2013.


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

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

This finding has a wider significance for our understanding of EU governance in a number of ways. First, it demonstrates with respect to a particular domain the argument made previously in a more abstract sense, namely that treaty reform is not complete with the signing of a new treaty, nor even with the ratification and its coming into force (Christiansen & Reh, 2009). Treaty reform is better seen as a continuous process which frequently involves “incomplete bargains” that require further interpretation (Spruyt, 2009), and only reveal their ultimate meaning, when the new treaty provisions are put into practice. The present case of comitology reform does appear to be a classic case of this sort, given the way in which it has impacted on inter-institutional relations appears to be quite different at this stage than it did when the treaty was signed.

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

Third, we have observed in the present case how the European Parliament may ‘under-perform’ in inter-institutional relations due to shortcomings in its administrative and political resource base. Effective participation in relations with Council and Commission, and in particular in the power-play that is decision-making under the ordinary legislative procedure. For the EP to actually come out of such negotiations as the equal of the Council that it formally is requires a high degree of expertise, information and knowledge on both the substantial and the procedural aspects of the dossier. As our research has shown, political decision-makers in the EP lacked insight into crucial aspects of the comitology file, and did not possess the required administrative resources to make up for this, leaving Commission and member states to determine the outcome to a large extent – an interesting finding that points to the need for a more systematic attention to the under-researched question of administrative inequality between the EP and the Council.
These observations help to put the specific findings in the case of comitology reform into a wider context of the EU's inter-institutional relations and the relative position of the EP within these. It also serves to put into perspective the widely-held view of the EP as the 'winner' of the Lisbon Treaty and confirms the need to study and evaluate the outcome of treaty reform until the process has run its course, reaching a point at which the outcome may be very different from the initial appearance.

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