

Council Decision 1999/468 – A New Comitology Decision for the 21st Century!?

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I. Introduction

On 28 June 1999 the Council adopted a new “Comitology” Decision which contains several significant changes with respect to the previous Decision of 1987. The term “comitology”¹ which is well known today was apparently coined in the European Parliament in 1987.² It refers to law-making procedures in the EC which have, however, existed since the 1960s and which involve committees composed of the representatives of the governments of the Member States at the level of civil servants. Comitology in the last 40 years has been probably the most fervently contested interinstitutional battleground between the Commission, Council and the European Parliament. It is the purpose of this article to assess whether the new Decision can put an end to that long-lasting struggle. For a better understanding of the underlying reasons of this power struggle and the positions of the different institutions, first a brief overview of the most important steps from the establishment of the first committees in the 1960s up to the Amsterdam Treaty in 1997 will be given. This is followed by a detailed presentation of the major changes introduced by the new Decision, based on a description of the positions adopted by the Commission and the European Parliament.

II. From the first committees to the Single European Act and the Treaty of Amsterdam

In 1961 and 1962, the first elements of the Common Agricultural Policy (CAP) were established.³ These initial steps already required extensive and detailed technical regulation which the Council could not carry out alone. The Council also lacked the resources to respond to the needs of day-to-day management in this area, which included the ability to take action quickly.

The Council did not wish to delegate the implementation of the acts it adopted to the Commission without having some form of control over the steps the latter would take in carrying out this delegated task. Therefore, several proposals were put forward as to how this could be accomplished. The compromise that was finally reached provided for the creation of committees known as “Management Committees”. These comprised representatives of the governments of the Member States whose task it was to issue an opinion on the implementing measures proposed by the Commission.

However, the Commission was entitled to adopt its proposed measures immediately, even if the committee gave a negative opinion by a qualified majority. In the latter case, the proposed measures had to be referred back to the Council, which could then take a different decision (by qualified majority) within a specified time – usually one month. This procedure allowed the Commission to take particularly urgent steps without delay, but at the same time provided the Council with the possibility of intervening and modifying the Commission decision.

Comitology was actually “born” on 4 April 1962 when the first management committee was established by Art. 25f of regulation 19/62.⁴ Most sectors of the CAP were subsequently established on this basis and the implementation of decisions was carried out using a variation of this (albeit only provisional) committee procedure in each sector. Before the end of the transitional periods for which the management committees had been established (on 31 December 1969) the Council decided to maintain the committees on a permanent basis.⁵ Management committees eventually came to be used for the entire agricultural field.

In 1966, there was a heated debate in the Council about which committee procedure was to be chosen to implement measures in the field of customs, veterinary legislation and legislation on feedingstuffs and foodstuffs. As a compromise, the first “Regulatory Committee” was created on 27 June 1968 by regulations 802 and 803/68.⁶ The Commission could only implement its proposals if the committee approved them by a qualified majority. If this was not the case, it had to submit its proposals to the Council. This procedure introduced the provision that the Commission could, nevertheless, implement its proposals if the Council had failed to reach a decision within a certain period of time specified in the act. This possibility was called a *filet* (*safety net*) procedure. While the Council could agree to this type of committee for the area of customs, there was opposition from some Member States when it came to veterinary matters and the fields of plant health and feedingstuffs. Here, the *filet* procedure was complemented by the *contrefilet* (double *safety net*) procedure.

From the very beginning, the European Parliament followed the development of comitology with mistrust,⁷ since “measures of considerable scientific and political importance” were being adopted “without the Parliament being given any opportunity to exercise its obligation of

* *Un bref résumé de cet article en français figure à la fin.*

control laid down in the Treaty”.⁸

The EP started pushing for the rationalisation of the apparently ever-increasing number of committees in the late 1970s and when the Commission calculated its budget estimates for 1983, on the basis of a 31% increase in the number of consultative bodies as compared with 1981, the EP decided to freeze a substantial part of the funds for committees.⁹ Based on an interim report¹⁰ of the Committee on Budgetary Control submitted in June 1983, the EP adopted a resolution on the expenditure included in the Community budget and on the efficiency of committees,¹¹ in which it expressed its concern about the fact that “the Commission has no effective centralised system for monitoring the activities of those committees” and that “this situation has led to shortcomings, where consultation activities are to some extent autonomous and no longer fully under the Commission’s supervision.” It demanded that strict rules should be applied concerning, *inter alia*, the frequency and duration of the meetings and the maximum number of participants from the Member States whose travelling expenses could be reimbursed. The Commission was asked to report to the Parliament on the rationalisation procedure and on the way in which appropriations had been managed during the period of 1983 in which funds had been frozen. In February 1984 the Commission submitted a report which responded in detail to the Parliament’s criticism and proposed to dissolve 132 committees (21.9% of the total number).¹² The EP subsequently released the frozen funds in two stages.

The Single European Act and the 1987 Comitology Decision

In the first major revision of the Treaty, the Single European Act, which entered into force in 1987, the provisions on implementation were amended. Article 155 [new 211] EC Treaty, which had been the legal basis in the Treaty for comitology until then, only stated that “the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter”.

- Article 145 [new 202] EC Treaty was amended to the extent that it now provided not just for the possibility of transferring powers but for an obligation to do so: “... the Council shall ... confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down”. Conferring implementing powers on the Commission was to be the rule; the Council could only resort to reserving such powers for itself in “specific cases”.
- Furthermore, the comitology system was given a sound legal basis since Art. 145 [new 202] now recognised that “the Council may impose certain requirements in respect of the exercise of these powers”.¹³
- Finally, following the proposal of the Commission and after obtaining the opinion of the EP, the Council

was to lay down in advance the principles and rules concerning these procedures. The Council’s Comitology Decision of 13 July 1987¹⁴ followed that request. It restricted the number of possible committee procedures to three (or rather five, since two of them had two sub-variants a and b each):

- In Procedure I (Advisory Committee) the Commission had to take the “*utmost account*” of the opinion delivered by the committee.
- In Procedure II (Management Committee) the Commission was to adopt measures which applied immediately. If these measures were, however, *not in accordance* with the opinion of the committee, the Commission had to communicate them to the Council. *Variant a* stated the Commission “*may*” defer the application of the measures, while *Variant b* stated that it “*shall*” do so. The Council, acting by a qualified majority, could take a different decision.
- In Procedure III (Regulatory Committee) the Commission was to adopt the measures only if they were in accordance with the opinion of the committee. If the measures were *not in accordance* with the opinion of the committee, or if *no opinion was delivered*, the Commission was to submit a proposal to the Council concerning the measures to be taken. In Variant a) (*filet procedure*) the Commission would adopt the proposed measures, if the Council had not acted by *qualified majority*. In Variant b) (*contrefilet procedure*) the Commission would adopt the proposed measures unless the Council had *decided against* them by a *simple majority*.

The Commission was concerned about the continuation of the III b) Procedure. In July 1987, it adopted a Decision in which it stated that it would never recommend a III b) Procedure in relation to a proposal for a legal act.¹⁵ The fear the Commission had was that the Council would resort to ever-heavier procedures – and the Council did. Between 1987 and 1990 it set up more than 30 III b) committees in the area of internal market legislation, where the Commission had proposed other procedures.¹⁶

The European Parliament challenged the Comitology Decision before the Court of Justice on the grounds that it was incompatible with the spirit of the Treaty and the Single European Act. However, the case was declared inadmissible by the Court.¹⁷

The Interinstitutional Agreements (Plumb-Delors, Modus Vivendi, Samland-Williamsen)

The EP also considered it necessary to have greater and more effective practical control over the way in which the Commission carried out its executive powers. It therefore requested the Commission to implement in full the interinstitutional agreement as of 14 March 1988 (the *Plumb-Delors Agreement*) in the interests of

providing effective information to, and the effective consultation of, the Parliament. In the *Plumb-Delors Agreement*,¹⁸ which was established by an exchange of letters between the then President of the Commission, Jacques Delors, and the then President of the EP, Henry Plumb, the Commission committed itself to forwarding all draft implementing acts of a “*legislative nature*” to the Parliament at the same time as they were forwarded to the implementation committee. “Routine” management documents and documents whose adoption were “urgent”, as well as “confidential” measures, were excluded.

The co-decision procedure introduced in the Maastricht Treaty (Art. 189b [*new* 251] EC Treaty) placed the EP as co-legislator on an equal footing with the Council for those legal acts that were to be adopted according to this procedure. The Parliament, as co-legislator, now expected to have the same rights as the Council in controlling the Commission in the exercise of the delegated implementing powers. In the view of the Council the new powers did not go beyond a decision on which powers were supposed to be delegated, and which committee procedure was to be used.

On 20 December 1994, the Council, the EP and the Commission reached an agreement on a *Modus vivendi* to be applied until the 1996 Intergovernmental Conference.¹⁹ This compromise provided that:

- the appropriate committee of the EP was to be sent, at the same time and under the same conditions as the committee comprised of representatives of Member States, any draft general implementing act submitted by the Commission, together with the timetable for it.
- If this draft act was referred back to it, the Council could only “adopt this act after informing the EP, setting a reasonable time limit for obtaining its opinion and, in the case of an unfavourable opinion, taking due account of the EP’s point of view without delay, in order to seek a solution in the appropriate framework”.
- Additionally, the Commission was to take “into account, as far as possible, any comments by the EP and [keep] the Parliament informed at every stage of the procedure” in order to enable it to assume its own responsibilities in full knowledge of the facts.

Although the EP did not succeed in its efforts to be placed on a completely equal footing with the Council with respect to the implementation of EC law, it was able to increase its participation in comitology to a remarkable extent,²⁰ by managing to obtain significantly more information and being granted the right to be consulted by the Commission as part of an informal procedure.

Parliament kept up the pressure in December 1995,²¹ entering half of the expenditure for each type of committee in the reserve of the general budget for

1996,²² since the Commission had refused to give any information on the question of committees meeting in public or to render public committee agendas and membership lists to the EP. The Chairman of the budget committee of the European Parliament and the Secretary General of the Commission finally in September 1996 reached an agreement which provides for measures regarding transparency in management and regulatory committee proceedings, the so-called “*Samland-Williamsen Agreement*”.²³ It stipulated that the Commission should make available to Parliament:

- “the annotated agendas for each meeting of management and regulatory committees”; and
- the “results of votes in Management and Regulatory Committees”.

Furthermore, it stated that if “Parliament or a parliamentary committee wishes to attend the discussion on certain items on the agenda of a committee, the chairman will put the request to the committee, which may take a decision; if the committee does not accept the request, the chairman must give reasons for the decision; Parliament may wish to publicise such reasons”.

The 1996 Intergovernmental Conference and the Treaty of Amsterdam

Since the *modus vivendi* provided that the question of comitology would be “examined in the course of the revision of the Treaties planned for 1996, at the request of the European Parliament, the Commission and several Member States” and the Reflection Group was also “invited to examine the question”, the issue came onto the agenda of the Intergovernmental Conference.

The position of the Reflection Group²⁴ was divided, reflecting the contrasting views of the Member States on the matter. Some members of the group took the position that the best solution to the problem would be to assign full powers to the Commission, subject to supervision by the Council and the EP, whilst others were only willing to consider simplified procedures which would not undermine the Council’s executive powers. A compromise position emerged, whereby a single procedure was proposed under which it would be up to the Commission, in consultation with national experts, to decide on the implementing measures under the supervision of the Council and the EP, which would have the right to cancel the measures and request the application of normal legislative procedures.

In its position of 13 May 1996,²⁵ the EP requested that the procedures be simplified by transferring overall responsibility for implementing measures to the Commission, which was to be supported only by an advisory committee. Type II and III committees were to be abolished altogether. The Council and the EP were to be notified of the measures proposed and each was to have the option of rejecting the Commission proposal and calling for new implementing measures or the initiation of a full legislative procedure.

The Commission²⁶ suggested that it should fully

exercise its function as the executive body, subject to review by the legislative authorities. It also pointed out that the role of the EP should be taken into account in instances where the basic act had been enacted by co-decision. It proposed a procedure whereby the EP or the Council could object to a draft measure which it had proposed, in which case the measure would be adopted by the co-decision procedure itself. In addition, the Commission took the view that the number of implementing procedures needed to be reduced, in order to avoid debates between the institutions as to the procedures to be followed. It also proposed that there should be, at the very most, three types of committees, namely one each for the Advisory, Management and Regulatory Procedures and that the different variants in the Comitology Decision should be dropped.

However, during the Amsterdam European Council in June 1997 the Member States decided not to make any amendments to the Treaty provisions relating to implementing measures (Art. 202 [*ex-145*] and 211 [*ex-155*]). Instead, a declaration was annexed to the Amsterdam Treaty²⁷ which provided as follows: “The Conference calls on the Commission to submit to the Council by the end of 1998 at the latest a proposal to amend the Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission”. According to Art. 202, the Decision was to be adopted “by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament”.

The fact that the Intergovernmental Conference did not solve the issue was not surprising since the necessary changes and adjustments (including a stronger involvement of the EP) did not require any Treaty amendments, but could be accomplished by a mere amendment of the Comitology Decision. The declaration showed, however, that the Member States recognised the necessity of making changes.

III. The Commission proposal for a new Comitology Decision

The Commission complied with the request of the IGC well in time, on 16 July 1998, by submitting a proposal²⁸ for a new Comitology Decision. It was to a great extent in line with the position that the Commission had already taken in its proposals for the “old” Comitology Decision, and the *modus vivendi*, as well as with its position during the IGC. But it also contained some new elements.

The proposal had two main purposes:

- Firstly, the proposal provided for the establishment of criteria for the use of the different procedures. For example, “measures of general scope designed to apply, update or adapt essential provisions of basic instruments” were to be adopted by the Regulatory Procedure. This was a new element in the Commission proposals.

- And secondly, the existing procedures were supposed to be simplified. It was proposed that the two sub-variants in procedure II and III²⁹ should be abolished: the Management Procedure (II) was supposed to become a mixture of procedures II a) and II b), and the Regulatory Procedure (III) was supposed to be changed significantly. If there was no qualified majority in favour of the proposal in the committee, the Commission was not to adopt the measures, but it could “present a proposal relating to the measures to be taken, in accordance with the Treaty.³⁰” Procedure III was therefore intended to be a “semi-legislative procedure” in two respects: firstly, because was to be reserved for “measures of general scope”, that is measures of a legislative nature; secondly, because it provided for the full legislative procedures if there was no qualified majority in favour of the proposal in the committee.

The proposal thus provided on the one hand for an involvement of the European Parliament according to the legislative procedure in all cases in which there was a reasonable argument for parliamentary participation, i.e. whenever the situation concerned the adoption of measures of general scope (Procedure III). In other matters (Procedures I and II) the separation of executive and legislative powers remained respected.³¹ On the other hand the proposal did not provide the EP with the right to reject Commission proposals regardless of the opinion of the comitology committee as demanded by the EP in the context of the IGC. This was only to be the case when there was no positive opinion of the committee, so that the Parliament’s right of supervision was subject to the views of the national civil servants.

The proposal finally provided for the European Parliament to receive more information on comitology matters. It was to receive agendas for committee meetings, draft measures submitted to the committees for the implementation of instruments adopted by the co-decision procedure and the results of voting. It was to also be informed whenever the Commission transmitted measures or proposals for measures to be taken to the Council.

IV. The opinion of the European Parliament

The opinion of the European Parliament of 6 May 1999³² was amazingly ambiguous (not to say contradictory) on the key issue, namely the involvement of the European Parliament in comitology.

On the one hand, in the explanatory statement relating to its proposal the EP demanded quite openly to be placed on an equal footing with the Council in comitology. It expressed its wish to “establish a system whereby it can exercise proper scrutiny and, if necessary, call back an implementing measure that it disagrees with, when it stems from the co-decision procedure”. Furthermore, the proposal fell “short of meeting the European Parliament’s position” because “it is still only

the committees which have the right to request the Commission to refer back an implementing measure – no equivalent right is given to the European Parliament.... A matter referred back in such a way from the executive to the legislative authority is sent to the Council alone, rather than to both branches of the legislative authority (European Parliament and Council).... The extension of the field of application of the co-decision procedure provided for by the Amsterdam Treaty implies that the control of the European Commission's executive activity has to be assumed equally by the legislative authority (European Parliament and Council)".

Yet, the legislative proposal itself was – in contrast to the explanatory statement – rather modest. The EP proposed to limit its involvement to an *ultra-virus* control, relating only to the legality of a measure but not to its content. This becomes clear from the proposed Recital 4a according to which “implementing measures must not modify the basic legislation (including annexes)” and “such legislation may not even be modified where the Council claims implementing powers for itself as the sole legislative authority”. The proposed Art. 7a and 7b (“Protection of the legislative sphere”) limit the involvement of the EP to being able to “challenge the legality of the decision” (Art. 7a) and “ask the Commission to submit a legislative proposal when the EP considers that an implementing measure ... exceeds the implementing powers” (Art. 7b). This limitation of the involvement of the EP is confirmed in another part of the explanatory statement: one of the “most important priorities to be taken into account in the modification of the comitology system” was the “distinction between ‘substantial legislation’ and ‘implementation provisions’, through a better definition in the basic act by the delegation on the exercise of implementation powers (given that, for the European Parliament, an implementing measure does not amend, update or complete the ‘essential aspect’ of normative provisions)”, while “guaranteeing that the legislative authority, i.e. the European Parliament and Council, does not intervene in the implementing measures”.

Furthermore, the EP legislative proposal provided for a simplification of the procedures and an elimination of the Regulatory Committee Procedure. It also aimed at improving the transparency of the procedures by making all documents public except for reasons of confidentiality, by the adoption of uniform rules of procedure and by strengthening the European Parliament's right to information with respect to draft measures submitted to the committees, agendas, summary records of committee meetings, attendance lists and the results of voting.

V. Council Decision 1999/468 of 28 June 1999

The Council adopted the new Comitology Decision 1999/468/EC³³ on 28 June 1999. It is strikingly different from the 1987 Decision in the sense that the new Decision is largely based on input from the Commission

and Parliament.

With regard to the establishment of criteria for the choice of committee procedure and the simplification of the procedures the Decision to a large extent adopted the Commission proposal, whereas the new Regulatory Committee Procedure is a modification of the proposal. The Decision, furthermore, takes into account the concerns of the European Parliament regarding the protection of the legislative sphere. Finally, it aims at introducing more transparency in comitology.

Establishment of criteria

Art. 2 of the Decision provides for criteria which determine the choice of committee procedure for the legislator. The criteria are thus – as the fourth consideration of the Decision says expressly – “of a non-binding nature”. They are very similar to those proposed by the Commission:

- The Management Procedure is to be followed as regards “*management measures such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications*”.
- The Regulatory Procedure is to be followed as regards “*measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, as well as measures designed to adapt or update certain non-essential provisions of a basic instrument*”.
- The Advisory Procedure is to be followed “*in any case in which it is considered to be the most appropriate*”.

The establishment of criteria has two advantages. Firstly, the distinction between certain types of implementing measures explains the necessity of having three different types of committees, which is certainly not self-evident. And secondly, it will make disagreements between the institutions, in particular the Council and Parliament, less likely. Such conflicts have in the past even caused the failure of the adoption of important pieces of legislation.³⁴

Simplification of procedures

The simplification of the committee procedures concerns the Management and Regulatory Procedures, which will no longer have two variants each. Also the question whether Art. 250 [*ex-189a*] was applicable in the III a) Procedure, which led to much confusion,³⁵ will become obsolete. The same is true for the complex inter-institutional agreements³⁶. Thus the simplification achieved by the new Decision should be seen as a significant step.

With regard to the Management Procedure (Art. 4), the Council basically accepted the proposal of the Commission. The new Procedure modifies the old II a)

Procedure only with regard to the time period. The Commission will adopt its proposed measures even in the case of a negative opinion of the committee. In that case:

- the Commission must, however, communicate them to the Council;
- it *may* defer the application for up to three months; and
- within that period, the Council may take a different decision.

Moreover, the Commission recalled in a declaration³⁷ to Art. 4 “that its constant practice is to try to secure a satisfactory decision which will also muster the widest possible support within the Committee” and gave is assurance that it would “take account of the position of the members of the Committee and act in such a way as to avoid going against any predominant position which might emerge against the appropriateness of an implementing measure”.

The most substantial change relates to the Regulatory Procedure (Art. 5): if the implementing measures proposed by the Commission are not approved³⁸ by a qualified majority in the committee, the Commission “shall, without delay, submit to the Council a proposal relating to the measures to be taken” and shall “inform the European Parliament”.

The Council can then either

- adopt the proposal by qualified majority; or
- “indicate by qualified majority that it opposes the proposal”. In that case, the Commission “shall re-examine it”. In doing so, it may:
 - submit an amended proposal to the Council;
 - re-submit its proposal; or
 - present a legislative proposal on the basis of the Treaty.³⁹
- If on the expiry of a period of 3 months maximum the Council has not adopted the proposed implementing act or has not indicated its opposition to the proposal for implementing measures, the proposed implementing act will be adopted by the Commission.

The Council therefore – in contrast to the former III b) Procedure – is no longer able to reject a proposal by simple majority. This is a logical amendment in view of the enlargement of the EU, since a significant number of small Member States will join in the next years. It was nevertheless difficult to accept for the present smaller Member States. Denmark in particular only finally agreed to this amendment after the German presidency submitted a compromise proposal. Under that compromise, the Commission in a statement on the new Comitology Decision⁴⁰ made a commitment that “in the review of proposals for implementing measures concerning particularly sensitive sectors ... in order to find a balanced solution” it would “act in such a way as to avoid going against any predominant position which

might emerge within the Council against the appropriateness of an implementing measure”.

Any new committee set up has to comply with the new procedures. But “old”, already existing, committees also have to be adjusted in order to align them with the new procedures. A Council and Commission Statement on the new Decision⁴¹ provides for a two step procedure:

- In a first step, the provisions are adjusted “without delay” in a rather mechanical way: current I Procedures are turned into the new Advisory Procedure, current II a) and II b) Procedures into the new Management Procedure and current III a) and III b) Procedures into the new Regulatory Procedure.
- But after this first step not all the committees will be in conformity with the newly established criteria. Therefore as a second step, a modification of the type of committee, will “be made, on a case by case basis, in the course of normal revision of legislation”.

As a consequence, e.g. the III a) Committee established by Art. 15 of Council Regulation 443/92⁴² on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America, will first be turned into a new Regulatory Committee, and only later, “in the course of normal revision of legislation”, into a Management Committee (because its task is the “implementation of programmes with substantial budgetary implications”).

Involvement of the European Parliament

The Decision furthermore provides for a (limited) involvement of the European Parliament *in the implementation of facts adopted by co-decision*. It accepts the request of the European Parliament for a “protection of the legislative sphere”, but rejects (possible) further-reaching demands that it should be placed on an equal footing with the Council:

- Under Art. 8, if the European Parliament “indicates that draft implementing measures the adoption of which is contemplated and which have been submitted to a committee would exceed the implementing powers provided for in the basic instrument”, the Commission shall “review the draft measures”.

The Commission may then:

- submit new draft measures to the committee;
- continue with the procedure; or
- submit a proposal to the European Parliament and the Council on the basis of the Treaty.

The Commission shall also “inform the European Parliament and the committee of the action which it intends to take on the Resolution of the European Parliament and the Council and of its reasons for doing so”.

The same applies according to Art. 5 para. 5 if in the framework of the Regulatory Procedure a proposal is referred to the Council. In that case the European Parliament can inform the Council of its position

under the same conditions.

This new procedure is some kind of an “early-warning” procedure in the sense that it gives the EP the possibility of indicating its reservations to the Commission or Council. But since the Commission cannot be forced to withdraw its draft measure the ultimate decision on whether a certain legal act is *ultra vires* or not remains with the European Court of Justice⁴³ in the context of the already existing procedure according to Art. 230 para. 3 [*ex-173*] EC Treaty (in which Parliament is a privileged applicant⁴⁴).

- Finally, Art. 7 para. 3 provides that “the European Parliament shall be informed by the Commission of committee proceedings on a regular basis”. To that end, it shall receive:
 - agendas for committee meetings;
 - draft measures submitted to the committees for the implementation of instruments adopted by the co-decision procedure;
 - the results of voting;
 - summary records of the meetings; and
 - lists of the organisations to which the persons designated by the Member States to represent them belong.

It shall also be kept informed whenever the Commission transmits measures or proposals for measures to be taken to the Council.

These parts of the Decision replace the *modus vivendi* and the *Samland-Williamsen* agreement. They limit the involvement of the European Parliament in comitology to an *ultra vires* control which is to make sure that implementing measures do not exceed the implementing powers provided for in the basic instrument. The EP is thus not placed on an equal footing with the Council. In some aspects the Decision does not go as far as what had already been granted to the EP in the *modus vivendi* and the *Samland-Williamsen* agreement (for example with respect to the types of draft measures sent to the European Parliament, the right to give an opinion in cases where the Commission makes a proposal to the Council in a Regulatory Committee Procedure, or the (theoretical) right of Members of the EP to attend committee meetings). The Decision, nevertheless, seems to be acceptable to the EP. According to the press release of the General Affairs Council meeting of 31 May 1999,⁴⁵ the European Parliament had signalled that it “could accept the compromise solution as in particular the so-called ‘double safety net’ will disappear and as the Council will have to act in future by qualified majority to oppose a Commission proposal. The Parliament is also satisfied that, under the new system, it will get comprehensive information on the work of the Committees and a right of scrutiny on every phase of the procedure”. In fact, the introduction of the *ultra vires* procedure (Art. 5 para. 5, Art. 8) is a remarkable success for Parliament, considering the fact that the latter was not even mentioned in the 1987 Decision.

Transparency

In the past, the lack of transparency in comitology has been criticised repeatedly.⁴⁶ Now, information to the public on committee procedures is supposed to be improved substantially:

- The principles and the conditions in relation to public access to documents which are applicable to the Commission will also apply to the committees (Art. 7 para. 2).
- The Commission will publish a list of all comitology committees in the Official Journal within six months of the entry into force of the Decision on 18 July 1999. This list will specify in relation to each committee the basic instrument(s) under which the committee is established (Art. 7 para. 4).
- From 2000 onwards the Commission will publish an annual report on the working of the committees (Art. 7 para. 4).
- References for all documents sent to the European Parliament will be made public in a register to be set up in 2001 (Art. 7 para. 5).

Standard Rules of Procedure for Committees

According to Art. 7 para. 1 and a Council and Commission statement concerning that provision, the Commission will adopt standard rules of procedure for committees by the end of 1999 which are to be the “basis” for the rules of procedure to be adopted by each committee. They will be published in the Official Journal and then be proposed by the Commission to each committee. They will then “adapt, in so far as necessary, their rules of procedure to the standard rules”. Under the standard rules of procedure, draft measures and agendas should reach the Permanent Representations at least 14 days, in urgent cases at least 5 days before a meeting.⁴⁷

VI. Conclusion

The new Comitology Decision can be regarded as an important step towards a modern system of comitology. It establishes criteria for the use of the different procedures, simplifies the so far unnecessarily complicated procedures, provides for an adequate involvement of the EP without violating the principle of separation of executive and legislative powers, and finally aims at reducing the secrecy in comitology – the main reason for legitimate criticism of comitology.

The new Decision will not lead to any dramatic shifts of power between the institutions involved in comitology: the Commission will remain the most important “player in the game”, and the role of the European Parliament will remain rather limited. Only the amendments with regard to the Regulatory Committee Procedure will cause a shift of power between the Commission and Council the effects of which are, however, limited since both the Commission and the Council “win” in one case and “lose” in the other. The adoption of measures which used to fall under the former III a) Procedure will become more difficult for the Commission since now the Council can oppose a

draft measure by qualified majority (before only by unanimity). On the other hand, the adoption of measures which used to fall under the old III b) Procedure will be easier for the Commission: now the Council can oppose a draft measure only by qualified majority (before by simple majority).

Of course it remains to be seen how the new Decision will work in practice – in particular with respect to the implementation of the provisions on transparency. Yet the chances that the new Decision will have a longer “life” than the 1987 Decision did may not be bad.

It is certainly true that the “communitarian method” is based on cooperation between the institutions, or, as former Commission President Jacques Santer put it: “L’efficacité de la méthode communautaire, on le voit à propos de la comitologie, repose sur la bonne coopération, sur une complémentarité organique, entre les institutions”.⁴⁸ But the experience of the last 40 years seems to suggest that the adoption of the new Decision is not very likely to end the power struggle of the institutions over comitology – after all the new Decision does not confer the control of the Commission’s executive activity equally on the Parliament and Council. Maybe the new Decision will be the beginning of a new era of comitology, in which rather than disagreeing over the fundamental issues, the institutions will struggle over the scope of implementing powers and the content of implementing legislation in specific cases.

RÉSUMÉ

Le Conseil a adopté, en juin 1999, la nouvelle décision de “comitologie” 1999/468 qui contient un certain nombre de modifications importantes par rapport à l’ancienne décision de 1987. Au cours des quarante dernières années, la comitologie a été probablement le champ de bataille interinstitutionnel qui a connu les luttes les plus acharnées entre la Commission, le Conseil et le Parlement européen.

Après un bref aperçu des étapes les plus importantes depuis la création des premiers comités dits de comitologie jusqu’au Traité d’Amsterdam, cet article présente la proposition de la Commission, l’avis du Parlement européen ainsi que les principales modifications introduites par la nouvelle décision du Conseil. Cette décision fixe les critères pour le recours aux différentes procédures prévues, simplifie ces procédures, prévoit une implication limitée du Parlement européen et, enfin, entend accroître la transparence.

La nouvelle décision ne devrait pas entraîner de grands bouleversements dans la répartition des pouvoirs entre les institutions impliquées dans la comitologie: la Commission demeurera le principal “acteur de la partie” et le rôle du Parlement européen restera relativement limité. Seules les modifications concernant la procédure du Comité de réglementation causeront un léger glissement dans le rapport de force entre la Commission et le Conseil.

Enfin, cet article se livre à une première évaluation

de la nouvelle décision. Bien que l’expérience de ces 40 dernières années semble suggérer que l’adoption d’une nouvelle décision ne risque probablement pas de mettre un terme à la lutte pour le pouvoir que se livrent les institutions sur le terrain de la comitologie, cette décision pourrait bien marquer le début d’une ère nouvelle pour la comitologie. Ainsi, à l’avenir, le conflit entre les diverses institutions concernées, plutôt que de porter sur des questions fondamentales, pourrait se concentrer sur la portée des pouvoirs d’exécution et sur le contenu de la législation d’exécution dans certains cas spécifiques.

NOTES

¹ The following articles on comitology have been published in *EIPASCOPE*: Demmke, “The Secret Life of Comitology or the Role of Public Officials in EC Environmental Policy”, *EIPASCOPE* 98/3; Haibach, “Comitology after Amsterdam: A Comparative Analysis of the Delegation of Legislative Powers”, *EIPASCOPE* 97/3.

Other articles on comitology published recently include: Bradley, “The European Parliament and Comitology: On the Road to Nowhere”, *European Law Journal*, 1997, pp. 230-254; Demmke/Haibach, “Die Rolle der Komitologieausschüsse bei der Durchführung des Gemeinschaftsrechts und in der Rechtsprechung des EuGH”, *Die Öffentliche Verwaltung*, 1997, pp. 710-718; Haibach, “Komitologie nach Amsterdam – Die Übertragung von Rechtsetzungsbefugnissen im Rechtsvergleich”, *Verwaltungsarchiv*, 1999, pp. 98-111; Hummer, “Die Beteiligung des Europäischen Parlaments an der Komitologie”, Hafner, Gerhard et al (eds.), 1998, *Liber Amicorum Professor Ignaz Seidl Hohenveldern in honour of his 80th birthday*, Kluwer Law International, The Hague, London, Boston; Joerges/Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, *European Law Journal*, 1997, pp. 273-299; Neyer, “Administrative Supranationalität in der Verwaltung des Binnenmarktes: Zur Legitimität der Komitologie”, *Integration*, 1997, pp. 24-36; Vos, “The Rise of Committees”, *European Law Journal*, 1997, pp. 230-254; Sauron, “Comitologie: comment sortir de la confusion”, *Revue du Marche Unique Européen*, 1999, pp. 31-78; Wessels, “Comitology: Fusion in Action. Politico-Administrative Trends in the EU System”, *Journal of European Public Policy*, 1998, pp. 209-34.

EIPA is organising seminars on comitology on a regular basis in Maastricht and in the Member States. For more information, please check our web site at: <http://www.eipa.nl>. EIPA has also published a book on the subject (Pedler/Schaefer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*). Please check our web site at: http://eipa-nl.com/public/public_publications/default.htm.

² Cf. Bradley, “Comitology and the Law: Through a Glass, Darkly”, *Common Market Law Review*, 1992, p. 693, Fn.7.

³ The first part of this article is based on: Demmke, Eberharter, Schaefer, Türk, “The History of Comitology”, in: Pedler/Schaefer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, European Institute of Public Administration, Maastricht, 1996, p.61.

⁴ OJ 1962, p. 933.

⁵ OJ 1969 L 324/23.

⁶ OJ 1968 L 148/1,6.

⁷ Cf. also: Bradley Kieran St. Clair, “The European Parliament and Comitology: On the Road to Nowhere”, in: *European Law Journal*, 1997, p. 230.

⁸ See Session Documents of the European Parliament of 5 May

- 1984 (Doc. 1-205/84).
- ⁹ OJ 1983 L 19; Articles 250 and 251 of section III, Part A of the EC budget for the 1983 financial year.
- ¹⁰ EP Doc. 1-446/83 (Interim report of the Committee on Budgetary Control on the costs to the EC budget and effectiveness of committees of a management, advisory and consultative nature).
- ¹¹ OJ 1983 C 277/195 (Resolution on the cost to the EC budget and effectiveness of committees of a management, advisory and consultative nature).
- ¹² See EP Doc. 1-40/84, p. 7.
- ¹³ This “confirmed” the ruling of the European Court of Justice in the Köster case (Case 25/70, *Einfuhrstelle v. Köster*, [1970] ECR 1161), the leading case on comitology, in which the Court had held that comitology did not distort the Community structure and the institutional balance since the committees did not have “the power to take a decision in place of the Commission or the Council”.
- ¹⁴ 87/373/EEC, Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1987 L 197/33.
- ¹⁵ Negotiations of the EP of 7 July 1987, No. 2-354, p. 63; also COM (87) Min 881 item XI, A of 8 July 1987, cited in: Communication from the Commission to the Council: conferment of implementing powers on the Commission, SEC (90) 2589 final, Annex II, p. 1.
- ¹⁶ Communication from the Commission to the Council: conferment of implementing powers on the Commission, SEC (90) 2589 final, Annex II, p. 1.
- ¹⁷ Case 302/87, *European Parliament v Council*, [1988] ECR 5615.
- ¹⁸ SG (88) D/03026; EP-Dok. 123.217, in: European Parliament, Conference of Committee Chairmen: The Application of the *modus vivendi* on Comitology: Practical Guidelines for Parliament’s Committees, 7 July 1995, pp. 21 and 22.
- ¹⁹ *Modus vivendi* between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty of 20 December 1994, OJ 1996 C 102/1.
- ²⁰ Report of the Committee on Institutional Affairs of the EP on a *modus vivendi* between the EP, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Art. 189b of the EC Treaty of 12 January 1995, PE-Coc. A4-0003/95.
- ²¹ Cf. Bradley, Kieran St. Clair, “The European Parliament and Comitology: On the Road to Nowhere”, *European Law Journal*, 1997, pp. 230-254 (242-3).
- ²² European Parliament, General Budget 96/96/Euratom, ECSC, EC, OJ 1996 L 22/456-459.
- ²³ Agreement of 25 September 1996, OJ 1996 C 347/125, Resolution on the draft general budget of the European Communities for the financial year 1997 – Section III – Commission.
- ²⁴ 1996 IGC: Reflection Group’s Report, SN 520/95 (REFLEX 21).
- ²⁵ 1996 IGC: Position of the European Parliament of 13 March 1996, PE 197.390.
- ²⁶ Commission Opinion on “Reinforcing Political Union and Preparing for Enlargement”, COM (96) 90 final.
- ²⁷ Declaration relating to the Council decision of 13 July 1987, OJ 1997 C 340/137.
- ²⁸ OJ 1998 C 279/5.
- ²⁹ In that respect the proposal resembles the proposal of the Commission for the “old” comitology decision of 3 March 1986, OJ 1986 C 70/6.
- ³⁰ i.e. consultation, cooperation or co-decision.
- ³¹ Cf. Haibach, “Comitology: A Comparative Analysis of the Separation and Delegation of Legislative Powers”, Maastricht Journal of European and Comparative Law 1997, p. 373; Demmke/Haibach, “Die Rolle von Ausschüssen in der Europäischen Gemeinschaft und in der Rechtsprechung des *EuGH*”, *Die Öffentliche Verwaltung* 1997, p. 710.
- ³² OJ 1999 C 279/258,404,411.
- ³³ Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23.
- ³⁴ In two cases so far negotiations in the conciliation committee between Council and Parliament have failed because the two institutions could not agree on the type of committee to be set up: The first case occurred in July 1994 when a proposed directive on the application of open network provision (ONP) to voice telephony could not be adopted, the second in May 1998 with respect to the proposed directive establishing a securities committee (because the EP wanted a II b) Committee, while the Council insisted on a III b) Procedure).
- ³⁵ Since an Opinion of the Legal Service of Council (!) of January 1991 had stated that this was the case, it was sufficient for the adoption of a measure by the Commission that one (!) Member State was in favour of the proposal.
- ³⁶ See below (Involvement of the European Parliament).
- ³⁷ Declaration No. 1 on Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (Commission Statement), OJ 1999 C 203/1.
- ³⁸ This significant difference between the Management Procedure (the Commission must avoid a negative opinion) and the Regulatory Procedure (the Commission must obtain a positive opinion) has remained unchanged.
- ³⁹ This provision was adopted by Council although it is quite doubtful whether it is compatible with Art. 7 [ex-4] EC Treaty (“Each Institution shall act within the limits of the powers conferred upon it by this Treaty”). The Legal Service of Council came to the conclusion that this was **not** the case since Parliament would participate in the adoption of implementing measures in a way not provided for by the Treaty, in particular not by Art. 202 [ex-145] (Opinion 11987/98 of 19 October 1998, JUR 370, INST 68).
- ⁴⁰ Declaration No. 3 on Council Decision 1999/468/EC (Commission Statement), see Footnote. 37.
- ⁴¹ Declaration No. 2 on Council Decision 1999/468/EC (Council and Commission Statement), see Footnote. 37.
- ⁴² OJ 1992 C 52/1.
- ⁴³ Sauron (Footnote 1) uses the term “*double mécanisme administratif et juridictionnel*” in this context.
- ⁴⁴ In the past, the ECJ has already annulled implementing measures on application of the EP because they were *ultra vires*, Cf. e.g. C-303/94, [1996] ECR I – 2943.
- ⁴⁵ Press Release No. 8657/99
- ⁴⁶ Cf. e.g. Trotman, “Agricultural Policy Management: A Lesson in Unaccountability”, *Common Market Law Review*, 1995, p.1385; Schaefer, “Committees in the EC Policy Process”, in: Pedler/Schaefer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, European Institute of Public Administration, Maastricht, 1996, p. 3.
- ⁴⁷ Cf. in that context case C-263/95, *Germany/Commission*, [1998] ECR I-441. In that case the court invalidated a Commission decision because the German member of the Standing Committee on Construction had received only the English, but not the German version of the draft measure within the 20-day period provided for in the rules of procedure of the committee, but 19 (!) days before the meeting. The Court confirmed that Art. 3 of Regulation No. 1 of the Council of 15 April 1958 establishing the language regime of the European Community (OJ 1958 17/385 is applicable to committees (“Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State”). This was now recalled by Council when it adopted the new Comitology Decision in the statement attached to the minutes of Council.
- ⁴⁸ Santer, *L’avenir de l’Europe. Quel rôle pour la Commission? Eloge de la méthode communautaire*, European University Institute, Florence, Jean Monnet Lecture of 20 October 1995. □