

# The European Parliament and Comitology: PRAC in Practice



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The history of comitology – the system of committees in charge of controlling the Commission’s implementing powers – has often been characterised by institutional tensions.<sup>1</sup> The crux of these tensions is the role of the European Parliament (EP) and its quest to be granted powers equal to those of the Council. Over time these tensions have been resolved through a series of inter-institutional agreements and Comitology Decisions, essentially giving the Parliament incremental increases in power. The latest step, which came in 2006, was the modification of the Comitology Decision of 1999<sup>2</sup> and the introduction of the new Regulatory Procedure with Scrutiny (RPS), also known in English by its French acronym – Procédure de Réglementation avec Contrôle (PRAC). This is unlikely to be the last word because it still fails to grant the Parliament an equal footing and because the Treaty of Lisbon promises more change. However, the new procedure has been in use for over two years and evaluating the early experiences of the European Parliament with RPS is now possible. This article offers a preliminary assessment of how the RPS is working in practice, highlighting the unforeseen developments that have arisen in the course of its implementation and answering some of the questions that were posed regarding the way the RPS would work in the Parliament.

## Introduction

The importance of comitology continues to grow as Community legislation increasingly delegates powers to the European Commission. When the first comitology committees were created in the 1960s it was to deal with purely technical implementing measures, mainly in the domain of agriculture. Despite this exclusively technical delegation to the Commission, the Council insisted upon the creation of comitology committees as a mechanism of oversight. Over time as the European project has expanded, both in depth and breadth, the need for comitology committees has increased such that they now form an essential part of the EU system. The majority of comitology activity continues to be found in the agricultural field, hence outside the scope of co decision and of the implications of this new RPS procedure. Should the Treaty of Lisbon come into force, and agriculture move into co decision, then almost 90% of delegation to comitology will occur via co decision. This increased volume of delegation poses a significant number of questions, notably about the oversight of the Commission by the co-legislators before adopting implementing

measures. Over time a series of attempts have been made to address the issues surrounding delegation, trying to balance transparency, efficiency and accountability. The latest of these attempts came with the modification of the 1999 Comitology Decision in 2006, which granted the European Parliament an important new power by adding the Regulatory Procedure with Scrutiny to the existing comitology procedures. This additional procedure, Article 5a of the modified 1999 Comitology Decision, was an explicit response to a number of the Parliament’s claims concerning its involvement in the delegation of powers to the Commission. Notably the new procedure grants the Parliament powers over comitology that more accurately reflect its powers in codecision, effectively increasing democratic control over comitology decisions. This is not only an important symbolic and political gain for the Parliament; in practical terms this also substantially increases the power given to the Parliament, as it has gained a right of ‘ex post’ veto on implementing measures of general scope that amend a legal act adopted under co decision. This right of veto goes

far beyond the previous powers of the Parliament and can be characterised as the third right that the Parliament has been granted in its quest for oversight of comitology.

The first was the right of information (Article 7 of the 1999 Comitology Decision) and the second the right of scrutiny,<sup>3</sup> which includes the right to pass a non-binding resolution if the Parliament considers that the Commission has gone beyond its implementing powers (Article 8 of the 1999 Comitology Decision).

Given the ever-increasing importance of comitology in European Union decision-making, the question of democratic legitimacy has become very important, especially for the Parliament. From obscure beginnings in the field of agricultural markets in the 1960s, the comitology system has been expanded to cover an increasing number of policy areas, such that in 2007 there were 264 Committees and 2,522 implementing measures.<sup>4</sup> It is not simply the number of committees, and the vast output of the system, however, that are of importance but also the substance of these implementing measures as they are no longer the simple technical agricultural measures from the 1960s. The Commission itself recognises this fact when it states that *“the sheer number of measures adopted as such gives no indication of the political, economic or financial importance of decisions taken”*.<sup>5</sup> For these very reasons, notably the inherent importance of the decisions taken, and given its co-legislative powers, the Parliament has been trying to increase its limited powers in this domain beyond those of being informed and the right to pass a non-binding resolution. Whilst the Parliament has been very welcoming of the increasing powers of information, most recently through an upgraded ‘Comitology Register’,<sup>6</sup> it only used its right of scrutiny on six occasions between 1999 and 2005, thus highlighting the weakness of its real powers over implementing measures.<sup>7</sup> The thrust of the new Article 5a procedure is to give the Parliament the power of veto in the area of so-called quasi-legislative measures – those measures that are considered to be of a near-legislative importance, but that remain non-essential and can therefore be delegated to the Commission. The aim was to create a situation where the process of comitology would be seen as being more democratic, in the sense that whenever the co-legislators give up legislative powers in the interest of greater flexibility, speed of decision-making and need for technical expertise, they do so in the knowledge that they retain a power of veto over what is being adopted by the Commission.

When the new procedure came into force in 2006 it was expected that it would take a number of years before any form of evaluation could take place. It is, however, possible to draw a preliminary evaluation now since the RPS procedure has already been used several times, although often

in somewhat different ways to those originally foreseen. The RPS procedure on paper, despite the intention to simplify and increase transparency and public understanding of comitology, is rather convoluted. The new procedure can be – and indeed, legally must be – used when three conditions are fulfilled: firstly that the act is a co decision act; secondly the measures are of general scope; and finally that only non-essential elements are concerned. This exercise needs to be done on a case-by-case basis. Once the procedure has been included in secondary legislation the next stage is for the Commission to submit its draft implementing measure to the comitology committee, which should adopt an opinion. At this point there are two possible outcomes:

1. In the case of a positive opinion<sup>8</sup> of the comitology committee the Commission forwards the measure to both Council and Parliament who then have up to three months to oppose to the measure. If there is no opposition from either party the Commission can adopt the measure after the three month period has lapsed. In the case of opposition *“the European Parliament, acting by a majority of its component members, or the Council, acting by a qualified majority, may oppose the adoption of the said draft by the Commission, justifying*

## The sheer number of measures adopted as such gives no indication of the political, economic or financial importance of decisions taken

*their opposition by indicating that the draft measures proposed by the Commission exceed the implementing powers provided for in the basic instrument or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality”*.<sup>9</sup> If opposition, based on these three criteria, is found, then the Commission must either re-submit a draft measure to the committee or present a legislative proposal. The co-legislators therefore have the same three criteria on which to base their opposition. It should be made clear that this does not grant them the right to oppose a draft measure because they are generally not satisfied with (a part of) its content, but they can only oppose on the basis of these criteria. It is also important to note that no provisions were put into the Decision to either allow for adoption of an implementing measure within the three month period, or to amend the content in case of opposition. Therefore if they agree they simply have to let the time period lapse or if either party opposes a single line in the implementing measure they have to oppose the entire measure.

2. In the case of a negative opinion<sup>10</sup> or the absence of an opinion on the part of the comitology committee, the Parliament does not maintain its status of equality with the Council. The measure goes first to the Council, which has three options: (a) It can oppose the measure in which case the Commission can modify the proposal and re-submit to the Council; (b) It envisages adoption, in which case it forwards the measure to the Parliament; (c) The Council takes no decision, in which case the Commission forwards the measure to the Parliament. If the measure is forwarded, the Parliament enjoys the same three criteria outlined above to make an objection.

When RPS was introduced in 2006 it raised a significant number of issues.<sup>11</sup> In this contribution, we would like to concentrate on three questions which are addressed in the following section. Firstly, some observers from the Commission and Council feared that Parliament would be tempted to use the new power too often, thus frustrating the smooth implementation of legislation. Has this happened? Secondly, some commentators and practitioners would also like Parliament to have the power to explicitly approve draft measures, but this is currently not foreseen in the Comitology Decision. Others would even want to go further and give Parliament a real right of amendment on comitology draft measures, which is certainly not intended by the Comitology Decision. This raises the question of what possibilities Parliament does have when it intends to approve or amend a draft measure. Finally, fears were raised that Parliament would be lacking the necessary expertise to deal with technical draft measures and would rely solely, or too heavily, on lobbyists. So has this situation actually arisen and how has Parliament dealt with this aspect of comitology?

## PRAC in Practice in the European Parliament

### 1. How often does the European Parliament oppose an RPS draft measure?

One of the reasons why the Commission and Member States were never keen on giving a veto right to Parliament on implementing measures, was their fear that Parliament would be tempted to (ab)use the new power too often, thus frustrating the smooth implementation of legislation. Although the veto right has now been given to the Parliament, it is still limited to the three criteria of exceeding implementing powers, not being in line with the aim or content of the basic act, or not respecting subsidiarity or proportionality. If we look at the first experiences with the RPS procedure, nothing seems to indicate that Parliament will abuse its power and frustrate the implementation of legislation. Interestingly the first use of the RPS veto came from the Council in July 2008 when it objected<sup>12</sup> to six draft measures that had previously been agreed by the comitology committee. What is interesting about this case is that the objection was based on a horizontal issue that had no relation with the content of the individual draft measures, namely the desire by Member States not to use correlation tables.<sup>13</sup> In the Parliament, up until March 2009, there has only been one case of a Resolution objecting to a draft measure that has been adopted. This concerned a draft measure for the Capital Requirements Directive (CRD) that was opposed by the plenary in December 2008, on the proposal of the parliamentary committee for economic and monetary affairs (ECON).<sup>14</sup> It is no surprise that the ECON Committee should have been the first to veto a draft implementing measure, since this parliamentary committee has always been particularly active in the oversight of draft implementing measures, and was at the basis of the reform of comitology. It is also inte-

resting to note which of the three criteria for objection were used in the two aforementioned cases. Both Council and Parliament argued that the Commission had exceeded its implementing powers. Council deemed that an obligation for correlation tables belongs in a basic act and not in a draft measure. In the CRD case, the draft measure amended certain annexes of the Capital Requirements Directive, whereas the Commission had shortly before presented a proposal to review the CRD directive itself. Parliament felt that it could not approve of a specific draft measure just before a more fundamental review under co decision. Apart from this, two more attempts were made to pass an objecting Resolution, but both failed in the vote in parliamentary committee. Both cases occurred in the parliamentary committee for environmental affairs (ENVI). The first case was on the use of the biocide 'diffeneacoum' and the second concerned eco-design of household lamps.

Overall practice shows that Parliament has not often objected to an RPS measure, which begs the question of why? We can think of at least four possible answers. A first answer could be that there have not been enough opportunities to do so, as the RPS procedure has only very recently been introduced into legislation. A second answer could be that although opportunities were there, the Parliament as a whole is yet to fully grasp the potential of the RPS procedure. Over time, increased experience might lead to a more frequent use of the RPS procedure, although this would not automatically lead to more objections. Thirdly it may be that the presented draft measures were simply not controversial and therefore not contested. Finally, as the above examples show, even if a draft Resolution for objection is presented, it will not necessarily be adopted. One should consider that a vote in a parliamentary committee is taken by simple majority of the Members present, whereas the vote in plenary on such objections is taken by the majority of Parliament's component Members (absolute majority). An absolute majority in plenary should never be taken for granted given that such sessions are rarely attended by all MEPs. This can be seen as another 'safety valve' on the use of the RPS power by Parliament. When voting, a failure to obtain a majority means that not all Members supported the objection. This may be because they did not agree with the grounds for objection, but sometimes Members may also withhold support because they do not want to get the blame for blocking a draft measure for only one particular aspect. In such cases, a right of amendment could have presented a different picture.

### 2. What alternatives does the Parliament have to opposing a draft measure?

The RPS procedure is meant as a control mechanism for Parliament after an implementing measure has been approved (or rejected) by a comitology committee. Hence it is an ex-post veto possibility that should only be used if necessary. In reality, Parliament is very unlikely to want to

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object to the vast majority of implementing measures. The normal procedure in these cases is simply to do nothing and let the time go by until the deadline lapses, at which point the Commission can adopt the draft measure. Where measures are not controversial, and not initially contested by the Parliament, the Commission has sometimes expressed the desire that Parliament approves the draft measure concerned without waiting the full three months. It should be noted that the RPS procedure, and Rule 81 of the Parliament's Rules of Procedure,<sup>15</sup> foresee no explicit legal possibility for such an approval. Nevertheless, nothing would appear to prevent Parliament from approving a draft measure, a practise which the Council has already adopted on a regular and almost systematic basis. In a few cases the Commission has explicitly asked the parliamentary committee concerned to approve a draft measure before the three month deadline. Until now it has been up to the parliamentary committee concerned to decide how to deal with such a request, but it is not unlikely that the Parliament could create some horizontal rules on this in the future if Commission demands continue. In some cases committees have indicated that at a given stage no objection had been made, which could be read as an informal approval, but can only be legally formal once the deadline has lapsed, given that Members have the right to object until the deadline passes. So, thus far, it has been up to the Commission services to decide whether they take the risk of adopting the draft measure before the deadline.

There is, however, another interesting practice that seems to be developing and is not visible in the adopted acts of Parliament, but which may indicate how Parliament will use its powers under the RPS procedure. In two cases parliamentary committees drafted objecting Resolutions that were withdrawn even before the vote in the parliamentary committee, after the Commission indicated that the modifications required by Parliament would be taken into account in a subsequent revision of the implementing measures. These cases occurred in the parliamentary committees for environmental affairs (on the use of animal testing) and for transport and tourism (on the use of seatbelts for children in aeroplanes). The intentions of the Commission were made in letters to the parliamentary committee concerned, after which the draft Resolution was removed from the agenda. This practice is particularly interesting, as it means the threat of a veto can lead to specific modifications, albeit in a future revision of the draft measure. In this way Parliament has a sort of 'de facto right of amendment', or a soft right of

## The RPS procedure is evolving in quite some unforeseen ways

amendment. On the other hand, the concrete effect of this practice is yet to be evaluated, as Parliament runs the risk that promises from the Commission are not kept and may even be forgotten if the time between revisions of implementing measures is relatively long, or new Commissioners or new Members of Parliament are in charge.

In such cases it may be up to the Parliament Secretariat to play the role of institutional memory.

### 3. Who influences Parliament's decision to oppose a draft measure?

Given that comitology is such a specialised and technical domain, and that the Parliament (and thus MEPs) lacks technical resources, it was originally feared that the introduction of the RPS procedure would open the door to intensive lobbying of comitology measures through the EP. Many practitioners and external commentators questioned whether the Parliament would simply have to rely on external sources of information, such as lobbyists, to generate its positions on implementing measures. The way the Parliament has built its internal structures to deal with RPS has resulted in the committee secretariats becoming the most important in-house filters and sources of expertise. Committee secretariats, however, mainly have a role of facilitation and transfer of information, not a direct role in influencing Members' decisions to oppose a draft measure, which would not suit their politically neutral position. The secretariat can play a role in providing Members with expertise, but it cannot be expected that these experts gain significant in-depth knowledge of the vast range of issues dealt with in draft measures. Expertise may be based on (scientific) external research, but here it should be noted that a three-month deadline does not allow for extensive in-depth external research. Given these constraints on the role of secretariats and external research, it

becomes clear why fears were raised about MEPs relying too heavily on lobbyists when taking their decisions to object to a particular measure. The role of lobbyists in Brussels-based decision-making is subject to extensive research and analysis, although mostly in the realm of legislation, not implementing measures. For our analysis of the lobbying of comitology we would like to concentrate on one



EU Parliament

particular aspect. Lobby organisations normally try to 'sell' their point of view not only to the European Parliament, but to all other political actors involved in the decision-making process. This means that the same lobbyists have normally already been talking to the experts of national governments

represented in the comitology committees and to the Commission officials drafting the implementing measures, before they come to knock on the door of Parliament. In fact, all actors can be influenced by lobbyists and it is their own decision to decide to what extent they take on board the views of lobbyists. This very phenomenon can be illustrated by an example from the transport committee of Parliament when it discussed a draft measure on the use of so-called 'loop belts' for children in airplanes. Although safety tests conducted in the 1990s had shown the potential danger of these belts to children's health, the competent comitology committee had never amended the applicable rules. When this issue was discussed in the Parliamentary committee it was suspected that no amendment had been made due to pressure from the airlines on the Council and Commission, because they did not want to spend money on extra seats for children, and rather preferring them to sit on an adult's lap even if this situation was potentially dangerous. This short example highlights the fact that lobbying in the realm of implementing measures is not limited to the Parliament, and early experiences with the RPS procedure suggest that there has been no significant increase in lobbying of the Parliament as originally feared. The Parliament has been soliciting more input from technical experts, but there has been no deluge of lobbying on comitology issues.

Members of Parliament are politicians and they will judge draft measures from a political perspective. This perspective may be influenced by suggestions from lobbyists, journalists, experts, scientists or any particular group of people. Members of Parliament will, however, always look at how the particular issue may fit with their personal views, the views of their political party or of the voters they represent, or from the point of view of the parliamentary committee of which they are a Member as far as there is a feeling of consensus there. Seen in this light it is no wonder that Members of Green political parties express themselves on environmental issues as much in comitology as they do in co decision. Members of the parliamentary committee on civil liberties and justice (LIBE) were at the origin of another case that highlights a further unforeseen aspect of the RPS procedure. This is the case of the rejection of 'body scanners'<sup>16</sup> as a device to screen passengers at airports. The use of body scanners was one small part of a draft measure on aviation security. This draft measure was, according to Rule 81 of Parliament's rules of procedure, referred to the transport committee. In the meantime, however, Members of the LIBE committee got hold of the issue and presented to the plenary a 'normal' parliamentary Resolution under Rule 108, criticising the use of body scanners, which was adopted. This kind of Resolution has no legally binding effect on the Commission, whereas a Rule 81 Resolution does. Yet, as the issue had raised significant media reaction and hence political responses in several Member States, the responsible Com-

missioner withdrew the draft measure. In this way we have a second case of a withdrawn draft measure, but this time not on the basis of the formal RPS procedure. What this example shows in particular, is that this decision was not based on the influence of a secretariat, lobbyist, or other group, but on the sensitivity of Members involved in civil liberties matters concerning those liberties and privacy issues. This highlights the fact that lobbyists, or the secretariat, can bring matters to the attention of a Member of Parliament, but at the end of the day it is the Member's political choice whether to proceed with an objection.

### Conclusions: Theory and Practise of PRAC

The three preceding sections demonstrate that the RPS procedure is evolving in quite some unforeseen ways, allowing some preliminary conclusions to be drawn on the differences between the theory and practise of this new comitology procedure. Even after only two years of experience with RPS a number of patterns have developed in the negotiation and use of the procedure – patterns that can be expected to continue. For this reason, and also because the new comitology provisions which would be introduced by the Lisbon Treaty are very similar to the current RPS provisions, the findings in this article are of particular practical importance for the future practice of comitology. This preliminary evaluation has not only answered a series of questions that the new procedure has raised since 2006, but also highlighted a number of unexpected developments about how the new procedure is working in practice.

In terms of usage of the new procedure, we noted the surprising fact that the Council was first to use its veto, and not the Parliament. The Parliament has been moderate in the number of objections it has tried to raise, although it is not clear to what extent this is due to the fact that the vast majority of RPS measures are still to come in the future; to Members not yet being familiar enough with the new procedure and its full potential; to the non-controversial nature of the draft measures; or because it is not easy to find a voting majority for resolutions. Summing up on how often Parliament opposes an RPS draft measure, we can conclude that the Council once rejected a set of six draft measures and that

Parliament once rejected one draft measure.<sup>17</sup> Furthermore, Parliament started four more procedures to object, two of which were voted down in the parliamentary committee concerned, and two others were withdrawn before the vote after promises

made by the Commission. Looking at which of the three criteria for rejection were used by Parliament, we noted that the only Rule 81 resolution adopted on proposal of the ECON committee alleged that the Commission had exceeded its implementing powers. Different criteria were used for the other cases. In the case of household lamps the measure was considered disproportionate, as it would lead to a ban

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on a product, a measure it was deemed more appropriate to decide under co-decision. In the three other cases (biocide 'diffeneacoum', children's seatbelts and animal testing) the draft measures were thought to be not compatible with the aim or content of the basic acts, the main purpose of which was the promotion of safety, life and/or the environment. It is in this area of attempting to oppose a draft implementing measure that a series of unexpected developments have arisen. The most interesting of these, certainly for the future, is the notion of the Parliament being able to threaten an RPS Resolution to extract a de facto right of amendment – although we are yet to see if the promises made through this development are actually kept. Finally, we also noted that

the European Parliament has not become, as initially feared, a Trojan horse for lobbying interests and that the pattern of lobbying of implementing measures has changed little in the last couple of years.

Given the increasing insertion of RPS into legislation, a full understanding – by all actors – of how they can use the procedure and how it works in reality will be essential. In this sense there is a form of information advantage for those who grasp the full consequences, intended and other, of how the RPS is working in reality. It is hoped that this article has provided a first insight into what may become a more and more researched and lobbied area of EU decision-making.

## NOTES

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\*\* Mario Damen, Administrator, European Parliament Transport Committee; the opinions expressed in the article are those of the author alone and not of the Institution.

<sup>1</sup> Alfé M. 'Institutional Tensions in the Evolution of the Comitology System' in: Christiansen T. Oettel J. & Vaccari B. (Eds.) 21st Century Comitology: The Role of Implementing Committees in the Wider European Union (forthcoming).

<sup>2</sup> Council Decision 2006/512/EC amending Decision 1999/468 EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

<sup>3</sup> The Right of Scrutiny is more commonly, and more accurately, known under its French name 'Droit de Regard'.

<sup>4</sup> Report from the Commission on the Working of Committees During 2007, Commission COM(2008) 844 final.

<sup>5</sup> Report from the Commission on the Working of Committees During 2007, Commission COM(2008) 844 final, page 6.

<sup>6</sup> <http://ec.europa.eu/transparency/regcomitology/registre.cfm?CL=en>

<sup>7</sup> For more information on these Resolutions see Lintner P. & Vaccari B. 'The European Parliaments Right of Scrutiny under Comitology: A Legal David but a Political Goliath?' in: T. Christiansen, J. Oettel & B. Vaccari (Eds.) 21st Century Comitology: The Role of Implementing Committees in the Wider European Union (2009, European Institute of Administration, Maastricht).

<sup>8</sup> A positive opinion of the committee requires a Qualified Majority Vote in favour, therefore at least 255 votes.

<sup>9</sup> Article 5a of Council Decision 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

<sup>10</sup> Negative opinions from comitology committees are very rare. In 2007 there were only 17 referrals (representing 0.7% of the total implementing measures), in 2006 5 (0.2%) and in 2005 11 (0.5%). These figures are often quoted to highlight the success and consensual operation of comitology.

<sup>11</sup> Christiansen T. & Vaccari B. "The 2006 Reform of Comitology: Problem Solved or Dispute Postponed?" EIPASCOPE 2006/3.

<sup>12</sup> Minutes of JAI Council of 24-25 July 2008, p. 35-36 [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/102007.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/102007.pdf)

<sup>13</sup> Correlation tables indicate how individual articles of a European legislative act are transposed into national law. Such tables are helpful for the Commission but not always wanted by Member States.

<sup>14</sup> The opposing Resolution was adopted in the European Parliament plenary of 16 December 2008 under number P6\_TA-PROV(2008)0607 which can be found on the Parliament's website [www.europarl.europa.eu](http://www.europarl.europa.eu)

<sup>15</sup> To cope with the new RPS procedure, the Parliament also amended the article on implementing provisions in its internal rules of procedure. The amended Rule 81 describes the procedure to follow from the reception of a draft measure to the adoption of a Resolution objecting to a draft measure.

<sup>16</sup> The Resolution was passed on the 23 October 2008 by 361 votes for, 16 against and 181 abstentions, under the number P6\_TA-PROV(2008)0521 which can be found on the Parliament's website [www.europarl.europa.eu](http://www.europarl.europa.eu)

<sup>17</sup> Situation as of end of March 2009.