

The European Parliament's Right of Scrutiny over Commission Implementing Acts: A Real Parliamentary Control?



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Some 300 legislative acts are adopted every year by the European Parliament and the Council, or by the Council alone. Based on these acts, the European Commission adopts around 3,000 implementing acts each year, after consulting one of the 250 so-called 'Comitology committees' made up of representatives of the Member States. Only about 0.2% of these delegated acts are referred back to the Council because of non-agreement between the Commission and the Committee. Since the entry into force of the second Comitology decision in 1999, Parliament also has a right of scrutiny over such acts, but it has used this right in order to question the Commission's proposals in only three cases. This paper asks whether this right of scrutiny is an appropriate way of controlling delegated rule-making. It starts with a short historical overview of Parliament's role, before describing the current legal regulation of Parliament's involvement in comitology procedures. It then looks in detail at the three cases in which Parliament has to date adopted a 'Resolution'. Finally, a general assessment is made of parliamentary control over implementing powers, with a view to contributing to the present discussion about an adequate system of delegated rule-making under the Constitutional Treaty.

1. A Brief History of Parliament's Involvement in the 'Comitology' System

The institutional position of the European Parliament with regard to delegated rule-making is fundamentally ambiguous. On the one hand, it is a legislator together with the Council and thus claims to control the Commission in the exercise of its implementing powers. On the other hand, as a supranational institution, the Parliament shares aims and interests which are closer to those of the Commission, and thus has a more oppositional relationship with the Council.

The comitology system was not provided for anywhere in the Treaty.¹ It emerged out of a practical need and for pragmatic reasons. The establishment and management of a common market requires the ability quickly to adopt and amend specific technical regulations. The Council had neither the necessary structure nor an appropriate institutional character to do this itself, but did not want to

· delegate implementing decision-making powers without
· retaining some sort of control. The Commission, on the
· other hand, did not possess all the necessary information
· and resources to keep abreast of developments and
· requirements in the fields to be regulated. Comitology was
· the perfect solution to satisfy both. The Council was not
· responsible for details, but was still in control via these
· 'mini-councils' in the committees. The Commission acquired
· the power to partly implement what it initially presents as a
· proposal in the legislative process. With the introduction of
· Article 202(3)² by the Single European Act, these imple-
· menting committees acquired an explicit legal basis in the
· Treaty. This paragraph formed the legal base for the first
· 'comitology' decision³ adopted in 1987, and retrospectively
· legitimised the existence of these committees by establishing
· that the Council could impose certain requirements in
· respect of the exercise of the Commission's implementing
· powers.

The current procedures governing the work of the

committees are laid down in the second Comitology Decision - Council Decision 1999/468.⁴ Under the advisory procedure, the Commission must take utmost account of the views of the committee. Under the management procedure, the committee, acting by qualified majority, gives an opinion; unless there is a negative opinion, the Commission may adopt the act. Under the regulatory procedure, the committee, acting by qualified majority, gives an opinion; the Commission may only adopt the act if there is a positive opinion.

The Parliament did not fundamentally oppose the emergence of the comitology system. In a Resolution of 1968 it recognised the additional value that these committees would give to the executive decision-making process.⁵ However, from the beginning the Parliament demanded that the committee procedures should not endanger the institutional balance of the Community, and should have a mere advisory role.⁶

The Parliament did express concerns regarding the lack of transparency of those committees and the impossibility of carrying out democratic supervision. These complaints failed to be heeded by the Commission, however, until Parliament exercised its budgetary powers and refused to release part of the funds intended to finance committee meetings in the early 1980s. In the following years Parliament was guaranteed information rights through inter-institutional agreements.⁷

With the 1999 Comitology Decision, the 'underground work' of the committees became more transparent and open to supervision on a legally-binding basis. Article 7(3) of the Comitology Decision entitles Parliament in the areas governed by co-decision to receive all the documents related to each committee meeting at the same time as the Member State delegations.⁸ A bilateral agreement on procedures for implementing the Decision⁹ provides for practical arrangements on document transmission to the EP.¹⁰

However, Parliament's right to control the Commission in the exercise of the powers delegated to it has still not been extended, even though the introduction of codecision has meant that Parliament became a full co-legislator on an equal footing with the Council in the adoption of essential elements, including the empowering provision for the Commission's implementing tasks, in the basic acts. Through the participation of Member States' delegations in the committees, the Council exercises direct influence and control in the process of drafting and adopting an implementing measure. In the management and the regulatory procedure, in the absence of approval by the committee, the Council may even adopt the implementing act itself.

The Parliament does not have the same powers.¹¹ It has the right to be informed on a regular basis about all committee proceedings, and an "ultra vires Council information right" only under the regulatory procedure. Under Article 5, the Commission is required to submit a proposal of the implementing measures to the Council and

to inform Parliament if a regulatory committee has given a non-favourable opinion or no opinion. In this case Parliament shall inform the Council if it considers that the Commission exceeded its powers when submitting a proposal.¹² Parliament can exercise this right in addition to its right under Article 8, exercised in an earlier stage of the implementing rulemaking process, to indicate if it considers that the Commission has exceeded the implementing powers provided for in a basic instrument adopted by codecision.

2. General Observations on Parliament's Right of Scrutiny

Implementing Powers and the Need for Parliamentary Control

Judgements as to whether a Commission implementing act remains within the powers formally delegated in the basic act can only be made by distinguishing between matters of a legislative and implementing nature. In so far as the content of delegated legislation is pre-defined and determined by the parent act, no problems should arise because the executive legislator (the Commission) has to act within the political will of the democratically-elected legislators (i.e. the Council and EP). But it is difficult or even impossible to assess the extent of the permissible delegation of law-making without some sort of substantive hierarchy of norms, established and assessed by legal acts and not only by formal criteria.

Contrary to most national Constitutions, the Community Treaty does not give any indications of what has to be regulated by the legislator(s) following legislative procedures and what can be delegated to the Commission. Article 211 only stipulates that 'implementing powers' shall be conferred on the Commission. The European Court of Justice (ECJ) has not defined the implementing powers, but what was to

be regulated at legislative level: namely 'the essential elements'.¹³

On the basis of case law, it can be concluded that the concept of implementation is generally given a wide interpretation, especially in the field of agriculture.¹⁴ It is not only the wording of the enabling provision that one has to look at, but the whole

system of the relevant market, the regulated issue in question when assessing the scope of empowerment.¹⁵ This lack of a general definition of executive and legislative measures does not make it easy for Parliament to indicate whether the Commission in a certain case acted within or beyond the delegated powers. In the end the ECJ is the only competent institution to decide if the Commission acts within its duties and powers, possibly at Parliament's instigation.

Moreover, Parliament's own interests are not uniform. Depending on the procedure to be followed and on what content is to be considered as non-essential, the EP's interest in control is different. As the Parliament itself stated in its 1984 Report, it is not interested in regulating or calling

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back issues on mere technicalities: 'The technical adaptation committee system is contrary to the spirit of this provision to the Treaty system and to the general principle common to the laws of the Member States that the legislator must not interfere with the exercise of delegated power.'

Parliament's right of scrutiny appears to have considerably different implications under each of the three comitology procedures. Matters dealt with under the management procedure are normally those with budgetary implications or of a more technical administrative nature (such as research, education and cultural programmes) with less leeway for the Commission. They are therefore generally of less interest to Parliament for control purposes. Another reason why Parliament might not even have an interest in having the '*ultra vires* Council information right' under Article 5 for drafts submitted to a management committee, is that most of the measures regulated under this procedure are agricultural matters for which basic acts are not adopted under Article 251 and Parliament does not have the same rights anyway.

Article 8 of the Comitology Decision

'If the European Parliament indicates, in a Resolution setting out the grounds on which it is based, that draft implementing measures, the adoption of which is contemplated and which have been submitted to a committee pursuant to a basic instrument adopted under Article 251 of the Treaty, would exceed the implementing powers provided for in the basic instrument, the Commission shall re-examine the draft measures. Taking the Resolution into account and within the time-limits of the procedure under way the Commission may submit a new draft measure to the committee, continue with the procedure or submit a proposal to the European Parliament and the Council on the basis of the Treaty (...).'

A Resolution based on Article 8 is in no way legally binding for the Commission, but it does have a legal effect insofar as it requires the Commission at least to re-examine the draft measure, taking the resolution into account. Whatever effect this 'taking into account' might ultimately have, after the Commission informs Parliament of the action it intends to take thereon, the Commission can continue with the procedure as if Parliament had not expressed its opinion at all.

The inter-institutional agreement implementing the Comitology Decision¹⁶ lays down a period of one month for Parliament in which the plenary has to adopt such a resolution, beginning on the date of receipt of the final draft of the implementing measure. The draft implementing measures are first presented at the committee meeting and, if they are substantially modified during the meeting, are resubmitted later.¹⁷

Rule 81 of Parliament's Rules of Procedure¹⁸

Rule 81 – Implementing provisions

1. When the Commission forwards a draft implementing measure to Parliament, the President shall refer the document in question to the committee responsible for the act from which the implementing provisions derive.
2. On a proposal from the committee responsible, Parliament may, within one month – or three months

for financial services measures – of the date of receipt of the draft implementing measure, adopt a resolution objecting to the draft measure, in particular if it exceeds the implementing powers provided for in the basic instrument. Where there is no part-session before the deadline expires, or in cases where urgent action is required, the right of response shall be deemed to have been delegated to the committee responsible. This shall take the form of a letter from the committee chairman to the Member of the Commission responsible, and shall be brought to the attention of all Members of Parliament. If Parliament objects to the measure, the President shall request the Commission to withdraw or amend the measure or submit a proposal under the appropriate legislative procedure.

Simultaneously with the introduction of the *ultra vires* right in the second Comitology Decision, Parliament reworded the rule on implementing provisions in its own Rules of Procedure in June 1999. In contrast with the Comitology Decision, Rule 81 provides for an objection to draft implementing measures also on grounds other than the Commission's exceeding its implementing powers. Before May 2004 the EP's rules of procedure did not mention any aspects at all of the Commission's executive powers to which Parliament should or could object. Parliament wanted to be free to object on any grounds and for any reasons whatever, formally as well as substantively. Therefore Parliament adopted a Resolution¹⁹ explaining that it will not refrain from objecting to the Commission's (draft) implementing measures based on Rule 88 (now Rule 81) because of the newly acquired *ultra vires* right introduced in the Comitology Decision. This Resolution is annexed to the inter-institutional agreement dealing with Parliament's information and scrutiny right given by the Comitology Decision: 'this agreement is without prejudice to its right to adopt any resolution on any subject, notably when it objects to the contents of a draft implementing measure; this agreement is also without prejudice to its right to object to implementing measures referred to the Council following an unsuccessful committee procedure pursuant to Rule 88 of Parliament's Rules of Procedure' (emphasis added).

Obviously, such a Resolution based only on Parliament's internal rules of procedure does not entail any obligation for the Commission, not even an obligation to re-examine the draft measure in the light of the Resolution. It is a simple political statement requesting the Commission to react in a certain way but without having any legally binding effect whatsoever. Conversely, this does as will be seen of course not prevent the Commission from actually sharing Parliament's opinion.

3. Parliament's Exercise of its Right of Scrutiny: the three Resolutions

Since the 1999 Comitology Decision, Parliament has adopted three Resolutions based on Article 8 of the Comitology Decision and/or Rule 81 of its rules of procedure with regard to three different draft implementing measures proposed by the Commission:

- Safe harbour privacy principles in 2000
- Cosmetics tested on animals in 2002
- Passenger name records (PNR) in 2004

Table 1

Comparison of Article 8 of the Comitology Decision and Rule 81 of the EP's Rules of Procedure

	Article 8 of the Comitology Decision	Rule 81 of the EP's rules of procedure
scope of application	draft implementing measures submitted pursuant to a basic act adopted under codecision	all draft implementing measures
timeframe	within 1 month after submission of the final draft measure to the EP: only then is the Commission allowed to adopt the implementing measure	whenever: it is in the EP's own interest to adopt it as soon as possible without prejudice to the time of adoption of the implementing measure
content	" <i>ultra vires</i> indication": the Commission exceeding its implementing powers, as provided for in the basic act	general objection to the draft implementing measure, including content
effect	Commission has to re-examine the draft measure "taking the Resolution into account" and inform Parliament accordingly	request to the Commission, no legally binding effect

a) Safe harbour privacy principles

The basic act and the Commission's powers

The EU data protection Directive²⁰ protects the rights of individuals with regard to the processing of personal data and ensures the free movement of personal data without restriction within the EU. Article 25 of this Directive stipulates that the transfer of data outside the EU is only allowable if an adequate level of data protection is secured in the recipient country. Article 25(6) empowers the Commission, following a management procedure, to lay down in a Decision that a third country actually does ensure an adequate level of protection. On the basis of this article, the Commission adopted its Safe Harbour Decision²¹ setting out a number of principles with which US organisations must comply if they want to receive personal data from the EU. The Commission confirms an adequate level of protection for personal data transferred from the Community to organisations in the US as long as these so-called 'safe harbour' principles are fulfilled.

*The EP Resolution*²²

Pursuant to Article 8 of the Comitology Decision and its own Rules of Procedure, Parliament used its power of scrutiny for the first time in its Safe Harbour Resolution in July 2000. In this Resolution, Parliament contests the adequacy of the level of protection given to personal data in the US, even if the safe harbour privacy principles are implemented by the receiving US organisation. It points out that 'such principles and the relevant explanations' could be considered adequate protection only if substantive changes are made. Parliament in particular proposes changes concerning the lack of an individual's right of appeal and compensation for the loss sustained through a violation of the safe harbour principles.

With regard to the Commission's powers, Parliament merely states that it is within the Commission's competence to 'ensure, on behalf of the citizens of the Union and its

Member States that "adequate" protection exists in third countries'. Even though Parliament bases its Resolution on its Rules of Procedure as well as on Article 8 of the Council Comitology Decision, nowhere does the Resolution actually mention that the Commission would act *ultra vires* by adopting the Safe Harbour Decision. Nor does Parliament refer to any of the possible requests anticipated – to withdraw, amend or submit a legislative proposal. It calls on the Commission to 'closely monitor the operation of the safe harbour system'. Parliament in the end asks for implementation of the Decision without making any amendments or making this conditional on introduction of the proposed changes.

The Commission: 'taking into account'

The Commission adopted the Safe Harbour Decision on 26 July 2000 despite Parliament's objections. It was a year later that the Commission introduced Recital 12 justifying its position in the light of Parliament's resolution:²³

'The Commission re-examined the draft decision in the light of that resolution and concluded that, although the European Parliament expressed the view that certain improvements needed to be made to the safe harbour principles and related FAQs before it could be considered to provide adequate protection, it did not establish that the Commission would exceed its powers in adopting the decision.'

Analysis and criticism

In its first *ultra vires* resolution, Parliament in a rather incoherent way expresses concerns, gives its opinion and proposes changes to the substance of a decision the implementation of which it calls on the Commission to monitor closely. It does not actually indicate that the Commission would exceed its powers by adopting its implementing measure. Even if one argues that the

Resolution is at variance with the draft, Parliament definitely does not raise any objections to an *ultra vires* action within the meaning of Article 8 of the Comitology Decision.

One could argue that Parliament itself acted *ultra vires* by not limiting its objections to the question of whether the Commission acted *ultra vires*. Following this position, the Commission could have argued that this Resolution is not to be considered to be such under Article 8 of the Comitology Decision, but only under Rule 81, thereby stating that it does not result in an obligation of the Commission to re-examine the draft measure.

Nevertheless some arguments could be found to suggest that the Commission did actually exceed its powers under the basic act: Article 25(6) of the Data Protection Directive only empowers the Commission to find that a third country ensures an adequate level of protection within the meaning of Article 25(2). It could be argued that, by confirming that the US provided an adequate level of protection, the Commission did not adhere to the assessment criteria as provided for in this Paragraph (2) and thereby exceeded its competences. This argument holds water especially as Paragraph 2 refers to the *rules of law in force* in the third country, whereas the safe harbour principles are not law but only non-binding principles with which US companies must comply if they want to receive data. Parliament actually addresses this problem in its Resolution on PNR (see below) where it indicates that the Commission might exceed its competences as regards substance because it declared rules, which had not been proven to be binding, adequate under Article 25(6) of the Data Protection Directive.

The Commission subsequently fulfilled its obligations under Parliament's resolution and more, by introducing Recital 12 in its Safe Harbour Directive. As the Commission is not called upon to give a statement to explain the extent to which it has taken account of Parliament's resolution and as the inter-institutional agreement only obliges the Commission to inform Parliament beforehand of what it intends to do (i.e. submit a new draft, continue the procedure or submit a legislative proposal), the reason for amending the legislative act by including Recital 12 almost a year after

cosmetics containing ingredients tested on animals. The original date for entry into force of this ban was 1 January 1998, but the Commission was empowered to postpone the date of implementation for the Member States 'if there has been insufficient progress in developing satisfactory methods to replace animal testing (...)'. Pursuant to this provision, the Commission, following a regulatory procedure, adopted Directive 97/18²⁵ and replaced the date of the ban in the basic act until after 30 June 2000. In this implementing Directive the Commission also empowered itself again to postpone the date of entering into force of the ban.²⁶

In spring 2000 the Commission presented two different legislative instruments to amend the Council Directive. On the one hand, it came up with a *legislative proposal*²⁷ to amend the Council Directive in order to solve once and for all the issue of experiments on animals in the cosmetics sector. On the other hand, the Commission exercised its *implementing powers* to amend the basic Directive by postponing the ban for a second and, as it said, the last time to 30 June 2002.²⁸ The reason for postponing the ban for only two more years was that the Commission expected alternative testing methods to become available within that period and the amended basic Directive to be adopted by then. However, the amendment of the Cosmetics Directive proved to be more difficult than the Commission had anticipated: Council and Parliament could not agree on a new regulation for animal tests for cosmetic products until 30 June 2002 thus allowing the ban on the marketing of animal tested cosmetics to enter into force.

After the legislative proposal had already been dealt with by the Conciliation Committee, the Commission presented a new draft implementing measure in September with the intention of again postponing the ban retroactively from 1 July 2002 until 31 December 2002. The latter date was defended by the Commission on the grounds that this implementing measure should only provide for an interim period until the Conciliation Committee came to agree on the amendment of the basic Directive.²⁹

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adopting it can hardly have been a legal one. Nor can the issue of transparency explain the Commission's action. The added value and interpretative guideline of this recital is thus rather questionable.

b) Cosmetics tested on animals

The basic act and the Commission's powers

The Council Directive relating to the marketing and sale of cosmetic products²⁴ provided for a ban on the marketing of

*The EP Resolution*³⁰

In its Resolution on the postponement of the ban, Parliament states that regardless of the legality of the second 'self-empowerment', the Commission had now in any case exceeded its powers by postponing the date of entering into force of the ban for a third time. Parliament argues that the Commission itself explicitly stated in Recital 10 of its implementing Directive that it would postpone the ban for the last time. It therefore holds the view that the Commission exhausted the implementing powers conferred on it by

adopting the second postponement. Furthermore it points out that any postponement would now be retroactive as the ban had already entered into force. Parliament therefore called on the Commission to withdraw its draft implementing Decision and on the Member States not to vote in favour of the draft measure in the regulatory committee.

The Commission: 'taking into account'

The Commission was under no obligation to react at all to this resolution, not even to re-examine the draft measure or to address the Parliament with a formal answer as would be the case for a Resolution adopted pursuant to the Comitology Decision. However the Resolution was taken into account in its substance: The Commission in the end did not adopt its draft implementing measure providing for a third postponement of the ban. After the negative echo from the Parliament, the draft measure was discussed at the Committee meeting on the 30 September 2000. At this meeting no formal opinion was delivered nor voted on and the treatment of the draft measure was postponed.³¹

At that time, the amendment of the basic act in the legislative procedure with the same aim to regulate the testing of cosmetic products was already discussed in the Conciliation Committee. A compromise could be found and a joint text could be agreed on in the Conciliation Committee in December 2002 and the newly amended Council Directive on animal tests entered into force in February 2003³² so that the adoption of an implementing act became superfluous anyway.

In the Comitology Report for the year 2002³³ this Resolution is not mentioned in the horizontal part under the heading "EP's right of scrutiny" as would be the case if the Resolution was to be considered such pursuant to the Comitology Decision. Although it is mentioned in the Reports Annex, being considered worthy of mention as an individual file of institutional importance.

Analysis and criticism

This is the only Resolution to date which states clearly, simply and without objecting to the political content of the draft implementing measure, that the Commission exceeded its powers under the basic act. Yet it is also the one which actually does NOT refer to Article 8 of the Comitology Decision, but only to Rule 81 of the Rules of Procedure.

The right of scrutiny only applies to joint acts or acts for which the last amendment has been adopted under the co-decision procedure. 'The Commission's services are, however, invited to go beyond this legal obligation and forward to the Parliament also the draft measures implementing basic instruments which, although adopted

The fact that Parliament adopted a resolution even though it was not legally binding at all, showed the Commission that Parliament takes the issue really 'seriously' and it might be seen as an 'early warning' of further and more rigorous legal action to be taken. The Parliament did actually bring an action for annulment.

on different legal basis before the entry into force of the Maastricht and/or Amsterdam Treaty, would nowadays come under the co-decision procedure. This was precisely the case with the Animal Testing Directive.³⁴ The Cosmetics Directive was originally adopted under the consultation procedure. The 6th amendment³⁵ before the draft implementing measure had been adopted under the co-operation procedure. It was actually only the most recent amendment (the 7th) that has been adopted pursuant to Article 95 of the EC Treaty and thus under the co-decision procedure. Therefore Parliament could not base its Resolution on Article 8 but only on its own rules of procedure.

In this special case of proposing an implementing measure as a 'quick-fix short-term solution' for having an interim regulation until the Conciliation Committee found a compromise on the adoption of the legislative proposal to amend the same basic act on which the implementing measure is based,³⁶ it is questionable whether it was

necessary for the Commission to present an implementing act, even only for an interim period, as the issue was in the hands of the legislators anyway. The fact that the Commission still proposed an implementing measure after the time of empowerment might be seen as an attempt to see whether Parliament would finally tolerate this third postponement – obviously without any legal basis – only for this interim period. The fact that Parliament adopted a resolution even though it was not legally binding at all, showed the Commission that Parliament takes the issue really 'seriously' and it might

be seen as an 'early warning' of further and more rigorous legal action to be taken. As will be seen, Parliament did actually do so in the case of PNR by bringing an action for annulment.

c) Passenger Name Records (PNR)

The basic act and the Commission's powers

The third Commission implementing act which prompted Parliament to adopt an *ultra vires* Resolution was again based on the Data Protection Directive. The adoption of Commission Decision on PNR³⁷ in May 2004 is a response to the unilateral US decision on Aviation and Transportation Security adopted in the aftermath of the events of 11 September 2001. This US decision requires airline companies to provide certain public US institutions with direct access to or transfer of data concerning passengers and crew flying to, from or in the US. As these US requirements potentially conflict with Community and Member State legislation on data protection, especially the EC Data Protection Directive, the EU tried to agree on a compromise

solution with the US in finding a balance between the citizens' (fundamental) right³⁸ of privacy and the need to exchange personal data in order to fight terrorism. After some commitments or 'undertakings' made by the US, the Commission finally gave the 'green light' to the transfer of PNR files of European citizens to US public authorities by indicating that the data on air passengers transferred to the US authorities would enjoy the 'adequate protection' required under the EU's Data Protection Directive (= 'adequacy finding').

The Commission adopted this implementing Decision using the powers given to it under Article 25(6) of the Council Data Protection Directive. The safe harbour principle did not apply to the transfer of data regarding European airline passengers to US public institutions because such data is only available to companies under the jurisdiction of certain public bodies that control the fairness of commercial practices. As European airlines do not fall under the jurisdiction of such US bodies, a special adequacy finding decision for PNR had to be adopted.³⁹ Furthermore the Commission decided that it was also necessary to have an international agreement, as an implementing act based on Article 25 of the Data Protection Directive would not allow for a comprehensive and full regulation of the matter. For that reason a bilateral international agreement between the EU and the US complements the 'adequacy finding' decision and deals with certain legal problems not addressed

protecting individuals as regards PNR data as long as the Union does not act. As regards substance, Parliament considers the Commission to have exceeded the executive powers conferred on it because of the non-binding nature of the undertakings made by the US. Parliament does not expressly complain that the Commission is exceeding its implementing powers given to it by Article 25 of the Data Protection Directive. What it states is that the draft decision is a measure merely designed to implement the Data Protection Directive and as such it may not result in a lowering of the data protection standards. Parliament held back from determining whether the draft decision actually is of such nature; it only states that 'its effect, however might be a lowering.'

Referring to one of the possibilities provided for in Article 8 of the Comitology Decision, Parliament calls on the Commission to withdraw the draft decision. Without referring to the existing international agreement which was ultimately adopted, Parliament calls on the Commission to provide for an international agreement in compliance with the fundamental rights and some of the principles stipulated by Parliament. Parliament considered that, if such an agreement were to be adopted, the Commission could legitimately submit a new adequacy-finding decision. Furthermore Parliament reserved the right to take the matter to the Court of Justice if the Commission went ahead.



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by the latter.⁴⁰ The Council authorised the Commission to negotiate such an agreement which was then adopted by the Council in accordance with Article 300(3) of the Community Treaty.⁴¹ This Article regulates the procedure for adopting international agreements and generally provides only for consultation with Parliament. Derogating from this principle, Article 300(3) provides for the assent of Parliament if, for example, an international agreement entails the amendment of a basic act adopted under the codecision procedure. The Council based both its instruments – the decision to conclude an international agreement as well as the Data Protection Directive itself – on Article 95, the legal basis for Internal Market instruments.⁴²

The EP Resolution⁴³

In its Resolution adopted on 31 March 2004 Parliament opposed this Commission draft measure.⁴⁴ On the one hand Parliament argues that the Commission was acting without a legal basis permitting the use of PNR commercial data for public purposes, and states on the other hand that the level of data protection in the US is not adequate.

With regard to the first argument, Parliament holds that [at this stage] there is no legal basis in the EU permitting the use of PNR commercial data for public-security purposes. It expressly underlines the Member States competence for

The Commission: 'taking into account'

The Commission Decision entered into force despite Parliament's Resolution, as did the international agreement, despite Parliament's request for the Court's opinion. The Commission thereby considered 'that adoption of the decision and consequent signing of the agreement with the US was for passengers and for the protection of their data much better than leaving the question in a complete legal void which was the only alternative. The Commission satisfied the requirement to inform Parliament on what it intended to do by providing oral explanations on 29 March and 19 April by Commissioner Bolkenstein as regards the Commission's draft decision. Written explanations were further given in a letter from President Prodi to President Cox.'⁴⁵

Analysis and criticism

In this Resolution, Parliament clearly expresses objections and gives reasons why the Commission exceeded its implementing powers with regard to the formal basis and substance of the Commission's draft decision. By saying that – at this stage – there is no legal basis in the EU for permitting the use of PNR commercial data for public-security purposes, Parliament indirectly rejects the Data Protection Directive as a legitimate legal basis for adopting

the PNR Decision. On the other hand, by calling on the Commission to submit to Parliament a new adequacy-finding decision, Parliament in fact asks for a new implementing act (based on the Data Protection Directive) adopted in combination with a sound international agreement.

Parliament does not give a comprehensive explanation as to why it considers the fact that the draft decision, which is based on 'undertakings the binding nature of which is far from proven,' makes the PNR Decision an *ultra vires* act. It most likely addresses the fact that Article 25(2) of the Data Protection Directive empowers the Commission to assess the adequacy of the level of protection in the third country, particularly in the light of the 'rules of law in force'. This would be an argument that Parliament could have brought forward previously when adopting the safe harbour resolution, as those principles are also of a non-binding nature (see above).

Even though an international agreement was already part of the legal framework regulating the transfer of PNR, and although Parliament asked for a new adequacy finding, thereby acknowledging that the Data Protection Directive could serve as a legal basis, it took the matter to Court. On 25 June 2004 Parliament decided to bring in an action for annulment under Article 230 of the Community Treaty for both the Commission Decision on PNR and the Council Decision which concluded the international agreement.⁴⁶

The question of whether Parliament should have been asked for its assent under Article 300(3) in view of the international agreement amending the Data Protection Directive is different, but of course related to the question of whether the Commission exceeded its competences given by this Council Directive. Assuming that the Commission was basically empowered to adopt the PNR agreement on the basis of Article 25 of the Data Protection Directive, Parliament seems to indicate that the Commission exceeded this empowerment by toning the basic act down. Generally the Commission is only empowered to legislate within the general principles and aims as provided for in the basic act. With regard to interference with fundamental rights of privacy in this case, the Court has decided in a case about agricultural subsidies that such interference does not necessarily have to be regarded as an 'essential element' and can therefore be dealt with at implementing level even if not explicitly provided for in the basic act.⁴⁷

4. Conclusions

Comparing the Parliament's *ultra vires* control given to it by the Comitology Decision with the possibility of adopting a Resolution on implementing acts under its own rules of procedure, we conclude that there is no crucial difference in the end. Both can be seen as a mere 'institutionalised threat' to bring an action for annulment. Also a Resolution adopted under the Comitology Decision does not prevent the Commission from going ahead, nor does it enhance the

democratic legitimacy of delegated rulemaking.

On the basis of the three individual analyses, moreover, we argue that this *ultra vires* control is actually not designed so that it can be used effectively. It conflicts with Parliament's political nature, while the current implementing system at European level does not allow for effective scrutiny. The main problem is the lack of a systematic distinction between implementing acts with a possible political impact and those of a mere executive nature. For the latter, the right of scrutiny as it stands, with only an *ex post* juridical control, should be enough.

Moreover, since Parliament has *locus standi* as a fully privileged actor under the Article 230 procedure, and can thus bring an action not only to defend its own prerogatives but also in the name of the citizens, judicial review can be regarded sufficient for mere technical measures. For Commission acts adopted under 'political discretionary power', however, a new way of parliamentary control and a system of cooperation and coordination with the Council has to be found.

Ultra vires control and democratic legitimacy

In a system of division of powers, the legislative is normally called on to exercise its *political* control over the executive. Parliamentary control usually means political control, but Article 8 of the Comitology Decision provides for *legal* control. It is designed to make the Commission aware that it is exceeding its powers in the adoption of a particular implementing act, but the EP, reflecting its political nature, has used it as a medium to make political statements. Parliament was not satisfied with the Commission's 'policy' content in the case of the data protection decisions and therefore adopted a Resolution. In both cases, the PNR and the Safe Harbour Decision, Parliament took the view that

the rights of citizens to data protection and privacy were not sufficiently protected in the political issue of finding a balance between the fight against terrorism and the protection of peoples rights to confidentiality.

The mere giving of an opinion by Parliament in the exercise of Article 8 is not sufficient to enhance democratic legitimacy of

the comitology system. Some would say that it does not give any additional value at all, since the Parliament already had the right to bring an action of annulment under Article 230. Yet, this right of *ultra vires* scrutiny, exercised correctly, could give Parliament quite a strong legal say in the early stage of drafting the Commission's implementing measures. As seen in the Resolution on the ban on animal testing, the use of Article 8 as an 'institutionalized threat' to bring an action for annulment may make the *ultra vires* right, which in itself is powerless, a quite effective right legally.

This distinction between mere execution and (political) rulemaking at implementing level can, of course, never be a sharp and clear one ex ante.

Parliament's internal organisation and the processing of implementing drafts

Nowadays Parliament does receive all the documents required to exercise its control over the comitology system as established by the Comitology Decision and the related inter-institutional agreements. Yet the internal organisation of Parliament as a political institution is hardly compatible with the legal-administrative comitology system. Parliament cannot properly control the comitology procedures because of internal difficulties in processing and assessing all the information received. Before adopting a resolution in plenary, as Parliament is required to do at the latest one month after receiving the final draft implementing measure, all the EP committees directly and indirectly involved in the domain should give their opinion on it. It might even happen that the decision in plenary has to be taken within a few days as the EP normally only has one plenary session a month. Parliament is simply overloaded.

Another reason for Parliament's incapacity to exercise its right of scrutiny properly might be found in the lack of a homogeneous party system at European level. At national level, information about 'hot issues' at administrative level are passed on via the political parties, thereby giving the overruled opposition the chance to bring the discussion to Parliament. At European level the political parties have different 'souls' and the interpretation of an issue quite often differs according to the internal national positions.

Distinction between the technical and political impact of implementing measures

Under the current system, there is no distinction between technical delegated acts and those with a possible political impact. Parliament cannot effectively apply *ultra vires* scrutiny under the current system on the one hand due to inter- and intra-institutional organisations but also because of a lack of any sort of institutionalised warning system to indicate which acts might possibly have a political impact and which ones merely change proportions of certain ingredients due to technical progress. At the moment it is either the legislators regulating themselves or delegating to the Commission under the Comitology procedures under which Parliament cannot legally influence or review the measure at all and also Council can only get heed of the measure again with quite some difficulty.

For simple technical measures a merely *formal* legal scrutiny can be considered sufficient in a working system of overall checks and balances being democratically accountable via judicial review anyway. But for political implementing measures, measures of legislative discretion a necessity of a legitimising democratic supervision – while deciding control – has to be developed.

This distinction between mere execution and (political) rulemaking at implementing level can, of course, never be

a sharp and clear one *ex ante*. But the best possible distinction seems to be better than none at all. This guarantees effective political supervision in delicate delegated fields and a fast and adequate implementation in technical delegated fields using comitology as a mainly advisory procedure (as proposed in the new Commission proposal).

Two proposals are currently on the table which would change the present situation.

The Commission's Proposal

The Commission has presented a Proposal⁴⁸ to modify Council Decision 1999/468/CE under which Parliament would be given full equality with the Council in the supervision of measures to implement acts adopted by codecision. However, in this proposal both supervisory bodies can

ultimately be overridden by the Commission. Thus even though Parliament is placed on an equal footing with the Council, both of them are 'placed down' to the current parliamentary level. Article 8 would be deleted, so that no parliamentary supervision for acts adopted under the advisory procedure would apply at all. There would no longer be a difference between the advisory and the regulatory procedure with

The added value of the regulatory procedure would be to serve as a bargaining forum, allowing the legislators to give their (political) opinions.

regard to the Commission's possibility to adopt the act in the end, even against the opinion of the Committee and objections by Council and Parliament. The added value of the regulatory procedure would be to serve as a bargaining forum, allowing the legislators to give their (political) opinions. The Commission is thereby made aware of the opposing views, legally and politically, and is given the option of adapting its position to avoid subsequent claims and litigation under Article 230.

This approach is perfectly coherent with the notion of a separation of powers, inasmuch as the legislative power should not participate in but only supervise executive rulemaking, and the Commission has responsibility for the execution of EC laws. The tenuous supervision granted to the legislators would also be democratically and politically acceptable as long as only executive tasks are delegated and do not entail any political impact, thus guaranteeing the predictability and accountability of the executive (the principle of legality). In this perspective, indeed, it would appear that the 'problem' of the current 1999 Decision is not so much that Parliament is granted too few supervisory powers but that the Council is granted excessive participation in the adoption of merely technical implementing acts.

Implementing Acts under the Treaty establishing a Constitution for Europe

The Constitutional Treaty introduces an explicit distinction between legislative and non-legislative acts, even though this is not entirely clear. On the one hand, these are to be distinguished by the nature of the *procedures* by which they are adopted: legislative acts are in principle adopted by the

Parliament and Council on the basis of a Commission proposal, whereas non-legislative acts are adopted either as delegated regulations (mainly by the Commission), implementing acts (mainly by the Commission at European level) or specific cases (mainly by the Council). On the other hand, they are distinguished in terms of the *instruments* involved: legislative acts will be European laws or framework laws; non-legislative acts will take the form of European Regulations and Decisions. These new Regulations, moreover, can either be directly applicable or require transposition into national measures (and thus have the legal form of either the present Regulations or Directives).

Despite these complications, however, a new and potentially very valuable distinction concerning the future of comitology is proposed. On the one hand, Article I-36 provides that 'European laws and framework laws may delegate to the Commission the power to adopt delegated

European regulations to supplement or amend certain non-essential elements of the law or framework law'. The conditions to be laid down in the future for this form of delegation suggest an equality between the Parliament and the Council, either of which may 'decide to revoke the delegation' and have the right to state a binding objection to the proposed delegated regulation. On the other hand, Article I-37 stipulates that 'implementing acts' may be adopted at European level where uniformity is required. In these cases 'mechanisms for control by Member States' will be agreed.

If this new classification helps to distinguish 'delegated legislation' with *political* impact from 'delegated execution' regulating *technical* issues, this could make it possible to improve the balance in rule-making for implementation between democratic accountability, on the one hand, and effectiveness in terms of flexibility, on the other.

NOTES

* The authors are thankful for the comments received from Edward Best and Thomas Christiansen.

¹ For general information see: Pedler/Schäfer: *Shaping European Law and Policy*. EIPA, 1996.

² This states that the Council may 'confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.'

³ Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, 87/373/EEC.

⁴ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999/468/EC. If not otherwise indicated in this text "Comitology Decision" always refers to this second one.

⁵ Résolution relative aux procédures communautaires d'exécution du droit communautaire dérivé. OJ 1968 C 108/37. Based on the Legal Affairs Committee Report EP Doc. 115/68 of 30 September 1968.

⁶ In its Resolution A3-310/90 Parliament recalls its internal guidelines to systematically delete in first reading any provisions in the basic act for the regulatory procedure.

⁷ For details see: *The History of Comitology*, in *Shaping European Law and Policy*, Pedler/Schäfer. EIPA, 1996.

⁸ Article 4 of the Standard Rules of Procedure. OJ 2001 C 38/3.

⁹ Information is provided by an electronic transmission of these documents via the Secretary General of the Commission to a central service of Parliament. Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 2000 L 256/19.

¹⁰ On this basis the Secretariats-General of Parliament and the Commission adopted an administrative agreement dated 14 December 2001, which lays down minimum standards with regard to the types of documents and their structure. Unpublished, but referred to in the Reports on the working of committees in 2001 (COM(2002)733) and 2002 (COM(2003)530).

¹¹ The main argument in favour of the different roles Council

and EP play in the participation of the comitology procedures is that the Council itself delegates to the Commission not (only) in the name of its legislative but –mainly- his executive powers. As an MEP stated in the Sitting of Tuesday, 5 February 2002 "(...) Due to its executive powers, Article 202 grants it [the Council] a specific role in drawing up implementing measures. The same does not apply to the European Parliament, which has only a legislative role in applying the Treaties, and must not therefore be involved in everything."

¹² This is not necessarily the same draft measure submitted to the regulatory committee: see Case C-152/98 *Pharos v. Commission*.

¹³ I.a.: Cases C-25/70 *Köster*, C-240/90 *Germany, T-64 Frucht-Compagnie v Council*.

¹⁴ The ECJ has so far been reluctant to give the Commission such wide powers in other fields. Case C-14/01 *Molkerei Niemann v. Bezirksregierung Hannover*.

¹⁵ The Court has constantly held that the Commission might have implicit implementing powers. See: Tuerk

¹⁶ Inter-institutional agreement on procedures for implementing Council Decision 1999/468/EC, OJ 2000 L 256/19.

¹⁷ Reports on the working of committees in 2000 (COM(2001)783), 2001 (COM(2002)733) and 2002 (COM(2003)530).

¹⁸ Rules of Procedure of the European Parliament 16th edition, July 2004.

¹⁹ ANNEX XII to the EP's Rules of Procedure, 16th edition. Extract from the European Parliament resolution on the agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

²⁰ Directive 95/46/EC of European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

²¹ Commission Decision 520/2000/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbour Principles and related Frequently Asked Questions issued by the US Department of Commerce, OJ 2000 L 215/7.

²² A5-0177/2000, European Parliament resolution on the Draft Commission Decision on the adequacy of the protection provided by the Safe Harbour Privacy Principles and related frequently asked questions issued by the US Department of Commerce (C5-0280/2000 – 2000/2144(COS)) of 5 July 2000, OJ 2001 C 121/152.

²³ Corrigendum, OJ 2000 L 115/14 (2000/520/EC). This

- Corrigendum was published only one day after Parliament's Resolution had been published in the OJ. This might explain why the Commission in the Corrigendum states that Parliament's Resolution has not yet been published in the OJ.
- ²⁴ Directive 76/768/EEC on the approximation of laws of the Member States relating to cosmetic products. OJ L 151, 23/06/1993, p. 32.
- ²⁵ Commission Directive 97/18/EC of 17 April 1997 postponing the date after which animal tests are prohibited for ingredients or combinations of ingredients of cosmetic products. OJ L 114, 01/05/1997, p. 43.
- ²⁶ By submission of a draft implementing measure until 1 January 2000, see Article 2 Directive 97/18.
- ²⁷ COM(2000)189 final, amended proposal COM(2001) 687 final.
- ²⁸ Commission Directive 2000/41/EC of 19 June 2000 postponing for a second time the date after which animal tests are prohibited for ingredients of combinations of ingredients of cosmetic products. OJ 2000 L 145/25.
- ²⁹ See: Debates of Parliament, Sitting of Tuesday, 24. September 2002, Speech by Mrs. Wallström.
- ³⁰ P5_TA(2002)0435 of 24. September 2002, European Parliament resolution on the postponement of the ban on the marketing of cosmetics tested on animals, OJ 2003 C 273E/126.
- ³¹ Information from the Commission in August 2004.
- ³² After the approval of the joint text, Directive 2003/15 amending Directive 76/768 was adopted on 27 February 2003 containing a prohibition of animal testing on finished cosmetic products. This new Directive expressly states that Article 4 (1) (i) of Directive 76/768 is deleted as of 1 of July 2002 which means that Council Directive 93/35 allowing for the ban and possible postponements was superseded retrospectively in the interest of legal certainty.
- ³³ COM(2003) 530 final.
- ³⁴ Information from the Commission in August 2004.
- ³⁵ Council Directive 93/35/EEC of 14 June 1993 amending for the sixth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, OJ L 151, 23.6.1993, p.32.
- ³⁶ Notably this EP resolution on a Commission draft implementing measure is mentioned in the prelex database listing the decision-making process of the amendment to the basic Directive 76/768, http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=155818, referring to Bulletin EÜ 9-2002 (Internal Market (5/24):1.3.29 where the Commission (mistakenly?) states that "Parliament calls on the Commission to withdraw its proposal for a seventh amendment to Directive 76/768/EEC (...)"
- ³⁷ Commission Decision of 14-5-2004 on the adequate protection of personal data contained in the Passenger Name
- Records of air passengers transferred to the United States' Bureau of Customs and Border Protection. C(2004) 1914.
- ³⁸ Article 8(2) of the European Convention for the Protection of Human Rights. Enshrined in EC law, in particular by Article 286. Whereas in the US the protection of privacy is not regarded as a fundamental right.
- ³⁹ See Pérez Asinari/ Pouillet: The Airline Passenger Data Disclosure Case and the EU-US Debate, University of Namur, 2003, <http://www.crid.be>.
- ⁴⁰ Namely to consent access ("pull") by US law enforcement authorities to PNR databases situated on Community territory, and to impose an obligation on air carriers to process PRN data as required by US law enforcement authorities.
- ⁴¹ Council Decision of 17.May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2004/496/EC, OJ 2004 L 183/83.
- ⁴² Another theoretically possible way of entering into an international agreement with the US to regulate the transfer of passengers' personal data, would have been under Articles 24 or 38 TEU in order to implement the objective of "preventing and combating crime, organised or otherwise, in particular terrorism (...)" of Article 29 TEU. For EP's powers of scrutiny over CFSP/ESDP decision-making see: G. Bono: European Security and Defence policy and the challenges of democratic accountability. (DRAFT paper, March 2002).
- ⁴³ P5_TA-PROV(2004)0245. At its plenary session on 31.March 2004 Parliament voted by 229 votes to 202, with 19 abstentions. The PSE backed the resolution, but some PSE national delegations (including UK Labour Party) joined the PPE in opposing the Resolution.
- ⁴⁴ Draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records (PNRs) transferred to the US Bureau of Customs and Border Protection (2004/2011(INI)) (C5-0124/2004).
- ⁴⁵ Letter from President Prodi to President Cox on the draft agreement between the EC and the USA on the transfer of passenger data, D (2004)3398.
- ⁴⁶ Case C-317/04 and C-318/04. See also: Note from the Council legal service 11876/04 dated 6 August 2004. In view of this appeal under Article 230 the request for the Court's opinion under Article 300 (6) from 21 April became null and void.
- ⁴⁷ Case C-294/95 Germany v. Commission.
- ⁴⁸ COM (2004) 324 final. Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission. ::

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