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of European Commission Proposals

Susan Owens

The New European Regulatory Impact
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Transposition and Implementation of EIA
Directive in some Member States

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Evaluation of the German Act on
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Amended Comitology Decision strengthens Position of European Parliament

Gerhard Roller

1 Introduction

After intensive debate and negotiation,¹ an amended Comitology Decision came into force on 23 July 2006.² The enacted Decision differs considerably from the Commission's original proposal,³ as well as from the modified Commission's proposal⁴ of 2004. The amendment that was ultimately adopted has to be considered as a substantial step forward in putting the Parliament on an "equal footing" with the Council in the comitology procedure. The Parliament now disposes of a real veto right, at least in cases of "excès de pouvoir".⁵

Comitology committees are characterised by the fact that they are established by a basic instrument (a regulation or a directive) by the Council (and EP); they operate according to a specific legal procedure (based on the Comitology Decision 1999/468/EC) and deliver opinions on draft implementing measures submitted to them by the Commission. Members of the committees are civil servants of the Member States. The overall number of committees has risen significantly in recent years. Today, the environmental sector has become one of the most prominent fields in terms of the application of comitology decisions.

These Committees were regulated for the first time in the comitology decision of 1987.⁶ The second comitology decision of the Council in 1999,⁷ aimed at improving the procedure by making it more transparent and established important information rights for Parliament and the Public. The 1999 decision also incorporated criteria for the choice of the rele-

vant procedure to be applied. However, in all of these procedures, Parliament was not provided with the same rights as the Council. In the case of the regulatory procedure – that is, the preferred procedure in environmental legislation – the Commission has to inform Parliament if the draft measure is not in accordance with the opinion of the Committee, or if no opinion has been delivered. If Parliament considers that the draft measure (as far as the co-decision procedure is concerned) exceeds the implementing powers provided for in the basic instruments ('excès de pouvoir' objection), it shall inform the Council. The Council then has a discretionary power to act on the proposal at its disposal. The main shortcoming in the existing procedure is that Parliament has no power to control the Comitology procedure that is equal to that of the Council. The new amendment changes this situation.

2 New regulatory procedure with scrutiny

The three existing committee procedures (advisory, management and regulatory committee procedure) are amended by a further procedure, the so-called "regulatory procedure with scrutiny". In accordance with new Art. 2 (2) of the Comitology Decision, this procedure has to apply when a basic instrument (adopted in the co-decision procedure) enables the adoption of "measures of general scope" designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument with the addition of new non-essential elements. Hence, measures of general scope are not "essential (or basic) elements" of a Directive or Regulation in the sense of the "Köster" ruling of the Court of Justice⁸, but they have a normative character and a "political" dimension that justifies conceding Parliament an effective instrument of control. It has to be noted, however, that the Parliament has the same competence as the Council in the co-decision procedure under the Treaty. Therefore, if Council and Parliament are delegating implementing power to the Commission, Parliament should have the same supervision rights as the Council if the delegated power is exceeding its competences.

Under the new Art. 5a of the comitology decision, the procedure is as follows: First of all, the Commis-

¹ On the genesis of this amendment, see: Report of the Committee on Constitutional Affairs, 3 July 2006, Document A6-0236/2006, p. 6 ff.

² Council Decision of 17 July 2006 amending decision 1999/468/EC, laying down the procedures for the exercise of implementing powers conferred on the Commission, (2006/512/EC), OJ L 200 of 22 July 2006, p. 11.

³ COM(2002) 719 final, 11 December 2002. A critical analysis of this proposal can be found in G. Roller, *Komitologie und Demokratieprinzip*, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 3/2003, p. 249 (275-278).

⁴ COM (2004) 324 final, 22 April 2004. On this proposal, see: G. Roller, *Comitology in Environmental Policy*, in: H. Hofmann/A. Türk, *EU Administrative Governance*, (Edward Elger, Cheltenham, 2006), p. 115 (131-134).

⁵ It seems that only one case has been reported, in which Parliament claimed that the Commission exceeded its competences by adapting a directive in the light of technical progress (Art. 8 of the Comitology Decision).

⁶ OJ 1987, L 197, p. 33.

⁷ Cf. K. Lenaerts/A. Verhoeven, *Towards a legal framework for executive rule-making in the EU? The contribution of the new comitology decision*, *Common Market Law Review* 2000, 645; C. Mensching, *Der neue Komitologie-Beschluss des Rates*, *EuZW* 2000, 268 ff.; J.-L. Sauron, *Komitologie: comment sortir de la confusion?* *Revue du Marché unique européen*, 1-1999, 31 ff.

⁸ ECJC, case 25/70, Judgement of 17 December 1970, ECR 1970, 1161. See also: K. St.C. Bradley, *Comitology and the Courts: tales of the unexpected*, in: H. Hofmann/A. Türk, *EU Administrative Governance*, (Edward Elger, Cheltenham 2006), pp. 417-447.

sion shall submit a draft of the measures to be taken to the Committee. The Committee then delivers an opinion on this draft. If the measures proposed by the Commission are in accordance with the Committee's opinion (that has to be delivered with qualified majority as laid down in Art. 205 (2) and (4) of the Treaty), the Commission shall submit the draft measure without delay for scrutiny by the European Parliament and the Council. Both institutions may oppose the adoption of the said draft by a majority of its component members (EP) or by qualified majority (Council) within 3 months. The opposition has to be justified by indicating that the draft measures proposed exceed the implementing powers bestowed 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 (new Art. 5a (3(b))). This Article for the first time provides for a far-reaching supervision right in favour of Parliament which goes far beyond the "excès de pouvoir" objection that prevailed previously. If the European Parliament opposes the draft measure, the Commission cannot adopt the measure. Thus, Parliament disposes of a real veto right. In this case, the Commission may submit an amended draft of the measures or present a legislative proposal on the basis of the Treaty to the Committee.

In the case that the Committee does not deliver an opinion, or the proposed measure is not in accordance with the opinion of the Committee, the Commission shall submit a proposal to the Council and the Parliament without delay. If the Council opposes to the proposed measure by a qualified majority within two months, the measure is not adopted. If the Council envisages adoption of the proposed measure, it shall submit it to Parliament, which may oppose the measure on the same grounds as described above. Thus, in this case, the Parliament's right to control is equal to that of the Council.

The amended comitology decision also allows for a slightly modified procedure in urgent cases. However, even then, Parliament disposes of an ex-post control. Existing legislation shall be revised in order for the new procedure to be adopted by the end of the year 2007. A list of directives and regulation to be revised has already been set up.⁹

3 Evaluation

For the first time in the long struggle over comitology, the European Parliament is set - at least in one procedure - on an equal footing with the Council. In two respects, the amended Comitology Decision substantially extends the existing legal situation in favour of Parliament:

Firstly, the reason for opposing a proposed measure is no longer restricted to the "excès de pouvoir" objection. Instead, Parliament disposes of a far-reaching substantial supervision right. Secondly, the Parliament has an effective veto right. Up to now, the opinions of Parliament had no legal binding effects.

Furthermore, it should be emphasised that the new regulatory procedure with scrutiny is obligatory if the conditions of Art. 2 (2) apply. In so far, the legislator has no discretionary power available.¹⁰ Of course, there might be cases in which whether a measure is of "general scope" or not is disputable. This will certainly become a source of conflict.

The new procedure contains a further element which might be considered to be untypical. Up to now, a proposed measure was only submitted to the Council in the case that a qualified majority of the Committee voted against the Commission's proposal (so-called "referral to the Council"); in the regulatory procedure this was also the case if no opinion was delivered by the Committee. In the case of a positive vote of the Committee, the Council did not have to deal with the proposed measure. Indeed, discharge of the Council from day-to-day business by means of delegation to the Commission has formed the quintessence of all comitology procedures.. The fact that under the new regulatory procedure with scrutiny the draft measure is in any case submitted to the Council, even if the Committee agrees with it, is questionable insofar that the MS are already represented in the Committee by their national servants. Contrary to this, the Parliament has no influence in the Committee. The supervision right in the referral phase thus compensates the structural imbalance between Council and Parliament. The future will reveal if this new procedure will work efficiently. In any case, comitology procedures will continue to play a crucial role in legislation in the multi-level EU system.

⁹ Annex to the report of the Committee on Constitutional Affairs, 3 July 2006, Document A6-0236/2006, p. 19.

¹⁰ The choice of the procedure (advisory management or regulatory) was not legally determined under Art. 2 of the 1999 Comitology Decision. Nevertheless, the Court of Justice ruled that any deviation from the criteria laid down in the Comitology Decision had to be justified, Judgement of 21 January 2003, ECR 2003 I-937, para 63.

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If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is €52 per year for commercial users (consultants, law firms, government administration) and €21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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- **Companies and environment**
 - Environmental management
 - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

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- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
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On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.