THE EU COMITIOLOGY SYSTEM IN THEORY AND PRACTICE
Keeping an Eye on the Commission?

Jens Blom-Hansen
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Foreword and Acknowledgements

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Jens Blom-Hansen,
Aarhus
1
Introduction

Second-tier rule-making

On 8 July 2010, officials from the Transport Ministries in the EU member state capitals travelled to Brussels. Their destination was the headquarters of the European Organisation for the Safety of Air Navigation (Eurocontrol) at Rue de la Fusée 96. They were to meet with the Commission to discuss its latest initiative under the single European sky programme launched around the turn of the millennium to improve regulation of the European airspace.

On the agenda for their meeting was a proposal from the Commission to amend regulation no. 1794/2006, a Commission regulation establishing a common charging scheme for air navigation services in the airspace over Europe. The Commission now wanted to amend it by a new Commission regulation, but could not proceed with its own proposal unless the officials from the national Transport Ministries formally approved. The reason was that the officials constituted a comitology committee, the so-called single sky committee, which was established in 2004 to support the Commission in the implementation of the single European sky programme. In addition to member state representatives the committee consisted of observers from Iceland, Norway, Switzerland and Eurocontrol. Most of the members knew each other well because they had met regularly since 2004, four to five times every year. The meeting on 8 July 2010 was their 36th meeting.

When the committee convened in the Europa conference room at Eurocontrol, the Commission, as usual, chaired the meeting. Having achieved the committee’s approval of the meeting’s agenda and the minutes of the committee’s previous meeting, the chairman turned to item 2a on the agenda, the amendment of the Commission regulation
on charging schemes for air navigation services. The chairman asked for a formal vote on the proposal. Only member state representatives were allowed to take part in this formal exercise. Using the same voting system as the Council of Ministers each national delegation then formally gave a vote on behalf of its national government. This resulted in 273 weighted votes in favour of the Commission’s proposal, no votes against and 58 abstentions. The Commission was happy; it had obtained a qualified majority in favour of its proposal.

The Commission could now proceed with its proposal. This was done in the autumn of 2010 when the College of Commissioners formally adopted the regulation. It was then duly published in the EU’s *Official Journal* on 17 December 2010 and entered into force three days later. The single European sky programme had taken another step forward.

The position of the single sky committee illustrates the importance of the EU’s second-tier rule-making system. The first tier, where the Commission proposes legislation which is then approved, modified or rejected by the Council and the European Parliament, is familiar and visible. But underneath that top layer hundreds of second-order decisions are taken each month to complete or implement rules adopted by the Council and the Parliament. These decisions are taken by the Commission and formally adopted as Commission regulations, directives or decisions. However, in most cases the Commission must first submit its draft rules to a committee such as the single sky committee.

The single sky committee is one out of 250–300 committees that monitor the Commission’s rule-making activities. Sometimes it is enough that the Commission consults with the committee; sometimes, like in the case of the single sky committee, it must obtain the formal approval of the committee. The purpose of this committee system is to allow the member states to monitor the Commission’s implementation of legislation adopted by the Council and the Parliament. The system is known as the EU comitology system.

Although second-tier rule-making in the comitology system is less familiar and visible than activities at the first tier, it is important. Every year the comitology committees formally approve 1500–2500 implementation measures – Commission regulations, directives and decisions – which complete or implement primary regulation in all policy areas. Examples include rules on animal welfare, the organization of agricultural markets, energy networks, cross-border cooperation within higher education, harmonization of product requirements under the internal market programme, handling of waste to protect the environment, the operation of the EU structural funds, road transportation
systems and many other things. There is far more rule-making at the second tier than at the well-known first tier, at least in a quantitative sense. This is why all EU actors take a keen interest in the comitology system and its institutional design. As aptly summarized by the weekly magazine *European Voice* (15 July 2010, p. 6) in a report on the Lisbon Treaty’s impact on the comitology system:

What decision-making rights should be given to the [comitology committees], by whom and under what conditions, is a matter of great importance. This is not the Parliament and the Council squabbling over whether the Commission should do the housework. It is about who gets to redesign the house.

This book is a journey into the universe of the comitology committees. It investigates their daily operation, their institutional set-up, the system’s development over time and its broader role in the EU system.

**A closer look at the comitology system**

The body of EU law, the *acquis communautaire*, consists of several thousand legal acts, most of which are made by the Commission as delegated rule-making. Only a minority is made by the Council of Ministers and the European Parliament. In fact, according to Eur-Lex, the EU’s official online register of EU law, the Commission has issued 69 per cent of all EU legislation that is in force today.5

Although the Commission is thus an important rule-maker, it is not autonomous. As the story of the single sky committee showed, the Commission is in many areas monitored by committees of member state representatives, known as comitology committees. These committees are not involved in all Commission rules; but almost. There are no official accounts, but an investigation of all Commission rules made in the period 2004–08 – a total of 11,056 rules – shows that 55–65 per cent were checked by a comitology committee (Brandsma, 2010a, p. 33). In other words, comitology is a standard operation procedure for delegated rule-making in the EU system.

The committees in the comitology system are gatekeepers. They cannot amend or reject Commission proposals, but may refer them to the Council if they disagree with them. There is a lot of variation in the exact working rules of committees. Until the Lisbon Treaty they were specified in so-called comitology decisions made by the Council, for example Council of Ministers (2006a). After the Lisbon Treaty they are made as
regulations by the Council and the European Parliament. These working rules specify the decision rule in the committees to refer proposals to the Council, the timing of Council control, the default condition if the Council does not act and the degree of involvement of the European Parliament.

The comitology system has changed considerably over time. It was established in the early 1960s when the Common Agricultural Policy was introduced. With the growth of Community legislation, the practice of establishing comitology committees also grew. It proved to be a practical solution for the member states to the problem of delegating decision-making powers to the Commission without losing control (Bergström, 2005). The system did not have any solid treaty foundation until 1987 when the Single European Act amended article 202 (ex-145). From then on the treaty recognized that the Council might ‘impose certain requirements’ upon the Commission when delegating implementing powers (Haibach, 2000).

Following this change of the treaty the Council adopted its first comitology decision specifying the operating rules of the committees in the system (Council of Ministers, 1987). The rules were overhauled and simplified in 1999 when the Council adopted its second comitology decision (Council of Ministers, 1999a). But simplification was rolled back in 2006 when the 1999 decision was amended and the so-called regulatory procedure with scrutiny was introduced (Council of Ministers, 2006b). The Lisbon Treaty, which is introduced in more detail in the next chapter, paves the way for a new comitology regime; partly because it introduces a distinction between legislative, delegated and implementing acts and only specifically operates with a comitology system for implementing acts; partly because the comitology framework rules, which until now have been specified by the Council’s comitology decisions, in the future will be set in regulations enacted by the codecision procedure and thus give the European Parliament more influence on the rules (Craig, 2008; Ponzano, 2008; Hoffmann, 2009).

The comitology system is still to a large extent a white spot on the EU map. Many aspects of the system remain under-researched, and there is a glaring imbalance between the impressive amount of research on first-tier EU decision-making by the Council and the Parliament and the limited research on second-tier EU rule-making by the Commission and the comitology committees. This book seeks to redress that imbalance and find answers to three fundamental, unresolved questions about the comitology system.
Comitology: A unique system – but why?

Parliamentary control of delegated rule-making by the executive is a problem known from all political systems, but solving it by a comitology system is unique to the EU. How and why did comitology start? The dominant answer in the literature is a functional one. The system was created in the early 1960s as a response to the Council’s need to delegate implementing powers to the Commission without losing control. With only slight variations this is the standard textbook explanation (Nugent, 2003, pp. 131–40; Pollack, 2003a, pp. 114–52; Hix, 2005, pp. 52–9). Even special studies focusing on the development of comitology over time devote surprisingly little attention to the origins of the system (Vos, 1997; Dogan, 1997; Haibach, 2000; Bergström, 2005, pp. 43–57).

However, functionalist reasoning may be misleading. The functions of institutions may be quite different from the motives that led to their establishment. At the very least, functionalist reasoning about institutional origins should be a hypothesis, not a premise (Pierson, 2000). But even if the functional reason is correct, it overlooks the importance of choice. If the member states really needed to delegate tasks, but at the same time worried about losing national control, comitology represented an institutional solution. But other solutions could easily be imagined, for example solutions used in their own national systems to solve similar problems, so why was comitology chosen? This is the first important question that this book addresses.

Full of sound and fury, signifying – what?

Almost all observers of comitology are struck by the inter-institutional rivalry about the system. Many use warlike metaphors to describe the political processes behind the development of the system. For instance, Franchino (2007, p. 283) talks of a ‘legislative battle on comitology’ in his investigation of the European Parliament’s endeavours to strengthen its position in the system. In a similar vein, Bergström’s (2005, p. 313) comprehensive treatment of comitology concludes that ‘the role of the European Parliament has been characterized by struggle…the tactic of the European Parliament has been to wear its opponents down by use and abuse of all means available until the point has been reached where they realize that it will be less costly to make concessions than to resist’. Likewise, Pollack (2003a, p. 120) speaks of ‘an ongoing political battle’ among the EU institutions when explaining the
evolution of the comitology system. Bradley (2008, p. 850), a seasoned observer of parliamentary tactics in the comitology area, concludes on the 2006 reform of comitology that ‘Parliament had to use the full panoply of its institutional prerogatives, legislative, budgetary and jurisdictional…these are for the most part weapons of mass obstruction…yet the fact is that, without recourse to such tactics, it seems unlikely that the 2006 reforms would ever have got off the ground’.

But what exactly is at stake? Despite the obvious intensity of the inter-institutional negotiations behind the comitology rules, we really know very little of the driving forces behind the system. What are the interests of the negotiating actors, their strategies and the instruments they have at hand to pursue their interests? Understanding the development of the comitology system over time is the second important question addressed by this book.

The comitology system in practice: Bargaining or deliberation?

Most comitology observers agree that the system’s numerous committees are established to control the Commission. Most observers also agree that the different decision procedures used by the committees constrain the Commission to different degrees. The accepted view is that, among the pre-Lisbon procedures, the regulatory procedure is more restrictive than the management procedure, which again is more restrictive than the advisory procedure. This hierarchical ordering has been confirmed by game theoretical analyses of the procedures (Steunenberg et al., 1996, 1997; Ballman et al., 2002). After the Lisbon Treaty the regulatory and management procedures have been merged into a new so-called examination procedure, while the advisory procedure is unchanged. The constraining effects of the two future procedures are obviously very different.

However, the constraining effect of the comitology procedures is contingent upon certain, but often implicit, behavioural assumptions. It is an old insight from the institutional literature that outcomes are determined by the interaction of institutional rules and actor orientations. In Ostrom’s words (1986), you need both a model of the situation and a model of the actors to explain outcomes. Or, as Scharpf (1989; see also 1997, pp. 84–9) has put it, policy choices are determined by the combination of decision rules and decision styles. The underlying behavioural assumption in comitology analyses inspired by game theory or rational choice theory is that preferences are fixed and defined exogenously to
the decision situation. In this view, the national representatives travel to the comitology meetings in Brussels to defend predefined national interests.

However, considerable evidence suggests that this working assumption is, at best, only partially valid. The literature provides two images of the committees’ daily workings (Pollack, 2003b). The first image – associated with authors such as Joerges and Neyer (1997a, b), Dehousse (2003) and Wessels (1998) – is drawn from sociological institutionalism and constructivism. It suggests that comitology committees provide a forum in which experts meet and deliberate to find the best or most efficient solutions to common policy problems. According to this image, comitology is a technocratic version of deliberative democracy in which informal norms, deliberation and good arguments matter more than economic interests and formal voting rules. The second image – drawn from rational choice theory and associated with authors such as Steunenberg et al. (1996, 1997), Pollack (2003a, pp. 114–46), Ballman et al. (2002) and Franchino (2000a) – portrays comitology committees as miniature versions of the Council. They provide arenas for tough intergovernmental bargaining where the member states fight over secondary rules to implement EU legislation. The primary evidence to shed light on the two images is provided by case studies of individual committees. But apart from Joerges and Neyers’ (1997a, b) well-known study of the Standing Committee for Foodstuffs, case studies of comitology committees seem to find traces of both images in the daily workings of comitology committees (Bradley, 1998; Daemen and van Schendelen, 1998; Philip, 1998; Töller, 1998; Gehring, 1999) as do survey-based studies (Egeberg et al., 2003; Blom-Hansen and Brandsma, 2009).

These findings are puzzling. Can it really be true that comitology committees operate as autonomous free-floating decision-making bodies? Are the national representatives in the comitology committees not instructed by their home government? Do the member states really struggle to establish control mechanisms and then forget about them once they are in place? The third and final important question addressed here is how the numerous comitology committees operate in day-to-day practice.

The book’s argument

This book argues that the comitology system is best understood from a delegation perspective. In general, legislators value the ability to delegate power to the executive because this allows them time and
energy to deal with more pressing business, helps them resolve difficult issues and provides them with information from specialists on complex matters. However, legislators cautiously decide when to delegate and which powers to give away because they face the possibility that the executive will make decisions that can go against their preferences.

The comitology system was originally created to facilitate delegation from the member states to the Commission without losing control. The fact that the system is first and foremost an oversight mechanism has implications for all subsequent decisions on the system. The member states, the European Parliament and the Commission care so much about getting the minutest details of the comitology procedures right because they suspect that this may affect policy decisions down the line. This is the logic that drives the design of the system.

The need to control the Commission varies across issue areas, and delegation can take place without comitology procedures, with permissive procedures or with strict procedures. But as the book will demonstrate, the pattern is not random. Predictable factors that are well-known from the delegation literature determine the choice of comitology procedures as well as the daily workings of the committee system and the discretion enjoyed by the individual national representatives. When the comitology system appears to be dominated by a deliberative decision style, and when national representatives appear to enjoy considerable discretion, it is not a coincidence, but because the member states have deliberately decided so.

The delegation argument on the comitology system is explained in more detail in Chapter 3.

**The contributions of this book**

In addition to the literature on comitology, the book contributes to the literature on EU committee governance, multi-level governance and rational delegation.

*EU committee governance.* The first contribution is to the literature on committee governance in the EU. The starting point for this literature is the fact that committees are involved in all phases of the EU decision-making process. In the agenda-setting phase the Commission takes advice from expert committees of member state representatives and other actors. In the decision-making phase the Council’s and Coreper’s decisions are prepared in Council working groups of member states’ representatives. Finally, in the implementation phase the Commission is assisted by comitology committees. These three types of committees