

## Implementation of the Treaty of Lisbon

# Implementing Acts

(Article 291, Treaty on the Functioning of the European Union)

# Guidelines for the services of the Commission

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### I. — Introduction

1. The present guidelines address implementing acts. They complete the guidelines concerning delegated acts (note SEC(2011) 855 of 24 June 2011— ‘DA Guidelines’).
2. The DA Guidelines (points 14 to 44) explain the distinction between delegated and implementing acts.
3. Under Article 291 of the Treaty on the Functioning of the European Union (TFEU), Member States are primarily responsible for the implementation of Union law, but where uniform conditions for implementing legally binding Union acts are needed, those acts must confer implementing powers on the Commission (or on the Council in very exceptional cases). The reference to ‘legally binding Union acts’ in Article 291 means that any legally binding Union act (not only a legislative act, as is the case for delegated acts<sup>1</sup>) is susceptible of conferring implementing powers. Acts adopted by the Commission under Article 291 are referred to in the TFEU

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<sup>1</sup> See DA Guidelines, point 14.

as ‘implementing acts’ (Article 291(4)). Only legally binding acts may be adopted by means of implementing acts. These acts take the form of regulations, directives or decisions, in conformity with Article 288 TFEU. By contrast, acts that are not legally binding but only offer guidance are adopted by the Commission under its own autonomous right under the TFEU. Furthermore, acts in the sphere of budgetary execution (Article 317 TFEU), are not implementing acts in the sense of Article 291 TFEU.<sup>2</sup>

4. The rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers are laid down in secondary legislation, i.e. the ‘Comitology Regulation’ adopted by the European Parliament and Council in February 2011 on the basis of Article 291 (3) TFEU.<sup>3</sup> The Comitology Regulation repealed Council Decision 1999/468/EC (‘the Comitology Decision’) as from 1 March 2011 and replaced the procedures set out in that decision by two new procedures. However, the Comitology Regulation provisionally maintains the effects of Article 5a of the Comitology Decision for existing basic acts that refer to the regulatory procedure with scrutiny (see below under point 74).

## II. — Implementing powers

### How to prepare a legislative basic act conferring implementing powers on the Commission

5. If the Commission, in its proposal, and the legislator, during the negotiations, have identified a ‘need for uniform conditions for implementation’, several decisions have to be taken in order to organise the implementing powers conferred on the Commission.<sup>4</sup>

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<sup>2</sup> E.g. while an annual work programme (constituting a financing decision) is an implementing act, the individual award decisions which are based on it, fall under execution of the budget and cannot be considered as implementing acts in the sense of Article 291 TFEU.

<sup>3</sup> Regulation (EU) 182/2011, OJ L 55, 28.2.2011, p. 13.

<sup>4</sup> The present guidelines do not cover situations where implementing powers are conferred on the Council in accordance with Article 291(2) TFEU. Those situations have to be examined on a case-by-case basis. Normally, the Commission does not include implementing powers for the Council in its proposals. Services should check carefully, when aligning existing basic acts, if cases where certain powers were reserved for the Council (whereby the Council may act on its own initiative or on a Commission proposal) constitute a conferral of implementing powers on the Council in line with Article 291(2) TFEU.

## ***II.A. — Necessity of control***

6. The first decision concerns the necessity of control by the Member States.
7. It is legally possible for the legislator to confer implementing powers on the Commission without requiring any control by the Member States. This interpretation is reflected in Article 1 of the new Comitology Regulation, which limits its scope of application to any legally binding Union act which 'requires that the adoption of implementing acts by the Commission be subject to the control of Member States' and equally in recital 6, which reserves the application of the comitology procedures to 'those basic acts which require the control of the Member States'.
8. It is therefore possible for a basic act not to require control by the Member States. However, since this might be politically sensitive, there should be good arguments relating to the nature of the implementing act in question which can be put forward during inter-institutional negotiations. This would be the case, for example, where the Commission is asked to take repetitive technical measures, or individual decisions addressed to Member States without precedent value and without impact on other Member States. It is not necessary to justify in the basic act why no control is required.

## ***II.B. — Nature of control***

9. If a control mechanism is necessary, a choice has to be made between the two 'comitology procedures' set out in the Comitology Regulation.
10. These are the advisory and examination procedures (Article 2).
11. It should be noted that the Comitology Regulation provides for automatic alignment of the existing procedures with the new procedures (Article 13). All references to the procedures in the Comitology Decision (advisory, management, regulatory and safeguard) are to be understood as references to the corresponding procedures of the Regulation (as of 1 March 2011, the former advisory procedure is the new advisory procedure, the former management and regulatory procedures become the examination procedure and the former safeguard procedure is the urgency procedure — see also below under points 65 and 70). The only

exception is the regulatory procedure with scrutiny (RPS/PRAC), which continues to apply in all basic acts that refer to it until those acts are formally amended (see below under point 74).

### **a) Prohibition of ad hoc procedures**

12. The control mechanisms are exhaustively set out in the new Comitology Regulation, so it is no longer legally possible to create any ad hoc procedure for the Member States to control the Commission's exercise of implementing powers. Furthermore, a legislative basic act cannot modify the operation of the procedures established by the Comitology Regulation, except where the Regulation explicitly authorises this (see below under points 19-25). Voting rules, deadlines, prerogatives of the Commission, the consequences of committees' opinions and all other procedural matters are fixed 'in advance' by the Comitology Regulation.
13. Some legislative basic acts provide for a kind of 'pre-comitology' phase, before the submission of draft implementing acts to a committee. Services should pay particular attention to such mechanisms; they cannot constitute an additional step in the procedures established by the Comitology Regulation. Thus, pre-consultations cannot be part of the conferral of implementing powers. In other words, it is not acceptable to provide that the Commission adopts implementing acts 'after consulting'/'after obtaining the opinion' etc. of an Agency or similar body, because this would make conferral conditional upon consultation.<sup>5</sup>
14. On the other hand, it is acceptable under Article 291 TFEU to establish a 'trigger mechanism' for the initiation of a comitology procedure. The legislator could indeed limit the intervention of the Commission to situations where a particular event occurs or where a request is submitted.

### **b) Choice between the advisory and examination procedures**

15. The criteria for choosing the advisory or examination procedure are set out in Article 2 of the Comitology Regulation.

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<sup>5</sup> This does not preclude a separate standard recital that provides for consultations by the Commission in the application of the basic act.

16. The choice must be guided by the nature and impact of the implementing act required (paragraph 1). Thus, for example, tighter control may be warranted because of the sensitivity of the implementing act. Conversely, where the implementing act is not sensitive, the lighter advisory procedure would be warranted.
17. Article 2 also establishes rebuttable presumptions. It follows from paragraph 2 that the examination procedure should in principle apply to the following implementing acts:
  - all implementing acts of a general nature (regardless of the policy domain concerned) and
  - other implementing acts (thus, for example individual decisions) relating to the policy areas listed in sub-points i) to v): programmes with substantial implications; the common agricultural and common fisheries policies; the environment, security and safety, or protection of the health or safety, of humans, animals or plants; the common commercial policy; taxation. There is no need to explain in detail the contents of these policy areas, except for the first: 'programmes with substantial implications'. The notion of 'substantial implications' is clarified in recital 12: it covers programmes 'with substantial budgetary implications or directed to third countries'. These two categories are not meant to be cumulative. Thus, in all cases — even where from a budgetary point of view the programme is not substantial — programmes covering third countries fall under the examination procedure.
18. Under paragraph 3, the advisory procedure applies in principle to all cases not covered by the examination procedure. However, to the extent that paragraphs 2 and 3 make rebuttable presumptions, it is possible to apply the advisory procedure in situations mentioned in paragraph 2, and vice-versa. In such cases, there should be a recital justifying the choice of procedure.

### **c) Possible choices as to procedural matters**

19. Essentially, once the procedure has been chosen, all of the rules applicable to that procedure are set out in the Comitology Regulation. Therefore, all the basic act needs to do is to refer to the relevant procedure. However, there are two cases where the Comitology Regulation allows the legislator to make a choice as to procedural matters.

20. The first choice concerns the rules applicable to written procedures. Article 3(5) sets these out in some detail (see below under point 40), and the legislator cannot depart from them — it cannot, for example, prohibit the use of written procedures. However, it can introduce a different mechanism for terminating a written procedure (second subparagraph of paragraph 5). In principle, a written procedure is terminated without result at the initiative of the chair or as soon as a single Member State so requests. However, the legislator can provide for different rules in the basic act. It may, for example, decide that a majority vote — simple or qualified — is necessary to trigger termination. Such an option has to appear explicitly in the provision establishing the comitology procedure (see the relevant template).
21. The second choice concerns the case of ‘no opinion’ in the examination procedure. In principle, if there is ‘no opinion’ (no qualified majority for or against a draft implementing act — see point 47), the Commission is authorised to adopt the draft implementing act. It is not required to do so, but can choose whether to adopt, amend or withdraw the draft.
22. In three situations, however, the Commission is not authorised to adopt the draft implementing act after ‘no opinion’ from the committee (see below under point 49 for the steps to be taken by the Commission in such cases). Two of these situations are clearly set out in the Comitology Regulation:
  - 1°) if the draft implementing act concerns the policy areas exhaustively listed in point a) of Article 5(4), second subparagraph, or
  - 2°) if there is a simple majority against the draft (point c) of Article 5(4), second subparagraph), regardless of the policy matter concerned.
23. Though not further explained, the Comitology Regulation also gives a third option to the legislator: point b) of Article 5(4), second subparagraph, allows the legislator to state in a basic act that in the event of ‘no opinion’, the Commission cannot adopt. This also applies to policy areas not listed in point a) and even to cases where there is no simple majority against (indeed, in the latter case, point c) applies).
24. Point b) derogates from the rule of principle — under which the Commission may adopt the draft implementing act after a ‘no opinion’. As such it is an exception, so as a general principle of Union law<sup>6</sup> has to be

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<sup>6</sup> See by analogy LIFE case before the ECJ (case C-378/00 Commission v Parliament and Council).

understood and interpreted restrictively. Therefore, the use of point b) should remain limited to specific cases and has to be justified in a recital.

25. To highlight this point, the Commission made the following declaration in the context of the adoption of Regulation (EU) No 1169/2011 on the provision of food information to consumers: 'The Commission underlines that it is contrary to the letter and to the spirit of Regulation 182/2011 (OJ L 55 of 28.2.2011, p. 13) to invoke Article 5(4), subparagraph 2, point b), in a systematic manner. Recourse to this provision must respond to a specific need to depart from the rule of principle, which is that the Commission may adopt a draft implementing act when no opinion is delivered. Given that it is an exception to the general rule established by Article 5(4), recourse to subparagraph 2, point b), cannot be simply seen as a "discretionary power" of the Legislator, but must be interpreted in a restrictive manner and thus must be justified.'

**d) Urgency procedure for immediately applicable implementing acts**

26. The urgency procedure is set out in Article 8 ('Immediately applicable implementing acts'). It is not a separate procedure but rather a 'variant' of the examination or advisory procedure. The urgency procedure does not apply directly under the Comitology Regulation. The basic act must explicitly provide for its use by referring to Article 8 in conjunction with the relevant Article on the comitology procedure concerned (see the relevant template for provisions to be included in the basic act, attached as an annex).
27. Further, the basic act must lay down explicitly the 'duly justified imperative grounds of urgency' (Article 8(1)). In addition, the need for using the urgency procedure has to be explained in a recital (see the relevant template for provisions to be included in the basic act, attached as an annex).
28. It has to be underlined that the urgency procedure allows for the adoption of provisional measures only. They can remain in force for not more than 6 months. The legislative basic act can modify (i.e. shorten or prolong) their permissible duration (Article 8(2)).



### **III. — New comitology**

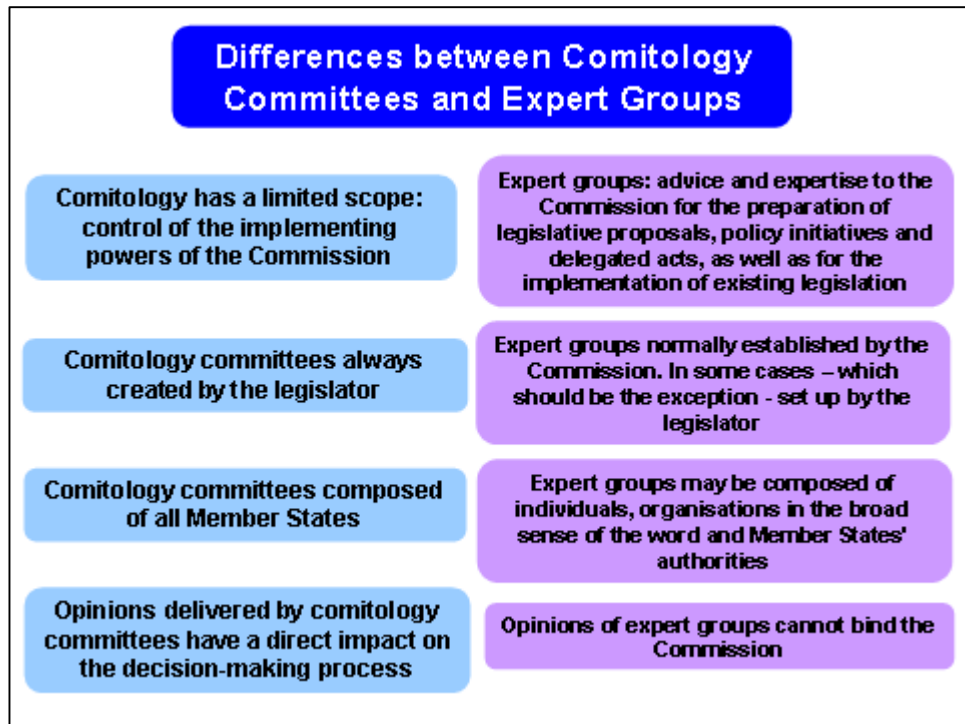
How to prepare, adopt and make enforceable an implementing act adopted under comitology

#### **III.A. — Comitology committee**

29. A comitology committee is composed of representatives of all the Member States and is chaired by a representative of the Commission (Article 3(2) of the Comitology Regulation). The role of comitology committees, as defined in the Comitology Regulation, is to assist the Commission in the exercise of the implementing powers conferred upon it by basic legal acts by giving opinions on draft implementing acts (upstream control mechanism). This role cannot be modified by a particular basic act. Comitology committees are always created by the legislator in a basic act.
30. For the examination procedure, the control mechanism established by the Comitology Regulation includes the possibility of referral to an appeal committee. The appeal committee is also a comitology committee, i.e. it is made up of Member State representatives, is chaired by the Commission and follows the same voting rules. As opposed to the other comitology committees, however, it is not a permanent body; rather, it is a procedural tool, giving Member States the opportunity to have a second discussion at a higher level of representation (see below points 54 et seq.).
31. It is important to draw a distinction between comitology committees, on the one hand, and other consultative entities, in particular ‘expert groups’, usually created by the Commission itself, on the other. The latter provide expertise to the Commission in preparing and implementing policy. Their input is not binding on the Commission, which remains fully independent in the way it calls upon and takes into account the expertise and views gathered.<sup>7</sup>

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<sup>7</sup> See for more information: <http://ec.europa.eu/transparency/regexpert/faq.cfm?aide=2>.



### **III.B. — Comitology register**

32. Like the Comitology Decision of 1999, the Comitology Regulation provides for the transparency of committee proceedings. Article 10 contains obligations for the Commission: (1) to maintain a register of committee proceedings containing different types of documents and information accessible to the European Parliament and the Council and (2) to make references to these documents and information available to the general public.<sup>8</sup>
33. The Comitology Register, created in 2003, consists of a two-part document register: an 'internal' part for inter-institutional cooperation and an 'external' part publicly accessible on EUROPA<sup>9</sup>. The Register is also used to transmit documents relating to committee proceedings to the European Parliament and Council. In 2008, the Register was completely revamped in line with an inter-institutional agreement between the Commission and the European Parliament.<sup>10</sup>

<sup>8</sup> Public access to information on committee proceedings is ensured in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43). Rules for the protection of classified documents applicable to the Commission also apply to the use of the Register.

<sup>9</sup> <http://ec.europa.eu/transparency/regcomitology/index.cfm>.

<sup>10</sup> Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC laying down the procedures for the exercise of

34. The Comitology Register contains:
- a list of all comitology committees (including the appeal committee),
  - agendas of committee meetings,
  - summary records of the meetings and the lists of authorities representing the Member States,
  - draft implementing acts submitted to committees,
  - the results of voting,
  - the final draft implementing acts following delivery of the opinion of the committees,
  - information concerning the adoption of the final draft implementing acts by the Commission,
  - statistical data on the work of the committees.

All documents must be uploaded to the Register at the same time as they are sent to the committee members, thus allowing them to be immediately disclosed to the European Parliament and the Council. Unlike in the past, these documents have to be uploaded regardless of the nature of the basic act. Therefore, documents have to be uploaded even if the basic act has not been adopted under the ordinary legislative procedure.

### ***III.C. — New comitology procedures***

#### **a) Common rules of procedure for committees**

35. As indicated earlier (point 19), the Comitology Regulation provides for common procedural rules applicable to committees. These include a number of important provisions that are common practice but were not covered by the Comitology Decision or were only included in the rules of procedure for committees — for example, the possibility to deliver an opinion by written procedure (Article 3(5)) and the possibility for draft implementing acts to be amended in order to take into account discussions in the committee prior to it delivering its formal opinion (Article 3(4)).
36. The Comitology Regulation provides for the Commission to adopt standard procedural rules (Article 9). The Commission thus adopted the Standard Rules of Procedure for comitology committees (StRoP) on 8

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implementing powers conferred on the Commission, as amended by Decision 2006/512/EC (OJ C 143, 10.6.2008, p.1).

July 2011. The standard rules are published in the Official Journal.<sup>11</sup> Based on these, all committees adopt their individual rules of procedure, adapting where necessary the standard rules to their specific needs. A committee adopts its rules of procedure by a simple majority of its component members on the proposal of the chair. The committees that operate under both the Comitology Regulation and Article 5a of the Comitology Decision (i.e. those that still use the RPS/PRAC procedure) need to establish two separate rules of procedure. The StRoP do not apply to the appeal committee. The appeal committee has its own internal rules of procedure, which were adopted in line with Article 3(7) of the Comitology Regulation on 29 March 2011.<sup>12</sup>

37. The role of the Commission (the chair) includes the organisation of committee meetings, the preparation of documents and the practical running of committee meetings. The chair prepares and submits a draft implementing act to the committee (Article 3(3) Comitology Regulation). Formal inter-service consultations must take place before the draft is submitted to the committee (after the committee has delivered its opinion, the draft can no longer be changed). When planning the adoption of an implementing act, the services might also need to set aside time for notification to the WTO, in particular under the Agreement on technical barriers to trade and the Agreement on the application of sanitary and phytosanitary measures, when the act falls within the scope of these Agreements (see points 110-122 of the DA Guidelines). Where such notifications are necessary, they have to take place after the inter-service consultation and before the vote in the committee. A reasonable time for comments (usually 60 to 90 days) must be provided to other WTO Members and needs to be taken into account in the time schedule.
38. The chair has to submit the draft agenda and the draft implementing act to the committee not less than 14 calendar days before the meeting. The time limit for submission can be shortened in exceptional cases. The chair can also set a time limit for the committee to deliver its opinion on the draft. The time limits have to take into account the urgency/complexity of the matter and afford the committee members early and effective opportunities to examine the draft and express their views (Article 3(3) of the Comitology Regulation).

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<sup>11</sup> OJ C 206, 12.7.2011, p. 11.

<sup>12</sup> OJ C 183, 24.6.2011, p. 13.

39. There are two basic principles guiding the work with committees. On the one hand, comitology is based on the 'reverse majority' principle, which allows the Commission in general to adopt the implementing act unless there is a qualified majority against the draft implementing act — thus a negative opinion of the committee (cf. recital 11 of the Comitology Regulation). On the other hand, the chair must nevertheless strive for solutions that command the widest possible support within the committee, taking into account the suggestions and amendments supported in the committee (Article 3(4) of the Comitology Regulation). The chair therefore has a margin for negotiation in a committee. Until the committee delivers an opinion, any committee member may suggest amendments and the chair may present amended versions of the draft (Article 3(4) of the Comitology Regulation). Should the amended text, however, depart from fundamental aspects of the draft agreed in the inter-service consultation, a new inter-service consultation (if necessary, simplified/accelerated) has to take place.
40. The written procedure is now regulated in some detail in Article 3(5) of the Comitology Regulation. However, the basic rule is to have a meeting and the written procedure is an exception, so its use needs to be justified ('in duly justified cases'). The written procedure permits a vote in written form. The steps in a written procedure are as follows:
- the chair decides to use the written procedure (the reasons for choosing this procedure need to be explained in a letter to the committee members);
  - the chair sends the draft implementing act to the committee members and sets a time limit for the written procedure (there is no fixed time limit under the Comitology Regulation, which instead stipulates that the time limit should be set 'according to the urgency of the matter');
  - the outcome of a vote under the written procedure is established as follows: a Member State (1) can explicitly give its agreement, or (2) can explicitly oppose, or (3) can explicitly abstain, or (4) does not respond in the sense of (1), (2) or (3) within the time limit set by the chair, in which case it is considered to agree tacitly to the draft implementing act;
  - unless otherwise provided in the basic act (see point 20 above), a written procedure is terminated without result where, within the time limit set for the written procedure, the chair so decides or a committee member so requests. Should a written procedure be terminated in such a way, the chair has to convene a meeting within a reasonable time.

## **b) Advisory procedure**

41. Under the advisory procedure (Article 4 of the Comitology Regulation), the committee delivers its opinion on a draft implementing act, if necessary by taking a vote by a simple majority of its component members.
42. The opinion of the committee under the advisory procedure is not legally binding. The Commission has complete discretion to decide on the draft implementing act. However, the Commission is obliged to strive for solutions that command the widest possible support within the committee (Article 3(4)) and to take the utmost account of the conclusions drawn from the committee discussions and of the opinion delivered (Article 4(2)).
43. There is no possibility of referral to the appeal committee under the advisory procedure.

## **c) Examination procedure**

### - Voting rules

44. The voting rules for the examination procedure reflect the voting rules required for the Council. Where the basic act requires the examination procedure, the committee delivers its opinion on a draft implementing act by qualified majority (Article 5 of the Comitology Regulation). Unless a member of the committee objects, the chair can, without proceeding to a formal vote, establish that the committee has delivered a positive opinion, by consensus, on the draft implementing act (Article 4(3) StRoP). Furthermore, there is no quorum requirement for committees, which in practice allows the chair (who may set a time limit for the delivery of an opinion in accordance with Article 3(3) of the Comitology Regulation) to establish that there is no opinion in cases where there are not enough Member States at the meeting to obtain a qualified majority for or against the draft submitted by the Commission.

### - Effects of a positive opinion

45. Where there is a qualified majority in favour of the draft implementing act (positive opinion), the Commission is required to adopt it (Article 5(2) of the Comitology Regulation). However, 'this provision does not preclude that Commission may, as is the current practice, in very exceptional cases, take into consideration new circumstances that have arisen after the vote

and decide not to adopt a draft implementing act, after having duly informed the committee and the legislator.<sup>13</sup> Such a decision requires a political endorsement (e.g. via a special meeting of the Heads of Cabinet (RSCC) or the inter-institutional relations group (GRI)).

- Effects of a negative opinion

46. Where there is a qualified majority against the draft implementing act (negative opinion), the Commission cannot adopt it (Article 5(3) of the Comitology Regulation). In such cases, the Commission can:
- (1) drop the draft implementing act altogether, if it is not deemed necessary;
  - (2) if it is deemed necessary, amend the draft implementing act and submit the revised version to the (same) committee within 2 months of the delivery of the negative opinion; or,
  - (3) if it is deemed necessary, refer the same draft to the appeal committee within 1 month of the delivery of the negative opinion.

- Effects of a 'no opinion'

47. Where there is no qualified majority for or against the draft implementing act ('no opinion', Article 5(4), first subparagraph of the Comitology Regulation) the Commission can — in principle:
- (1) adopt the draft implementing act, or
  - (2) drop the draft implementing act, or
  - (3) amend it and go back to the (same) committee.

An innovation compared with the previous comitology system (management procedure) is that there is no obligation for the Commission to adopt draft implementing acts in cases of 'no opinion'. The underlying consideration was the need for greater flexibility so that the Commission could reconsider the draft, taking account, among others, of positions expressed within the committee.

48. In certain cases, however, a 'no opinion' is equivalent to a negative opinion. In accordance with Article 5(4), second subparagraph, of the Comitology Regulation, the Commission cannot adopt the draft implementing act where:
- (1) it concerns any of the sensitive areas exhaustively listed in the Regulation (taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures); or,

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<sup>13</sup> Statement by the European Parliament, the Council and the Commission on the adoption of the Comitology Regulation, OJ L 55, 28.2.2011, p. 19.

- (2) the basic legal act provides that the draft implementing act may not be adopted where no opinion is delivered;<sup>14</sup> or,
- (3) a simple majority of the component members of the committee oppose it.

49. In those 3 cases, the Commission has the same options as for a 'negative opinion' (Article 5(4), third subparagraph, of the Comitology Regulation), i.e. it can:
- (1) drop the draft implementing act altogether, if it is not deemed necessary;
  - (2) if it is deemed necessary, amend the draft implementing act and submit the revised version to the (same) committee within 2 months of the delivery of the 'no opinion'; or,
  - (3) if it is deemed necessary, refer the same draft implementing act to the appeal committee within 1 month of the delivery of the 'no opinion'.

- Article 7

50. In very exceptional circumstances, the Commission can adopt a draft implementing act despite a negative opinion or a 'no opinion' with a blocking effect. Article 7 of the Comitology Regulation provides for such a possibility where an implementing act needs to be adopted without delay 'in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU'. This refers to situations where it is not possible to wait until the committee votes again on the same or another draft implementing act, because in the meantime the market could be significantly disrupted e.g. due to the speculative behaviour of operators.<sup>15</sup> In such cases, the Commission must immediately refer the adopted implementing act to the appeal committee. The implementing act remains in force if the appeal committee does not deliver a negative opinion. If it does deliver a negative opinion, however, the act must be immediately repealed. Article 7 applies without the need to provide for this possibility in the basic act. However, as regards basic acts adopted before 1 March 2011, Article 7 applies only where the basic act refers to the former management procedure (Article 13(3) of the Comitology Regulation).

- Next steps in the case of a negative opinion / 'no opinion' with a blocking effect

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<sup>14</sup> For more details on this option, see above (points 23-25).

<sup>15</sup> See statement by the Commission on the adoption of the Comitology Regulation, OJ L 55, 28.2.2011, p. 20.



51. There is a considerable margin of discretion for the Commission as regards the decision to be taken following a negative opinion or 'no opinion'.
52. In any case, continuing with procedure requires the implementing act to be deemed necessary (Article 5(3) and (4) of the Comitology Regulation). It is up to the Commission to determine if this requirement is met. An example would be the existence of a legal obligation for the Commission to adopt an implementing act (e.g. where there has been an application for an authorisation). A possible way to address this issue at an early stage could be for the service concerned to indicate already in the inter-service consultation that the implementing act is deemed necessary and thus, in the case of a negative opinion or 'no opinion', the procedure will continue to be pursued under Article 5(3) and (4) of the Comitology Regulation.
53. A decision to continue the procedure by submitting an amended draft to the same committee or the same draft to the appeal committee is taken in principle by the service responsible for the committee concerned (the chair).
54. It has to be stressed that under the Comitology Regulation recourse to the appeal committee is not a regular step in the procedure but is rather an exception. There is no obligation to go to the appeal committee.<sup>16</sup> Hence, wherever possible, the Commission should give preference to going back to the committee with an amended draft rather than going to the appeal committee. Recourse to the appeal committee is based on the presumption that all possibilities of discussion within the committee have been exhausted and no amended draft can be envisaged.
55. In addition, the service concerned should consider, if going to the appeal committee could be sensitive (e.g. in the case of a negative opinion or strong resistance within the committee to the draft), whether to seek political endorsement (e.g. via the GRI). This has to be decided on a case-by-case basis.
56. Where the chair of a committee decides to refer a case to the appeal committee, the chair must immediately inform the members of the committee and the Permanent Representations of the Member States of

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<sup>16</sup> Except in two cases: Article 5(5) and Article 7 of the Comitology Regulation (see points 63 and 50, respectively).

that decision. The date of that communication is considered as the date of referral (Article 1(1) RoP Appeal Committee).

57. The referral to the appeal committee initiates a new phase in the procedure, which has its own time frame (Article 3(7) of the Comitology Regulation):
  - (1) where the appeal committee is called upon, it has to meet no sooner than 14 days, except in duly justified cases, and no later than 6 weeks after the date of referral;
  - (2) the appeal committee has to deliver its opinion within 2 months of the date of referral, unless the chair, in accordance with Article 3(3) of the Comitology Regulation, has set a shorter time limit.
58. In order to ensure that the appeal committee meets at 'an appropriate level of representation', the Commission has to conduct specific consultations with the Member States after the referral and before setting the date for the meeting (Article 3(7), fifth subparagraph, of the Comitology Regulation). To this end, the Commission consults Member States on various options for the date of the meeting and takes the utmost account of Member States' suggestions. Member States also indicate the level of representation that they consider appropriate, which should be 'of a sufficiently high and horizontal nature, including at Ministerial level' (Article 1(5) RoP Appeal Committee) and 'as homogenous as possible' (Article 5(1) RoP Appeal Committee).
59. In the appeal committee, as in other committees, the chair has a margin for negotiation (see point 39 above). The chair has to strive for solutions that command the widest possible support within the appeal committee, taking into account the suggestions and amendments supported in the appeal committee (Article 6(2) of the Comitology Regulation). In addition, when considering the adoption of draft implementing acts concerning particularly sensitive sectors (taxation, consumer health, food safety, and protection of the environment), the chair, in order to find a balanced solution, should, as far as possible, act in such a way as to avoid going against any predominant position which might emerge within the appeal committee against the appropriateness of an implementing act (Comitology Regulation, recital 14). Until the appeal committee delivers an opinion, any member of the appeal committee may suggest amendments and the chair may present amended versions of the draft (Article 6(2) of the Comitology Regulation). Should the amended text, however, depart in fundamental aspects from the draft agreed in the inter-

service consultation, a new inter-service consultation (if necessary, simplified / accelerated) has to take place.

60. The appeal committee delivers an opinion by qualified majority. As with other committees, the appeal committee's opinion may be determined without a formal vote. Unless a member of the appeal committee objects, the chair may, without proceeding to a formal vote, establish that the appeal committee has delivered a positive opinion, by consensus, on the draft implementing act (Article 4(4) RoP Appeal Committee). The Rules of Procedure of the appeal committee provide for a quorum ('the presence of a majority of the Member States', Article 5(4) RoP Appeal Committee). However, when the time limit for the appeal committee to deliver an opinion has expired (whether the time limit set by the chair under Article 3(3) or the two months set by Article 3(7) of the Comitology Regulation), the appeal committee is considered not to have delivered an opinion (Article 5(4) RoP Appeal Committee).
61. Under Article 6(3) of the Comitology Regulation, the consequences of voting in the appeal committee are as follows:
  - (1) in the case of a positive opinion, the Commission is required to adopt the implementing act (but see point 45 above);
  - (2) in the case of no opinion, the Commission — as in the committee procedure — 'may' adopt it;<sup>17</sup>
  - (3) in the case of a negative opinion, the Commission cannot adopt the draft implementing act.
62. Given that referrals to the appeal committee are under the responsibility of the service concerned, it has been considered useful to standardise the necessary correspondence. To this end, templates for the letter of referral, the invitation to the appeal committee and the agenda are annexed.
63. There are specific rules for certain trade issues during the appeal committee phase. The Comitology Regulation requires draft definitive anti-dumping or countervailing measures to be referred to the appeal committee where no opinion was delivered by a committee and a simple majority of its component members opposed the draft (Article 5(5) of the Comitology Regulation). In such cases, there is no possibility to go back to the (same) committee with an amended draft. Immediately after the vote, the Commission has to start consultations with the Member States. No

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<sup>17</sup> With one exception (see point 64 below).

sooner than 14 calendar days and no later than one month after the committee meeting, the chair informs the Member States of the results of those consultations and, on that basis, submits to the appeal committee either the version of the draft implementing act on which the committee voted or an amended version (Article 2 RoP Appeal Committee). The time limit for the appeal committee to meet is shorter than the limit under Article 3(7) of the Comitology Regulation: no sooner than 14 calendar days and no later than one month after submission. However, the time limits for submission and the meeting, as set out in Article 5(5) of the Comitology Regulation, are without prejudice to the need to respect the deadlines set in the relevant basic acts. The time limit for the appeal committee to deliver its opinion on draft definitive anti-dumping or countervailing measures is in principle 2 months after the date of referral (Article 3(7) of the Comitology Regulation).

64. Further exceptions concern the voting rules in the appeal committee on trade issues:

(1) (provisional) until 1 September 2012, the appeal committee votes by a simple majority on draft definitive anti-dumping or countervailing measures (Article 6(5) of the Comitology Regulation);

(2) (permanent) the Commission can adopt definitive multilateral safeguard measures only if the appeal committee issues a positive opinion (Article 6(4) of the Comitology Regulation).

- Conversion of former management and regulatory procedures

65. Under the automatic alignment provided for in Article 13(1), points (b) and (c), of the Comitology Regulation, the former management and regulatory procedures became examination procedures as from 1 March 2011. That alignment has certain consequences as regards the appeal committee. In the case of the former management procedure, where there is 'no opinion' in a committee, the Commission may adopt the implementing act and the appeal committee procedure does not apply (automatic exclusion of Article 5(4), second and third subparagraphs). In the case of the former regulatory procedure, where there is 'no opinion' in a committee, the Commission cannot adopt the implementing act (automatic application of Article 5(4), second subparagraph, point b)). It can either submit an amended draft to the same committee or refer the same draft to the appeal committee.

**d) Urgency procedure for immediately applicable implementing acts**

66. The urgency procedure allows the Commission to adopt, without prior consultation of a committee, an implementing act that applies immediately (see also points 26-28 above). The ‘missing’ consultation must, however, be held after adoption: no later than 14 days after adoption, the Commission must submit the act to the relevant committee in order to obtain its opinion in accordance with the relevant comitology procedure (advisory or examination procedure).
67. There are specific rules for certain trade defence measures (Article 8(5) of the Comitology Regulation). The urgency procedure under Article 8 automatically applies to provisional anti-dumping and countervailing measures. Article 8(5) provides for a specific procedure prior to adoption. Where the Commission intends to adopt provisional anti-dumping or countervailing measures, it must first consult or, in cases of extreme urgency, simply inform the Member States. In the former case, the consultation is not to be understood as the formal submission of a draft measure to the relevant committee, as this would not be compatible with Article 8(2) — it is therefore rather an informal consultation with the Member States individually, i.e. outside the committee. In cases of extreme urgency, where the Commission only informs the Member States before adoption, consultations must take place no later than 10 days after notification to the Member States of the measures adopted by the Commission (Article 8(5)). No later than 14 days after adoption, the Commission must submit the adopted provisional anti-dumping or countervailing measures to the relevant committee in order to obtain its formal opinion.
68. Where the advisory procedure applies, the Commission must take the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered, and then decide if the act remains in force or is to be repealed.<sup>18</sup>
69. Where the examination procedure applies and the committee delivers a negative opinion, the Commission must immediately repeal the implementing act (Article 8(4) of the Comitology Regulation). If the committee issues a positive opinion or fails to deliver an opinion, the act

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<sup>18</sup> Cf. Article 4(2) of the Comitology Regulation.

remains in force in principle for a maximum of 6 months (see point 28 above). Should there be a need for a definitive act, i.e. an implementing act to apply for an indefinite period, the following practice is recommended. After the adoption of the provisional measure, the examination procedure should be launched as soon as possible in order to obtain a committee opinion on the final measure, which would allow the Commission to adopt it. Once adopted, the definitive measure would then replace the provisional measure.

70. Article 13(1), point (d), of the Comitology Regulation stipulates that where an existing basic act refers to the former safeguard procedure (Article 6 of the Comitology Decision 1999), the urgency procedure (Article 8 of the Comitology Regulation) applies. It has to be understood that in case of the former safeguard procedure Article 8(4) applies, i.e. a variation of the examination procedure.

### ***III.D. — Role of the Parliament and the Council***

71. The Parliament or the Council are not involved in the preparation of implementing acts and do not participate in committee meetings. They cannot block the adoption of a draft implementing act (no right of veto) and cannot 'call back' the implementing powers.
72. However, both legislators must be properly and continuously informed of committee proceedings through the Comitology Register, which has been adapted to the new procedures (see points 32-34 above). Article 10 of the Comitology Regulation specifies the documents to be sent to the EP and Council at the same time as they are sent to the committee members.
73. The legislators have a right of scrutiny (French 'droit de regard') over draft implementing acts based on acts adopted under the ordinary legislative procedure. This means that, at any stage of the procedure, they can indicate to the Commission that the draft exceeds the implementing powers provided for in the basic act. In such cases, the Commission has to review the draft and inform the Parliament and the Council whether it intends to maintain, amend or withdraw it (Article 11 of the Comitology Regulation). It should be noted that the right of scrutiny no longer entails the automatic suspension, for a period of one month, of the Commission's internal procedures for adopting the implementing act.

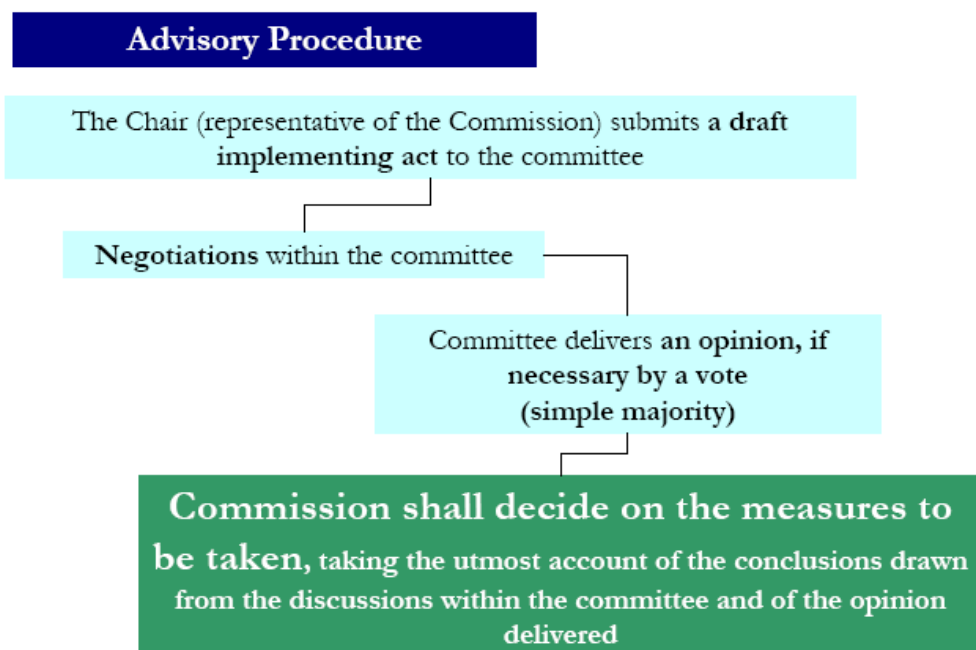
## **IV. — RPS/PRAC**

74. The RPS/PRAC procedure was not affected by the comitology reform of 2011 (Article 12 of the Comitology Regulation). It can no longer be used in new legislation, but still appears in more than 200 existing basic acts and will continue to apply (in line with Article 5a of the Comitology Decision of 1999) in those acts until they are formally amended and adapted to the Lisbon Treaty. An alignment exercise is under way.
75. It should be emphasised that, as from 1 March 2011, it is not possible to adopt an act that combines RPS/PRAC with procedures under the Comitology Regulation (i.e. advisory/examination procedures), as this would combine in one act provisions that are subject to entirely different institutional control procedures.
76. Measures adopted under RPS/PRAC are not ‘implementing acts’ in the sense of Article 291(4) TFEU.

## V. — Conclusions

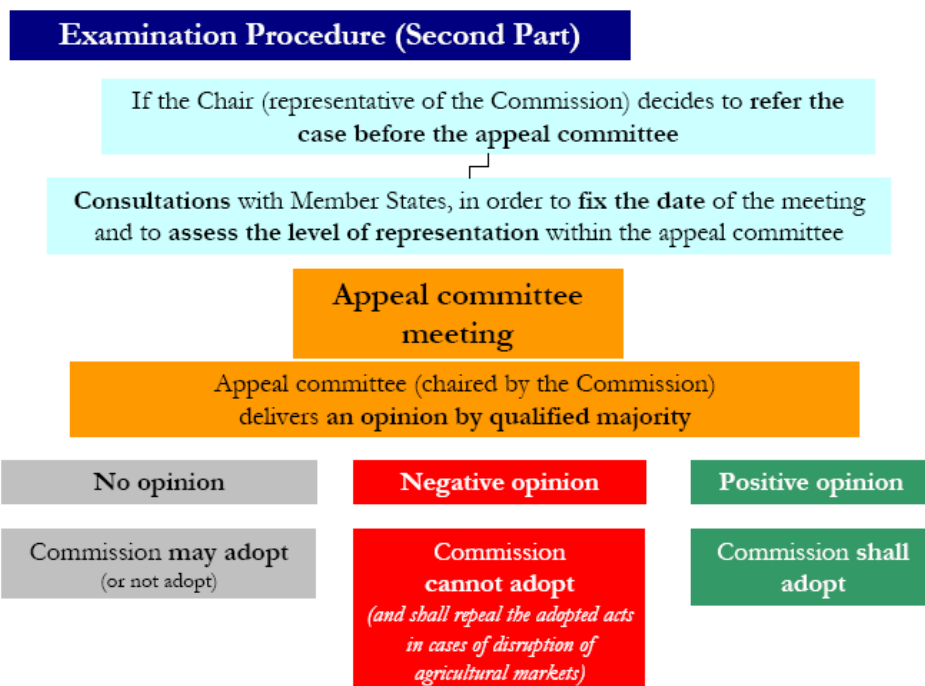
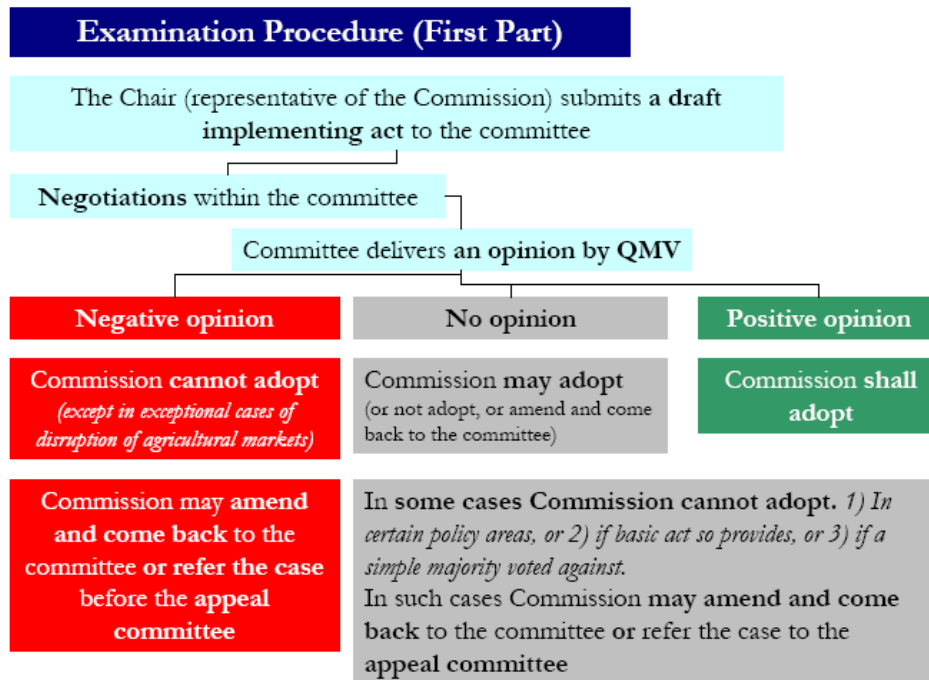
### Recapitulation of procedures

#### 1. / Advisory Procedure





## 2. / Examination Procedure



## Annexes:

- 1) Templates for provisions in basic acts
- 2) Templates for correspondence relating to the appeal committee (letter of referral, invitation and agenda)

## Links:

- 1) Comitology Regulation (2011):

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0013:0018:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0013:0018:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0013:0018:EN:PDF)

and the attached statements:

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0019:0019:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0019:0019:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0019:0019:EN:PDF)

- 2) Comitology Decision (1999):

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:255:0004:0008:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:255:0004:0008:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:255:0004:0008:EN:PDF)

- 3) Standard rules of procedure for committees (2011):

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:206:0011:0013:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:206:0011:0013:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:206:0011:0013:EN:PDF)

- 4) Rules of procedure for the Appeal Committee (2011):

[http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:183:0013:0016:EN:PDF)

[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:183:0013:0016:EN:PDF](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:183:0013:0016:EN:PDF)