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Université catholique de Louvain: Authors: Christian de Visscher, Olivier Maiscoq

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Summary

The aim of this article is to assess whether or not the Lamfalussy reform in the securities sector has had an impact on the institutional relationship between Commission, Council and European Parliament regarding comitology. The first part presents the four-level approach of the Lamfalussy reform as endorsed by the European Council of Stockholm; the reason thereof being that the first proposals following the Lamfalussy process were submitted after that European Council, but before the European Parliament endorsement. In the second part, the main issues of comitology are explained. Based on official documents, the third part identifies the conceptions of the legislative institutions on this policy stage. These conceptions are then, in the fourth part, examined regarding their practical implementation on cases before and after the reform. In conclusion, it is shown, first, that there has been a change of the institutional conflict. This change occurred both in terms of the scope of the claims: from a choice between comitology procedures to a choice between policy levels, namely implementing measures and legislation, and in terms of the actors concerned, mainly the European Parliament. Next, it is asked whether the relationship between the conceptions of the institutions and their practical implementation is blurred by risk-aversion.

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I. Introduction

Among the financial services, *i.e.* the banking, insurance and investment services (securities and investment funds) sectors, the securities sector was particularly behind in terms of integration across the Member States of the European Community (EC) in 1993¹. Article 8A of the Treaty establishing the European Economic Community (EEC) as revised by the Single European Act (SEA), held nevertheless that the EEC financial markets should be integrated by December 31, 1992. The reason was that the sector was particularly sensitive for the Member States, on account of its effect on the economy and savings. In the following years, market changes such as the development of alternative trading systems and new financial products required new legislation. The need to move on was triggered by the perspective of the single currency, which emphasized how non-integrated financial markets, and especially securities markets, could prevent companies and consumers from benefiting from the advantages of the monetary union in the financial field.

Accordingly, the European Council of Cardiff requested, on June 15-16, 1998, the Commission to establish a framework for action to improve the integration of the European Union (EU) financial markets. Following this framework, the Commission drafted the Financial Services Action Plan (FSAP)², which had to be implemented by 2005, following the deadline set by the European Council of Lisbon on March 23-24, 2000. Within this process and taking account of the future introduction of the euro, the Economics and Finance Ministers (ECOFIN) Council appointed a Committee of Wise Men on the Regulation of European Securities Markets on July 17, 2000. Its mandate was to assess how to best adapt the “mechanism for regulating the securities markets” to market developments, and the cooperation between national regulators to ensure a more effective implementation of the legislation (Council, 2000: 2-3). The Committee was chaired by Alexandre Lamfalussy, former President of the European Monetary Institute.

In its initial report, the Committee of Wise Men identified the functioning of the institutional framework as the main shortcoming of the Community regulation: it was too slow, the texts adopted were sometimes ambiguous, transposition deadlines were often not respected, some sensitive issues were not covered properly (pension funds, international accounting standards and the European company statute for instance), there was no rapid mechanism to update the legislation and the obligations to cooperate were insufficient (CWM, 2000: 18-19). As was mentioned in the final report, “the problem is the system itself” (CWM, 2001: 13). The Committee therefore proposed a four-level system that would speed up the legislative process and provide the Community institutions with the expertise of European regulators, while maintaining a democratic and institutional balance (CWM, 2001: 24-25). The system was agreed

¹ The single market was almost achieved for the banking sector, some barriers remaining to the provision of cross-border services and the implementation of Directive 94/19/EC being delayed until June 30, 1995. As far as the insurance sector is concerned, it was achieved in most Member States on July 1, 1994, thus with a delay of 18 months. The investment services sector was the last sector in which integration was achieved, with a delay of three years. Compliance with the last directive adopted (Directive 93/22/EEC) was indeed required by December 31, 1995.

² Commission of the European Communities (1999) *Financial Services: Implementing the Framework for Financial Markets: Action Plan* (Brussels: Commission of the European Communities, http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf), 19-31.

by the ECOFIN Council on March 22, 2001 and mostly endorsed by the European Council of Stockholm on March 23-24, 2001³ and the European Parliament on February 5, 2002.

One specific stage of the decision-making process had posed problem before the reform: the drafting of measures implementing legislative instruments (directives or regulations). Decision on these measures is usually reached according to procedures involving the Commission, assisted by a committee composed of representatives of the Member States and chaired by a representative of it. These procedures are commonly referred to as comitology. The choice of a comitology procedure was a major factor in the non-adaptation of the EC legislation on securities in the 1990s. The three legislative actors of the legislative process, the Commission, the Council and the European Parliament, indeed had different positions on the procedure to be chosen; which led the Council to reserve the exercise of the implementing powers itself, slowing the updating of technical aspects of the legislation.

The aim of this article is to assess whether or not the Lamfalussy reform in the securities sector has had an impact on the institutional relationship between Commission, Council and European Parliament regarding comitology. The first part presents the four-level approach of the Lamfalussy reform as endorsed by the European Council of Stockholm; the reason thereof being that the first proposals following the Lamfalussy process were submitted after that European Council, but before the European Parliament endorsement. In the second part, the main issues of comitology are explained. Based on official documents, the third part identifies the conceptions of the legislative institutions on this policy stage⁴. These conceptions are then, in the fourth part, examined regarding their practical implementation on cases before and after the reform. In conclusion, it is shown, first, that there has been a change of the institutional conflict. This change occurred both in terms of the scope of the claims: from a choice between comitology procedures to a choice between policy levels, namely implementing measures and legislation, and in terms of the actors concerned, mainly the European Parliament. Next, it is asked whether the relationship between the conceptions of the institutions and their practical implementation is blurred by risk-aversion.

II. The Lamfalussy Reform as Endorsed by the European Council of Stockholm

In its report of February 15, 2001, the Committee of Wise Men proposed to introduce a four-level system for adoption of framework legislation (Level 1 – L1), adoption of implementing measures (Level 2 – L2), consistent and equivalent implementation (Level 3 – L3) and monitoring of the enforcement of the Community legislation in the securities sector (Level 4 – L4) (CWM, 2001: 19). This system is based on the extensive use of comitology and consultation with market practitioners (intermediaries), end-users (issuers of securities) and consumers (investors) (Lamfalussy, A., 2001: 12; CWM, 2001: 6, 32).

At L1, the initiation phase, the Commission adopts a proposal for a directive or a regulation after a full consultation process of market actors (CWM, 2001: 25). The proposal is thereafter sent to the European Parliament and the Council, which adopt, according to the co-decision procedure, the legislative act containing the framework principles and the definition of the implementing powers to be conferred on the Commission.

³ “Mostly” because the final report of the Committee of Wise Men as adopted by the European Council was slightly revised; for instance, an “aerosol clause” was introduced (see point 1 below) (Lamfalussy, A., 2001: 9, 26, 28).

⁴ Documents are primary sources, except where otherwise noted.

At L2, the implementing powers phase, the Commission adopts the technical measures implementing the L1 directive or regulation on the basis of the comitology process established in Council Decision 1999/468/EC. Before proceeding with the elaboration and adoption of L2 measures, the Commission first consults the European Securities Committee (ESC), which is the relevant comitology committee in the field of securities. The ESC was created by a Commission decision on June 6, 2001 (2001/528/EC). In addition to its regulatory committee function, the ESC is also a policy advisor, notably on envisaged L1 legislation and on Commission services mandates (CWM, 2001: 6, 29). The ESC is composed of representatives of the Member States and chaired by a representative of the Commission services. Before the ESC was created, there was no effective L2 committee⁵. Next, the Commission also requests advice from CESR, which is an independent advisory group, composed of national regulators designated by their respective Member State. More specifically, following a mandate granted by the Commission, CESR prepares a technical advice in consultation with market practitioners, end-users and consumers and forwards it to the Commission. On the basis of the advice of CESR, the Commission draws up draft implementing measures, which are then submitted to the ESC for vote. The Commission adopts the implementing measures after an approving vote of the latter.

At L3, the implementation phase, CESR works to ensure that convergent application and day-to-day practice are established in the Member States. For instance, it issues administrative guidelines, joint interpretation recommendations and common standards in areas not covered by Community legislation. CESR was also created by a Commission decision on June 6, 2001 (2001/527/EC). A member of the latter is entitled to participate in all meetings, unless they deal with confidential matters (CESR, 2006: article 3, § 1). The work is prepared by expert groups established on a non-permanent basis and by permanent groups (CESR, 2006: articles 5, § 3 and 5, § 4).

Finally, at L4, the enforcement phase, the Commission monitors consistent transposition and subsequent application of measures adopted at L1 and L2. The Commission exercises its function of guardian of the Treaty establishing the European Community by checking the compliance of the Member States with Community legislation and, if necessary, starting proceedings for failure to fulfil an obligation if a breach is suspected⁶ (CWM, 2001: 6, 27, 36-37, 39).

The European Council of Stockholm added a safeguard in favor of the Member States: the application of the “aerosol clause” to the securities sector⁷. This clause makes provision for the commitment of the Commission not to go against “predominant views” within the Coun-

⁵ There existed two formal contact committees, the Securities Contact Committee (1979) and the Undertakings for collective investment in transferable securities (UCITS) Contact Committee (1985) (Commission, 2000: 32, 36-40, 58; Moloney, N., 2002: 851-852, 856). Both committees had an advisory function. The Securities Contact Committee had a comitology function (Directive 79/279/EEC, article 21), which was never exercised. Similarly, the UCITS Contact Committee was given a comitology function in 2001 (Directive 2001/108/EC, article 2, § 22); however, it only held one meeting in 2004, without adopting implementing measures (Commission, 2003b: 43-44; Commission, 2005d: 26). Its functions were later transferred to the ESC (Commission, 2006c: 28; Commission Decision 2004/8/EC, article 1).

⁶ EC Treaty, articles 226 and 228.

⁷ European Council. 2001. *Presidency Conclusions*, Stockholm, Brussels: Council of the European Union, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html, March 23-24, annex I: “Resolution of the European Council on More Effective Securities Market Regulation in the European Union, Stockholm, 23 March 2001”, point 5.

cil⁸ when passing L2 measures (IIMG, 2003: 14, 40)⁹. Indeed, the German Government was opposed to the unchanged application of the comitology procedure to L2 (Quaglia, L., 2007: 278). Therefore, in order to secure an agreement on the Lamfalussy reform at the ECOFIN Council in March 2001, the Commission made such commitment. Actually, this commitment had already been made by the Commission on the occasion of Decision 1999/468/EC¹⁰.

III. The Comitology Framework

Since delegation and accountability mechanism in representative democracies follow generally the principal –agent model, we could make use of this model in order to describe the content of Lamfalussy reform and in particular to assess the evolution of the delegation of regulatory powers to the Commission and the accountability of the Commission towards the European Parliament and the Council of Ministers. In a very simplified way, one could argue that the European Parliament and the Council of Ministers (as principal) delegate regulatory powers to the Commission (as agent). Furthermore, the Commission (as principal) also delegate some power to the European Securities Committee (ESC) and to the Committee of the European Securities Regulators (CESR) as these committees are in charge to define technical implementing measures. A key assumption of the principal-agent approach is that political actors should be able to design *specific institutional rules and arrangements* guiding delegation and accountability. These devices include both *ex ante* contract design, screening and selection on the one hand and *ex post* monitoring, reporting and institutional checks on the other hand. However, in this particular case, the principal-agent relationships are (potentially) problematic as the propositions made by the Commission, the Council and the European Parliament (regarding comitology and the Lamfalussy reform) are diverging. They depend clearly upon the extent to which the committee opinions are binding for the Commission and, thus, upon the possibility of effective supervision of the Commission work. In sum, each Community institution tends to support the institutional control mechanisms that reduce its agency loss (adverse selection and moral hazard).

III.1. General Background

Comitology refers to the procedures used for the exercise of implementing powers granted by the Council to the Commission, assisted by a committee. These measures aim notably at updating of directives to take technical and technological developments into account (HL, 1999: point 37). From a historical point of view, this mechanism of delegation was first enacted through an “advisory committee”, composed of representatives of the Member States and “convened by the Commission”¹¹, in the field of competition on February 6, 1962. Numerous implementation procedures developed afterwards, causing disputes on the choice of the procedure to be adopted that would favor more the Commission or the Council. These disputes turned out to be time-consuming and harmful to the smooth working of the implementation

⁸ “From a historical point of view, predominant views might be interpreted as a simple majority of Member States. For the time being, this is not established in law” (IIMG, 2003: 40).

⁹ This political commitment in the framework of the regulatory procedure is referred to as the “aerosol clause”, following its first use in the field of environment in the 1970s (IIMG, 2003: 40).

¹⁰ Declarations on Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, *Official Journal of the European Communities C 203/1*, July 17, 1999, point 3.

¹¹ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, *Official Journal 13/204, February 21, 1962*, article 10 and article 10, § 5 for the quotation.

process and the clear assignment of responsibilities between Commission and Council¹². A limited number of procedures was thus needed.

The 1987 “comitology decision” was the first answer. This decision described four procedures according to which implementing measures may have to be taken (procedures I, II a and b, III a and b, and a fourth procedure for safeguard measures) (article 2 and article 3). “May have”, because the Council can also decide, as above-mentioned, to reserve the right to exercise directly implementing powers itself (article 1). These procedures were respectively referred to as advisory, management, regulatory and safeguard procedures in Council Decision 1999/468/EC¹³ (articles 3, 4, 5 and 6 respectively), which replaced Decision 87/373/EEC. A fourth comitology procedure, called the “regulatory procedure with scrutiny”, was added in 2006 by Decision 2006/512/EC. The advisory, management and regulatory procedures as well as the regulatory procedure with scrutiny are comitology procedures, inasmuch as they involve the participation of a committee, unlike the safeguard procedure in which the Commission formally acts without the assistance of a committee (Bergström, C. F., 2005: 198).

To each of these procedures correspond a “comitology committee”, that is thus to say, a committee involved in the adoption of measures implementing directives or regulations. These committees are created by a basic instrument (a directive or regulation for which implementing powers have been conferred on the Commission), proposed by the Commission and adopted by the Community legislator (the Council and the European Parliament). The level of influence of the European Parliament on that legislative act depends on the procedure laid down in the EC Treaty (Commission, 2002: 2)¹⁴, which can provide it sometimes with a non-binding power (consultation procedure), sometimes with the power to prevent the adoption of the act (co-decision procedure, nay cooperation procedure). The basic instrument provides for the comitology procedure to be used in the field concerned, and assigns the committee specific functions. Once created, the composition and organization of the comitology committees are detailed in a decision of the Commission or the Council (Commission, 2002: 5). There were no formal criteria governing the choice of comitology procedures before the 1999 decision, which reduced the leeway of the legislative institutions on that subject (see points 2.2. and 3.1.).

III.2. Comitology Procedures

Across the different procedures and in a linear way, there is a decrease in power of the Commission to adopt implementing measures going against the opinion of the comitology committee, and thus the Member States. In the advisory procedure, the Commission has the last word over the committee on the measures to be implemented. In the management and regulatory procedures however, its power is reduced in favor the Council. The European Parliament has been involved in terms of information since the Plumb-Delors Agreement of 1988. With the 1999 decision, it was formally granted a non-binding right of scrutiny on measures implementing directives or regulations adopted under co-decision. This right will become binding

¹² Commission Proposal to the ICG 1985, *op. cit.*, points 1.1.2. to 1.1.16; and *Bulletin EC* 6-1987, point 2.4.12 (the Commission’s implementing powers), quoted in BERGSTRÖM, C. F., 2005: 175 and 175, note 228 for the reference, and 179 and 179, note 240 for the reference.

¹³ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), *Official Journal of the European Communities* L 184/23, July 17, 1999.

¹⁴ Depending on the measure, a consultation of the Committee of Regions and/or of the Social and Economic Committee or the European Central Bank may be required.

in the regulatory procedure with scrutiny, following the revision of that decision, in 2006. That procedure provides the European Parliament with the possibility to prevent the adoption of draft measures implementing such instruments.

In the *advisory procedure*, the Commission can adopt the draft implementing measures it submitted to the advisory committee, even if the latter has delivered an unfavorable opinion regarding these draft measures (article 3, § 4 of Decision 1999/468/EC)¹⁵. The Council does not intervene in the procedure. Therefore, Member States do not have a significant influence on the Commission in that case. The 1999 decision will provide the European Parliament with a right of scrutiny on the draft measures implementing a directive or regulation adopted under co-decision (article 8). This implies that the European Parliament can request the Commission to re-examine such draft measures, if it considers that they exceed the implementing powers laid down in the directive or regulation (Bergström, C. F., 2005: 270, note 293). In that case, the Commission can either submit a new draft to the advisory committee, continue with the procedure or submit a proposal for a directive or regulation based on the disputed measures to the Council and the European Parliament on the basis of the EC Treaty. The advisory procedure is the default procedure, used when “considered to be the most appropriate” (article 2(c), recital 8 of Decision 1999/468/EC).

In the *management procedure*, the Commission adopts implementing measures, which apply immediately. Then, these are conveyed to the management committee. In case the latter gives an unfavorable opinion, the Commission communicates them to the Council, which may then decide to adopt, by qualified majority, different implementing measures (article 4, § 3 and § 4 of Decision 1999/468/EC), modifying or annulling the measures of the Commission. However, between the moment the disputed measures are communicated to the Council and a possible decision of the Council on different measures, the Commission has the choice to maintain the application of the implementing measures it has adopted (Bergström, C. F., 2005: 199, 266). In the initial comitology decision of 1987, the management procedure, called “procedure II”, had two variants, a and b (article 2 of Decision 87/373/EEC). In variant a, the Commission had the possibility to decide whether or not to suspend disputed implementing measures. In variant b, the Commission was obliged to defer the application of questioned implementing measures. These variants were integrated in the revised procedure laid down by the 1999 decision, in favor of variant a, insofar as the revised procedure provided the Commission with the power to decide whether or not to defer application under all circumstances. The management procedure should be followed for measures regarding the application of the Common Agricultural Policy (CAP) and the common fisheries policy, and the implementation of programs with substantial budgetary implications (article 2(a), recital 6 of Decision 1999/468/EC).

In the *regulatory procedure*, if the opinion of the regulatory committee is unfavorable or no opinion is delivered, a proposal relating to the draft measures is conveyed to the Council. Then, the Council has two options. First, it can prevent the adoption of these measures and, in this case, the Commission can submit an amended proposal to the Council, submit the initial proposal anew, or leave the implementation process and submit a legislative proposal on the basis of the EC Treaty. Second, the Council can adopt the contested measures as they were by qualified majority, amend them unanimously (Bergström, C. F., 2005: 268, note 285), or authorize their adoption by the Commission by not opposing them (article 5, § 6 of Decision 1999/468/EC). In the initial comitology decision of 1987, the regulatory procedure, called

¹⁵ In the advisory procedure, approval by the comitology committee is made by unanimity and, if necessary, by simple majority voting (article 3, § 2 of Decision 1999/468/EC; BERGSTRÖM, C. F., 2005: 198-199).

“procedure III”, also had two variants, a and b (article 2 of Decision 87/373/EEC). Variant a, also referred to as “net” (Commission, 1989: 4, annex I), consisted in the possibility for the Commission to adopt implementing measures disputed by the comitology committee or on which the latter had not delivered an opinion, if the Council had not taken a decision on them. The variant b was maintained in the 1999 decision, but the majority at which the Council could oppose draft measures was increased from simple majority (article 2, procedure III, variant (b) of Decision 87/373/EEC) to qualified majority (article 5, § 6 of Decision 1999/468/EC). The right of scrutiny, provided for in Decision 1999/468/EC regarding measures implementing basic instruments adopted under co-decision, is reinforced in this procedure, in case the committee delivers an unfavorable opinion or no opinion (article 5, § 5 and § 6): the European Parliament can then inform the Council if it considers that the proposal submitted by the Commission to the latter, following the absence of a favorable opinion of the regulatory committee, exceeds the implementing powers laid down in the directive or regulation at issue. The regulatory procedure should be used, first, for measures of general scope intended to implement essential provisions of the basic instrument. These measures include measures for the health or safety of humans, animals or plants. Second, it should be used for measures aiming at adapting or updating non-essential provisions of the basic instrument (article 2(b), recital 7 of Decision 1999/468/EC).

In the *regulatory procedure with scrutiny*, firstly, if the regulatory procedure with scrutiny committee gives a favorable opinion on the draft implementing measures, the Commission submits them for scrutiny by the European Parliament and the Council (article 5a, § 3 introduced by 1, § 7 of Council Decision 2006/512/EC). In the regulatory procedure, in such a case and if the European Parliament had not indicated in a resolution that the draft measures exceeded the implementing powers, the Commission simply adopts the measures. Once the measures have been forwarded for scrutiny, the European Parliament or the Council can oppose their adoption. Unlike the regulatory procedure, the grounds for opposition are not limited to the exceeding of implementing powers, but also include the situations where the draft measures are not compatible with the aim or content of the basic instrument, and where they do not respect the principles of subsidiarity or proportionality. In case of opposition, the draft measures are not adopted. The Commission may submit amended implementing measures or present a legislative proposal on the basis of the EC Treaty, but cannot re-submit the same measures to the committee. If no opposition has been expressed by either the European Parliament or the Council within three months following the referral of the draft measures, the Commission can adopt them.

Secondly, if the opinion of the committee is unfavorable or no opinion is delivered, a proposal relating to the draft measures is conveyed to the Council and the European Parliament ((article 5a, § 4 introduced by 1, § 7 of Council Decision 2006/512/EC). As in the regulatory procedure, the Council has two options. First, it can prevent the adoption of these measures and, in this case, the Commission can submit an amended proposal to the Council, or present a legislative proposal on the basis of the EC Treaty. Contrary to the regulatory procedure, the Commission cannot submit to the Council the same proposal anew. Second, if the Council *contemplates* adopting the contested measures, it submits them to the European Parliament. If the Council does not forward the contested measures within two months, the Commission does it. The European Parliament can then oppose the measures within four months from the initial forwarding by the Commission – thus four months minus at most two months depending on the time taken by the Council to reach a potential decision – on one of the three aforementioned grounds. In such a case, the measures are not adopted and the Commission may submit amended implementing measures or present a legislative proposal on the basis of the EC Treaty. If no opposition has been expressed within this deadline, the implementing meas-

ures are adopted by the Council or the Commission¹⁶. The regulatory procedure with scrutiny “is necessary” to follow – the text differs from the other procedures where it is indicated that they “should be followed” – for measures of general scope seeking to amend non-essential elements of a basic instrument adopted under the co-decision procedure, by removing or adding such elements (article 2(b), § 2 inserted by article 1, § 5 of Decision 2006/512/EC). Hence, the reference to measures adopted under this procedure as “quasi-legislative”¹⁷.

Table 1: Criteria for the Choice of Procedures

Procedure	Criterion
Advisory	default procedure
Management	<ul style="list-style-type: none"> - application of the CAP and the common fisheries policy; - implementation of programs with substantial budgetary implications.
Regulatory	<ul style="list-style-type: none"> - implementation of essential provisions of the basic instrument, including measures for the health or safety of humans, animals or plants; - adaptation or update of non-essential provisions of the basic instrument.
Regulatory with Scrutiny	amendment to non-essential elements of a basic instrument adopted under the co-decision procedure, by removing or adding such elements

IV. Conceptions on Comitology: Commission, Council and European Parliament

Each legislative institution has its own conception of comitology. We will take account of the Commission, not only regarding its relationship with the Council, but also regarding its relationship with the European Parliament. Indeed, the Commission, although it does not have a veto power in the final decision, can promote its own conception during the legislative process, on account of its monopoly on initiative in Community matters. The Commission proposes whether a particular comitology procedure should be used or whether no delegation should occur, and decides, in case of co-decision or cooperation, whether an amendment in that direction is included or not in the second reading opinion it transmits to the Council.

IV.1. Commission: The Argument of Efficiency

The main concern of the Commission, in its relationship with the Council, is the efficiency of the comitology decision-making process¹⁸. The argument of efficiency was first brought up

¹⁶ The different deadlines can be extended by one month or curtailed for reasons of efficiency or urgency.

¹⁷ Statement by the European Parliament, the Council and the Commission concerning the 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), 2006/C 255/01, *Official Journal of the European Communities* L 255/1, October 21, 2006, point 1.

¹⁸ The issue of institutional balance is considered following the working problems in comitology (see COMMISSION, 1989: 10).

by the Commission in 1986, during the negotiations of Decision 87/373/EEC. The Council indeed discussed the addition of restrictive variants to the management and regulatory procedures (b variants for both and a c variant for the regulatory procedure¹⁹), as well as a fourth mode of decision, the safeguard procedure with a b variant too, to the procedures initially listed by the Commission in its proposal (Ehlermann, C.-D., 1988: 236-237). The Commission fought against the b variants of the regulatory and safeguard procedures and the c variant of the regulatory procedure, because they could lead to the absence of decision. In the case of the regulatory procedure, the claim of the Commission was not taken into account, for the Member States deemed the b variant essential in sensitive fields. However, the Commission managed to obtain the withdrawal of a variant c, which held that, in case of referral to the Council, the implementing measures could no longer be adopted by the Commission if the Council did not take a decision. The Council would thus not have needed to oppose the draft measures to prevent their adoption; which would have made the probability of no decision even higher than in the b variant. In the case of the safeguard procedure, the Commission got similar results: the b variant was maintained, but the requirement, requested by the delegation of a Member State, of the systematic use of variant b regarding the common commercial policy was not accepted (Ehlermann, C.-D., 1988: 237).

The issue of non-decision was next put forward in 1987, following the adoption of the comitology decision by the Council. The Commission reiterated its reservations to the Council about the b variants of the regulatory and safeguard procedures²⁰. The reaction of the European Parliament was more vocal and did not only concern the decision-making system. As for the Member States, some delegations considered that, given that the variant c of the regulatory procedure had not been adopted, the Council should reserve the right to exercise the implementing powers itself more often (Ehlermann, C.-D., 1988: 239).

The issue was anew addressed in 1989, within a larger debate on comitology; the Commission fearing a delay in the achievement of the internal market (Commission, 1989: 10-11). That debate was about “speed and efficiency in the [comitology] decision-making process”, including, for the regulatory procedure, certainty for “the business world which needs a clear view of measures adopted for the application of Council decisions” (Commission, 1989: 10-12). The Council had indeed amended proposals related to the completion of the internal market, so that implementing measures were “almost systematically” adopted according to the regulatory procedure instead of the advisory procedure (Commission, 1989: 8). The latter was kept by the Council in six out of the 23 proposals related to the internal market and adopted between the entry into force of the SEA on July 1, 1987 and July 14, 1989; thus, in around 26% of the cases (Commission, 1989: 7-8, annex II). This, despite the fact that the IGC negotiating the SEA, composed of representatives of the Member States, had requested the Council to “give the advisory committee procedure in particular a predominant place in the interests of speed and efficiency in the decision-making process (...) within the field of Article 100A of

¹⁹ The inclusion of a variant c to the management procedure was also discussed. According to this variant, implementing measures would have been referred to the Council, not only in case of unfavorable opinion of the committee, but also in case of absence of opinion. It was however ruled out by the Council itself (EHLERMANN, C.-D., 1988: 237).

²⁰ *Bulletin EC 6-1987*, point 2.4.14 (the Commission's implementing powers); and *Twenty-first General Report on the Activities of the European Communities 1987*, Luxembourg: Office for Official Publications, 1988, p. 31, quoted in BERGSTRÖM, C. F., 2005: 202 and 202, note 65 for the reference. See also BERGSTRÖM, C. F., 2005: 202-203.

the EEC Treaty”²¹, and despite the fact that this declaration had been confirmed by the Council in its minutes (Commission, 1989: 7, 10). The Commission considered that this defensive attitude was not justified by data on the working of comitology committees (Commission, 1989: 8-9). A second study for the year 1995 provided similar results, bringing about a new reaction from the Commission regarding the complexity of the system and the risk of non-decision (Commission, 1996: 6-7). It was this risk, rather than the will to enhance its bargaining position, that led the Commission to support the change, in the regulatory procedure, of the blocking majority from simple to qualified majority in the framework of the 1999 decision.

Finally, beyond the comitology procedures are the criteria leading to their choice. The issue was first addressed by the Commission when preparing the 1987 comitology decision. The Commission contemplated notably that measures related to the internal market should only be implemented *via* the advisory procedure. However, the opposition of the Member States led it to renounce these criteria when drafting the proposal for that decision²² (Bergström, C. F., 2005: 191-192). Some were finally included in the 1999 decision, but were general and “of a non-binding nature” (recital 5 of Decision 1999/468/EC). The general character of the criteria follows from the will of the Council to keep discretion in the choice of the procedure regarding matters that might prove to be sensitive²³. As to their non-binding nature, it is justified by the efficiency of the decision-making system; it stems from the risk that binding criteria were likely to lead to appeals to the CJEC (HL, 1999: point 164), which could in turn delay the decision-making system.

IV.2. Council: The Argument of National Interests

The Council is mainly concerned by the protection of the interests of the Member States. That implies that it keeps control on the final decision; which is especially reflected in the use of advisory, management and regulatory procedures.

First, the advisory procedure is, as aforesaid, the default procedure, resorted to when deemed “the most appropriate” and “without prejudice to” the management and regulatory procedures (article 2(c) of Decision 1999/468/EC). Thus, the advisory procedure should only be chosen when the two other procedures are not considered appropriate (Bergström, C. F., 2005: 274) and, consequently, the cases where the Member States’ influence is weak should be limited. This is indeed reflected in practice. From 2000²⁴ up to and including 2005, the most frequent procedure has constantly been the regulatory procedure, followed by the management procedure and then the advisory procedure (Commission, 2002: 5; Commission, 2003a: 5; Com-

²¹ Declaration on the powers of implementation of the Commission, Single European Act, Final Act, Official Journal of the European Communities L 169/24, June 29, 1987.

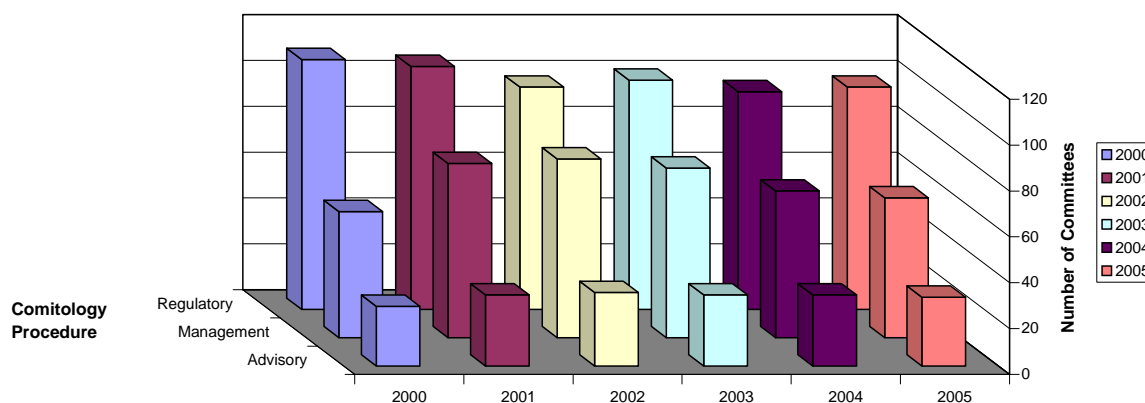
²² Proposal for a Council Regulation (EEC) laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(86) 35 final, Official Journal of the European Communities C 70/6, March 25, 1986, article 1.

²³ “The inclusion in the draft Decision of rules to determine the choice of comitology procedure would constitute an important measure of reform. But it is likely to be controversial. (...) As mentioned, one of the key interests to be protected is that of the Member States. There will remain matters on which there are sensitivities” (HL, 1999: point 164).

²⁴ Regular reports on the working of comitology committees have been drawn up since 2000 (COMMISSION, 2005c: 6).

mission, 2003b: 20-21; Commission, 2005a: 5-6; Commission, 2005c: 9-10; Commission, 2006c: 4-5)²⁵.

Graph 1: Number of Committees by Procedure (2000-2005)²⁶



Second, in the revision of the management procedure by the 1999 decision, variant b and the option it gave to the Council to require the Commission to defer application of disputed implementing measures were not completely relinquished. *Firstly*, recital 6 of Decision 1999/468/EC held that “where non-urgent measures are referred to the Council, the Commission should exercise its discretion to defer application of the measures”. *Secondly*, the deadline the Council had to adopt different measures was extended from one month to three months, the latter being the deadline previously used for variant b. *Thirdly*, the Commission recalled that “its constant practice is to try to secure a satisfactory decision which will also muster the widest possible support within the [Management] Committee”²⁷. This implied that, on the one hand, there were comings and goings between the Commission and the management committee *before* the former adopts its implementing measures. And that, on the other hand, the Member States could influence, through their representatives, the content of the implementing measures before the formal opinion of the committee. Consequently, the likelihood of a negative opinion and of the ensuing possibility of the Commission not deferring application of disputed measures were reduced (Bergström, C. F., 2005: 266-267). *Finally*, the

²⁵ The data does not include committees acting according to different procedures.

²⁶ Graph based on the data given in COMMISSION, 2002: 5; COMMISSION, 2003A: 5; COMMISSION, 2003B: 20-21; COMMISSION, 2005A: 5-6; COMMISSION, 2005C: 9-10; COMMISSION, 2006c: 4-5. As above-mentioned, committees working according to more than one procedure are not taken into account.

²⁷ Declarations on Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, *Official Journal of the European Communities C* 203/1, July 17, 1999, point 1, § 1.

Commission committed to “take account of the position of the members of the [Management] Committee and act in such a way as to avoid going against any predominant position which might emerge within the Council against the appropriateness of an implementing measure”²⁸. In other words, the Commission committed to defer application of contested measures if a simple majority of Member States at the Council were of that opinion. As a result of these factors, the Council did not give up much of its control in that procedure.

Third, the increase in the majority required from the Council to prevent the adoption of contested measures, making it difficult for the Member States to have the last word in the regulatory procedure, did not really redistribute the power between Commission and Council. As in the case of the amendment to the management procedure, there was a give-and-take between both institutions to come to that change. The Commission indeed committed, “in the review of proposals for implementing measures concerning particularly sensitive sectors”²⁹, to “act in such a way as to avoid going against any predominant position which might emerge within the Council against the appropriateness of an implementing measure”³⁰. As mentioned in point 1, this clause has been reaffirmed in the securities sector.

IV.3. European Parliament: The Argument of Institutional Balance

The conception of the European Parliament is mainly concerned by the institutional balance, on two aspects: the role of institutions and the scope of implementing measures³¹. The issue of the role of institutions means that the Council should concentrate on its legislative role and no longer be involved in the work of implementation of legislative measures or, implicitly, that the European Parliament be involved on a par with the Council for co-decided measures. Two other ways of restoring the balance when focusing on the institutions themselves are, firstly, to suppress the management and regulatory procedures where the Commission may not have the last word, and, secondly, to extend the supervisory powers of the European Parliament to the Council – a politically unfeasible option. The issue of the scope of very implementing measures means that, if these measures are of political significance, they should be decided upon using the relevant legislative procedure, neither through comitology nor with the Council reserving the right to exercise the implementing powers itself.

²⁸ Declarations on Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, *op. cit.*, point 1, § 2.

²⁹ Sensitive sectors include foodstuffs and health issues (COMMISSION, 1989: 5, 8, 11).

³⁰ Declarations on Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, *op. cit.*, point 3.

³¹ The issue of efficiency is also considered by the European Parliament, but less importantly (see COMMISSION, 1989: 12, BERGSTRÖM, C. F., 2005: 203-204; Resolution closing the procedure for consultation of the European Parliament on the proposal from the Commission of the European Communities to the Council for a regulation laying down the procedures for the exercise of implementing powers conferred on the Commission, *Official Journal of the European Communities C 297/94, November 24, 1986, fifth indent; and amendments, voted on July 9, 1986, to the proposal* from the Commission of the European Communities to the Council for a regulation laying down the procedures for the exercise of implementing powers conferred on the Commission, *Official Journal of the European Communities C 227/54, September 8, 1986, article 1 bis*; Resolution on the executive powers of the Commission (comitology) and the role of the Commission in the Community's external relations, *Official Journal of the European Communities C 19/273, January 28, 1991, points 2 and 7*; and Legislative resolution embodying Parliament's opinion on the proposal for a Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(98)0380 – C4-0501/98 – 98/0219(CNS), *Official Journal of the European Communities C 279/411, October 1, 1999, point 3*).

IV.3.1. European Parliament versus Council: The Role of Institutions

The position of the European Parliament on that aspect originated from a 1968 resolution³² following a debate on the Jozeau-Marigné Report, drawn up the same year³³. Article 155 of the EEC Treaty held that the Commission exercised “the powers conferred on it by the Council for the implementation of the rules laid down by the latter”. However, the report found that in most cases of delegation, the Commission was not acting alone in the implementing tasks, but worked in cooperation with implementing committees. Furthermore, in some cases, the Commission was not acting at all, because the Council had reserved the implementing powers itself³⁴. The report concluded that the presence of committees was compatible with the treaty (article 155 provided for a possibility to confer and, thus, a possibility to confer under conditions) as well as the implementing measures adopted by the Council alone (article 155 provided for a possibility to confer, not an obligation)³⁵. Notwithstanding this conclusion, the report pointed out that these two phenomena represented a departure from the conception of the EEC Treaty that the Commission should be the only executive branch of the EEC³⁶. In the ensuing 1968 resolution, the European Parliament then recommended that committee procedures do not prejudice the institutional balance. More precisely, it requested that the role of the committees, composed of representatives of the Member States, be only consultative so that they do not limit the implementing powers of the Commission (Bergström, C. F., 2005: 90, 92-93, 204).

This last rationale was expressed anew in the Hänsch Report, drafted by the Political Affairs Committee of the European Parliament, on July 2, 1986³⁷, in the framework of the preparation of the 1987 comitology decision. The management and regulatory procedures were both considered detrimental to the institutional balance, because they provided the possibility for the Council to “take back the power”³⁸. However, this time, it was insisted on the imbalance between Council and European Parliament, rather than between Council and Commission as in the Jozeau-Marigné Report and the 1968 resolution. Indeed, the argument was here that the fact that the Council could have the last word, whilst the European Parliament had supervisory powers over the Commission (through parliamentary questions, discussion of the annual

³² Resolution published in 1968, in *Official Journal of the European Communities* C 108/37, quoted in BERGSTRÖM, C. F., 2005: 93, note 228.

³³ Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), PE Doc 115/68, quoted in BERGSTRÖM, C. F., 2005 : 89, note 216 for the reference.

³⁴ Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), *op. cit.*, p. 10 (paragraphs 7-9), quoted in BERGSTRÖM, C. F., 2005: 90-91 and 91, note 218 for the reference.

³⁵ Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), *op. cit.*, pp. 10 (paragraphs 7-9), 27 (paragraph 44) and 24 (paragraph 37), quoted in BERGSTRÖM, C. F., 2005: 90-91 and 91, note 218 for the first reference, 92 and 92, note 224 for the two other references.

³⁶ Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), *op. cit.*, p. 27 (paragraph 45), quoted in BERGSTRÖM, C. F., 2005: 92 and 92, note 225 for the reference.

³⁷ Report of 2 July 1986 drawn up on behalf of the Political Affairs Committee on the proposal from the Commission of the European Communities to the Council for a regulation laying down the procedures for the exercise of implementing powers conferred on the Commission (rapporteur: Klaus Hänsch), EP Doc A2-78/86, quoted in BERGSTRÖM, C. F., 2005: 192, note 33.

³⁸ Debates of the European Parliament of 9 July 1986, *Official Journal of the European Communities* 1986, Annex No. 2-341, pp. 118-119, quoted in BERGSTRÖM, C. F., 2005: 193 and 193, note 34 for the reference.

report the Commission had to convey to it and motion of censure – articles 137, 140, 143 and 144 of the EEC Treaty)³⁹, meant that the European Parliament could only exercise these powers regarding implementing measures adopted under the advisory procedure⁴⁰.

With the entry into force of the Treaty of Maastricht on November 1, 1993, the co-decision procedure, which gives the right to the European Parliament to prevent the adoption of a proposal by the Council, started to be applied. If this procedure did not allow the European Parliament to have the last word and thus choose the advisory procedure, it was an improvement of the institutional balance, not only at the legislative level, but also at the implementation level. The new legislative procedure indeed enabled the European Parliament to block the adoption of a proposal making provisions for a procedure other than the advisory procedure. A new balance was achieved with Decision 2006/512/EC, for measures of quasi-legislative nature, implementing directives or regulations adopted under the co-decision procedure.

IV.3.2. European Parliament versus Commission: The Scope of Implementing Measures

Also addressed by the Jozeau-Marigné Report, the scope of implementing measures had initially been dealt with in the Deringer Report on October 5, 1962⁴¹. The negotiations between the Member States, which led to the first implementing committees on February 6 and April 4, 1962, were difficult on account of the unwillingness, of notably France and Germany against the Netherlands, to concede powers to the Commission at the executive level (Bergström, C. F., 2005: 46-47, 52). During the negotiations, the European Parliament required, in a resolution of December 20, 1961⁴², that no decision be taken before it had given its opinion. Faced with the risk of longer negotiations, the Council found an agreement on December 21, 1961. By keeping the European Parliament in the background, the Council gave rise to suspicion and to the European Parliament claim that it should have a word to say in the implementation process (Bergström, C. F., 2005: 52, 54). This suspicion was first expressed in the Deringer Report. While approving the principle of implementing committees, the report noted that the European Parliament, since it was not involved in the implementation process, could not ensure that matters of political importance were not handled at the implementation level, depriving it from its right to deliver an opinion, right he had for legislative acts. The report then proposed that, should that occur, the European Parliament should “not be excluded” and have the right, even if not consulted by the Commission, “to discuss its position publicly and promote it”⁴³.

³⁹ Article 137 stated that the European Parliament had supervisory powers; the other articles mentioned detail these powers. Article 140 provided for the obligation of the Commission to reply to questions asked by the European Parliament or its members. Article 143 held that the Commission should submit a general report to the European Parliament annually; the report being discussed in open session. Finally, article 144 allowed the European Parliament to adopt a motion of censure on the activities of the Commission, leading to the collective resignation of its members.

⁴⁰ Debates of the European Parliament of 9 July 1986, *op. cit.*, pp. 118-119, quoted in BERGSTRÖM, C. F., 2005: 193 and 193, note 34 for the reference.

⁴¹ Rapport du 5 octobre 1962 fait au nom du comité des présidents sur le cinquième Rapport général sur l'activité de la CEE (rapporteur : Arved Deringer), PE Doc 74-1962, quoted in BERGSTRÖM, C. F., 2005 : 54 and 54, note 73 for the reference.

⁴² Résolution du 20 décembre 1961 sur les attributions de la Commission européenne dans la mise en oeuvre de la politique agricole commune, *in* Annuaire-Manuel 1961-62, pp. 468-469, quoted in BERGSTRÖM, C. F., 2005: 52, note 69.

⁴³ Rapport du 5 octobre 1962 fait au nom du comité des présidents sur le cinquième Rapport général sur l'activité de la CEE (rapporteur : Arved Deringer), *op. cit.*, p. 44 (paragraph 151), quoted in BERGSTRÖM, C. F., 2005 : 56 and 56, note 78 for the reference.

Almost six years after the Deringer Report, the Jozeau-Marigné report continued where the former had stopped, and reaffirmed more strongly the request for involvement of the European Parliament. The Jozeau-Marigné report showed that some implementing measures adopted by the Commission actually dealt with politically significant matters and should therefore have been adopted according to a legislative procedure instead⁴⁴. The limit between implementation and legislation was then defined by the technicality of the measure: if the measure had more than a “simple technical” content, the legislative procedure should be followed⁴⁵ (Bergström, C. F., 2005: 89, 91, 253-254) – therefore giving the European Parliament a role (although non-binding until the SEA) in the elaboration of the decision. In other words, the issue of the scope of implementing measures was a matter of whether the Commission might exceed its implementing powers and adopt politically significant measures using a non-legislative procedure, interfering in that manner in the institutional balance.

Accordingly, the report requested that the European Parliament be granted the right to be informed on matters discussed in the management and regulatory committees and to have the possibility to give its opinion should a non-technical problem arise⁴⁶. This request was restated in the aforementioned 1968 resolution, specifying that, for such problems, the European Parliament should be consulted by the Commission if conferred upon the implementing powers, or by the Council if it had reserved these powers itself (Bergström, C. F., 2005: 92-93)⁴⁷. With Decision 1999/468/EC, the European Parliament finally obtained a right of scrutiny on draft measures, implementing legislative instruments adopted under the co-decision procedure (article 8).

V. Operationalization of the Conceptions on Comitology in the Securities Sector

From what precedes, it could be expected that, under the regime of the 1987 decision, the three legislative institutions would have the following preferences. Driven by efficiency, the Commission opts for the comitology procedures that are more rapid and less likely to lead to the absence of decision. The Council, however, would favor the regulatory procedure, and, in case of sensitive sectors⁴⁸, its b variant under the 1987 decision. As for the European Parliament, the issue of the role of institutions led it to prefer the advisory procedure to the two other. The problem of the scope of implementing measures reinforced that preference by developing a general suspicion towards comitology and the involvement of the Member States; which brought the European Parliament to favor the legislative process over the implementation process, when matters of political importance might be at stake. As mentioned in points

⁴⁴ Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), *op. cit.*, p. 14 (paragraph 21), quoted in BERGSTRÖM, C. F., 2005: 91, note 220.

⁴⁵ Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), *op. cit.*, p. 13 (paragraph 19), quoted in BERGSTRÖM, C. F., 2005: 91, note 220.

⁴⁶ Rapport du 30 septembre 1968 fait au nom de la commission juridique sur les procédures communautaires d'exécution du droit communautaire dérivé (rapporteur: Léon Jozeau-Marigné), *op. cit.*, p. 27 (paragraph 45), quoted in BERGSTRÖM, C. F., 2005 : 92-93 and 93, note 226 for the reference.

⁴⁷ Resolution published in 1968, in *Official Journal of the European Communities* C 108/37, quoted in BERGSTRÖM, C. F., 2005: 93, note 228.

⁴⁸ As noted by the Commission, the protection of national interests also covered cases where the matter at issue was not sensitive; for instance, in the area of standardization (COMMISSION, 1989: 5-6, 8).

2.1. and 3.1., Decision 1999/468/EC reduced discretion regarding the choice of comitology procedures *via* general and non-binding criteria. Let us compare the application of these preferences before and after the Lamfalussy reform to see whether there was any change in this respect.

V.1. Before the Lamfalussy Reform

The issue of comitology was raised in the securities sector in 1989⁴⁹, regarding the setting-up of a Committee on Transferable Securities in the framework of the Directive 93/22/EEC on investment services⁵⁰. The establishment of such a committee was also addressed in the preparation of Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions. Finally, given that in both directives, the creation of a comitology committee was postponed, the Council exercising the implementing powers in the meantime (article 29 and 10 respectively), a new proposal was made by the Commission in 1995 to create a “Securities Committee”⁵¹. The below table sums up the positions of the different institutions.

Table 2: Proposed Solutions Regarding the Issue of Technical Adaptations to Directive 93/22/EEC and 93/6/EEC⁵²

Institution/Legislative Act with Readings	Directive 93/22/EEC		Directive 93/6/EEC		1995 Proposal	
	FR	SR	FR	SR	FR	SR
Commission	III, a	No Delegation	III, a	No Delegation	III, a	III, b
Council	No Delegation	No Delegation	No Delegation	No Delegation	III, b	III, b
European Parliament	II, b	III, a	III, a	III, a	II, b	II, b

It can be seen that the solution preferred by each institution was that technical adaptations be made through:

- the regulatory procedure, variant a (Commission);

⁴⁹ The issue had first been raised regarding the Securities Contact Committee, in 1979. The latter was set up in 1979 by the Admission Directive, to act according to a procedure corresponding to the regulatory procedure, variant a (Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing, Official Journal of the European Communities L 66/21, March 16, 1979, article 21, § 2). However, as aforesaid the committee never exercised its comitology function (Commission, 2000: 36-37).

⁵⁰ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, Official Journal of the European Communities L 141/27, June 11, 1993.

⁵¹ Proposal for a European Parliament and Council Directive amending Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions and Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, COM/95/360 FINAL - COD 95/0188, Official Journal of the European Communities C 253/19, September 29, 1995, article 1 introducing article 10a, § 1 and article 2 introducing article 29a, § 1.

⁵² The order of the directive is determined by the date of the first proposal; “FR” means first reading; “SR” means second reading; “II, b” means management procedure, variant b; “III, a” means regulatory procedure, variant a; and “III, b” means regulatory procedure, variant b. “No delegation” means the Council reserves the right to exercise the implementing powers itself.

- the Council or the regulatory procedure, variant b (Council);
- the management procedure, variant b (European Parliament)⁵³.

These results match the expectations that could be deduced from the conceptions of the Commission, the Council and the European Parliament. Indeed, the main goal of the Commission is the efficiency of the decision-making system. It will therefore choose a comitology procedure that is not likely to lead to the absence of decision (the case of the regulatory procedure, variant b), while ensuring that the proposed procedure has a substantial chance of being adopted by the Council at the legislative level. To ensure adoption by the Council, the Commission took explicitly account of the sensitivity of the technical adaptations to be made (last recital of the 1989 proposal of the Commission for Directive 93/22/EEC), when proposing a comitology procedure. Thereafter, the Commission integrated in second reading the procedure chosen by the Council.

The Council, for its part, is concerned about keeping control on the final implementing measure. This explains why it, first, refused to delegate the implementing powers in both directives, then selected the procedure where it had the most power in the 1995 proposal. The argument of the Council in its common position on that proposal⁵⁴, that the comitology procedure had to be levelled up to the procedure used in the two other financial comitology committees did not explain why the regulatory procedure, variant b had been chosen for these two committees.

Finally, the European Parliament mainly focused on the institutional balance. As a result, it preferred the management procedure to the regulatory procedure, and the variant a of the regulatory procedure to the variant b, inasmuch as the Council had less power in the first procedure of each alternative and the European Parliament did not have supervisory powers on the Council. This choice was strengthened by the fact that issues of political significance were likely to be discussed during the adoption of implementing measures (Almer, J. *et al.*, 2004: 9) and that the right of scrutiny was in its infancy.

V.2. After the Lamfalussy Reform

The question is now whether the Lamfalussy reform either changed these perceptions or the way they are put in practice. The reform was so far applied to four directives: Prospectus⁵⁵, Market Abuse⁵⁶, MIFID⁵⁷ and Transparency⁵⁸. The proposals for the first two directives were

⁵³ In addition to these preferred solutions, there were variations during the legislative process and among the different legislative acts. Firstly, the Commission subscribed to the common positions of the Council. Secondly, the European Parliament joined the Commission on its initial proposals in the case of Directive 93/22/EEC and, in parallel with that directive, in the case of Directive 93/6/EEC.

⁵⁴ Common Position (EC) No 8/97 adopted by the Council on 16 December 1996 with a view to adopting European Parliament and Council Directive 97/.../EC of ... amending Directive 93/6 EEC on the capital adequacy of investment firms and credit institutions and Directive 93/22/EEC on investment services in the securities field, *Official Journal of the European Communities C 69/1*, March 5, 1997, point IV of the Statement of the Council's Reasons, included in the common position.

⁵⁵ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, *Official Journal of the European Union L 345/64*, December 31, 2003.

⁵⁶ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *Official Journal of the European Union L 96/16*, April 12, 2003.

⁵⁷ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the

submitted by the Commission on May 30, 2001, thus around two months after the endorsement of the reform by the European Council of Stockholm, but almost one year before the endorsement by the European Parliament.

The initial proposal for all directives held that the European Securities Committee would act according to the regulatory procedure (respectively, articles 22, § 2; 17, § 2; 59, § 2; and 23, § 2), following the choice made in the report of the Committee of Wise Men (CWM, 2001: 29) and endorsed by the European Council of Stockholm⁵⁹. However, it should be noted that in the first two proposals, for the Prospectus and Market Abuse directives, the Commission indicated that the regulatory procedure should be used “since the measures necessary for the implementation of this Directive are measures of general scope” (respectively, recitals 27 and 23)⁶⁰. Therefore, it did not exclude the possibility to resort to a more efficient comitology procedure in the future, if the nature of the implementing measures allowed it. The concern for efficiency was thus still present. However, this possibility was suppressed by the Council in its common position on both proposals, possibly in accordance with its national-interest conception in a relatively sensitive field. When drafting the proposals for the MIFID and Transparency directives afterwards, the Commission aligned itself to the position of the Council⁶¹.

In its first reading of the proposals, the European Parliament also supported its own conception in terms of institutional balance. Secondly, the amendments made also indicated a change in the expression of its conception on comitology: there was a shift from an alternative between comitology procedures, to an alternative between policy levels, that is, the legislative level (L1) and the implementing powers level (L2). Finally, all amendments made by the European Parliament were accepted by the Commission and the Council, making the European Parliament the most prominent actor of the comitology debate surrounding the four Lamfalussy directives.

In its opinions on the two proposals of the Commission drafted before the European Parliament endorsement of the Lamfalussy reform, namely regarding prospectus and market abuse directives, the Committee on Legal Affairs and the Internal Market of the European Parliament opposed the comitology procedure. In the first opinion, the Committee reinforced the regulatory procedure with a binding right of scrutiny (amendments 63 and 64), in line with its concern for institutional balance. Addressed through the issue of the scope of implementing measures, over which the European Parliament should “exercise a democratic control” (justification of amendment 63), the institutional balance actually focused on the matter of the role of institutions; the justification of amendment 63 bringing up the “legislative role” of the

European Parliament and of the Council and repealing Council Directive 93/22/EEC, *Official Journal of the European Union* L 145/1, April 30, 2004.

⁵⁸ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, *Official Journal of the European Union* L 390/38, December 31, 2004.

⁵⁹ European Council. 2001. *Presidency Conclusions*, Stockholm, *op. cit.*, annex I: “Resolution of the European Council on More Effective Securities Market Regulation in the European Union, Stockholm, 23 March 2001”, point 5.

⁶⁰ It is indeed possible for a determined comitology committee to act according to different procedures in different cases.

⁶¹ These proposals were adopted on November 19, 2002 and March 26, 2003 respectively.

European Parliament to justify the application of an aerosol clause towards the latter⁶². The point was thus to restore the balance between the European Parliament and the Council, rather than towards the Commission.

In the second opinion⁶³, the Committee deleted the article regarding comitology (amendment 28), explaining that the regulatory procedure was “inadmissible because (...) recourse to the regulatory committee is only possible if measures to protect the health and safety of humans, animals or plants are to be applied” (justification of amendment 28). This is the key point in the shift of strategy of the European Parliament. As mentioned in point 2.2., the regulatory procedure can also be used to adapt or update non-essential provisions of the basic instrument. And that was the problem for the Committee and, more largely, the European Parliament: the fear that “‘detailed rules’ [*i.e.* implementing measures] frequently conceal significant changes to fundamental legal and political decision”⁶⁴, thus *essential* provisions of the basic instrument, which should be adopted at the legislative level. This fear, expressed since the Deringer Report in 1962 (see point 3.3.2.), was revived by the Lamfalussy reform. By distinguishing between framework principles, dealt with using a legislative procedure (L1), and technical aspects, adopted through implementing measures (L2), the reform increased the possibility that essential provisions be included at L2, where the European Parliament did not have as much power as at L1⁶⁵. Thus, the reason of the opposition of the Committee in both its opinions resulted from the Lamfalussy reform. As to the shift of strategy, it stemmed, first, from the fact that discretion in the choice of the comitology procedure had been limited since Decision 1999/468/EC. Second, it followed from the fact that, two weeks before the second opinion⁶⁶, the European Parliament had endorsed the reform, which provided for a regulatory procedure. It was therefore politically difficult to contest the comitology procedure; accordingly, the Committee recommended, instead of making provisions for a procedure replacing the regulatory procedure, to “transfer all the comitology provisions from the Annex to the articles of the Directive” so as to “ensure that these acts will continue to be determined through co-decision”⁶⁷.

⁶² “The technical amendments which the European Commission intends to make to this Directive shall be forwarded to the European Parliament, which shall have a period of four weeks within which to state its position. If during that period Parliament has not adopted a resolution stating that the proposed technical amendments exceed the implementing powers laid down in the Directive, the Commission shall adopt those measures. If Parliament has done so, the Commission shall present new proposals to Parliament which do not go against the majority view of Parliament” (amendment 63).

⁶³ Report on the proposal for a European Parliament and Council directive on insider dealing and market manipulation (market abuse), COM(2001) 281 - C5-0262/2001 - 2001/0118(COD), Luxembourg: European Parliament, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2002-0069+0+DOC+PDF+V0//EN>, February 27, 2002.

⁶⁴ Report on the proposal for a European Parliament and Council directive on insider dealing and market manipulation (market abuse), *op. cit.*, p. 59.

⁶⁵ Report on the Implementation of Financial Services Legislation, 2001/2247(INI) (Luxembourg: European Parliament, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2002-0011+0+DOC+PDF+V0//EN&language=EN>), January 3, 2002, point 3.

⁶⁶ The opinion of the Committee on Legal Affairs and the Internal Market regarding the proposal for a market abuse directive was delivered on February 19, 2002, while the Lamfalussy reform was endorsed on February 5, 2002. The first opinion of the Committee, regarding the proposal for a prospectus directive, had been delivered on November 8, 2001.

⁶⁷ Report on the proposal for a European Parliament and Council directive on insider dealing and market manipulation (market abuse), *op. cit.*, p. 59.

During that endorsement, the European Parliament secured two safeguards. First, the European Parliament would have a three-month period (except in urgent cases), from the transmission of any draft implementing measures, to react to them and possibly indicate that they exceed the implementing powers delegated to the Commission⁶⁸. The European Parliament would also continue having a one-month period (except in urgent cases), from the transmission of final draft measures, to indicate that the Commission has exceeded its implementing powers (IIMG, 2003: 15)⁶⁹. Second, each L1 directive or regulation adopted under the Lamfalussy process would include a “sunset clause”, that is to say, a clause limiting to four years, from the entry into force of the directive or regulation, the time the Commission has to exercise implementing powers. This period can be renewed only with the agreement of the Council and the European Parliament on a proposal from the Commission⁷⁰. These safeguards were then added by the European Parliament when amending the Commission proposals drafted before that endorsement⁷¹. When drawing up the proposals for the two other Lamfalussy directives, MIFID and Transparency, the Commission included these safeguards on its own initiative⁷². It did not contest them given that it had agreed upon them⁷³ following the request made in the von Wogau report⁷⁴.

In addition to these two safeguards, two other safeguards, not explicitly addressed in the above report⁷⁵, were included by the European Parliament and adopted during the legislative process. The first regarded the scope of the implementing measures: these should “not modify the essential provisions” of the directives. It was added by the European Parliament for the prospectus and market abuse proposals (amendments 60 and 69 respectively) and provided for by the Commission in its MIFID and transparency proposals (articles 59, § 2 and 23, § 2 respectively). The second supplementary safeguard consisted in principles likely to “guide the Commission when exercising its implementing powers”. These were included by the European Parliament for the first two proposals (amendments 9 and 17 respectively) and integrated

⁶⁸ European Parliament resolution on the implementation of financial services legislation, 2001/2247(INI), *Official Journal of the European Communities* C 284 E/115, November 21, 2002, point 15.

⁶⁹ In accordance with the agreement between the Commission and the European Parliament on Decision 1999/468/EC, the European Parliament has one month, from the receipt of the final draft measures, to draw up a resolution indicating that the Commission has exceeded its implementing powers, except in urgent cases where that period can be reduced (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, *Official Journal of the European Communities* L 256/19, October 10, 2000, points 6 ad 7).

⁷⁰ European Parliament resolution on the implementation of financial services legislation, *op. cit.*, point 17.

⁷¹ Amendments 10 and 61 respectively for the prospectus proposal, and amendments 2 and 70 respectively for the market abuse proposal.

⁷² Recital 48 and article 59, § 3 respectively of the MIFID proposal, and recital 25 and article 23, § 4 respectively of the transparency proposal.

⁷³ “Mr Romano Prodi President of the European Commission "Implementation of Financial Services Legislation in the Context of the Lamfalussy Report" – Intervention by President Romano Prodi to the European Parliament's Plenary Session Strasbourg, 5th February 2002”, Brussels: Commission of the European Communities, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/44&format=HTML&aged=1&language=EN&guiLanguage=en>, February 5, 2002.

⁷⁴ Report on the Implementation of Financial Services Legislation, *op. cit.*, point 14.

⁷⁵ The closest reference to these two other safeguards can be found in point 6 of the report, laying down that “it is incumbent on the Community legislator, Parliament and the Council acting together, to lay down on a case-by-case basis, in each legislative text, the scope of and the limits on the implementing powers conferred on the Commission” (Report on the Implementation of Financial Services Legislation, *op. cit.*).

in the Commission initial proposal for a transparency directive. These principles were not added by any of the two institutions in the MIFID directive; this might stem from the numerous provisions of the directive where comitology is required⁷⁶. These additional safeguards indicate, on the one hand, that the practical translation of the European Parliament conception on comitology was thus drifting away from comitology procedures, to focus on the alternative L1 versus L2. On the other hand, that the legislative process went relatively smoothly, the Commission and the Council for the transparency directive, both accepted the amendments of the European Parliament on these additional safeguards.

The first three of these safeguards were then integrated in the regulatory procedure with scrutiny by Decision 2006/512/EC. Firstly, the European Parliament has three months to prevent the adoption of implementing measures approved by the comitology committee, and from two to four months in case of measures rejected or for which no opinion was delivered. Secondly, the call-back right puts the European Parliament on an equal institutional footing with the Council, regarding the supervision of the executive role of the Commission in the adoption of quasi-legislative measures implementing co-decided instruments. This right replaces the sunset clauses, which constituted a bridge from the issue of the scope of implementing powers to the issue of the role of institutions. Thirdly, the criterion governing the use of this comitology procedure provided for that “essential elements of a legislative act may only be amended by the legislator” (article 1, § 2 introducing recital 7a). Finally, the determination of the European Parliament to put its conception into practice can be noted on two other elements. First, as noted in point 2.2., the text of the decision holds that it is “necessary” to follow that procedure if the criterion is matched, while other procedures “should” be followed in such a case. Second, the reasons for which the European Parliament can oppose draft measures are no longer limited to the scope of implementing powers, but extend to the compatibility with the aim or content of the basic instrument, and the respect of the principles of subsidiarity and proportionality (article 7 inserting article 5a, § 3(b) and § 4(e)).

VI. Conclusions: Risk-Avert Institutions?

Although the comitology reform had been scheduled by the 2001 White Paper on European Governance in the perspective of the enlargement, it is clear that the distinction made in the Lamfalussy reform between framework principles and technical rules triggered new reactions by the European Parliament and accelerated the pace of the reform; the latter fearing that essential elements be dealt with at L2. During the adoption of the Lamfalussy directives, the European Parliament could not propose a comitology procedure where it would have supervisory powers on the Commission, namely the advisory procedure, on account of the 1999 decision and its endorsement of the Lamfalussy reform. It thus chose to act towards an equal involvement with the Council at L2. Following the von Wogau report (points 3 and 19)⁷⁷ and after the introduction of several safeguards, a first step was made in that direction by the 2004 Treaty establishing a Constitution for Europe, which included a clause granting a general call-

⁷⁶ In the explanatory memorandum of its proposal, the Commission wrote that “the scale of the Directive and the introduction of important new disciplines at EU level (e.g. transparency rules, “best execution”) call for extensive use of comitology powers to give effect to core provisions of the proposal. 20 of the 67 articles provide for some use of comitology” (Proposal for a Directive of the European Parliament and of the Council on investment services and regulated markets, and amending Council Directives 85/611/EEC, Council Directive 93/6/EEC and European Parliament and Council Directive 2000/12/EC (2003/C 71 E/07), *op. cit.*, p. 89).

⁷⁷ “The rejection of the proposed Constitutional Treaty in France and the Netherlands has implications for the Lamfalussy approach (...) in that it delays an institutional solution to the European Parliament’s request to have equivalent control powers as its co-legislator” (Commission, 2006a: 3).

back right to the European Parliament (article I-36, § 2(a)). Its non-ratification in 2005 led to the Decision 2006/512/EC and the new comitology procedure, which included most of the above safeguards, added specifically in the framework of the Lamfalussy process – hence, the influence of that process on the outcome of the comitology dispute. The upcoming treaty revision should provide the European Parliament with such a right⁷⁸.

However, the Lamfalussy reform did not change the conceptions of the legislative institutions on comitology. Instead, it affected, first, the scope of the claims: from a choice between comitology procedures, it turned into a choice between policy levels, *i.e.* implementing measures and legislation. Next, it affected the number of actors concerned by the comitology dispute; it went from three actors to one, the European Parliament.

This led us to ask ourselves whether the relationship between the conceptions of the institutions and their practical implementation is mediated by risk-aversion. Indeed, the safeguards built by the legislative institutions are rarely used. First, regarding the relationship Commission-Council, it was seen that, following the revision of the management procedure in 1999, the Council introduced four safety measures. However, empirically speaking, there was no ground for these safety measures, insofar as data on the working of management committees up to and including 1988 indicated a proportion of negative opinions lower than 0.05%⁷⁹, whereas subsequent data for the year 1995 showed no case of negative opinions out of 2231 draft implementing measures (Commission, 1996: 6). Similarly, between the entry into force of the SEA on July 1, 1987 and July 14, 1989, the Council amended the comitology procedure chosen by the Commission in its proposals relating to the internal market, so that the regulatory procedure became the most common procedure. It was present in 72.5% of the adopted proposals, while the advisory procedure was provided for in 11.8% of the adopted proposals (Commission, 1989: annex II).

⁷⁸ European Council. 2007. *Presidency Conclusion*, Brussels, Brussels: Council of the European Union, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf, June 21-22, Annex I: Draft IGC Mandate, point 19, v.

⁷⁹ From 1962 to 1978, eight out of the 16,258* votes taken by the agricultural management committees led to a negative opinion. The Commission reported that this trend was confirmed by later statistics, specifying that no negative opinion were delivered in 1987 and 1988 (COMMISSION, 1989: 9).

* The number given in the Commission report is 16,248; however, the addition of the numbers for favorable, unfavorable and no opinions equals 16,258. It was assumed that these numbers were correct rather than the total.

Table 3: Comitology Procedures in Proposals from the Commission and Acts Adopted by the Council from July 1, 1987 to July 14, 1989 regarding the Internal Market⁸⁰

Comitology Procedure/Type of Legislative Act	Commission Proposals	Acts Adopted by the Council
Advisory Procedure (I)	45.1%	11.8%
Management Procedure, Variant a (II, a)	2%	2%
Regulatory Procedure, Variant a (III, a)	31.4%	45.1%
Regulatory Procedure, Variant b (III, b)	10%	27.4%

The Commission considered that the defensive preference of the Council towards the regulatory procedure was ill-founded. Indeed, data collected on comitology before 1989 indicated a favorable opinion of the regulatory committees in 98% of the cases; and, in the remaining 2%, no case where the Council intended to oppose the adoption of questioned implementing measures by the Commission (Commission, 1989: 8-9). Similarly, in the data for 1995, the ratio of favorable opinions was a little higher than 98%⁸¹ and there was only one case among a total of 560 where the Council prevented the adoption of questioned measures⁸² (Commission, 1996: 6-7).

Data on the working of committees since 2000 continue indicating only a very small number of referrals to the Council for both the management and regulatory procedures⁸³. The position of the Council – and thus also of the Commission – is therefore, as in the case of the management procedure, grounded on a weak risk factor (for the Council, the risk that the Commission adopts challenged measures or, for the Commission, that the Council blocks the decision-making system) rather than on facts⁸⁴.

Second, regarding the relationship Commission-European Parliament, the use of the right of scrutiny since its creation in 1999 has remained very limited. It was only used twice: once in 2000 (Commission, 2002: 3) and once in 2005 (Commission, 2006b: 4-5). Even when taking into account the three other cases where the European Parliament considered the Commission had exceeded its implementing powers without referring to article 8 of the Decision 1999/468/EC (one case in 2004 and two in 2005 – see Commission, 2005c: 5-6 and Commission, 2006b: 5-6 respectively), the total number of cases amounts to 5 out of around 15,000

⁸⁰ Data regarding the safeguard procedure are not displayed in the table (Commission, 1989: annex II).

⁸¹ 552 cases of favorable opinions among 560 cases. The eight other cases were cases where no opinion had been delivered (COMMISSION, 1996: 6).

⁸² It occurred in the sector of animal foodstuffs (COMMISSION, 1996: 7, first footnote).

⁸³ From 2000 (the beginning of annual reports on the working of comitology committees – article 7, § 4 of Decision 1999/468/EC) up to and including 2005, there have been 51 referrals of implementing measures, to be adopted under both the management and regulatory procedures (data are not distinguished), to the Council. In percentage, the referrals have not exceeded 1% of all such measures, decreasing to 0% in 2003 (Commission, 2002: 3; Commission, 2003a: 3; Commission, 2003b: 18; Commission, 2005a: 3; Commission, 2005c: 6; Commission, 2006b: 6).

⁸⁴ The Commission indeed noted in 1989 that there is “no objective basis for the Council's insistence on a blocking mechanism” (COMMISSION, 1989: 11).

implementing measures, adopted from 2000 up to and including 2005. This brings us to potential use and usefulness of the call-back right: will it be used more often than the non-binding right of scrutiny, or will it constitute, in the same way as policy expertise (Krehbiel, K., 1991: 62, 64), a safeguard against legislative instruments with uncertain consequences?

More generally, the discussion so far brings us to the conclusion that the Lamfalussy process reinforces the conflict between the Parliament and the Council and brings the two principals to multiply the oversight procedures well beyond what is reasonable to control potential agency losses at L2. The distrust between the two principals has fuelled this escalation of control mechanisms. As mentioned in point 3.3.1., the European Parliament has never accepted that committee procedures prejudice the institutional balance between the three main institutions. At first, there was a striking imbalance between the Council and the European Parliament resulting from the fact that the former had the last word in the legislative process and that, in addition, it could control the sub-agent, namely the comitology committee. But with the entry into force of the co-decision procedure, the European Parliament has gained considerable bargaining power in order to have its say in monitoring the agent's (Commission) and the sub-agent's (committee) behaviour. And the Lamfalussy Reform has consolidated the Parliament's position. It can sell its supports by blocking any legislative proposal at L1 and by exercising a budgetary control on the committees.