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Summary

On 13 June 2006 representatives of the Commission, the Parliament and the Council agreed on an amendment of the so called comitology decision introducing a new comitology procedure; *the regulatory procedure with scrutiny*. This new procedure will put the European Parliament on an ‘equal footing’ with the Council regarding the supervision and control of delegated legislation to the Commission in the field of co-decision. The purpose of this article is to try and answer the following questions: What circumstances made the new deal on comitology possible? What were the incentives for the Council? In this article it is argued that it was the parallel development in the field of financial services that gave the European Parliament the ‘weapon’ it needed to make the Council accept an agreement on comitology.

In order to set a common frame of reference for the rest of the text the article will begin with a short background on comitology in general and the stand of the European Parliament on comitology in particular (part 2). Thereafter, in part 3, there will be a more detailed description of the development in the field of financial services focusing on the so-called Lamfalussy report on the securities market. In this article it is argued that it was the “Lamfalussy deal” that made the “comitology deal” possible and some extra attention will therefore be given to how the “Lamfalussy deal” came about. In part 4 of the article, a brief account is given of the reform of comitology and the debate on the future of the Union that led to the signing of the Constitutional Treaty. Finally, in part 5, some conclusions will be drawn on why and how the comitology deal came about seen in the light of developments in the area of financial services.

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I Introduction

I.1 Background

On 13 June 2006 representatives of the Commission, the Parliament and the Council agreed on an amendment of the so called comitology decision introducing a new comitology procedure; *the regulatory procedure with scrutiny*. This new procedure will put the European Parliament on an ‘equal footing’ with the Council regarding the supervision and control of delegated legislation to the Commission in the field of co-decision. According to Richard Corbett, the rapporteur of the European Parliament, the deal is “a significant step forward for the European Parliament...”.¹

Until now, the European Parliament has not had the same right as the Council to supervise delegated legislation, not even when the European Parliament has co-legislated and made decisions together with the Council on what to delegate to the Commission. This situation has been the source of discontent for the European Parliament for a long time and resulted in inter-institutional conflicts regarding delegation to the Commission between the European Parliament and the Council when adopting framework legislation. The European Parliament has argued that since it is a co-legislator it should have the same possibility of controlling the delegated legislation as the Council. The long-term solution that would satisfy the Parliament is an amendment of Article 202 of the Treaty. In the short-term the European Parliament has argued for an amendment of the so-called comitology decision.

I.2 Questions and Outline

The purpose of this article is to try and answer the following questions: What circumstances made the new deal on comitology possible? What were the incentives for the Council? In this article it is argued that it was the parallel development in the field of financial services that gave the European Parliament the ‘weapon’ it needed to make the Council accept an agreement on comitology.

In order to set a common frame of reference for the rest of the text the article will begin with a short background on comitology in general and the stand of the European Parliament on comitology in particular (part 2). Thereafter, in part 3, there will be a more detailed description of the development in the field of financial services focusing on the so-called Lamfalussy report on the securities market. In this article it is argued that it was the “Lamfalussy deal” that made the “comitology deal” possible and some extra attention will therefore be given to how the “Lamfalussy deal” came about. In part 4 of the article, a brief account is given of the reform of comitology and the debate on the future of the Union that led to the signing of the Constitutional Treaty. Finally, in part 5, some conclusions will be drawn on why and how the comitology deal came about seen in the light of developments in the area of financial services.

II Background

II.1 Comitology

Article 202 of the Treaty establishing the European Community (ECT) states that the Council shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. Furthermore, according to Article 202 ECT, the Council may impose certain requirements in respect of the exercise of these powers.

¹ See Mr Corbett during a debate on 21 June 2006 in the Legal Affairs Committee of the European Parliament.

The requirements that the Council has imposed on the Commission are in the form of a decision, according to which the Commission, when implementing basic legislation must cooperate with committees consisting of representatives from national authorities. The cooperation between the Commission and the committees was first formalised in a Council Decision from 1987.² On 18 July 1999, the decision was replaced by Council Decision EEC/99/468, the so-called comitology decision.³ The comitology decision regulates the different types of comitology procedures. The procedures are distinguished by the extent to which their opinions are binding for the Commission. There are three types of comitology procedures: the advisory procedure, the management procedure, and the regulatory procedure.

According to the least binding procedure, the advisory procedure, the Commission shall take utmost account of the opinion delivered by the committee, and it shall inform the committee of the manner in which its opinion has been taken into account. According to the management procedure, the Commission shall adopt the implementing legislation which shall apply immediately. However, if the implementing legislation is not in accordance with the opinion of the committee, the Commission shall inform the Council, where a different measure can be adopted. According to the regulatory procedure, the Commission shall adopt the implementing legislation if it is in accordance with the opinion of the committee. If that is not the case, the Commission shall submit the proposal to the Council and inform the European Parliament.⁴

Three declarations are attached to the comitology decision. According to the first one the Commission states that under the management procedure the Commission recalls that its constant practice is to secure a satisfactory decision which will gain the widest possible support in the comitology committee. Furthermore, the Commission will take account of the position of the members of the committee and act in such a way “as to avoid going against any predominant position which might emerge against the appropriateness of an implementing measure”. The second statement is from the Council and the Commission and regulates how to align the old comitology procedures with the new one. According to the third declaration the Commission states that it will avoid going against any predominant position in the Council against the appropriateness of an implementing measure in the review of proposals for implementing measures concerning particularly sensitive sectors.⁵

The choice between the different comitology procedures is governed by the principles set out in the decision, for example, that the management procedure should be applied where the common agricultural policy is concerned; the regulatory procedure should be applied when the implementing measures concern “measures of general scope designed to apply essential provisions of basic instruments...”. It should be noted, though, that the criteria for the choice of the different procedures are non-binding.

II.2 The European Parliament and Comitology

The European Parliament has always seen comitology as a threat to its own role; both as a legislator but also as a political supervisor of the Commission. The European Parliament has therefore favoured a strict definition of executive decision-making with a narrow substantive

² 1987/373/EEC: Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission.

³ 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁴ See Articles 3, 4 and 5 of Council Decision 1999/468/EEC.

⁵ See the declarations attached to Council Decision 1999/468/EEC.

scope. Since the 1960s, the European Parliament has demanded that it obtain influence over the process by a so-called *droit de regard*: which would include a right to be kept informed and a right to state its opinion. In the first comitology decision from 1987, the European Parliament was not even mentioned; comitology was a matter for the Council and the Commission only. When the co-decision procedure was introduced, the European Parliament had a stronger case and in the second comitology decision, the European Parliament was given some influence at least.⁶

According to the preamble of the decision, the purpose of the new decision was, *inter alia*, to “improve the involvement of the European Parliament in those cases where the basic instrument conferring implementation powers on the Commission was adopted in accordance with the procedure laid down in Article 251 of the Treaty...” and “to give the European Parliament an opportunity to have its views taken into consideration” when it considers that a measure adopted under the regulatory procedure exceeds the scope provided for in the basic legal act. Furthermore, the purpose was to improve information to the European Parliament by providing that the Commission should inform it on a regular basis of committee proceedings, transmit to it documents related to activities of committees and inform it whenever the Commission transmits to the Council measures or proposals for measures to be taken.⁷

According to Article 8 of the comitology decision, in the field of co-decision the European Parliament has the right to adopt a resolution if it considers that a draft implementing measure goes beyond the scope of the delegation. If that is the case, the Commission shall take the resolution into account and may submit a new draft measure, continue with the procedure or submit a proposal to the legislators on the basis of the Treaty. Furthermore, according to Article 7, the European Parliament shall be informed by the Commission of committee proceedings on a regular basis.⁸

The European Parliament has always wanted to get rid of the comitology system altogether, but since the second comitology decision entered into force the agenda of the European Parliament has not been as clear as before. It seems as if the European Parliament has decided to accept or tolerate comitology if it obtains the same right as the Council to control the substance of the delegated legislation.⁹ The tactic of the European Parliament has been to use the powers at its disposal to try and influence other areas. The European Parliament may, in the field of co-decision for example, refuse delegation or delay the adoption of important legislation in order to get its way in some other area. One example of this tactic might be found in the field of financial services.

III The Financial Market and Comitology

III.1 Background

The financial market consists of the activities of banks, insurance companies, stock brokers and securities managers. According to the Treaty, the market should have been harmonised by

⁶ See Bergström, C-F., *Comitology – Delegation of Powers in the European Union and the Committee System*, Oxford University Press, 2005.

⁷ See Council Decision 1999/468/EEC.

⁸ See Article 8 of Council Decision 1999/468/EEC.

⁹ See Bergström, C-F., *Comitology – Delegation of Powers in the European Union and the Committee System*, Oxford University Press, 2005, p 313 – 315.

31 December 1992.¹⁰ Some directives were passed to fulfil this objective. However, these were not far-reaching enough.¹¹ During the 1990s several actions have been taken in order to achieve the goal of an integrated financial market.¹²

Between 1993 and 1999¹³ negotiations between the Council and the European Parliament in the conciliation committee have failed to lead to the adoption of the legislative act in question on three occasions alone.¹⁴ One of these occasions concerned amendments of Council Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions and Council Directive 93/22/EEC on investment in securities.¹⁵ These directives constitute the cornerstone of the regulation of the securities market. The original directives were adopted by the Council before the co-decision procedure came into force. The Commission's original proposal included a proposal for the setting up of a securities committee, which would act as a regulatory comitology committee.¹⁶ When the Council adopted the directive, the issues were divided and the Council chose to keep the implementation authority to itself for the time being.¹⁷ Thus, the Commission's proposal to set up a securities committee was postponed, which indicates that the governments considered the field too politically sensitive to delegate to the Commission the power to implement the legislation. Even though a securities committee was suggested in order to secure the interests of the governments, they apparently wanted to keep full control of the legislation. This was, however, intended to be only a temporary solution.¹⁸

On 17 July 1995 the Commission proposed a number of changes to the new directives in order to set up a securities comitology committee.¹⁹ At that time the field was subordinate to the co-decision procedure. The Parliament suggested four amendments to the Commission's proposal following the first reading, which all concerned the committee procedure and delegation

¹⁰ See Article 14 of the EC Treaty.

¹¹ For example, see Directives 85/611, 73/183, 92/96 and 92/49.

¹² See COM (1999) 232, 11.05.99, Financial Services: implementing the framework for financial markets: Action Plan Communication from the Commission. See also the Commission General Report on the Activities of the European Union, 1998 p 25.

¹³ Co-decision was introduced 1993 and the new comitology decision was adopted in 1999.

¹⁴ See Dahlman T., Förlkningsinstitutet – från Maastricht till Amsterdam, *ERT*, 2000, p 55. One case concerned a directive on voice telephony, the other a proposal for a directive on biotechnology, and the third the amendment of two directives concerning the securities market.

¹⁵ Council Directive 93/6/EEC of the 15 March 1993 on capital adequacy of investment firms and credit institutions Official Journal L 141/93 p 1-26 and Council Directive 93/22/EEC of the 10 May 1993 on investment services in the securities field Official Journal L 141/93 p 27-46.

¹⁶ See Proposal on a Council Directive on capital adequacy of investment firms and credit institutions Official Journal C 152/90 p 6. Amended proposal for a Council Directive on capital adequacy of investment firms and credit institutions Official Journal C 50/92 p 5. Proposal for a Council Directive on investment services in the securities field Official Journal C 43/89 p 7. Amended proposal for a Council Directive on investment services in the securities field Official Journal C 42/90 p 7.

¹⁷ According to article 202 of the EC Treaty the Council may reserve the right, in specific cases, to exercise directly implementing powers itself instead of delegation the implementation to the Commission.

¹⁸ See Explanatory Memorandum COM (1995) 360. 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, Official Journal C 253/95 p 19.

¹⁹ See COM (1995) 360 final. 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, Official Journal C 253/95 p 19.

to the Commission.²⁰ The Commission presented an amended proposal on 20 June 1996 which took one of the amendments suggested by the European Parliament into account. However, the European Parliament had proposed to change the comitology procedure into a less restrictive one and the suggestion was not taken into consideration.²¹ On 16 December 1996 the Council adopted a common position,²² according to which the purpose of the amendment of the directives was to establish a comitology committee for securities and to give the Commission the authority to update and adapt the directives in question.²³ On 9 April 1997 the European Parliament proposed further amendments on the committee procedure following its second reading.²⁴

The Commission presented a draft opinion on 10 July 1997, after having considered the common position of the Council as well as the Parliament's proposal, in which the Parliament's proposal concerning the committee procedure was still not accepted.²⁵ A conciliation committee was set up on 10 February 1998 in order to bring the different opinions of the Council and the European Parliament in line with each other, but they could not agree on a common proposal and the legal act was therefore not adopted.²⁶ The Commission's suggestion to set up a comitology securities committee was rejected this time as well. The failure on the first occasion was due to the fact that the governments did not want to transfer the implementing authority to the Commission, and on the second the Parliament could not accept the proposed regulatory comitology procedure.

This case illustrates both the difficulties for the institutions to agree on a system for the adoption of legal acts in the securities market, and the general conflicts of interest between the institutions concerning comitology. When the governments finally agreed to delegate to the Commission, the condition was that a more binding comitology procedure would be used. The governments were prepared to delegate legislative powers, even though the field was politically sensitive, since they realised that this was a necessary step in order to be able to adapt the legislation rapidly enough to the fast-changing securities market. The European Parlia-

²⁰ A4-0034/96, first reading resolution of 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)0360 - C4-0305/95 - 95/0188(COD)), Official Journal C 152/96 p 18.

²¹ COM (1996) 292 final. Amended 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, Official Journal C 221/96 p 31.

²² C4-0005/97 - 95/0188(COD), Council Common Position. Common position (EC) No 8/97 of 16 December 1996 adopted by the Council with a view to adopting a European Parliament and Council Directive 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 C 69/97 p 1.

²³ See Bulletin EU 12-1996, internal market (22/29), point 1.3.38.

²⁴ A4-0093/97, Decision on the common position adopted by the Council with a view to adopting a European Parliament and Council Directive on amending Council 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 (C4-0005/97 - 95/0188(COD)) (Co-decision procedure - second reading), Official Journal C 132/97 p 83.

²⁵ See also COM (1997) 355 final. Opinion of the Commission pursuant to Article 189b(2)(d) of the EC Treaty, on the European Parliament's amendment to the Council's common position regarding the proposal for an amendment of the European Parliament and Council Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions and Council Directive 93/22/EEC on investment services in the securities field.

²⁶ See Bulletin EU 4-1998, internal market (16/21), point 1.2.34.

ment maintained its view that a less binding procedure should be applied since many political issues would be discussed implying the importance of democratic control. It was agreed in general terms that a delegation would take place. The discussion concerned which committee procedure should be applied.

The two directives were amended a number of times, but the original articles on implementing authorities were kept unchanged. Thus, the initial temporary solution became permanent for more than ten years, due to institutional disputes regarding comitology.²⁷

Thus, there was a deadlock on the securities market. The Council and the European Parliament could not agree on a system of delegation in this field. For the time being the Council kept the implementing power to itself concerning the application of the directive on investment services and all legislation had to be passed through the time-consuming co-decision procedure. This was not acceptable since it meant that the legislation could not be adapted rapidly enough to new developments on the securities market.

According to the European Parliament, the delay of the reform of the European financial market was due to the fact that there was a lack of political will for reform in the Council. In a resolution on 4 May 1999, the European Parliament stated its view on comitology in general and the financial market in particular. The European Parliament stated in the resolution that it was sceptical to a piece of legislation which only deals with essential principles and leaves the details to the Commission. Legal rights cannot be guaranteed in this way. The European Parliament referred to its attitude towards the comitology that has been expressed by the European Parliament many times and to promises from the Commission to diminish the democratic deficit.²⁸

In order to find a solution for the problems regarding the lack of integration of the European Securities Market the Council decided to set up a Committee of Wise Men that had as its mandate to address this issue.²⁹ The chairman of the Wise Men Committee was Baron Alexandre Lamfalussy and the committee is therefore commonly referred to as the Lamfalussy committee. The mandate of the committee was to address the procedural aspects of the market and not the substance.³⁰

²⁷ Directive 93/22 has been amended by 95/26, 97/09 and 00/64, Directive 93/6 has been amended by 98/31 and 98/33. Article 29 and 10 of the directives reads: "*Pending the adoption of a further Directive laying down provisions adapting this Directive to technical progress in the areas specified below, the Council shall, in accordance with Decision 87/373/EEC (15), 20 acting by a qualified majority on a proposal from the Commission, adopt any adaptations which may be necessary...*" (author's italics).

²⁸ A4-0175/99 (COM 0625- C4-0688/98), OJ C 279 1999 p. 97.

²⁹ See http://www.europa.eu.int/comm/internal_market/en/finances/general/pogroup.htm. On 8 February 2000, the Financial Services policy group met to discuss the securities market. The group stated that it was necessary to improve the financial market and on 17 July 2000 the EcoFin Council decided to set up a Committee of Wise Men. See also www.europa.eu.int/comm/internal_market/en/finances/general, 2002-08-15, Financial Services policy group discusses securities markets. 10328/00 (Presse 263), ECOFIN, Brussels 17 July 2000

³⁰ See also Communication from the Commission entitled "Financial Services: Building a Framework for Action" presented on 28 October 1998. In this Communication the Commission concluded that "...compared to the situation in other industrialised countries, the EU financial services sector is still lagging behind." In the Communication the Commission presented a number of "action points", inter alia, that "the Council and the European Parliament are invited to work together with the Commission to explore a possible inter-institutional agreement enshrining the modalities for *stream-lined, flexible and speedier legislation* in the single financial services market [and] should be committed to exercise a degree of *self-restraint in the legislative process to avoid over-complex legislation*." see p. 8 of the communication.

III.2 The Implementation of the Lamfalussy Model

The final report of the Lamfalussy committee was presented on 15 February 2001. The main conclusion drawn by the group was that the most important problem of the market was that the regulatory framework was too rigid, too slow and in general not very well adapted to the needs of the fast changing and developing securities market.³¹ The proposed remedy for this was to introduce a four-level system for adoption, implementation, transposition, and monitoring of the legislation. The four-level system now implemented and in force, is based on an extensive use of comitology and consultation with market practitioners and end-users. The basic idea of the system is that the legislators, the Council and the European Parliament, should focus on the essential elements of the legislation leaving the details and technical measures needed to be implemented to the Commission.

Very briefly the four-level system can be described as follows; at level one, the initiation phase, the Commission adopts a proposal for a directive or a regulation after a full consultation process. The proposal is subsequently sent to the European Parliament and the Council that together adopt the legislative act and reach an agreement on framework principles and definitions of implementing powers according to the co-decision procedure.

At level two, the implementing phase, the Commission adopts the implementing measures in cooperation with two committees, the European Securities Committee, ESC, and the Committee of European Securities Regulators, CESR. The Commission first consults the ESC and after that requests advice from the CESR on the implementing measures. The CESR prepares the advice in consultation with market practitioners, end-users and consumers and submits its advice to the Commission. On the basis of the advice from the CESR, the Commission then makes a proposal to the ESC. The Commission adopts the implementing measures after an approving vote from the ESC.

At level three, the transposition phase, the CESR works to ensure the consistent implementation and application of EU legislation in all Member States, for example by adopting guidelines and common standards.

At level four, the monitoring phase, the Commission fulfils its function as guardian of the treaty by checking compliance with EU legislation in Member States and, if necessary, by taking legal action if a breach is suspected.³²

In 1998 the Council and the European Parliament were not able to agree on the establishment of a securities committee or on formalising delegation to the Commission. Was there any reason to believe that the Council and the European Parliament were prepared to carry out the Lamfalussy reform of 2001, only three years later?

One important event that had happened after the negotiations in the conciliation committee broke down in 1998 was that the new comitology decision had entered into force. This decision met some of the European Parliament's demands. However, the Lamfalussy report was meant to be applicable not only on two directives but on the whole of the securities market and the negotiations proved to be difficult.

The Member States were able to welcome the proposals in the Lamfalussy report only after the Commission had promised *not to go against the dominant view of the governments when*

³¹ See Final Report of the Committee of Wise Men, pp. 13-14.

³² See Final Report of the Committee of Wise Men, p. 6.

*passing secondary legislation.*³³ At a summit meeting in Stockholm 23 – 24 March 2001 the Member States adopted a resolution on a more effective securities market. In the resolution they stressed that a dynamic securities market was an important part of the implementation of the Commission's action plan for the financial market. The legislation procedure had to be speeded up. The governments welcomed the Lamfalussy report and the proposed four-level system. In the resolution the Commission was encouraged to inform the Council and the European Parliament about legislative proposals at an early stage. The division of the legislation into basic legislation on the one hand and secondary legislation adopted by the Commission on the other should be decided on a case-by-case basis, according to the resolution. The European Parliament should always be informed of comitology measures. If the European Parliament were to be of the opinion that the Commission exceeds its powers, the Commission must take this into consideration and reconsider the matter and state the reasons for the proposal.³⁴

On 15 March 2001, before the summit in Stockholm, the European Parliament passed a resolution which welcomed the Lamfalussy report.³⁵ However, the European Parliament thought that negotiations were needed with the Council and the Commission about certain inter-institutional problems still remaining. Among other things, the European Parliament considered that openness was important and that the new committees should be democratically responsible. The Commission was obliged to send proposals for the committees to the European Parliament at the same time as they were sent to the Council. If the European Parliament or the Council were negative, the Commission was obliged to withdraw the proposal and start a call-back procedure. The European Parliament concluded that it could control the new regulatory committee in two ways: by deciding the scope of the delegated powers to the Commission and by *refusing delegation the following time*. Another resolution was adopted only a few weeks later in which the European Parliament emphasized the importance of the effective democratic control of secondary legislation. The European Parliament stressed the importance of receiving all the documents that are sent to the new committees. The Commission was not allowed to oppose a resolution of the European Parliament but was obliged to start a legislative procedure according to the co-decision procedure if the Commission had exceeded its powers of implementation in the European Parliament's opinion. The European Parliament welcomed an overhaul of the system in 2004 and emphasized that *it would use its powers according to the co-decision procedure in the meantime* to make sure that the Commission did not exceed its powers.³⁶

In January 2002 the Parliament issued a report on the reform of the legislative procedure on the securities market and a resolution was adopted on 5 February 2002. This was possible after the Commission had given the European Parliament certain promises on how to apply the new system, *inter alia*, that the time limit for the European Parliament was extended to three months instead of one in which to examine draft implementing measures, that the Commission would take utmost account of the European Parliament's position, and, most relevant for pre-

³³ 'Power struggle over financial services?' www.EurActiv.com . Agreement on Lamfalussy proposals' www.EurActiv.com. See also the declarations attached to the comitology decision.

³⁴ Stockholm European Council (23-24 March 2001): Presidency conclusions

³⁵ B5-0173/2001

³⁶ B5-0244/2001

sent purposes, the inclusion of so called sunset-clauses in all basic legislation in this field, see below.³⁷

III.3 The Institutional and Legal Framework of the European Securities Market

Thus, the proposed four-level system of the Lamfalussy committee was implemented and approved by the institutions on 5 February 2002.

The European Securities Committee, ESC, was established by a Commission Decision in June 2001.³⁸ The decision established the advisory capacity of the ESC. According to Article 2 of the decision, “the role of the Committee shall be to advise the Commission on policy issues as well as on draft legislative proposals the Commission might adopt in the field of securities”. This means that the Committee shall advise the Commission in level one initiatives during the initiation phase. At level two, the implementing phase, the Committee functions as a regulatory comitology committee. ESC is composed of representatives of the Member States and chaired by a representative of the Commission.³⁹ Summary records of all meetings are made available on the ESC website.⁴⁰

The Committee of European Securities Regulators, CESR, was also established by a Commission Decision in June 2001.⁴¹ The CESR is an independent advisory group and its two main tasks are to:

- advise the Commission on level two measures, and
- co-ordinate national implementation at level three.⁴²

The CESR is composed “...of high-level representatives from the national public authorities competent in the field of securities”.⁴³ The Committee shall consult extensively with market actors, consumers and end-users at an early stage before giving its advice to the Commission. The CESR shall also submit an annual report to the Commission. The Committee meets at least four times a year and a member of the Commission is entitled to participate at all meetings. The CESR produces guidelines, recommendations and standards. The work is prepared by expert groups established on a non-permanent basis.⁴⁴

An Inter-institutional Monitoring Group (IIMG) was also established in 2001. The Group consists of six independent experts; the Council, the Parliament and the Commission appoint two representatives each. The Monitoring Group held its first meeting on 7 October 2001. The

³⁷ A5-0011/2002. SPEECH/02/44 Romano Prodi, "Implementation of financial services legislation in the context of the Lamfalussy Report" Intervention by President Romano Prodi to the plenary session of the European Parliament in Strasbourg, 5th February 2002. 'MEPs obtain democratic control over financial securities legislation' www.EurActiv.com 6 February 2002. See solemn declaration.

³⁸ See Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee (OJ 2001 L 191/45). In November 2003 Article 2 of the Decision was amended by Commission Decision 2004/8/EC of 5 November 2003 amending Decision 2001/528/EC establishing the European Securities Committee (OJ 2004 L 3/33) extending the role of the Committee to advise the Commission not only in the field of securities but also on undertakings for collective investment in transferable securities (UCITS).

³⁹ See Article 3 of Decision 2001/528/EC.

⁴⁰ See http://www.europa.eu.int/comm/internal_market/en/finances/mobil/esc_en.htm

⁴¹ See Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators (OJ 2001 L 191/43).

⁴² See <http://www.cesr-eu.org>.

⁴³ See Article 3 of Commission Decision 2001/527/EC.

⁴⁴ See Articles 5 and 6 of Commission Decision 2001/527/EC.; and the CESR website <http://www.cesr-eu.org>.

task of the Group is to follow developments in the field and identify possible bottlenecks in order to ensure a more effective legislation. The Group reports to the institutions twice a year.

In 2003 the Lamfalussy model was extended to the rest of the financial market and the institutional framework was extended to the area of banking and insurance. Also the mandate of the Inter-institutional Monitoring Group was extended.

The first directive that was adopted according to the new procedure was a directive on market abuse that was adopted in 2003. In total four “Lamfalussy level 1 Directives” have been adopted; a directive on markets in financial instruments, a prospectus directive, a transparency directive and a directive on market abuse. A “sunset clause” was included in all these directives:

“Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following the entry into force of this Directive, the application of its provisions requiring the adoption of technical rules and decisions in accordance with paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, they shall review them prior to the expiry of the period referred to above.”⁴⁵

The sunset clauses included in the basic legislation in this field was the final weapon the European Parliament needed to be able to make the Council agree on a new deal on comitology in general. In the next part a brief explanation of the discussion on the future of comitology will be given in the lead up to the introduction of the new regulatory procedure with scrutiny but first a short account will be given on the debate on the reform of Article 202 ECT that primarily took place in the Convention on the Future of Europe.

IV The Debate on the Future of the Union and Comitology

IV.1 Amendment of Article 202 of the EC Treaty

Article 202 of the EC Treaty was amended at the latest Intergovernmental Conference (IGC) that ended with the signing of the Constitutional Treaty by the Heads of States and Government of the Union on 29 October 2004. However, the Treaty will probably not enter into force in its present form due to difficulties that have arisen in the ratification process. Despite this it is relevant for our present purposes since the European Parliament uses the final text of the Treaty as a reference on how it envisages the regulation of the supervision of delegated legislation in the future.

On 3 December 2002 the European Parliament presented a report on the typology of acts and the hierarchy of legislation in the European Union to the Convention. The European Parliament made references to resolutions adopted before dealing with the same issues and also to its resolution on financial services from 5 February 2002. According to the report, enlargement together with the confirmation that the Union has two legislators would make a restructuring of implementing competences necessary, Article 202 of the Treaty in particular should follow two principles; the implementing powers must be the competence of the Commission or the Member States and not the Council and; the implementing powers should be exercised

⁴⁵ See Article 17 of the Market Abuse Directive.

within the framework of the conditions and limitations set out and supervised by the two institutions that are the legislators of the Union.⁴⁶

The Commission's vision of a long-term based solution for amending the current comitology system was also expressed in a communication presented in December 2002 suggesting that the powers to implement European legislation in the future should be entrusted exclusively to the Commission. It proposed a classification of legislative norms of three levels: *institutional laws*, *laws* adopted under the co-decision procedure and *regulations*, adopted by the Commission, for the purposes of implementing laws. At the second level, the laws could make provision for the power of legislation to be delegated to the Commission for the purpose of amending legal instruments adopted by the legislator. The Commission should only be able to exercise this power within the limits and subject to the conditions of its legislative delegation. Instead of the current control of the Council set out in Article 202 of the EC Treaty, the European Parliament and the Council would exercise ex-ante control, for example through a call-back system.⁴⁷

The hierarchy of legal acts presented in the final Constitutional Treaty does to a large extent realise the Commission's vision.⁴⁸

Article I-36 of the Constitutional Treaty

Delegated European regulations

1. European laws and framework laws may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain non-essential elements of the law or framework law.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws. The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power.

2. European laws and framework laws shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated European regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the European law or framework law.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

A protocol was annexed to the Constitutional Treaty in which it is stated that the structures for delegated legislation shall not affect the Lamfalussy model in the field of financial services.⁴⁹

The European Parliament adopted a report on the draft Treaty establishing a Constitution for Europe and its opinion on the convening of the Intergovernmental Conference.⁵⁰ The Euro-

⁴⁶ See A 5 -0425/2002, Bourlanges.

⁴⁷ See COM (2002) 728 final/2, p. 7. See also Working document of 7 November 2002 to the Working Group IX on Simplification, Proposal to distinguish legislative and executive functions in the institutional system of the European Union, paper by Mr. Ponzano, member of the Convention and the Commission's representative in the Group, WD 16.

⁴⁸ See, in general, Bergström, C.F. and Rotkirch, M., *Simply Simplification? The Proposal for a Hierarchy of Legal Acts*, SIEPS 2003:8.

⁴⁹ See, ECOFIN, Brussels 11 May 2004 and Bulletin EU 5-2004. See protocol.

pean Parliament welcomed the hierarchy of legal acts that was introduced in the Treaty and wanted to call attention to the fact that it put up a number of conditions for the implementation of the Lamfalussy model and was therefore pleased to see them incorporated into the Constitutional Treaty but considered it to be necessary to have an inter-institutional agreement in place before the Treaty entered into force in order to make sure that level II legislation in the Lamfalussy model was considered as “delegated regulations” according to the system introduced in the Constitutional Treaty. Even though the Constitutional Treaty probably not will enter into force it is used as a point of reference by the European Parliament and one example can be found in the discussion on the re-casting of two directives in the field of financial services.

On 14 July 2004 a proposal was presented for a re-casting of the Directives of the European Parliament and of the Council 2000/12/EC relating to the taking up and pursuit of the business of credit institutions and Council Directive 93/6/EEC on the capital adequacy of investments firms and credit institutions. According to the proposal the delegating competences would, *inter alia*, be amended. The European Parliament wanted, *inter alia*, to include the following:

The adoption of the necessary implementing measures and the use of the powers delegated to the Commission under this Directive should be subject to the full respect by all European institutions of the existing political agreement based on the European Parliament resolution of 5 February 2002 on the implementation of financial services legislation, on the solemn declaration made before Parliament on the same day by the Commission and on Mr Bolkenstein's letter of 2 October 2001 with regard to the safeguards for Parliament's role in this process. It is important to ensure the rights of Parliament as provided for in Article I-36 of the Treaty establishing a Constitution for Europe. Therefore the provisions conferring implementing powers on the Commission should not enter into force until an inter-institutional agreement codifies the existing agreement.

Furthermore, the European Parliament proposed to introduce a new article in the directives:

Article 42 [delegation] shall not be applied until the conditions to which the powers of the Parliament, the Commission and the Council of the European Union are subject under Decision 1999/468/EC are modified along the lines of Article I – 36 of the Treaty establishing a Constitution for Europe.

The European Parliament also wanted a sunset clause to be inserted in the directives although they were not strict Lamfalussy directives. In October 2005 an agreement was reached on the two directives that included the amendments of the European Parliaments.⁵¹

As has been showed by the above, the Commission and the European Parliament both support a reform of the comitology system. But is a reform of the system also in the interest of the Council? The present system seems to work well in the interest of the Member States and of the Council as an institution. Well, there may be several reasons for the Council amending the comitology decision but one of the reasons, at least, is that the European Parliament has made a reform of the comitology system a condition for the approval and adoption of the legislation in the field of financial services.

⁵⁰ See A5-0299/2003.

⁵¹ Both Directives 1993/6 and 2000/12 have been repealed by 2006/49.

In a report from 23 January 2002 on the implementation of financial services legislation the Parliament stated that: "... the European Parliament is being increasingly confronted with situations where it feels that its powers are likely to be eroded by the comitology procedure as laid down in the Council Decision. This is true in particular of the framework of directives following the Lamfalussy report, where too much room is left to the Commission. "

Furthermore, the European Parliament stated that it: "Takes the view that, with a view to consolidating democratic scrutiny of implementing powers and bringing them into line with a changing economic and technical environment, the legislator must be able to revise the scope of the powers conferred on the Commission by specifying the period during which they may be exercised, and thus proposes that the following clause be incorporated into the basic legislative acts." The proposed clause was, of course, the sunset clause.

Furthermore, the European Parliament: "points out that the proposals in this resolution are provisional, pending an amendment of Article 202 of the Treaty that meets the European Parliament's requirements, at the next Intergovernmental Conference...".

In November 2002 the European Parliament adopted a resolution on the extension of the Lamfalussy process to include the entire financial services sector. In this resolution the Parliament: "recalls its position that the current institutional framework governing the powers to adopt implementing measures is inadequate, unbalanced and lacking transparency, and that there must be a clear Council commitment to reform in order to guarantee a proper institutional balance before the European Parliament could agree to the proposed extension of the Lamfalussy process ..." and the Parliament: "underlines that implementing measures adopted on the basis of a legal act adopted under the co-decision procedure should also be subject to equal control by the two co-legislators."

The temporary solution has been the inclusion of sunset clauses in the basic legislation as well as commitments made by the Council to reform the comitology system.

IV.2 Amendment of the Comitology Decision

The Commission presented a proposal to amend the comitology decision on 11 December 2002 although the Commission, just as the European Parliament, would have preferred an amendment of Article 202 and the Commission stressed that the proposal to amend the comitology decision should only be seen as a temporary measure.⁵² According to the Commission, the primary purpose of the proposal was to enhance the role of the European Parliament as regards the supervision of the implementation of legislation decided by co-decision. The Commission also saw the reform as a way of clarifying the exercise of executive functions. The proposal was later amended on 22 April 2004 with regard to some of the objections raised by the European Parliament. It entailed three major changes. First, it tried to place the European Parliament and the Council on an equal footing during the supervisory phase of the comitology process by granting the European Parliament co-decision status with the Council when supervising the implementing powers conferred upon the Commission.⁵³

Secondly, the Commission proposed to reduce the number of Committees from three to two. It abolished the management committee procedure and made the least restrictive advisory committee procedure the standard one.⁵⁴

⁵² See COM (2002) 719.

⁵³ See Article 2 of the proposal, COM (2002) 719.

⁵⁴ See Article 1 of the proposal, COM (2002) 719.

Thirdly, the proposal envisaged the choice of the two remaining procedures, in relation to measures adopted under co-decision, to be prescribed and no longer left to the discretion of the legislating institution. The existing regulatory procedure, *i.e.* the most restrictive one, was revised for implementing measures under co-decision by introducing two distinct phases. In the initial phase, the Commission would be responsible for drawing up implementing measures. The committee could influence the substance of the measure by delivering an unfavourable opinion. However, it was ultimately the Commission that would be responsible for the substance of the draft. In the second phase, both the European Parliament and the Council would oversee the executive role of the Commission by expressing opposition to the Commission's draft implementing measure. In such a case, the Commission would have four choices. Taking the objections into account, it could present a legislative proposal, make a modification of its draft, adopt the original draft without changes, or, finally, withdraw its draft.⁵⁵

The main substantive changes in the amended proposal, compared to the original proposal, were that the Council would always have to react to any European Parliament position that the Commission proposal was *ultra vires*, that the deadline for the legislators to raise objections had been extended by one month, that the Commission was obliged to ensure that all relevant documents were available on the Internet and that all relevant information had to be at the disposal of the European Parliament. Furthermore, the amended proposal included a paragraph in the recital stating that the decision should not affect the Lamfalussy structure in the field of financial services.⁵⁶ The amended proposal was transmitted to the Council and the European Parliament in April 2004.

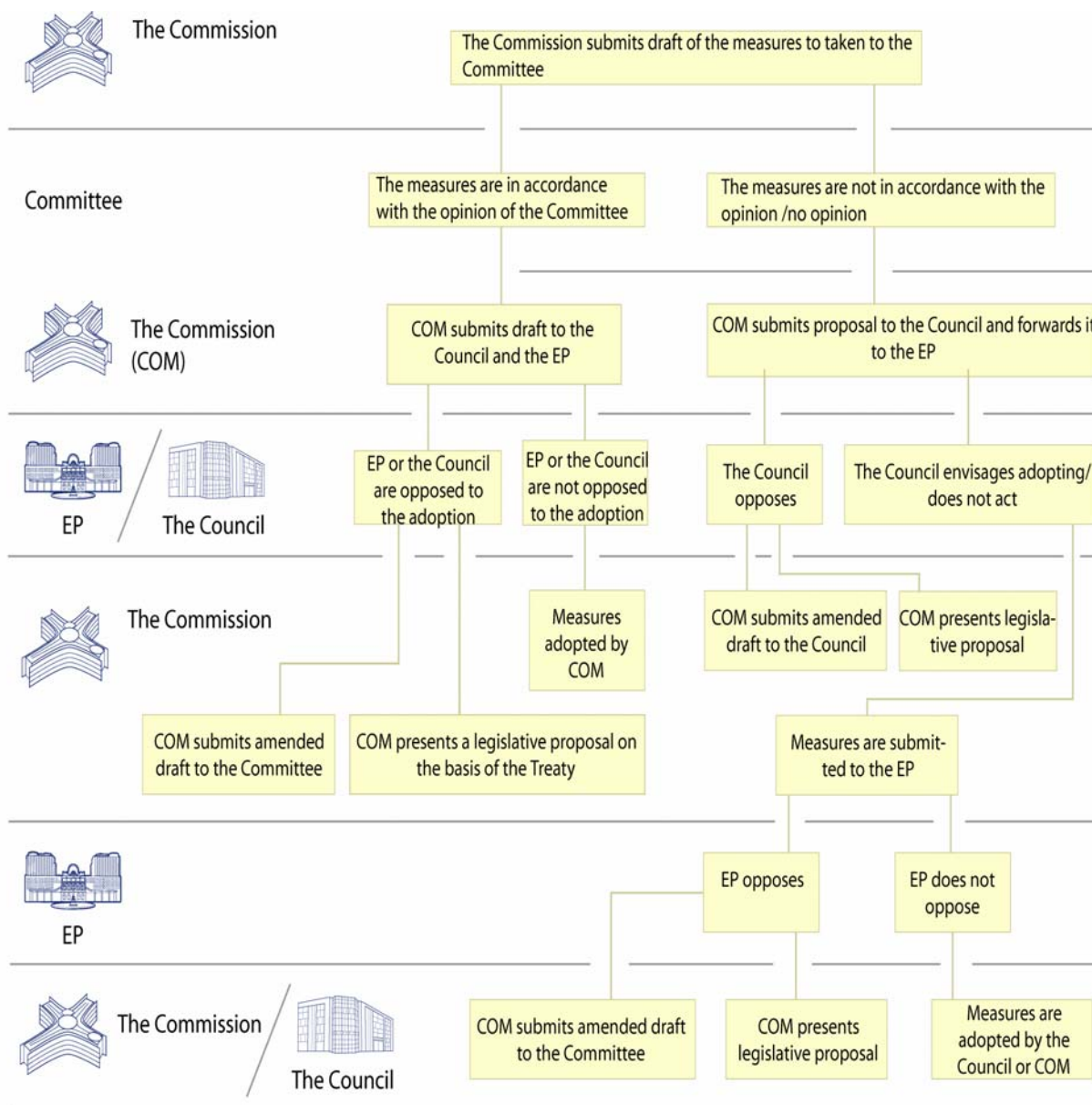
This was all taking place at a time when the Constitutional Treaty preparations were still underway and the proposal was not discussed in the Council until, as the European Parliament puts it, "...the introduction of clauses conferring implementing powers on the Commission became again contentious and Parliament started to introduce so called 'sunset clauses' into the texts, especially in the financial market sector, limiting the delegation of powers in time."

An inter-institutional agreement on comitology was reached on 2 June 2006 and includes, *inter alia*, a new regulatory procedure with scrutiny that shall be used for measures of general scope that will amend non-essential elements of a basic instrument adopted in accordance with co-decision. The essential elements of an act can only be amended by the legislators.

⁵⁵ See Article 1 of the proposal, COM (2002) 719, and Amended proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2004) 324 final. See also House of Commons, European Scrutiny Committee, Thirty-seventh report of session 2002-03, published 26 November 2003.

⁵⁶ See COM (2004) 324 final. See also, House of Commons, European Scrutiny Committee, Twenty-third report of session 2003-04, published 1 July 2004. The European Parliament also underlined that the new comitology decision should be without prejudice to any undertakings made by the Commission in the field of the securities legislation in order to make sure that the Lamfalussy process should continue to apply. See European Parliament Second Report of 11 July 2003 on the proposal for a Council Decision on amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, A5-0266/2003 final; and European Parliament legislative Resolution of 2 September 2003 on the proposal for a Council Decision on amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, P5_TA-PROV 0352/2003.

Graph 1: The new regulatory procedure with scrutiny



According to a statement annexed to the agreement the European Parliament, the Council and the Commission “emphasise that, in the context of the existing Treaty, the Decision provides a horizontal and satisfactory solution to the European Parliament’s wish to scrutinise the implementation of instruments adopted under the co-decision procedure.” But the European Parliament states in its decision that “the Constitutional Treaty [...] grants Parliament the right to revoke the delegation of powers (Article I-36). The final compromise text for a new regulatory procedure with scrutiny does not provide for such a right for the Parliament. The right to revoke a delegation of powers will therefore remain one of the key demands of the European Parliament, something which could be achieved notably by the Constitutional Treaty...”. This

probably means that the battle over comitology is not over but on hold until the next Intergovernmental Conference is held.⁵⁷

V Concluding Comments

This article has attempted to show that one of the effects of developments in the field of financial services has been a new deal on comitology. Another way of putting it is to say that it is difficult to assess the reasons behind the new deal on comitology without taking into account the parallel developments in the field of financial services.

Comitology has been the source of inter-institutional conflicts ever since its introduction but it was not until the co-decision procedure was introduced in 1993 that the European Parliament obtained both a better bargaining position as a co-legislator and co-delegate as well as a significantly improved case. The European Parliament's struggle with comitology was intensive in the 1990s and one example of this can be found in the field of financial services and has been described above. In 1999 the Council adopted a new comitology decision that gave the European Parliament more influence.

When the Lamfalussy model was going to be implemented in the field of securities it was clear, however, that the European Parliament had no intention of letting go of its basic concerns regarding comitology. It took almost one year before the European Parliament could accept the new legislative model in this field that was based, *inter alia*, on an extensive use of comitology and delegation to the Commission. The European Parliament agreed to implement the model after it had received a promise from the Commission to include, *inter alia*, so-called sunset clauses in all basic legislation.

At the same time the debate on the Future of Europe was taking place leading to the signing of the Constitutional Treaty on 29 October 2004. The Constitutional Treaty included an amendment of Article 202, the legal basis for the comitology system. The Commission had also presented a proposal for an amendment of the comitology decision. When it was clear that the Constitutional Treaty would not enter into force, the Council started negotiating a new or amended comitology decision. During this time it was also becoming apparent that the sunset clauses and the delegation to the Commission in the field of financial services needed to be renewed. A deal on comitology was reached in the summer 2006 which, *inter alia*, has introduced a new regulatory procedure with scrutiny that will be applied in the field of co-decision and gives the European Parliament the same right as the Council to control delegated legislation. According to the European Parliament this is for now a satisfactory solution for comitology pending an amendment of Article 202 of the EC Treaty.

⁵⁷ See Report on the conclusion of an inter-institutional agreement taking the form of a joint statement concerning the draft for a Council Decision amending Decision 1999/468, Committee on Constitutional Affairs, Rapporteur: Richard Corbett, A6 – 237/2006.

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