



THE NEW COMITOLGY RULES

Delegated and implementing acts

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1 INTRODUCTION

When the Council of the European Union (hereafter the 'Council') and the European Parliament (hereafter the 'Parliament' or 'EP') adopt a new law, a legal framework is created. In some cases, further detailed measures, for example lists of substances or products, still need to be defined. So as not to overburden the legislators and because of practical issues involved in adapting legislation, these implementing measures are delegated to the European Commission (hereafter the 'Commission' or 'EC') under a procedure called 'comitology'.

Through comitology, the Commission executes its implementing powers via numerous 'comitology committees' that are composed of policy experts representing the Member States and chaired by a *chef de dossier* from the Commission. Comitology enables the Member States to influence decision-making even when powers have been delegated to the Commission, as laid down previously in the so-called 'Comitology Decisions' (Decision 1999/468/EC as amended by Decision 2006/512/EC) and currently laid down in the Treaty on the Functioning of the European Union (TFEU)¹ and the new Implementing Acts Regulation.² It is important to stress that comitology is an *implementation* device, and only comes into the picture once the Council and the Parliament (the co-legislators using co-decision procedure) have adopted basic legislation (such as the Habitats and Birds Directives).³

The Lisbon Treaty substantially modifies the framework for implementing powers that are conferred on the Commission by the Council and Parliament. The Treaty has modified comitology, to distinguish which procedures are followed in order to adopt 'delegated acts' (for more politically relevant issues) and 'implementing acts' (for less important, administrative issues). The Parliament and Council have been put on an equal footing in relation to the conferral of 'delegated' and 'implementing' powers and the Treaty provides two legal procedures to reflect more closely the different nature of these two types of acts. This delegation of power is now based on Articles 290 (for delegated acts) and 291 TFEU (for implementing acts) (see Annex I). Annex II provides more details on the implications of the new comitology on the balance between the EU institutions.

¹ Consolidated version of the Treaty on the Functioning of the European Union (TFEU)
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>

² Regulation (EU) No 182/2011 of the European Parliament and the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:055:0013:0018:EN:PDF>

³ Brandsma, G J (2010) *Backstage Europe. Comitology, Accountability and Democracy in the European Union*.

- **Delegated acts** are designed for politically sensitive matters that amend, delete or supplement non-essential elements of the legislative act (e.g. adding a substance to an annex of banned products). The procedure for adopting delegated acts replaces the current ‘regulatory procedure with scrutiny’ (see Annex III). The major change is that the comitology committees have been abolished and the Commission will present its draft delegated acts simultaneously to both the Parliament and the Council without asking the opinion of a committee.

In the case of delegated acts, the legislator delegates to the Commission the power to adopt measures that it could have adopted itself, which is why it is the legislator that controls the Commission’s exercise of these delegated powers. Article 290 TFEU deals with delegated acts and provides for the legislator to control the exercise of the Commission’s powers by means of a right of revocation and/or right of objection. These provisions are sufficient in themselves and do not require any legally binding framework to make them operational.

- **Implementing acts** are the continuation of ‘traditional’ comitology in which the Commission is empowered to implement EU legislation under the supervision of comitology committees.

In the case of implementing acts, dealt with in Article 291 TFEU, the Member States are naturally responsible for implementing the legally binding acts of the European Union. However, where such basic acts require uniform implementing conditions, it is the Commission that must exercise implementing powers. In these cases it is the Member States that are responsible for controlling the Commission’s exercise of these implementing powers and not the Parliament and the Council. A legal framework is required to establish the mechanisms of control.

This paper explains these new procedures and gives examples of how these procedures might, or will, apply in the area of EU biodiversity and biodiversity-related legislation. It also identifies various potential intervention points for parties with a mandate to contribute to these ‘backstage’ processes of EU decision-making.

It is useful to note, depending on the requirements of a legislative act, the procedures described leading to the development of delegated and implementing acts may both be required during the timeframe of that legislation.

2 THE NEW PROCEDURE FOR ADOPTING DELEGATED ACTS

2.1 What kind of delegated acts will be adopted under this new procedure?

As defined in Article 290 TFEU, the new procedure will apply to *non-legislative acts of general application* that amend or supplement certain non-essential elements of EU secondary legislation, i.e. legislative acts such as EU Directives and Regulations. It should also be noted that this procedure only applies if the basic legislative act has been adopted by co-decision (whereby the Parliament stands on an equal footing with the Council when negotiating the adoption of a Directive or Regulation). It does not apply to Directives and Regulations that have been or will be decided by the Council without involvement of the Parliament.

The new procedure will apply to most EU environmental legislation. This includes EU agricultural and fisheries legislation, because the Parliament's powers of co-decision have been extended to common agricultural and fisheries policy areas. However, these co-decision powers do not apply to various measures addressing significant environmental impacts, e.g. agricultural price support, quantitative limitation and the fixing and allocation of fishing quotas (see IEEP Analysis Briefing: 4 December 2009). Examples of issues that will be decided upon through the procedure for delegated acts are provided in section 4. Those examples relate to the Birds Directive, the Marine Strategy Framework Directive and the Water Framework Directive.

The final scope of delegated acts is still unclear. This will have to be negotiated between the Council and the Parliament on a case-by-case basis for each basic legislative act (see below). The actual difference between delegated acts and implementing acts is also not clear. Room for negotiation exists on the scope of the two types of acts, and these now form part of discussions between Council and Parliament in the context of legislation revisions. The ultimate legal decision rests with the European Court of Justice (hereafter 'Court'), but the Commission, Parliament and/or Council will need to call on the Court to make a ruling in a case of disagreement on the scope. Even if one of the institutions do so, it is unlikely that the Court would come up with a strong definitive judgement that would touch, by definition, on legislative prerogatives.⁴

2.2 Will the new delegated acts procedure apply immediately?

This new procedure will not apply immediately. All existing legislative acts, such as the Birds and Habitats Directives, will first have to be reviewed and adapted with a view to insert a clause on how this procedure relates. It should be noted that Article 290 TFEU only defines the basic components of the procedure for delegated acts (see Figure 1). Further details of the procedure will have to be defined for each Directive individually. In fact the objectives, content, scope and duration of the delegation of power and the conditions to which the

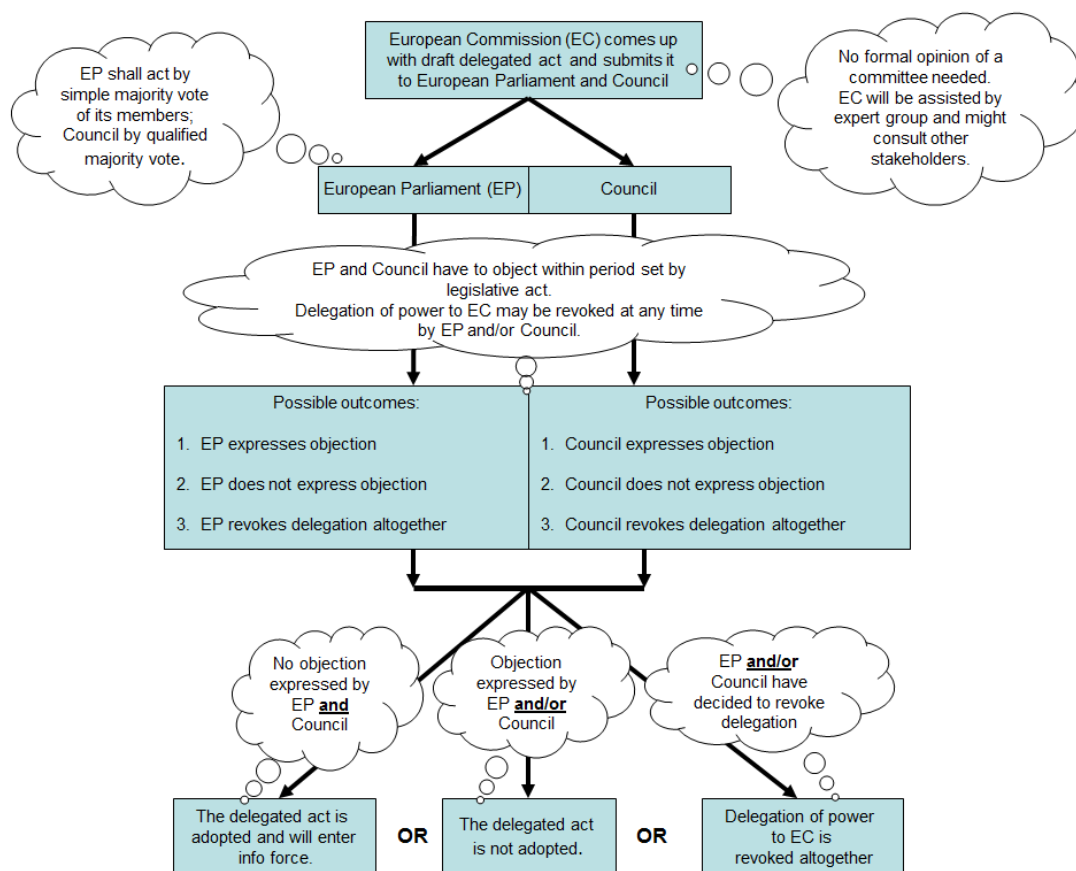
⁴ Kaeding, M and Hardacre, A (2010) *The execution of delegated powers after Lisbon. A timely analysis of the regulatory procedure with scrutiny and its lessons for delegated acts*. EUI Working Papers.

delegation is to be subject, are to be explicitly defined on a case-by-case basis in each basic legislative act.

During the period that Directives and Regulations (such as the Water Framework Directive) have not yet been revised with an inserted clause on the new procedure for delegated acts, these legal acts will continue to be adopted under the existing ‘regulatory procedure with scrutiny’ (see Annex III for details on this procedure). The Commission is committed to finalising an alignment scrutiny exercise by the end of 2012 and to completing the legislative exercise of substituting the ‘regulatory procedure with scrutiny’ with the procedure for adopting delegated acts by the end of the current parliamentary term in 2014. As concrete examples of decisions under the delegated acts provisions, the Birds Directive, the Marine Strategy Framework Directive and the Water Framework Directive are considered in Section 4.

2.3 The procedure for adopting delegated acts: general framework as defined by Article 290 TFEU

Figure 1 Procedure for adopting delegated acts as defined by Article 290 TFEU



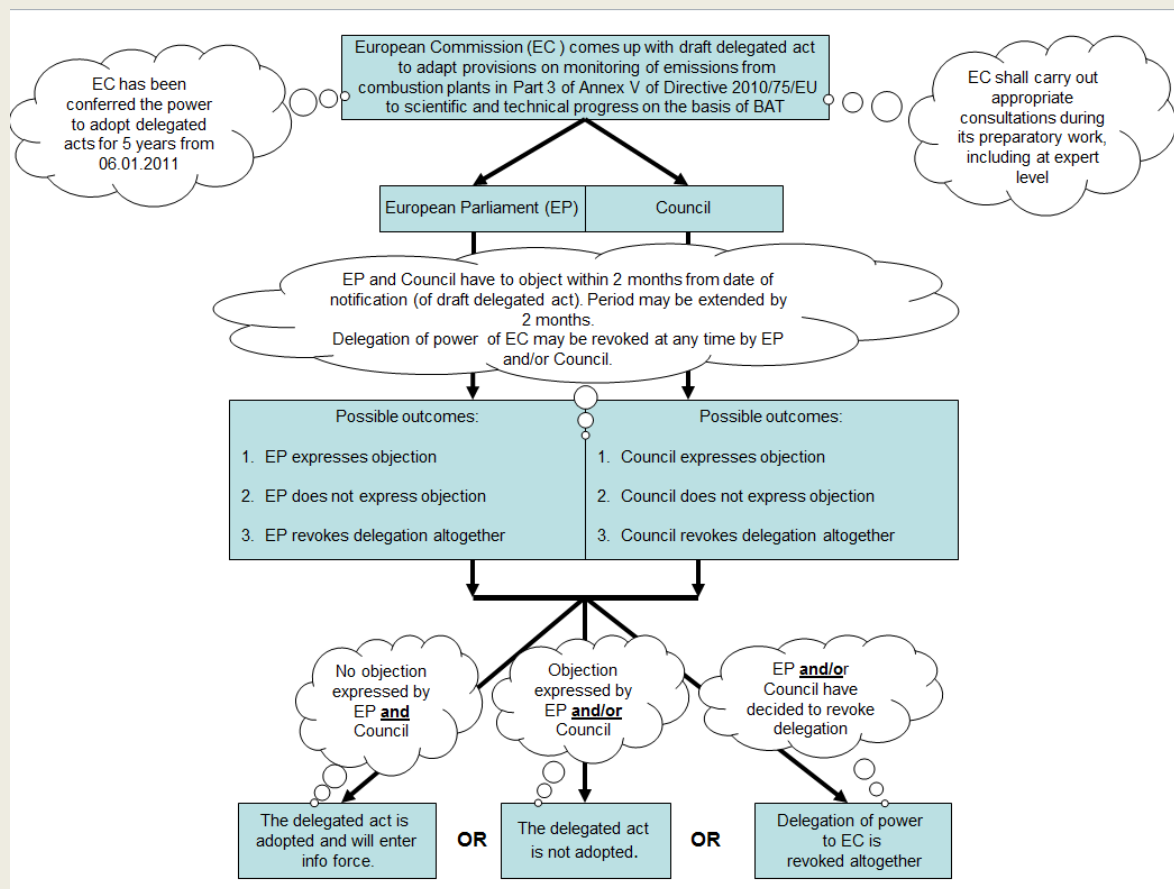
The examination procedure is explained in Figure 1. In addition to this figure, it should be noted that when the Commission does not adopt the delegated act because of objection

expressed by the Parliament and/or the Council this is the end of the process for the particular proposal developed by the Commission. However, this does not mean the end of attempts to develop an acceptable proposal. The Commission might decide later on to start a new procedural process with a revised draft delegated act. It might also decide to turn the draft delegated act into a legislative proposal. In that case the EU institutions will decide upon it through a legislative procedure (mostly the co-decision procedure for environmental dossiers) instead of the procedure for delegated acts.

Delegated acts example: the new industrial emissions Directive (Directive 2010/75/EU)

This example is provided in the absence of any new or amended biodiversity-related EU legislation, but shows a broadly similar approach. On 24 November 2010 a recast of the Directive on integrated pollution prevention and control (IPPC), i.e. Directive 2010/75/EU on industrial emissions, was adopted in which detailed provisions were inserted on a procedure for adopting delegated acts. The most important provisions are illustrated in Figure 2. These are quasi-identical to the provisions inserted in other legislative acts that have been adopted since the entry into force of the Lisbon Treaty, such as Regulation (EU) No 438/2010 of 19 May 2010 on the animal health requirements applicable to the non-commercial movement of pet animals.

Figure 2 Procedure for delegated acts as laid down in Directive 2010/75/EU on industrial emissions



According to the text of Directive 2010/75/EU, delegated acts are to be adopted in respect of the setting of the date from which continuous measurements of emissions into the air of heavy metals and dioxins and furans are to be carried out, and the adaptation of certain parts of Annexes V, VI and VII to scientific and technical progress on the basis of best available techniques⁵. In the case of waste incineration plants and waste co-incineration plants, this may include, *inter alia*, the establishment of criteria to allow derogations from continuous monitoring of total dust emissions.

⁵ In particular Parts 3 and 4 of Annex V, Parts 2, 6, 7 and 8 of Annex VI and Parts 5, 6, 7 and 8 of Annex VII.

3 THE NEW PROCEDURE FOR ADOPTING IMPLEMENTING ACTS

3.1 What kind of acts will be adopted under the procedure for implementing acts?

The Implementing Acts Regulation, which was adopted in December 2010, provides for two procedures: the *'advisory procedure'* and the *'examination procedure'*.

Advisory procedure

The advisory procedure is the simpler of the two procedures and is to be used to deal with low sensitivity implementing measures such as for grant and funding approvals. The steps are:

- the Commission drafts the implementing measure/act;
- the *'advisory'* committee⁶ (which includes a representative of each Member State and is chaired by the Commission) must adopt an opinion by simple majority vote;
- the Commission takes the utmost account of this opinion, without being legally obliged to follow it.

Examination procedure

The examination procedure will be more prominent in the environment field as opposed to the advisory procedure; it will be used for, amongst other things, implementing measures of general scope, programmes with substantial budgetary implications, and measures related to agriculture policy, fisheries policy, environment policy, taxation and commercial policy. The examination procedure is explained in more detail below. Figure 3 outlines the first stage; Figure 4 looks at the extended process when the *'examination'* committee⁷ issues a negative opinion; and Figure 5 where the examination committee does not issue an opinion.

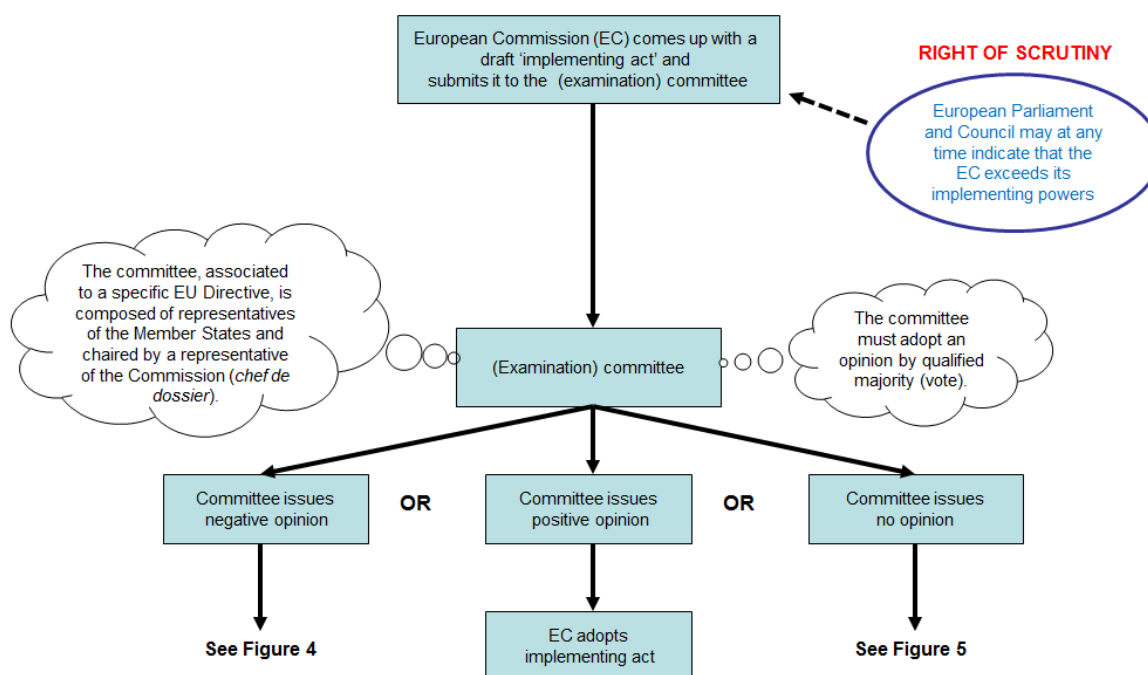
3.2 Does the new procedure for implementing acts already apply?

The new procedure for adopting implementing acts has applied since 1 March 2011 when the new Implementing Acts Regulation entered into force. This Regulation automatically replaced both the preceding management and regulatory procedures with the examination procedure. The former advisory procedure has been maintained, though with some changes. Unlike delegated acts, no future alignment with existing Directives and Regulations is required in order to put the new procedures for implementing acts in practice.

⁶ The authors use the term *'advisory'* committee to refer to the fact that the *'comitology'* committee is acting under the advisory procedure.

⁷ The authors use the term *'examination'* committee to refer to the fact that the *'comitology'* committee is acting under the examination procedure.

Figure 3 First stage of the examination procedure as laid down in the new Implementing Acts Regulation

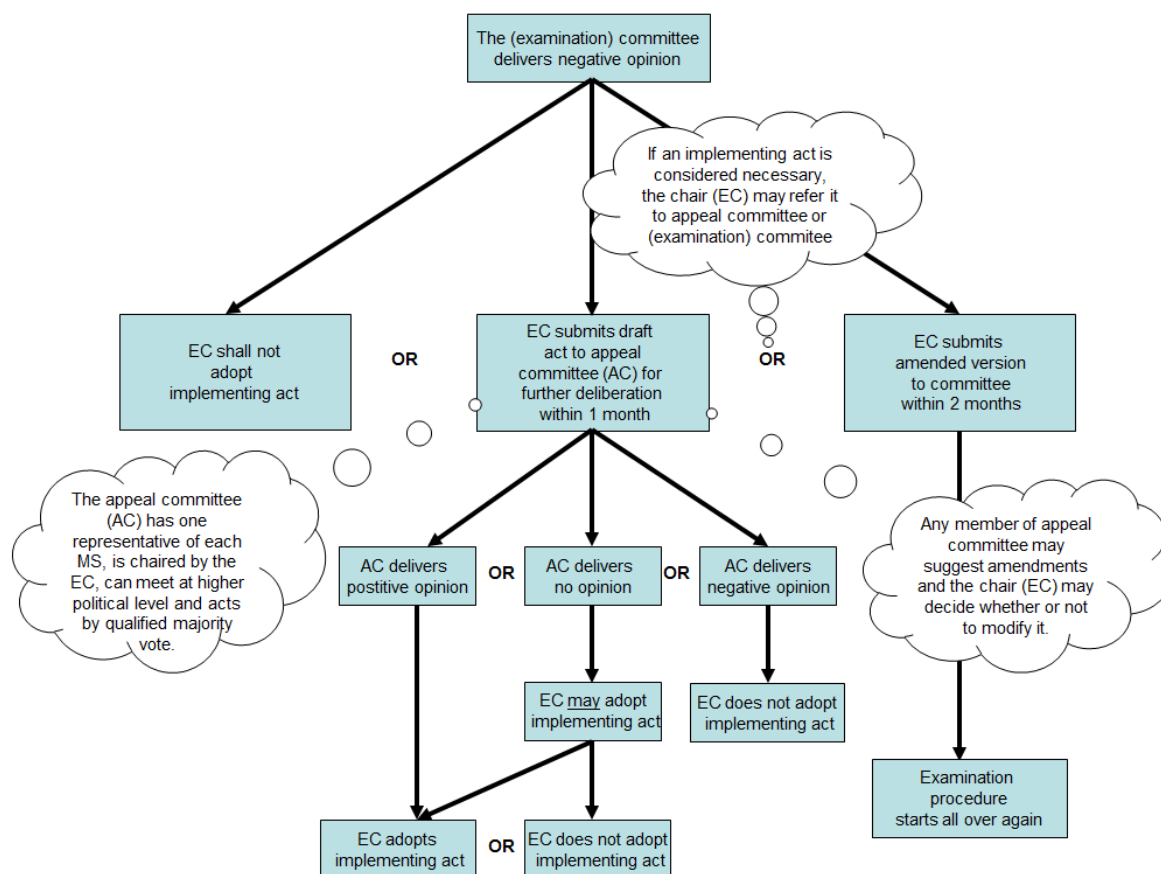


3.3 The examination procedure as laid down in the Implementing Acts Regulation

The examination procedure is explained in Figures 3, 4 and 5. However, the right of scrutiny of the Parliament and the Council merits further explanation here. In the case of EU legislation that has been adopted under the co-decision procedure (i.e. almost all legislation), the right of scrutiny implies that the Parliament and the Council have the possibility at any time to indicate to the Commission that a draft implementing act exceeds the Commission’s implementing powers provided for in the legislative act (Directive or Regulation). In such a case, the Commission shall review the draft implementing act and inform the Parliament and the Council whether it will maintain, amend or withdraw the draft implementing act. It is clear from this that the Commission is not obliged to take into account the views expressed by the Parliament and/or the Council, but as EU decision-making is based very much on negotiation, it is not likely that the Commission would act in such an independent way, ‘against’ the wishes of its co-legislators.

In addition to these figures, it should be noted that when the Commission does not adopt the draft implementing act, nothing further happens. However, the Commission might decide later on to try again and to come up with a revised draft implementing act.

Figure 4 The examination procedure when the appeal committee issues a negative opinion



In relation to Figure 4 and Figure 5 (procedure for specific cases), it should also be noted that in *exceptional circumstances* the Commission can adopt the draft implementing act without further delay instead of submitting the draft implementing act to the appeal committee for further deliberation (within one month) or to submit an amended version to the (examination) committee (within two months). This is to be done where this is necessary to avoid a significant disruption of agricultural markets or a risk for the financial interests of the EU. In that case the Commission has to submit the adopted measure immediately to the appeal committee. If the appeal committee delivers a positive opinion, the adopted implementing act remains in force. If the appeal committee delivers a negative opinion, the Commission must repeal the implementing act.

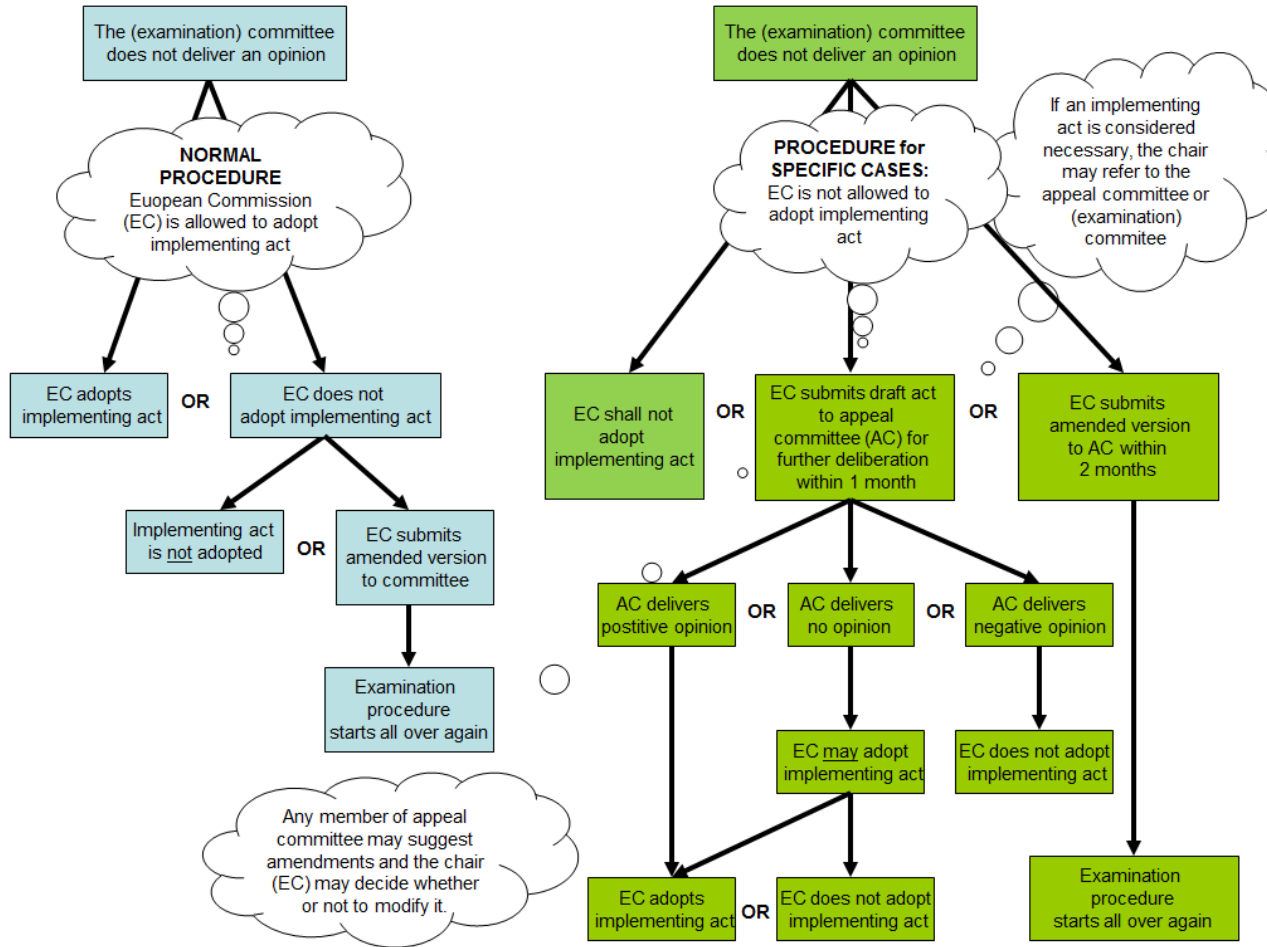
To conclude, it should be noted that by way of derogation from the advisory and examination procedure, the Commission can adopt *immediately applicable implementing acts* which shall not remain in force for longer than six months. The Commission must submit the act to the relevant committee within 14 days. The committee must find a qualified majority to repeal the measure (only where the examination procedure applies).⁸

⁸ Hardacre, A and Kaeding, M (2011) *Delegated & Implementing Acts. The New Comitology. EIPA Essential Guide*. European Institute of Public Administration.

Figure 5 The examination procedure when the appeal committee does not issue an opinion

i) Procedure which normally occurs

ii) Procedure for specific cases



If the examination committee does not issue an opinion, in principle, the procedure illustrated in Figure 5i generally applies.

However, an alternative procedure applies (see Figure 5ii) when:

- a) the draft implementing act concerns taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures.
- b) the basic legislative act provides that the draft implementing act may not be adopted where no opinion is delivered;
- c) a simple majority of the members of the examination committee opposes it.

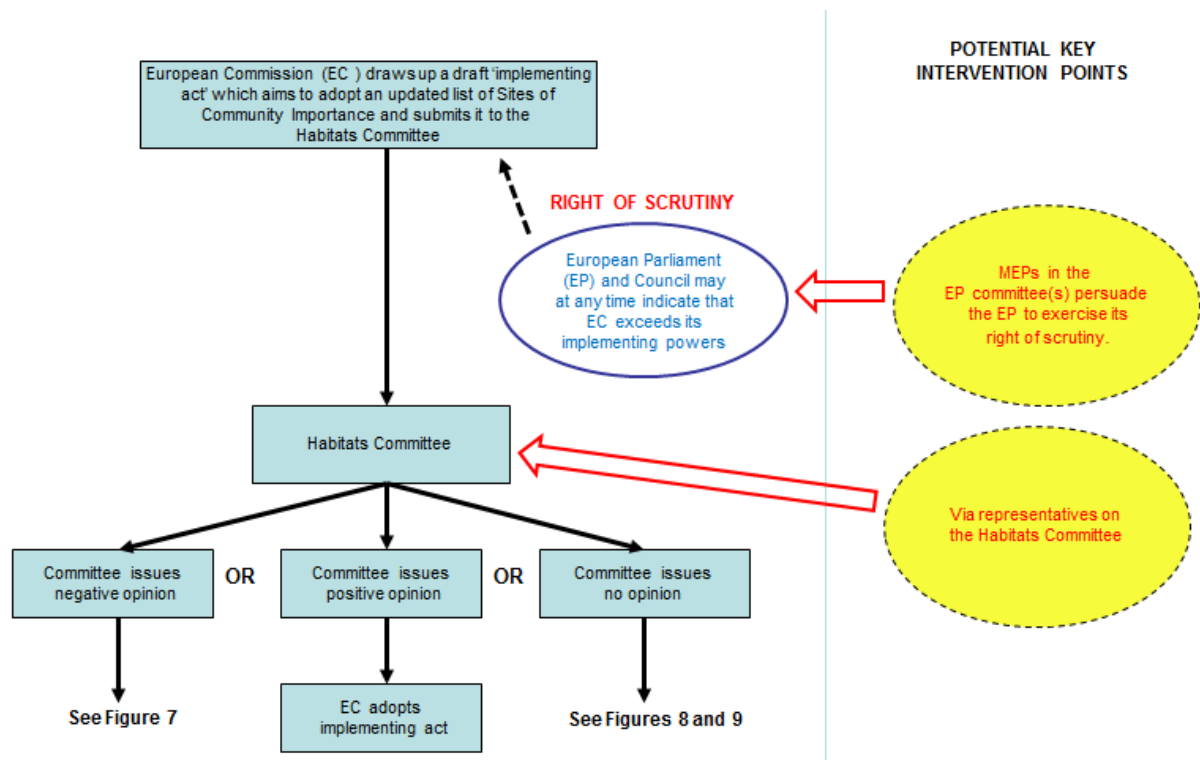
In each of these three cases, the Commission is not allowed to adopt the implementing act.

4 EXAMPLES FROM THE BIODIVERSITY FIELD

Since 1 March 2011, the examination procedure is to be used for adopting implementing acts in relation to Directives in the biodiversity policy area such as the Habitats Directive, the Birds Directive, the Water Framework Directive and the Marine Strategy Framework Directive.

The procedure for delegated acts will apply to these Directives once the Directives have been revised. This revision will take place at some point during the period 2012-2014. In the meantime the regulatory procedure with scrutiny will continue to apply for these Directives, with the exception of the Habitats Directive (see Annex 1 for details on this procedure). In the case of the Habitats Directive, the EU legislators have not yet inserted provisions on the regulatory procedure with scrutiny during the previous reforms of comitology, which resulted in the Comitology Decision 2006/512/EC.

Figure 6 The examination procedure for the Habitats Directive



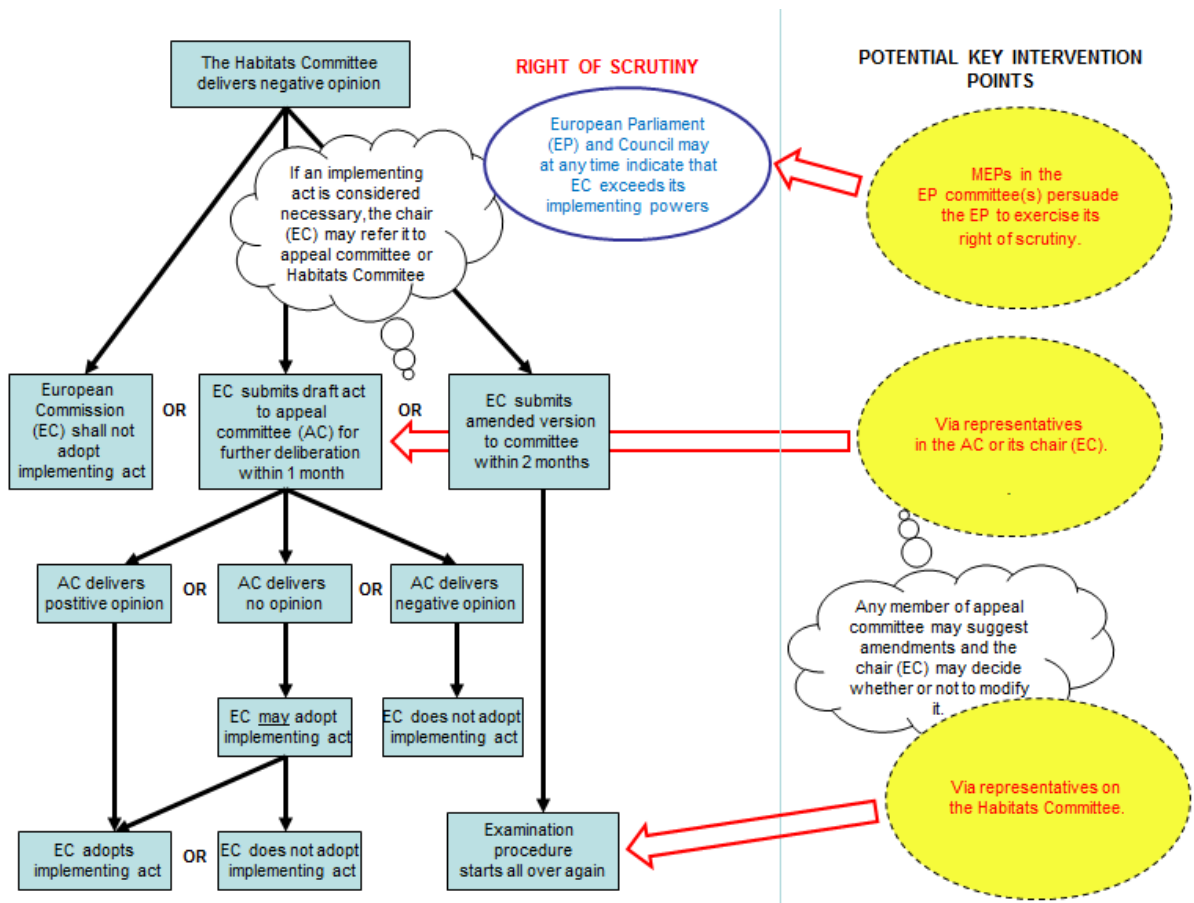
4.1 Habitats Directive

In the case of the Habitats Directive, from 1 March 2011 it is the examination procedure that will apply, in order to:

- adopt the list of sites selected as Sites of Community Importance (SCIs), identifying those which host one or more priority natural habitat types or priority species;
- adopt a prioritised action framework of measures, involving co-financing, to be taken when the site has been designated by the Member State as a Special Area of Conservation (SAC);
- review the action framework every two years. Within the context of this review, measures which have not been retained in the action framework for lack of sufficient resources, as well as those included in the above mentioned action framework which have not received the necessary co-financing or have only been partially co-financed, shall be reconsidered.
- periodically review the contribution of Natura 2000 towards achievement of the objectives set out in Articles 2 and 3 of the Habitats Directive. In the context of this review, a SAC may be considered for declassification where this is warranted by natural developments observed as a result of the surveillance provided for in Article 11 of the Directive.

More details of what this examination procedure might look like in the case of the Habitats Directive, and where the potential intervention points exist for mandated parties are described in Figures 6-9.

Figure 7 Example scenario of the examination procedure (Habitats Directive) where the Habitats Committee issues a negative opinion



It remains to be seen for which types of amendments to the Habitats Directive the procedure for delegated acts will apply in the future.

Figure 8 Example scenario of the (normal) examination procedure (Habitats Directive) where the Habitats Committee issues no opinion

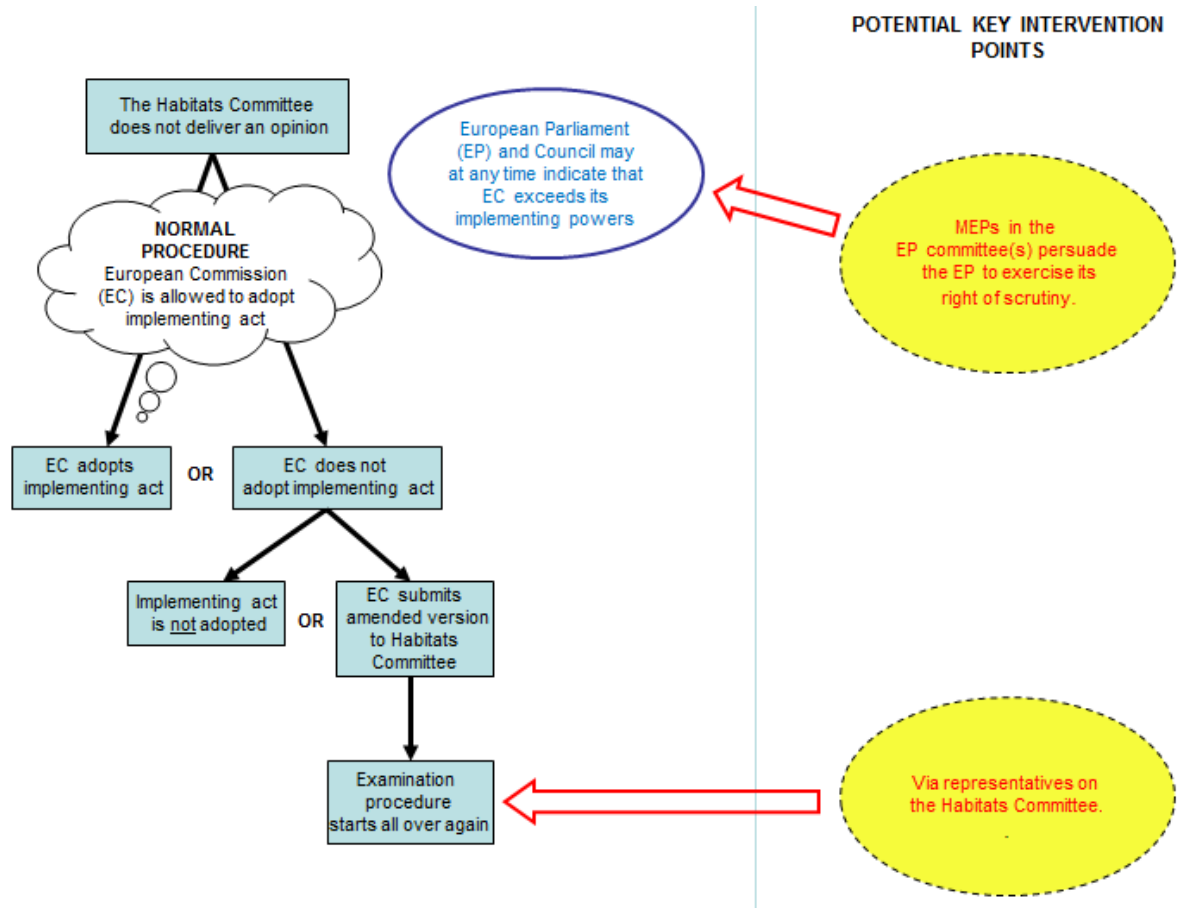
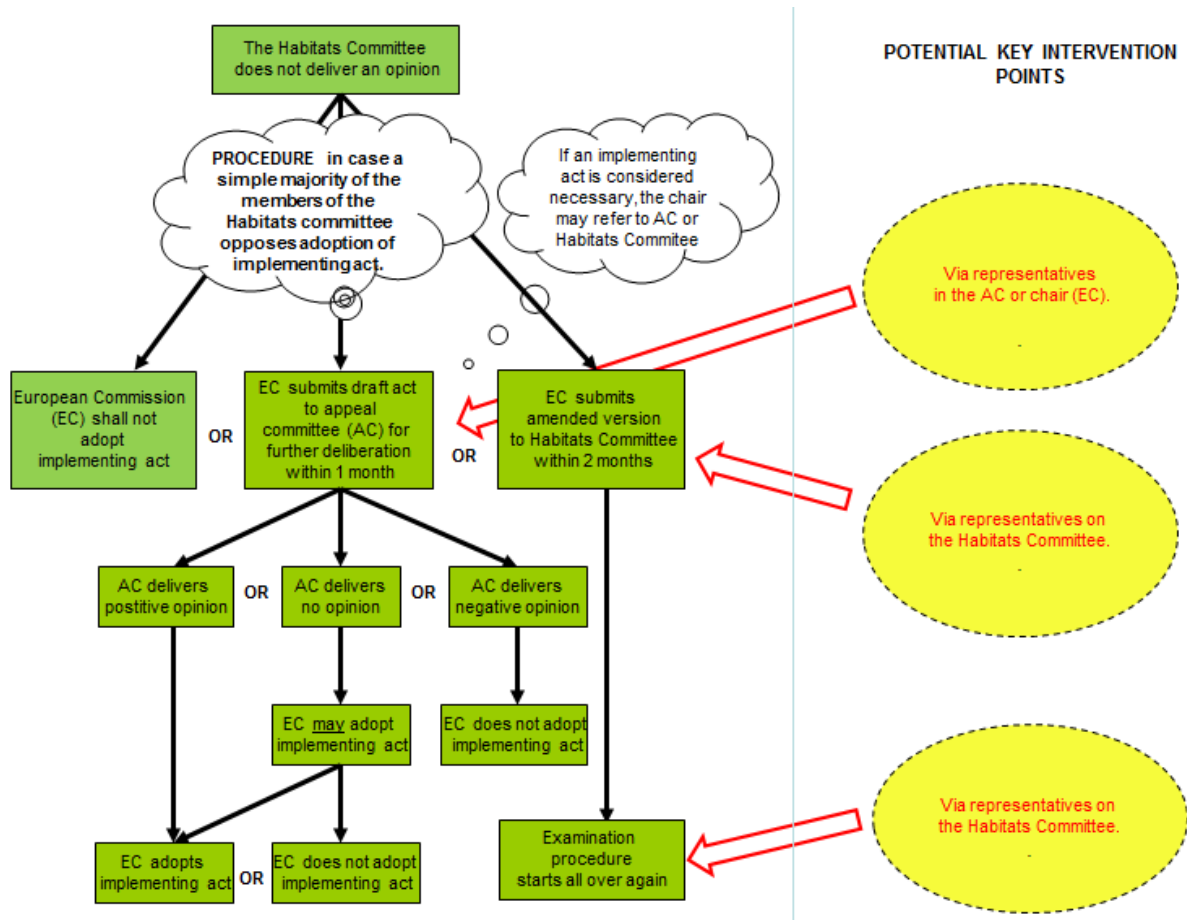


Figure 9 Example scenario of the examination procedure (Habitats Directive) where the Habitats Committee issues no opinion but opposes adoption of implementing act by the Commission



4.2 Birds Directive

In the case of the Birds Directive, the procedure for delegated acts will be used to adapt Annexes I and V in terms of “technical and scientific progress”. Annex I lists species that require special conservation measures concerning their habitat (because they are in danger of extinction, vulnerable to habitat change, rare, localised or otherwise affected by habitat-related threats). Annex V lists subjects to which particular attention shall be paid in research and work required as a basis for the protection, management and use of the population of all bird species.

The procedure for delegated acts will only be applied once the Birds Directive has been revised and provisions with respect to the procedure for delegated acts has been inserted in the Directive. Until then the regulatory procedure with scrutiny will continue to apply.

The examination procedure might also apply from March 2011 for adopting acts implementing the Birds Directive. However, as the current text of the Directive does not refer to any other procedure than the regulatory procedure with scrutiny, it does not explicitly state what kind of implementing acts the examination procedure might be used for.

4.3 Water Framework Directive

For the Water Framework Directive, the examination procedure (for adopting implementing acts) and the procedure for delegated acts are to be used.

The examination procedure (for implementing acts) is to be used from March 2011 in particular to:

- adopt guidelines, where necessary, on the implementation of Annexes II and V of the Directive;
- adopt technical formats for the purpose of transmission and processing of data, including statistical and cartographic data, which are required to enable the Commission to adapt Annexes I, III and section 1.3.6 of Annex V to scientific and technical progress;
- establish the final register of sites which are to form the inter-calibration network.

The procedure for delegated acts will be used in particular to:

- lay down technical specifications and standardised methods for analysis and monitoring of water status;
- adapt Annexes I, III and section 1.3.6 of Annex V to scientific and technical progress taking account of the periods for review and updating of the River Basin Management Plans (RBMPs);
- adopt the results of the inter-calibration exercise (as to the comparability of the biological monitoring results) and the values established for the Member State monitoring system classifications.

It should be noted that, the procedure for delegated acts will only be applied once the Water Framework Directive has been revised and provisions with respect to the procedure for adopting delegated acts has been inserted in the Directive. Until then the regulatory procedure with scrutiny will continue to apply.

4.4 Marine Strategy Framework Directive

For the Marine Strategy Framework Directive, the examination procedure (for adopting implementing acts) and the procedure for delegated acts are to be used.

The examination procedure is to be used from March 2011 to:

- adopt methodological standards for the application of Annexes I, III, IV and V;
- adopt technical formats for the purposes of transmission and processing of data, including statistical and cartographic data.

The procedure for delegated acts will be used in particular to:

- adapt Annexes III, IV and V to this Directive to scientific and technical progress taking into account the periods for the review and updating of marine strategies laid down in Article 17 of the Directive;
- lay down criteria and methodological standards to be used by the Member States and to adopt specifications and standardised methods for monitoring and assessment in such a way as to ensure consistency and to allow for comparison between marine regions or sub-regions of the extent to which good environmental status is being achieved.

It should be noted that, these criteria and methodological standards had to have been laid down by 15 July 2010 and that the procedure for delegated acts will only be applied once the Marine Strategy Framework Directive has been revised and provisions with respect to the procedure for adopting delegated acts has been inserted in the Directive. Until then the regulatory procedure with scrutiny will continue to apply.

ANNEX I: ARTICLES 290 AND 291 FROM THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

Article 290 TFEU (on ‘delegated acts’)

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts 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 act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

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.

3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.

Article 291 TFEU (on ‘implementing acts’)

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

4. The word ‘implementing’ shall be inserted in the title of implementing acts.

ANNEX II: IMPLICATIONS FOR INSTITUTIONAL BALANCE

The reform of comitology has changed and will continue to change somewhat the institutional balance, though it remains to be seen whether there will be big winners and losers in practice. The picture we get is quite complex, in particular for delegated acts.

Delegated acts

At first sight the Commission seems to have won some powers in relation to delegated acts vis-à-vis the Council and the Parliament. Under the Nice Treaty (amending the Treaty on European Union and the Treaty establishing the European Community, signed in 2001 and coming into force in 2003), the Council of Ministers held the power of execution which it delegated to the Commission. Under the Lisbon Treaty, the power of delegated acts lies with the Commission with a possible subsequent control (i.e. only after the adoption of the decision by the Commission) by the Council and the Parliament according to conditions set out on a case-by-case basis in each basic legislative act. However, the powers of the Council and the Parliament vis-à-vis the Commission are considerable as they have the right to revoke both the individual measure and the delegation of power as a whole.

The abolition of the comitology committees in the case of delegated acts has thus been compensated by a much greater control by the Parliament and the Council. Furthermore the Commission will still have to consult with Member State experts when drafting a delegated act. However, the Commission and the Parliament have already insisted and emphasised that these consultations will take place at the same level as the consultations with other stakeholders. Furthermore, the Parliament and the Council now have the power to object to an individual delegated act on any grounds whatsoever, whereas before they could only object on the basis of one of three legal grounds. This significantly increases the powers of both legislators.

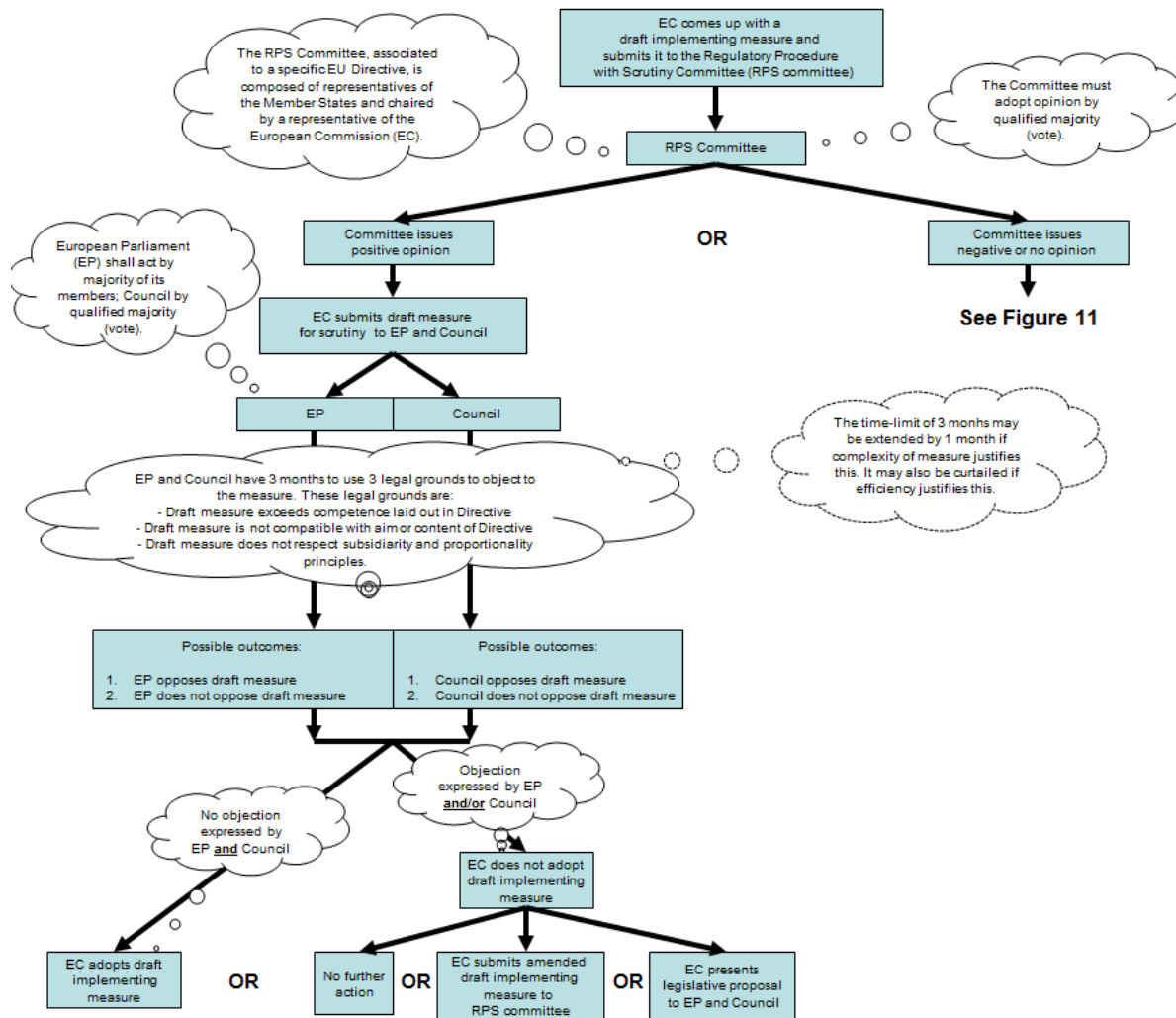
Implementing acts

For implementing acts, the Commission seems to have won considerable powers vis-à-vis the other two institutions. A major change is that the Commission is no longer obliged to adopt a draft measure when the committee fails to adopt an opinion. Furthermore, the draft implementing acts/measures will no longer be referred back to the Council – though this referral has been replaced by referral to an appeals committee which is the Council in everything but name – and both the Parliament and the Council only have a limited right of scrutiny, which implies they have the possibility at any time to indicate to the Commission that a draft implementing act exceeds its implementing powers. The Commission, however, is not obliged to take into account the views expressed by Parliament and/or Council. This implies that the Commission will remain the master of implementing acts.

The trends from legislative activity to date show that the Parliament and the Council exercise their power by deciding which types of acts (delegated or implementing) will apply to specific aspects of a legislative act, thereby setting the scope of the Commission's official level of control. In any case, co-decision is very much based on negotiation, and the Commission is not interested to prepare proposals that will ultimately be rejected by its co-legislators, therefore it is not likely that Council or Parliament will frequently exercise its freedom of objection.

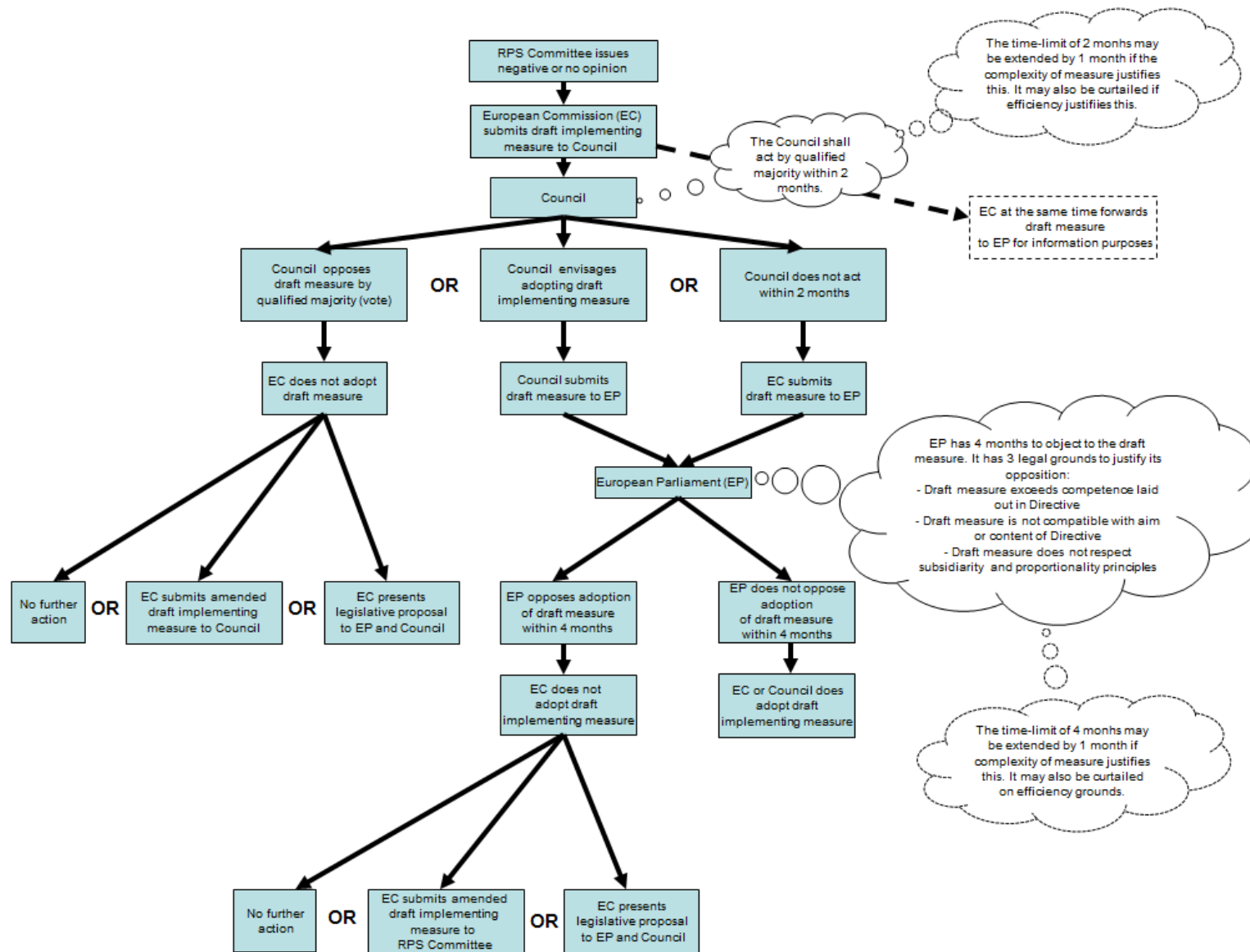
ANNEX III: THE CURRENT REGULATORY PROCEDURE WITH SCRUTINY⁹

Figure 10 The regulatory procedure with scrutiny where the committee issues positive opinion



⁹ The existing 'regulatory procedure with scrutiny' will continue to apply until Directives and Regulations have been revised with an inserted clause on the new procedure for delegated acts.

Figure 11 The regulatory procedure with scrutiny where the committee issues negative or no opinion



ANNEX IV: WEBSITES

European Commission Comitology Register

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

European Commission Expert Group Register

<http://ec.europa.eu/transparency/regexpert/>