

COMITOLOGY: THE NEW EU POLITICAL BATTLEGROUND

MORE DEMOCRACY, MORE TRANSPARENCY, MORE BUSINESS RISK AND OPPORTUNITY

'Comitology' - the procedure for implementing technical elements of European Union legislation - is becoming an increasingly important policy battleground in the EU. Named after the myriad committees that assist the European Commission in implementing legislation, comitology was once a technocratic, closed procedure comprising EU *fonctionnaires* and thousands of national experts.

Now it has become, in many cases, a highly political exercise. It deals with controversial issues and increasingly involves commissioners, ministers and MEPs. It is also becoming a major aspect of European integration, having a significant impact on business and other interests in the EU. It can cause products to be banned or their marketing restricted, and place new obligations on companies and citizens.

This development is due principally to the introduction of a new comitology procedure. The 'regulatory procedure with scrutiny' (RPS) was created in 2006 and is now being used widely. The RPS gives the European Parliament and the Council additional powers to scrutinise decisions made by comitology - and even to veto decisions. As such, the process has become more political, more democratic, more transparent - and more unpredictable.

This Burson-Marsteller Insight explains the comitology procedure, focusing on the RPS, as well as the reasons and history behind it and the consequences of its use for business and citizens.

WHAT IS COMITOLOGY AND WHY IS IT USED?

'Comitology' is the EU-level equivalent of a process that occurs in governments throughout the world: following agreement of a law by the legislature, the executive arm of government needs certain tools to implement legislation. In most national governments, this involves a minister setting down an order, decree or statutory instrument.

A law, for example, may state that certain substances should be banned from use due to concerns about health. An implementing measure will state the list of substances, and update them according to scientific data. Likewise, a law may state the principle that there should be a maximum level of a substance in a product; the implementing measure will decide on the exact level.

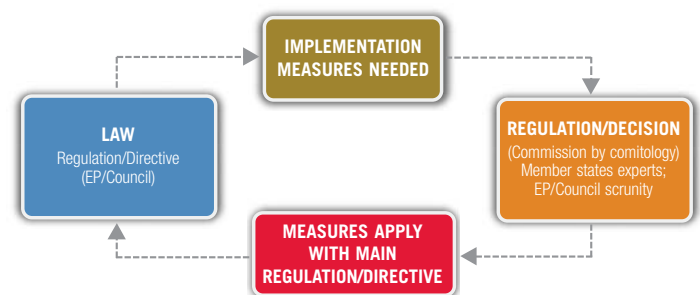
These implementing decisions can, however, have a major impact on business and citizens.

There are currently around 250 committees taking around 2500 decisions each year. Virtually every area in which the EU has some competence for policy is affected, most notably in pharmaceuticals, financial services, transport, energy, agriculture, food, chemicals (such as REACH), genetically modified organisms and the environment.

Comitology has existed since the 1960s, and has gradually grown in importance since then. In 1987, a new common procedure was agreed; by 1999 the growing importance of the Parliament was recognised, with MEPs being given the right to be informed of and to oversee decisions made under comitology; and in 2006 the Parliament (and Council) gained the power to block some decisions, thereby making comitology more political - and unpredictable - than ever.

FROM CO-DECISION TO COMITOLOGY

EU legislation is generally agreed by the European Parliament and Council (national governments) under the co-decision procedure. This legislation (the 'basic act' as it is known in comitology) often delegates implementing powers to the European Commission, assisted by a committee of member state experts (in accordance with rules set out in Article 202 of the EC Treaty). These committees are composed of member state experts, but all decisions are ultimately made in the name of the Commission. They apply in conjunction with (and with the same legal force as) the original legislation from which they result.



WHY IS COMITOLOGY USED?

Comitology, and similar systems for implementing legislation used throughout the world, have a number of advantages:

- > **speed:** legislation can take years to agree and cannot cover all eventualities, whereas an implementing decision can be agreed in only a few months (or even days when necessary);
- > **efficiency:** reducing the workload of legislatures (such as the European Parliament and the Council);
- > **flexibility:** allowing for decisions to be updated easily to new scientific data or new risks;
- > **recognition of the technical nature of many decisions:** in the EU context, MEPs and ministers may not have sufficient knowledge and/or expertise to analyse complex scientific data and decide on, for example, maximum levels of permitted substances based on complex scientific data. Such implementing decisions are therefore delegated to the Commission and member state experts;
- > **control and oversight:** in the EU, comitology ensures that member states, via national experts, are involved in decisions about detailed and usually technical matters that flow from the adoption of EU law.

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THE REGULATORY PROCEDURE WITH SCRUTINY - POWER TO THE PARLIAMENT (AND A BIT MORE TO THE COUNCIL TOO)

In 2006, after lengthy negotiations between the Council, Parliament and Commission, the institutions agreed to introduce the regulatory procedure with scrutiny (RPS). This procedure placed the Parliament on an equal footing with the Council in scrutinising the implementation of EU legislation.

From the Parliament's perspective, the introduction of RPS was a logical development flowing from its growing power over legislation: as they shared power with the Council in co-decision, MEPs had become increasingly dissatisfied with their exclusion from scrutinising the implementation of the laws they had helped to draw up. The introduction of RPS helped to redress this imbalance and, in effect, anticipated increased parliamentary power as a result of the Lisbon Treaty.

WHAT KIND OF LEGISLATION USES RPS?

There is now a large body of legislation subject to implementation by RPS, across a wide range of policy areas. While new legislation includes the new procedure, a large number of old laws have had to be updated. In some cases, this was carried out individually – often coinciding with planned reviews of the laws.

However, a large body of EU law has been updated by 'omnibus' measures: a single legal act that amends the comitology procedures in a large number of texts. So far, more than 160 items of legislation have had their comitology procedures updated to RPS, principally through omnibus measures. Around 100 more will follow before the end of 2009.

When adopting legislation, Parliament and Council decide whether or not to apply RPS to subsequent implementing measures. Although there is some degree of discretion, RPS must be applied when all the following conditions are met:

- the basic legislation is adopted under co-decision;
- proposed implementing measures are of general scope; and
- the proposed implementing measures amend non-essential elements of the basic legislation.

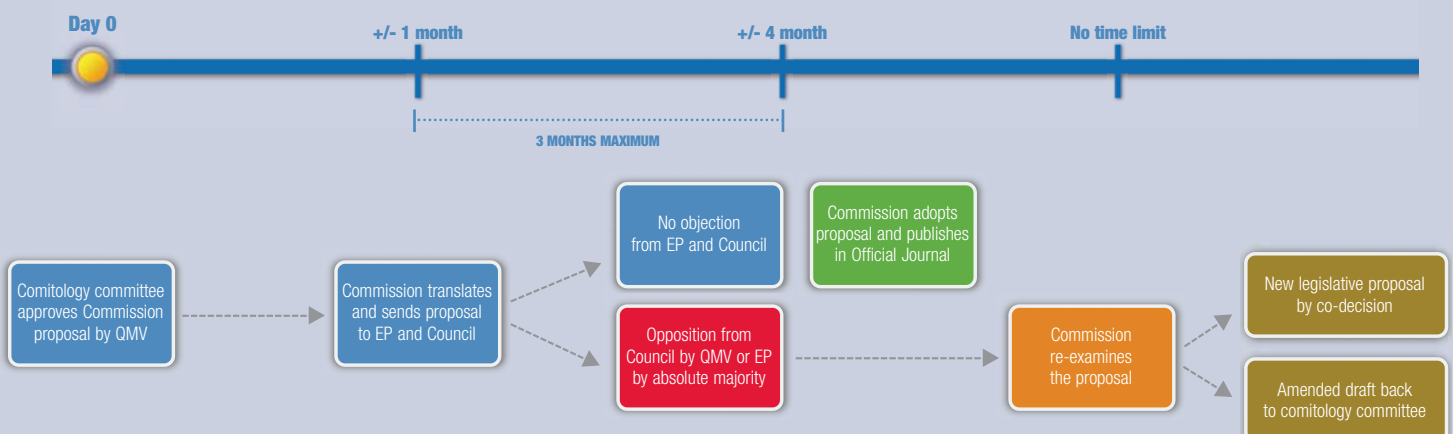
The introduction, for example, of nutrient profiles under the Regulation on nutrition and health claims fulfils these criteria: the Regulation was decided by co-decision; nutrient profiles will apply generally to all foods according to objectively defined criteria; and nutrient profiles themselves will supplement the existing rules on nutrition and health claims contained in the Regulation, without altering the basic legislation.

OTHER COMITOLOGY PROCEDURES

The RPS is the newest comitology procedure, and the only one that gives the Parliament the right to veto the Commission's draft measures.

For descriptions of the other procedures, please see page 6.

RPS TIMETABLE



HOW THE RPS WORKS: THE 'REGULATORY PROCEDURE' PHASE

Once the Council and Parliament have adopted legislation (the 'basic act') that requires implementation by a measure under RPS, the Commission will begin work with a committee.

Comitology committees are often created by the 'basic act' – for example, the Services Directive created a specific committee to deal with the pan-European aspects of implementation of the law. However, some existing 'standing committees' are called upon to handle the implementation of new legislation. One example is the Standing Committee on the Food Chain and Animal Health, which has seven sections dealing with a range of issues relating to food labelling, quality and safety, and animal and plant health.

Comitology committees are composed of member state experts, usually from a domestic ministry or agency. Sometimes, academics or professionals represent their member state. Meetings are chaired by a Commission official, often at the

level of Director or Head of Unit, who acts as a conduit between the committee and the senior levels of the Commission. Most committees meet several times a year and some also have sub-committees or working groups. There is usually a high level of participation in the committees; however, some smaller member states struggle to cover all committees.

Decisions in the committee are taken by qualified majority voting (QMV) – just as in the Council (255 votes out of 345 are currently required to adopt the Commission's proposal). To this end, the Commission tries to find an agreement with the member states before putting a draft implementing measure to a vote.

However, under the RPS the Commission must now also be particularly careful to consider the political context: the threat of the measures being vetoed by the Council or the Parliament means that wider political and economic considerations, beyond expert opinion, must also be taken into consideration.

HOW THE RPS WORKS: THE '... WITH SCRUTINY' PHASE

Under RPS, once a draft measure has been adopted by the committee it is sent to the European Parliament and Council for scrutiny: the two institutions can block the draft measures by adopting Resolutions within three months of them being posted on the inter-institutional 'comitology register' in all EU languages. The Commission can extend this time limit on the grounds of 'complexity', or – as is more common – curtail it on the grounds of 'efficiency'.

Formally, draft measures under the RPS may only be blocked when the Parliament or Council considers that:

- the measures exceed the implementing powers in the basic act (the original co-decision legislation);
- they are not compatible with the aim or the content of the legislation; or
- they do not respect the principles of subsidiarity or proportionality.

However, experience shows that the Parliament will interpret the possibilities under the decision as widely as possible in order to act when it disagrees with the content of the draft measure.

Scrutiny by the European Parliament

In order to oppose a measure, a Resolution must be adopted by an absolute majority of MEPs, irrespective of the numbers voting (393 out of 785 MEPs in the 2004-2009 parliament; 369 MEPs from July 2009). However, there are many steps to complete before that stage is reached.

Draft measures are sent to the parliamentary committee that handled the original legislation, and that committee decides whether to draft a Resolution under Rule 81 of the Parliament's Rules of Procedure. It takes only one member to object, after which the committee will decide how to proceed. Some parliamentary committees appoint a single rapporteur for all comitology measures; others revert to the rapporteur on the original legislation; some committees mandate the Chair to act.

Should the parliamentary committee adopt a Motion for Resolution to block a draft comitology measure, the Motion is considered by the plenary session. If it is adopted by an absolute majority, the Resolution is sent to the Commission,

CASE STUDY

Politicising implementation - the example of nutrient profiles

Parliament's new powers of scrutiny have helped to politicise the process of implementation, even in advance of a comitology decision being officially sent by the Commission, as demonstrated by the case of nutrient profiles, an implementing measure under the Regulation on nutrition and health claims.

A proposal by the European Commission Directorate-General for Health and Consumers (DG Sanco) to implement profiles planned to set strict limits on the types of food that could bear claims, based on their levels of saturated fat, salt and sugar.

Industry, particularly in Germany, feared that they would lose the right to bear claims on their products. They leapt to the defence of traditional, local products, and were supported by a number of MEPs, many of whom had opposed the idea of nutrient profiles during the legislative phase. A number of member state governments were concerned about the plans. Lobbying of the Commission itself also took place, with other directorates-general protesting against DG Sanco's proposals.

The result was that the Commission began - at the highest levels - negotiations on a new, less strict proposal to submit to the comitology committee – and a clear demonstration of the political influence of the Parliament, industry, member states and other DGs, even before the proposal has reached the comitology committee.

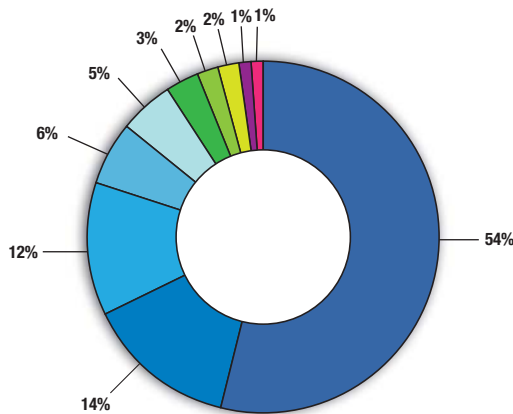


which is required to withdraw the draft measure and start again – or make a legislative (co-decision) proposal instead.

So far, Parliament committees have considered draft Motions for Resolution under RPS just eight times, out of around 150 draft measures. It has blocked the Commission's draft measures just twice, on technical provisions concerning risk management in the area of financial services and energy labelling for televisions.

It is a 'nuclear option' to block the draft measure – but the Parliament is prepared to use this option, and other tools, to change or reject the Commission's plans (see case studies below).

REFERRALS OF DRAFT RPS MEASURES BY PARLIAMENTARY COMMITTEE



■ Environment, Public Health and Food Safety	■ Civil Liberties, Justice and Home Affairs
■ Transport and Tourism	■ Industry, Research and Energy
■ Legal Affairs	■ Employment and Social Affairs
■ Economic and Monetary Affairs	■ International Trade
■ Internal Market and Consumer Protection	■ Agriculture and Rural Development

Time limits

Under comitology rules, there is no mechanism for the Parliament to 'approve' draft comitology measures: the Commission simply has to wait for the three-month time period to expire.

However, Parliament is increasingly coming under pressure from the Commission to signal its intentions with regard to draft measures adopted by a committee under RPS. Often this is done via a letter from the Chair of the relevant parliamentary committee to the Commissioner concerned. However, this approach can, in certain cases, present difficulties: a draft RPS measure on aviation security was sent to the Committee on Transport and Tourism, which decided not to oppose the measure. However, objections from members of the

Committee on Civil Liberties, Justice and Home Affairs regarding body scanners led to a critical Resolution and eventual withdrawal of the measure.

As a result, the Parliament's legal service has made it clear that only a Resolution of the whole Parliament – and not simply a letter from the Chair of the parliamentary committee most directly concerned – can signal an intention not to oppose a draft RPS measure.

Scrutiny by the Council

Given that member states nominate the experts that participate in comitology committees, it is perhaps surprising that the Council has rejected more draft measures under RPS – six in total by the end of March 2009 – than Parliament. This is perhaps even more surprising considering that Council needs a qualified majority in order to reject draft RPS measures.

Each of these six cases related to the same issue: 'correlation tables', under which member states are obliged to inform the Commission, by means of a table, which provisions of national law correspond to which elements of a particular Directive, in order that the Commission can more easily check the transposition of a Directive into national law. This is a long-standing technical and legal disagreement between the Commission and Council, but one which led to the rejection of six draft RPS measures (one relating to the Water Framework Directive, and five to the inclusion of active substances under the Biocides Directive). Another draft RPS measure that included a provision on correlation tables was accepted when the German delegation voted in favour of the measure (which related to vehicle lights).

These rejections demonstrate that even extremely technical issues can lead to the rejection of draft measures that could have a major impact on certain businesses (through the approval of certain substances, for example) and other interests.

The Council has greater power when the comitology committee fails to support a draft measure proposed by the Commission. In such cases, the Commission's draft measure is submitted to the Council: if national governments back the Commission's plans, then the draft measure is sent for scrutiny by the Parliament (within four months); if it does not, the Commission must start again.

Time limits

Unlike the Parliament, there is little difficulty in 'reducing' the period for scrutiny and getting 'early approval' for comitology measures. This is due to two factors. Firstly, the Commission is present in Council working groups, where draft RPS measures are considered, and in the Committee of Permanent Representatives (COREPER), where a decision is made regarding whether to oppose; as a result, there is a better and faster flow of information. Secondly, the Council groups, being composed of civil servants, have less need for translation into all official languages than parliamentarians.

COMITOLGY AFTER LISBON

The constitutional treaty had envisaged greater powers of scrutiny for the Council and Parliament. However, following the rejection of the treaty by Dutch and French voters, the RPS was introduced in order to resolve the issue of parliamentary scrutiny pending a new treaty. Therefore, RPS de facto anticipates the parliamentary control system envisaged by the current round of treaty reform. Under the Lisbon Treaty, there will be two 'comitology' articles – one (Article 290 – 'delegated acts') corresponding to RPS, and another (Article 291 – 'implementing acts') corresponding to comitology under the advisory, management and regulatory procedures.

The article on implementing acts requires a Regulation to be adopted by the Parliament and Council "in advance" concerning "the rules and general principles concerning mechanisms for control by Member States" (i.e. comitology committees). This measure would need to be adopted when the Lisbon Treaty enters into force in order to ensure continuity, as the Treaty does not foresee transitional measures.



PARLIAMENTARY CASE STUDIES

1 Technical provisions concerning risk management in the area of financial services – Parliament vetoes an RPS measure

The first example of Parliament blocking a measure under the RPS relates to ‘technical provisions concerning risk management’ in financial services. In this case, Parliament’s Committee on Economic and Monetary Affairs (ECON) believed that part of the draft RPS measure should have been handled in the framework of ongoing legislative procedures on credit ratings agencies and the Capital Requirements Directive.

The Resolution to oppose the measure was adopted by ECON and overwhelmingly endorsed by the plenary session in December 2008 (by 627 votes to ten). The Resolution requested a new measure that would omit the sections that should (in Parliament’s view) be dealt with via legislation – and by March 2009 the Commission had submitted a new measure that is currently before Parliament.

In May 2009, the Parliament rejected another draft RPS measure to alter the energy labelling requirements for televisions. A similar measure relating to refrigerators was opposed by MEPs - but without the absolute majority required to veto the draft measure.

Lesson to be learnt: Parliament is not afraid to use its new powers – especially when it believes that its more significant existing powers, under co-decision, are being circumvented.

2 Body scanners – parliamentary opposition from an unexpected source

In autumn 2008 a draft RPS measure on aviation security was agreed in the comitology committee and transmitted to the relevant European Parliament committee (the Committee on Transport and Tourism). Although MEPs on that committee decided not to oppose the measure, MEPs on the Committee on Civil Liberties, Justice and Home Affairs, lobbied heavily by civil liberties groups, objected to the inclusion of body scanners in the proposal.

Members from nearly all of the political groups tabled a critical joint parliamentary Resolution – not via the official procedure (Rule 81), but via an oral question to the Commission. Such was the criticism levelled at the measure – and the breadth of opposition – that the Commissioner for Transport withdrew the proposal.

Although the Parliament had not legally rejected the RPS measure, it had, in effect, given its political veto.

Lessons to be learnt: politics, as well as legal deadlines, matter in comitology. Also, the decision of one committee cannot bind the whole Parliament – and related interests can be mobilised to oppose seemingly benign and technical measures.

3 Rodenticides – every vote counts

In May 2008 the Committee on the Environment, Public Health and Food Safety launched a procedure to oppose the inclusion of Difenacoum, a rodenticide, in the list of active substances under the Biocides Directive.

However, the Resolution failed to be adopted by the Environment Committee, with 27 votes in favour, 28 against, and one absence. As a result, the Resolution was not sent to the plenary session, and the Commission could adopt the measure as planned.

Lessons to be learnt: the parliamentary committee is the first hurdle to cross – and votes may need to be fought for as keenly as in any co-decision vote.

4 Incandescent lightbulbs – national opposition in the Parliament

In January 2009 an RPS measure on ecodesign requirements for non-directional household lamps was submitted to the Parliament. This measure would, in effect, ban incandescent lightbulbs.

Some members of the Environment Committee tabled a Resolution to reject the measure, arguing that such a move deserved a full legislative procedure, and not merely an implementing measure. After a lengthy exchange of letters between the Commission and MEPs, and intense lobbying (particularly by German industry), a vote was held.

MEPs rejected the Resolution – and therefore supported the Commission’s plans – by 44 votes to 14. Almost all the MEPs that wanted to reject the Commission measure were German – from across the political divide.

Lessons to be learnt: MEPs can be mobilised to veto Commission plans – but, as in co-decision votes, you need to build a coalition across nationalities and across political groups.

5 REACH and loop belts – Parliament demands reassurances

Two RPS measures have been subject to draft Resolutions by Parliament without being adopted.

In the first ever use of the scrutiny procedure by Parliament, the Committee on the Environment, Public Health and Food Safety drafted a Resolution about an RPS measure on test methods in relation to the REACH chemicals legislation. After receiving reassurances from the Commission, the Environment Committee dropped its draft Resolution to block the measure and instead tabled an oral question to the Commission and a Resolution to formalise the Commission’s promises.

The Committee on Transport and Tourism also planned to oppose a measure relating to the use of child ‘loop belts’ (attached to adult belts) on commercial aircraft. However, it withdrew the measure in order not to jeopardise the other elements of the RPS measure. Instead, it tabled an oral question in order to receive reassurances from the Commission.

Lessons to be learnt: Parliament does not always need to take the ‘nuclear option’ – and will often try to avoid it. On-the-record assurances from the Commission can be useful to minimise political risk without rejecting an entire RPS measure.

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IMPACT ON BUSINESS AND OTHER INTERESTS

Comitology is an old issue – but one that has been brought to the fore by the new rights given to the European Parliament, and its use for ‘quasi-legislative’ measures under the RPS. As a result, the system has become more politicised, presenting both a risk and an opportunity for business and other interests.

The system is not very transparent – but is less opaque than before, when only a privileged few would know about what was happening in the comitology committees. Now, companies and others have an opportunity to influence what happens in comitology through contacts with the Commission, member state experts and MEPs. There is also potentially a much greater influence from interest groups, consumer groups and environmentalists.

There is also the unpredictability of parliamentary and Council scrutiny – draft measures can be adopted unanimously in the comitology committee, only to be scuppered by MEPs (or the Council) who may have other economic, social, environmental or procedural issues with the draft measures. Again this presents a risk to some, but allows groups which oppose the draft measures to gain a second chance.

In short, the system is complicated and barely transparent – but it is becoming increasingly important to engage in the process in order to avoid or mitigate potentially catastrophic problems, such as restrictions on the sale or marketing of products or new social or environmental obligations and standards.

Comitology by numbers

- > Around **150** draft RPS measures received by Parliament to date
- > **8** uses of the ‘Rule 81’ procedure to oppose a measure under RPS
- > **2** European Parliament vetoes of an RPS measure
- > **6** Council vetoes of RPS measures
- > More than **160** items of legislation aligned with the RPS

(Figures correct at mid-May 2009)

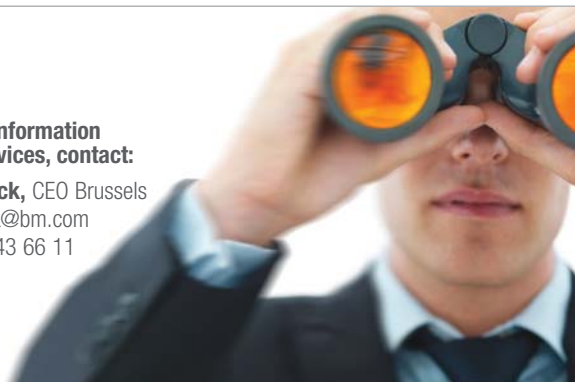
BURSON-MARSTELLER'S EXPERTISE

Burson-Marsteller Brussels has wide experience of guiding clients through comitology procedures. We aim to achieve successful outcomes both in the initial stages of comitology, working with our network of offices across Europe to mobilise support from member state experts and the Commission, and at the ‘political’ stage of scrutiny by the European Parliament and Council.

Our team includes people with experience of all three institutions and a wide range of policy expertise to help guide you through the process.

For more information on our services, contact:

Robert Mack, CEO Brussels
robert.mack@bm.com
+32 (0)2 743 66 11



THE COMITOLOGY PROCEDURES

At present, there are four comitology procedures, each giving the Commission varying degrees of freedom to act:

> **The advisory procedure** gives the Commission almost total freedom to act: it is only required to ‘take account of’ member state experts’ views. Although technically the default procedure, the advisory procedure is mainly used for politically uncontroversial decisions, such as allocations of funding or grants.

> **The management procedure** also gives the Commission a wide margin of manoeuvre, but does refer the measure to the Council when a majority of member state experts oppose the Commission’s plans. This procedure is mostly used for measures under the Common Agricultural Policy and Common Fisheries Policy, or for the implementation of programmes with substantial budgetary implications.

> **The regulatory procedure** is used for ‘quasi-legislative’ measures of general scope, such as market authorisations, and gives the Council the power to block a Commission decision. The Parliament also has a right to scrutinise comitology measures (the *droit de regard*), but not to block them. Furthermore,

MEPs can only oppose draft implementing measures when they exceed the powers conferred on the Commission in the basic act, with the Commission only obliged to ‘review’ the draft measures in such an eventuality. Given this limited degree to act, the Parliament has used its *droit de regard* powers very rarely.

> **The regulatory procedure with scrutiny (RPS)** – the main focus of this Burson-Marsteller Insight – is the most restrictive of the four procedures, and is being used increasingly for ‘quasi-legislative’ implementing measures that derive from co-decision legislation. The RPS gives the European Parliament and the Council the opportunity to veto the Commission’s implementing measures.

There is also a ‘safeguard procedure’: this is used very rarely, when the Commission has to adopt a measure as a matter of urgency. Such cases include anti-dumping measures in the area of trade policy. The Commission does not have to consult member states, but any member state may refer the measure to the Council, which can adopt a different measure.