



ClientEarth briefing about proposed amendments on:

The proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (COM(2010)0083 – C7-0073/2010 – 2010/0051(COD))

Article 291 of the TFEU refers to implementing acts as those measures required where uniform conditions for implementing legally binding Union acts are needed. The basic act 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. In addition, the Treaty requires that the word 'implementing' is inserted in the title of implementing acts.

Implementing acts are considered secondary legislation provisions that are adopted by the Commission within the framework of its implementing powers. The adoption of implementing acts will follow new rules regarding the comitology procedures. Under the above mentioned article of the Treaty the European Parliament and the Council, would adopt a Regulation in accordance with the ordinary legislative procedure, laying down the rules and general principles concerning mechanisms for control **by Member States** of the Commission's exercise of implementing powers. The regulation will replace the existing comitology decision adopted in 1999 and amended in 2006.

The proposal from the Commission excludes completely the participation by the European Parliament in the decision making process of implementing acts. Yet those acts might involve the adoption of important decisions imposing harmonised rules in relation to the implementation of EU law. The European Parliament should be enabled to participate in order to ensure more transparency and democracy in the EU decision making process versus a system based on the adoption of measures in close doors (in Committees).

The requirement of the Lisbon Treaty article 291 refers to the control by Member States. This concept has been interpreted by the Commission as referred to the control by the Committees and therefore the European Parliament intervention would be excluded constitutionally. This interpretation is also based in the fact that Member States are responsible for implementation and therefore it makes sense that they are the ones to ensure control of the Commission implementing powers. However ClientEarth considers that the concept of "control by Member States" should not be considered limited to Committees on the basis of the following legal grounds presented below.

First, it is not clear this was the legislation's intention. If the legislator had this intention, it could have used the words Committees and not Member States.

In addition, the wording of the Treaty of the EU clearly links the European Parliament and Member States. According to Article 14 TEU the European Parliament represents the Union's citizens, who are part of each of the Member States. Citizens are part of the Member States and at the heart of any democratic government and the public institutions. The concept of Member States should not be interpreted to be exclusively referred to the Committees and justify its participation in decision making but the citizens' representatives should also be considered part of the notion of Member State and be part of the decision making process.

Furthermore, Article 14 TEU¹ links the notion of Member States with the European Parliament since each Member State has allocated a specific number of seats in the European Parliament and the number cannot go beyond an established ceiling. According to this provision Member States are also represented by the members of the European Parliament and all Member States have their own ones. It is therefore clear that the concept of Member States does not refer exclusively to the Committees (or the Council of the EU) but would also involve the European Parliament.

The members of the European Parliament should vote in favour of those amendments that ensure the European Parliament's participation in the decision making process of non-legislative acts defined as implementing acts.

In addition, the European Parliament should not give up on the steps towards a more democratic decision making as obtained all along the history of the Comitology procedure. The first Committees established in 1962 were not based on public rules. In 1987 the first rules were adopted defining the type of committees and procedures with no access to information or participation at all by the European Parliament. The European Commission was taking decisions based on the implementing powers it had recognised under the Treaty and by the Council and would take decisions on its own with the advice of committees. The Comitology decision in 1999 established a proper system for the procedures to use giving the possibility to the European Parliament to be kept informed and react and requiring the Commission to make documents available to the public. The amendments introduced in 2006 ensured a higher involvement of the European Parliament in the decision making process of this secondary legislation under the regulatory procedure with scrutiny. These powers should not be given away on the basis of the wording of the Lisbon Treaty because this is not the meaning of Article 14 TEU.

ClientEarth is proposing amendments that would ensure the participation of the European Parliament in the comitology procedure. We consider that at the minimum the European Parliament should be able to intervene to flag the fact that a proposal would not exceed the Commission powers or would not comply with the content and aim of the basic legislative act. We are also proposing that the examination procedure includes the possibility to reject the Commission proposal on the basis of limited grounds. The European Parliament has this role recognised for the adoption of delegated acts with no limitation of grounds for rejecting. Certain implementing decision establishing harmonised rules would have an extremely important impact and the European Parliament should not be prevented from the possibility to check their compliance with the basic legal act. For example, if the ETS Directive 2003/87/EC² were being drafted now, the adoption of harmonised rules for benchmarks might have been considered an implementing act.

¹ Article 14 TEU states: "No Member State shall be allocated more than ninety-six seats." (in the European Parliament)

² Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

ClientEarth therefore advises the MEPs to vote in favour of the amendments or group of amendments proposed in the current briefing.

1. The following group of amendments proposes to provide the European Parliament with the possibility to intervene at any time in the adoption of an implementing act on the basis of specific grounds.

The Commission proposal does not include the European Parliament at all. The proposed amendments purports that the European Parliament participates at any time in the procedure to indicate to the Commission that the draft implementing act exceeds the implementing powers, or that the act is not ***compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality***. The European Parliament should also be able to intervene if the proposal is not compatible with the basic legal instrument or goes against the principles of subsidiarity or proportionality. European Parliament should be enabled to control the legal compatibility of the implementing powers of the Commission. It needs to be noted that those grounds were already used in the previous Comitology decision for other type of measures and procedures (regulatory procedure with scrutiny). There is nothing that should prevent the European Parliament to use similar grounds to justify its participation at any time of the decision making process if the reasons are that the powers are exceeded or that the compliance of the proposed measure with the Treaty or the basic legal instrument.

Commission proposal	ClientEarth Amendment proposals
Proposal for a regulation	Proposal for a regulation
Recital 12 a (new)	<p>Amendment Recital 12 a (new)</p> <p><i>(12a) The European Parliament and the Council can at any time indicate to the Commission that they consider a draft implementing act to exceed the implementing powers provided for in the basic act or that it is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality. In such (a) cases, the Commission should review the draft measure in question taking the utmost account of the opinions of the European Parliament and the Council and inform them of the action which it intends to take and of its reasons for doing so. The European Parliament and the Council remain able to intervene again.</i></p>

<p>Article 8 – paragraph 2 b (new)</p>	<p>Amendment Article 8 – paragraph 2 b (new)</p> <p><i>2b. The European Parliament and the Council can at any time indicate to the Commission that they consider a draft implementing act to exceed the implementing powers provided for in the basic act or that it is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality. In such (a) cases, the Commission shall review the draft measure taking the utmost account of the opinions of the European Parliament and the Council and inform them of the action which it intends to take and of its reasons for doing so. The European Parliament and the Council remain able to intervene again.</i></p>
<p>A right of scrutiny, as previously provided for in Article 8 of the Comitology Decision, is necessary for each co-legislator to be able to indicate at an early stage to the Commission if it considers that a draft implementing act exceeds the implementing powers provided for in the basic act. However, this should not be limited to exceeding of power alone, but also allow the co-legislator to trigger a review if it considers that a draft implementing act is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality.</p>	

2. The amendment to add a new Article 8(2)c aims at ensuring that citizens and natural and legal persons have access to EU Institutions documents.
 This requirement is in line with the obligations stated on EC Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents³.

Commission proposal	ClientEarth Amendment proposals
Proposal for a regulation	Proposal for a regulation
<p>Article 8 – paragraph 2 c (new)</p>	<p>Amendment Article 8 – paragraph 2 c (new)</p> <p><i>2c. Regulation 1049/2001 of 30 May 2001 on access to European Parliament, Council and Commission documents is applicable to these procedures granting any Union natural or legal person residing, or having its registered office, in a Member State access to the information referred to in paragraph 1 points (a) to (g).</i></p>
<p><i>Justification: Following article 15 of the Treaty on the Functioning of the European Union, information and documents on committee proceedings should be made available to any Union natural or legal person residing or having its registered office in a Member States. This is in line with Recital 13 of the proposed Regulation.</i></p>	

³ OJ L 145/43, 31.5.2001

3. The following group of amendments provides the European Parliament with the possibility to intervene in the examination procedure.

The amendments related to Article 5 of the Regulation purports the participation of the European Parliament similar to the regulatory procedure with scrutiny whereby the European Parliament would be able to reject the Commission proposal on the following limited grounds: ***if the draft measures proposed by the Commission exceed the implementing powers provided for in the basic instrument or if the draft measure is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality.***

There is nothing in the Lisbon Treaty that would prevent the European Parliament to participate in the decision making process of implementing acts. The European Parliament ensures the democratic participation of Member States and its citizens in the decision making process and should be enabled to participate to ensure legality of the exercise of the Commission implementing powers.

The proposed procedure for delegated acts enables the European Parliament to reject the Commission proposal on any grounds. For the implementing acts, the grounds of the European Parliament would be limited to arguments related to the legality of the act and its compliance with the Treaty or the basic legal instrument.

Commission proposal	ClientEarth Amendment proposals
Proposal for a regulation	Proposal for a regulation
<p>Amendment Recital 9</p> <p>The examination procedure should only apply for the adoption of measures of general scope designed to implement basic acts and specific measures with a potentially important impact. That procedure should provide for the control of the Member States in such a way that measures cannot be adopted if they are not in conformity with the opinion of the committee, except in very exceptional circumstances, where the Commission should be able, in spite of a negative opinion, to adopt and apply measures for a limited period of time. The Commission should be able to review the draft measures in the event that no opinion is delivered by the committee, taking into account the views expressed within the committee.</p>	<p>Amendment Recital 9</p> <p>The examination procedure should only apply for the adoption of measures of general scope designed to implement basic acts and specific measures with a potentially important impact. That procedure should provide for the control of the Member States in such a way that measures cannot be adopted if they are not in conformity with the opinion of the committee, except in very exceptional circumstances. <i>This procedure should enable the two arms of the legislative authority to scrutinise such measures before they are adopted.</i> (where the Commission should be able, in spite of a negative opinion, to adopt and apply measures for a limited period of time. The Commission should be able to review the draft measures in the event that no opinion is delivered by the committee, taking into account the views expressed within the committee).</p>

Article 5

Examination procedure

1. The committee shall deliver its opinion by a qualified majority as provided for in Article 16(4) and (5) of the Treaty on European Union.
2. If the draft measures are in accordance with the opinion of the committee, the Commission shall adopt these measures, unless exceptional circumstances or new elements have arisen which would justify the measures not being adopted. In such cases, the chairperson may submit to the committee a new draft of the measures to be taken.
3. If the draft measures are not in accordance with the opinion of the committee, the Commission shall not adopt those measures. The chairperson may submit to the committee the draft measures for further deliberation or submit an amended version of the draft measures.
4. If no opinion is delivered, the Commission may adopt the draft measures. Where the Commission does not adopt the draft measures, the chairperson may submit to the committee an amended version of the draft measures.
5. By derogation from paragraph 3, the Commission may adopt draft measures which are not in accordance with the opinion of the committee where their non adoption within an imperative deadline would create a significant disruption of the markets or a risk for the security or safety of humans or for the financial interests of the Union.

In such a case the Commission shall immediately inform the committee of its reasons for adopting the measures and may submit them to a second deliberation of the committee. If the measures adopted are not in accordance with the second opinion of the committee, or if the measures have not been submitted to a second deliberation within a month after their adoption, the

Amendment Article 5

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2. If the draft measures are in accordance with the opinion of the committee, the Commission shall adopt these measures, unless exceptional circumstances or new elements have arisen which would justify the measures not being adopted. In such cases, the chairperson may submit to the committee a new draft of the measures to be taken.

3. If the measures envisaged by the Commission are in accordance with the opinion of the Committee the following procedure will apply:

(a) the Commission shall without delay submit the draft measures for scrutiny by the European Parliament and the Council;

(b) the European Parliament, acting by a majority of its component members, or the Council, acting by a qualified majority, may oppose the adoption of the said draft by the Commission, justifying their opposition by indicating that the draft measures proposed by the Commission exceed the implementing powers provided for in the basic instrument or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality;

c) if, within three months from the date of referral to them, the European Parliament or the Council opposes the draft measures, the latter shall not be adopted by the Commission. In that event, the Commission may submit to the Committee an amended draft of the measures or present a legislative proposal on the basis of the Treaty;

- 4 3. If the draft measures are not in accordance with the opinion of the committee, the Commission shall not adopt those measures. The chairperson may submit to the committee the draft measures for

<p>Commission shall repeal the measures forthwith. If the measures are in accordance with the second opinion of the committee, or if no opinion is delivered, those measures shall remain in force.</p>	<p>further deliberation or submit an amended version of the draft measures.</p> <p><i>5. If the measures envisaged by the Commission are not in accordance with the opinion of the Committee, or if no opinion is delivered, the following procedure shall apply:</i></p> <p><i>(a) the Commission shall without delay submit a proposal relating to the measures to be taken to the Council and shall forward it to the European Parliament at the same time;</i></p> <p><i>(b) the Council shall act on the proposal by a qualified majority within two months from the date of referral to it;</i></p> <p><i>(c) if, within that period, the Council opposes the proposed measures by a qualified majority, the measures shall not be adopted. In that event, the Commission may submit to the Council an amended proposal or present a legislative proposal on the basis of the Treaty;</i></p> <p><i>(d) if the Council envisages adopting the proposed measures, it shall without delay submit them to the European Parliament. If the Council does not act within the two-month period, the Commission shall without delay submit the measures for scrutiny by the European Parliament;</i></p> <p><i>(e) the European Parliament, acting by a majority of its component members within four months from the forwarding of the proposal in accordance with point (a), may oppose the adoption of the measures in question, justifying their opposition by indicating that the proposed measures exceed the implementing powers provided for in</i></p> <p><i>the basic instrument or are not compatible with the aim or the content of the basic instrument or do not respect the principles of subsidiarity or proportionality;</i></p> <p><i>(f) if, within that period, the European Parliament opposes the proposed measures, the latter shall not be adopted. In that event, the Commission may submit to the Committee an amended draft of the measures or present a legislative proposal</i></p>
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	<p><i>on the basis of the Treaty;</i></p> <p><i>(g) if, on expiry of that period, the European Parliament has not opposed the proposed measures, the latter shall be adopted by the Commission.</i></p> <p>(4. If no opinion is delivered, the Commission may adopt the draft measures. Where the Commission does not adopt the draft measures, the chairperson may submit to the committee an amended version of the draft measures.)</p> <p><i>6. By way of derogation from paragraphs 3, a basic instrument may in duly substantiated exceptional cases provide:</i></p> <p><i>(a) that the time-limits laid down in paragraphs 3(c), 4(b) and 4(e) shall be extended by an additional month, when justified by the complexity of the measures; or</i></p> <p><i>(b) that the time-limits laid down in paragraphs 3(c), 4(b) and 4(e) shall be curtailed where justified on the grounds of efficiency.</i></p> <p><i>7. A basic instrument may provide that if, on imperative grounds of urgency, the timelimits for the regulatory procedure with scrutiny referred to in paragraphs 3, 4 and 5 cannot be complied with, the following procedure shall apply:</i></p> <p><i>(a) if the measures envisaged by the Commission are in accordance with the opinion of the Committee, the Commission shall adopt the measures, which shall immediately be implemented. The Commission shall without delay communicate them to the European Parliament and to the Council;</i></p> <p><i>(b) within a time-limit of one month following that communication, the European Parliament, acting by a majority of its component members, or the Council, acting by a qualified majority, may oppose the measures adopted by the Commission, on the grounds that the measures exceed the implementing powers provided for in the basic instrument or are not compatible with the aim or the content of the basic instrument or do not</i></p>
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	<p><i>respect the principles of subsidiarity or proportionality;</i></p> <p><i>c) in the event of opposition by the European Parliament or the Council, the Commission shall repeal the measures. It may however provisionally maintain the measures in force if warranted on health protection, safety or environmental grounds. In that event, it shall without delay submit to the Committee an amended draft of the measures or a legislative proposal on the basis of the Treaty. The provisional measures shall remain in force until they are replaced by a definitive instrument.</i></p> <p>(5 By derogation from paragraph 3, the Commission may adopt draft measures which are not in accordance with the opinion of the committee where their non adoption within an imperative deadline would create a significant disruption of the markets or a risk for the security or safety of humans or for the financial interests of the Union.</p> <p>In such a case the Commission shall immediately inform the committee of its reasons for adopting the measures and may submit them to a second deliberation of the committee. If the measures adopted are not in accordance with the second opinion of the committee, or if the measures have not been submitted to a second deliberation within a month after their adoption, the Commission shall repeal the measures forthwith. If the measures are in accordance with the second opinion of the committee, or if no opinion is delivered, those measures shall remain in force.)</p>
<p>Justification: A right of scrutiny, as previously provided for in Article 5a of the Comitology Decision, is necessary for each co-legislator to be able to oppose the Commission draft implementing act by indicating that it exceeds the implementing powers provided for in the basic act or are not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality. The co-legislator should maintain the right to oppose Commission proposals for the adoption of implementing acts through the examination procedure as it was recognised in the previous Comitology Decision for regulatory procedure with scrutiny.</p>	

4. The following amendment proposes a new article 5b aiming at enlarging the powers of the European Parliament not only to oppose the adoption of the proposed implementing measure on the basis of limited grounds described in previous article 5 but also to propose concrete amendments to ensure compliance with the basic legislative act or with the Treaty principles of subsidiarity and proportionality.

Article 5b – (new)	Amendment Article 5b – (new) <i>5b In cases where the European Parliament, acting by a majority of its component members, or the Council, acting by a qualified majority, oppose the adoption of the said draft by the Commission, justifying their opposition by indicating that the draft measures proposed by the Commission exceed the implementing powers provided for in the basic instrument or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality, both EU Institutions can propose amendments.</i>
Justification: The co-legislator should be able to propose the amendments that it considers necessary to ensure compliance of the implementing act with the Treaty or the basic legislative instrument.	

Keys:

All suggested amendments by ClientEarth are in the second column

All suggested amendments modifying the rapporteur's proposed amendments are in **blue italicised bold**.

All suggested deletions to the text are in (brackets strikethrough).

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