The new “comitology” rules

By Danilo Desiderio and Mauro Giffoni

The European Commission, being the executive body of the European Union, is responsible for the issuing of both implementing measures of basic legislative acts adopted by the Council and European Parliament (e.g. "implementing" regulations, directives and decisions, ref. Article 291, par. 2, of the new Treaty on the Functioning of the European Union, hereinafter “TFEU”), and of implementing measures adopted on the basis of an express delegation of powers by these two institutions, having a not-legislative nature, a general scope and introducing additions or amendments of non-essential elements of the basic legislative acts (e.g. "delegated" regulations, directives and decisions, Ref. art. 290 TFEU).

Article 290 TFEU clarifies that "legislative acts" are only those acts which are adopted by the European Parliament and Council through the ordinary or the special legislative procedures. The EU Commission, not having the legislative power, has only the possibility to adopt specific regulatory acts, i.e. acts whose force of law is inferior to that of the acts adopted by other institutions.

Within the execution powers of the EU Commission, it is therefore possible to distinguish two general types of acts:

1) executive acts;
2) delegated acts.

The first kind of measures is used where uniform conditions for the implementation of certain legally binding Union acts are needed in the member States. For their adoption, the Commission normally benefits from the technical support of *ad hoc* experts committees chaired by the Commission and made up of representatives of the 27 EU Member States[1]. The procedure of the Committee responds to the need of giving more flexibility to the ordinary decision-making system adopted within the EU, a system that has significantly changed after the introduction of the Lisbon Treaty, and that is divided today into an "ordinary" and a "special" legislative procedure. The ordinary legislative procedure is based on the traditional separation of responsibilities between Commission, EU Parliament and Council, where the first Institution submits a proposal to the other two bodies, that analyze and amend it, with a number of “bounces” between them that can result in a long

[1] Currently, these committees are particularly numerous (they are more than 200 in total) and their competence and composition varies according to the specific field of reference. With regard to customs matters, there are currently three committees operating at EU level: 1) the 2013 Customs Committee, 2) the Committee on mutual assistance in customs matters and agriculture and 3) the Customs Code Committee. The latter, in turn, is divided into 14 Sections whose composition varies according to the subject matter (e.g. General Customs Rules, origin, Duty-Free Arrangements, customs valuation, customs warehouses and free zones and customs procedures with economic impact, transit, etc..). Committees assisting the EU Commission during the execution of its execution powers, have been for a long time criticized, due the lack of transparency in their decision-making process and their purely technocratic nature. They are now inscribed in a public register, available on-line on the Europa website, that collects information on both the measures adopted by each Committee and on their composition.

timeline for their final approval (as is the case with the two branches of the national parliaments of some member States).

This approval period often exceed also two years, as already occurred with the Community 'Modernized' Customs Code. Conversely, in the special legislative procedure, the Council takes a leading position with respect to the European Parliament, being the role of the latter reduced to a mere advisory activity provided in favor of the first institution, which basically adopts the act.

The new Treaty on the Functioning of the European Union (TFEU) sets a more clear division of powers between the EU Parliament and the Council on the one hand, and the European Commission on the other hand. Indeed, the activity of first two institutions is mainly focuses on the definition of the essential elements of a given topic, while the second one has the responsibility to define, though a regulatory (i.e. not-legislative) activity, the technical and implementing measures of the basic legislative acts. This task, in the case of the "executive acts" (not also in the case of the "delegated acts") must be carried out in close cooperation with the Member States represented in the various Committees.

More precisely, the new rules introduced by Regulation (EU) No. 182/2011 have modified the procedures and criteria for the participation of the Member States to the exercise of the executive powers of the European Commission within the process of adoption of implementing acts, by amending the criteria established by the "Comitology Decision" (Decision 1999/468/EC), that has now been repealed.

The EU Reg. No. 182/2011, entered into force as of 1th March 2011, identifies two basic procedures for the adoption of such acts, defined "**examination**" and "**consultative"** procedures, that replace the former 4 procedures regulated in the old Decision 1999/468/EC, i.e. the: 1) consultative, 2) management 3) regulatory and 4) regulatory with scrutiny procedures.

The "regulatory procedure with scrutiny" was introduced only recently, with the Council Decision 2006/512/EC of 17 July 2006, that amended the Comitology Decision by introducing a new article 5a. This is basically one of the many possible ways by which the Commission can carry out its implementation powers of Community legislation, whose main characteristic was represented by the fact that the two branches of the legislature (Council and European Parliament) intervene to perform a control on the provisions of the executive act in order to ensure that they are compatible with the purpose or the content of the basic legislative act, that they do not exceed the implementing powers laid down in the latter, and respect the subsidiarity or proportionality principles. In particular, the regulatory procedure with scrutiny was applied for the adoption of implementing measures of general scope designed to amend non-essential elements of those basic legal acts adopted under the co-decision procedure, where the "essentiality" of the single parts of a given legislative act was determined on a case by case basis, splitting that act in two groups of elements: provisions that defined fundamental regulatory issues, from provision regulating secondary matters (e.g. annexes, lists of product, technical specifications, etc.).

An express reference to the regulatory procedure with scrutiny and to the management procedure was made by several provisions of the EC Regulation no 450/2008 (with regard to the management procedure, see the articles 18, 19, 33, 85, 119). By virtue of the amendments introduced by the Regulation (EU) No. 182/2011, now all these references in the Modernized Customs Code must be updated with the correct references to the new

advisory and examination procedures. This means that a new Regulation of the European Parliament and Council is needed, amending the Community Customs Code.

Concerning the adoption of the implementing provisions of the new code (IP-MCCC), these rule will be divided into two separate groups of provisions: a set of fundamental, more delicate, provisions, to be adopted with the examination procedure, and some ancillary provisions that will be adopted with the consultation procedure.

With particular regard to the regulatory procedure with scrutiny, the Declaration of the European Parliament, Council and Commission annexed to the text of the EU Regulation No. 182/2011 (see the Official Journal L 55 of February 20, 2011), states that all legislative acts in force containing a reference to this procedure, will be reviewed by the Commission in order to fit the criteria laid down by the Treaty of Lisbon and align them to the two procedures defined by the new Regulations. By the end of 2012, the Commission will therefore follow the appropriate legislative action to complete this process of adaptation, **so that by the end of the current EU legislature (2014), all provisions referring to the regulatory procedure with scrutiny will be deleted by the existing EU legislation**.

The examination process is the main procedure and, as such, is characterized by higher guarantees than the advisory procedure. It applies in particular for the adoption of implementing acts of the basic acts of general scope (i.e. acts not applicable to particular categories of persons or specific sectors, but to communities of citizens or general matters, see the decision of the European Court of Justice of 24 October 1989 - Case 16/88), as well as for the adoption of implementing acts that relate to matters with a high impact on the economic interests of EU citizens, in particular in agriculture, fisheries, environment, health, trade and taxation. This procedure is aimed to ensure that the executive acts adopted by the Commission are supported by a **qualified majority** of the Committee, to be calculated similarly to what occurs for the decisions of the Council, i.e. by applying a balancing test (or “ponderation factor”) that gives a greater weight to most populated States.

If the qualified majority is reached within the Committee, and it votes against the measure proposed by the Commission, the Commission can follow two procedures:

1) to propose a modified version of the act, within two months, to the same Committee, so that it will decide on the new draft;

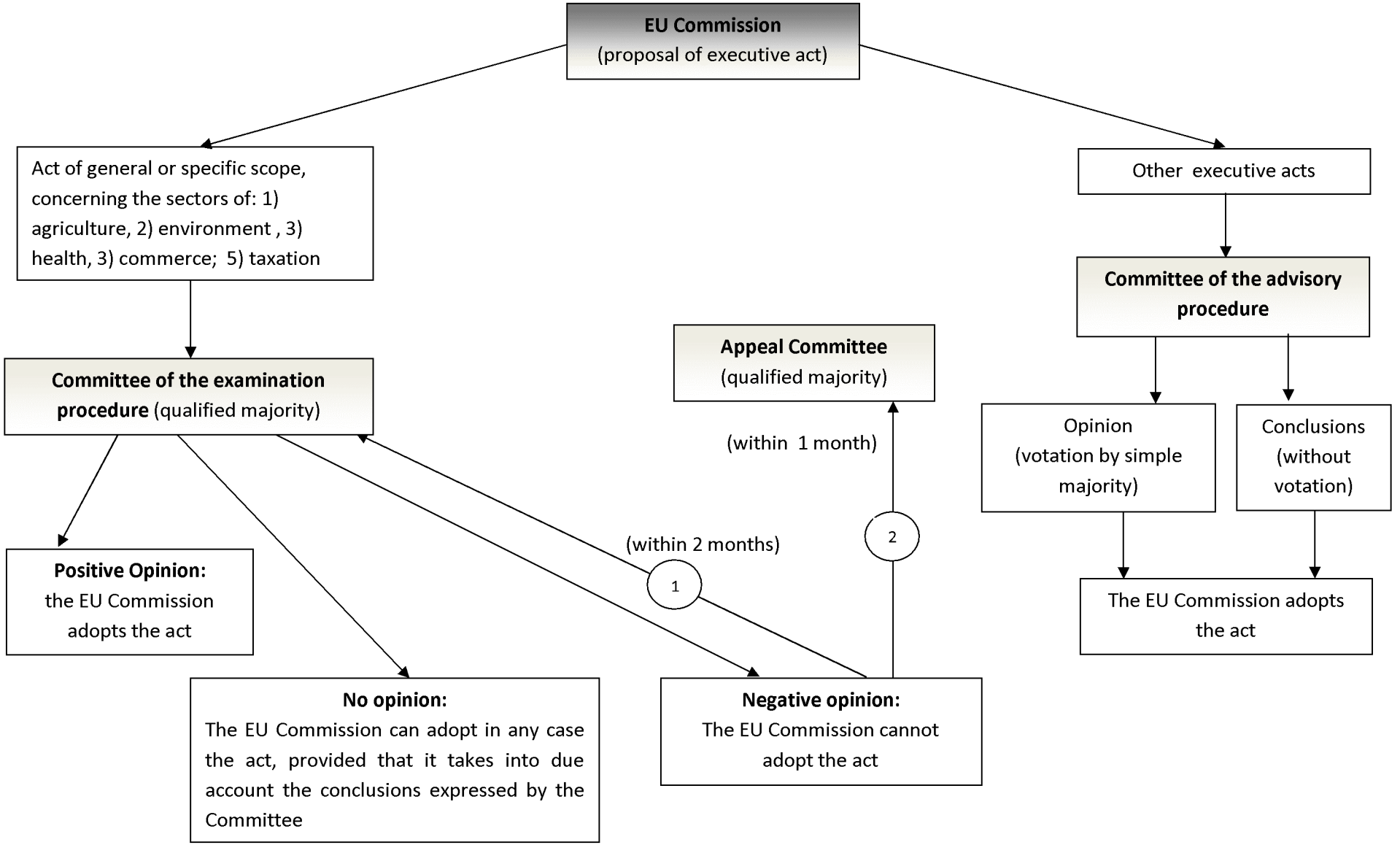
2) to appeal against the opinion of the Committee before a new Committee (called "Appeal Committee") so that the latter will review the draft implementing measures previously rejected by the first Committee. The recourse to the Appeal Committee must be activated within one month from the issuing of the negative opinion by the first Committee. The Appeal Committee is also made up of Member State officials, but of an higher level of representation than those that compose the first Committee.

if the Committee fails to provide an opinion at all, this a case of “consent implies silence”; therefore the Commission may choose to adopt implementing measures, provided that it takes the “utmost account” of the conclusions drawn from the discussions within the Committee and of the opinion delivered by the latter. It must be also emphasized that the committee procedures are conducted on the basis of the principle of transparency: all the documents submitted to the committees are simultaneously transmitted to the European Parliament and the Council, so that these two institutions, on a level of full equality, can carry out a continuous monitoring on the work of the Commission. This means that both the EU Parliament and the Council can at any time request the Commission to review the

draft implementing act to be adopted, when this is considered exceeding the powers conferred on the Commission by the basic legislative act.

The advisory procedure is simpler and more streamlined than the examination procedure. This is a residual procedure that applies only for the adoption of acts not expressly covered by the examination procedure. However, in exceptional circumstances and for justified reasons, the advisory procedure may apply also the adoption of those implementing acts normally reserved to the examination procedure. In more general terms, it is possible to say that the advisory procedure covers all those sectors which have no potentially harmful or adverse impact on the interests of EU citizens (e.g. culture). The main difference with the examination procedure is that the decisions of the Committee in this case are taken by the **simple majority** (half + 1 of voters). The role of this advisory body is also less effective than in the examination procedure, because the Committee cannot block the Commission's initiative, but it can only make conclusions or provide an opinion (only for the adoption of an express advice the simple majority is required), which the Commission will take into due account at the moment of approval of the final executive act. Indeed, article. 4, par. 2 of EU Regulation 182/2011 provides that the final decision for the adoption of the draft implementing act is on the Commission, that has only an obligation to "take the utmost account" of the conclusions emerged during the discussions within the Committee of and the opinion of that body, which therefore must be considered as not binding.

Regarding the choice between which one of the two procedures must be followed in the practice by the Commission in adopting the above implementing acts, basic legislative acts shall make, case by case, a specific reference to the art. 4 (advisory procedure) or the art. 5 (examination procedure) of EU Regulation 182/2011.


EU Commission
(proposal of executive act)
Act of general or specific scope, concerning the sectors of: 1) agriculture, 2) environment , 3) health, 3) commerce; 5) taxation
Other executive acts
Committee of the advisory procedure
Committee of the examination procedure (qualified majority)
Appeal Committee
(qualified majority)
(within 1 month)
Opinion
(votation by simple majority)
Conclusions
(without votation)
(within 2 months)
2
1
Positive Opinion:
the EU Commission adopts the act
The EU Commission adopts the act
No opinion:
The EU Commission can adopt in any case the act, provided that it takes into due account the conclusions expressed by the Committee
Negative opinion:
The EU Commission cannot adopt the act