

FUNKCE KOMUNITÁRNÍHO PRÁVA PŘI IMPLEMENTACI POLITIK EU

COMMUNITY LAW AS THE FRAMEWORK FOR IMPLEMENTATION OF EU POLICIES

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Abstrakt

K provádění politik EU je dán závazný právní rámec v podobě sekundárních legislativních aktů Společenství, iniciovaných Komisí EU, přijímaných Radou EU společně s Evropským parlamentem a implementovaných členskými státy a institucemi EU. Pro přípravu sekundární legislativy zřizuje Komise na základě nařízení Rady EU o komitologii z let 1979 a 1987 řadu výborů jako iniciativních, doporučujících i poradních orgánů. Článek rozebírá jejich roli a význam pro tvorbu právního rámce politik EU.

Klíčová slova

politiky EU, sekundární prameny práva ES, komitologie

Abstract

The binding legal framework for the realization of EU policies is given by secondary legislative Community acts initiated by the EU Commission, adopted by the EU Council together with the European Parliament. They are implemented both by Member States and the EU institutions. According to the EU Council decisions on Comitology of 1987 and 1999 the Commission creates for the preparation of secondary legislation a number of committees with initiative, co-ordinatory and consultative functions. The paper analyses its role and importance for the creation of the legal framework of EU policies.

Key words

EU policies, secondary EC law sources, comitology

1. Introduction

The instruments through which the objectives laid down in the Treaty establishing the European Community (thereinafter “TEC”) reach from political resolutions with declaratory character to acts legally binding and directly implementable both by the EU institutions and Member States. The crucial role, however, is played by the secondary legislation of the EU institution that created a uniform legal framework for their implementation EU-wide. The TEC did not set up a uniform system for the implementation of Community legislation: where necessary, each organ determines its implementation procedures itself. Where the act in question does not do so, the principle applies in any event that “Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of TEC or resulting from action taken by the institutions of the Community” (TEC, Art. 16 first para.). In some policy areas, specific provisions entrust EU institutions and bodies with implementation tasks. In both cases, the enforcement of EU policies through implementing acts of Community law and the imposition of sanctions for breaches thereof fall primarily to the national administrative and judicial authorities. According to what the European Parliament, the Council and the Commission agreed in the Interinstitutional Agreement of December 2003, the EU Commission has to verify whether or not the Community legislation is being implemented and, if necessary, to propose an amendment to the legislative act or any other appropriate legislative measure. (Lenaerts, K., Arts, D. 2005)

2. Objectives and methods implemented

The following paper examines the role of the Commission in the implementation process as influenced by the “Comitology” system created by EU Council decisions in order to stress the role of Member States in this process. Although the EU Commission is obliged to follow European interests and values the process of drafting the secondary legislative acts often shows the contrary. The EU Council has set some binding instruments through which the opinions of Member States can be presented and influence the conclusions of the Directorate General responsible for the preparation of the respective draft. The paper analyses the provisions of the Council decisions and differentiates the types of committees and their role *vis-à-vis* to the EU Commission. It also analyses the role of the European Court of Justice (thereinafter “ECJ”) in the application process of the Council decisions on Comitology.

3. Results and Discussion

It falls to the EU institutions to implement Community law only when that task has been expressly conferred upon them. According to the Art. 202 of the EC Treaty (added by the Single European Act) the Council is to “confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down” and “may impose certain requirements in respect of the exercise of these powers”. As a result, the Commission is given in principle the executive role to play in Community legislative measures, which may or may not be subject to conditions laid down by the Council (together with the European Parliament in matters coming under the co-decision procedure). However, the EU Council “may also reserve the right, in specific cases, to exercise directly implementing powers itself”. If it takes this step it must state in detail the grounds for its decision.¹

An implementing power will be validly conferred only if it is sufficiently specific, in the sense that its bounds must be clearly specified.² Implementing powers encompass both regulatory powers and the power to apply rules to specific cases by means of individual decisions³. Moreover, the term “implementation” has to be given a wide interpretation. In complex areas such as the organisation of the market in agricultural products, the Council may be forced to confer wide powers of discretion and action on the Commission.

Supervision of implementation by the Commission - Comitology Decision.

As already mentioned, in conferring implementing powers on the Commission, the Council (and where the co-decision procedure applies, the European Parliament) may impose certain requirements. In general, the European Parliament and the Council impose requirements on the Commission with a view to its carrying out its implementing function by means of a particular form of collaboration with a committee set up by them. In order to improve the efficiency of the Community decision-making process, the EU Council adopted the First Comitology Decision on July 13, 1987, which limited and enumerated the number of implementing procedures. On June 29, 1999 the EU Council adopted the Second Comitology

¹ This condition was stressed, i.a. by the ECJ judgement in the Case *Commission v. Council* in 1989 (Case 16/88)

² Compare the opinion stressed by the ECJ judgement in the Case *Central-Import Münster*, 1988 (Case 291/86)

³ Again, as to this condition the ECJ made comments in its decisions ,e.g. in the Case 41/69 *ACF Chemiefarfla v Commission* [1970] E.C.R. 661, paras 60—62, or the Case 16/88 *Commission v Council* [1989], para 11.

Decision, which, to a limited extent, responded to the European Parliament's wish to be able to exercise control over the implementation of acts adopted by co-decision⁴

Comitology Decision sets out the “principles and rules” with which the Community legislator should comply in adopting legislative acts that confer implementing powers on the Commission⁵. As in the case of the first Comitology Decision, the Second Decision classifies the committees into three groups, depending on whether they have advisory, management or regulatory powers. The decision sets out criteria on the basis of which the legislator may choose a committee procedure. Although those criteria are not binding, they oblige the Community legislator to state reasons in the legislative act for any departure from those criteria. This was stressed i.a. by the ECJ in its Judgement *Commission v European Parliament and Council*, 2003. The ECJ declared an unreasoned choice departing from those criteria for void⁶

All the committees are constituted by representatives of the Member States and chaired by a representative of the Commission, who has no vote. The chairman submits to the committee a draft of the measures to be taken and may lay down a time-limit within which the committee must deliver its opinion according to the urgency of the matter. The second Comitology Decision requires each committee to adopt its own rules of procedure on the basis of standard rules of procedure and to allow the public to have access to its documents (Comitology Decision, Art. 7(1) and (2)). The Commission shall inform the European Parliament of committee proceedings on a regular basis. The European Parliament receives in particular draft measures submitted by the committees for the implementation EU policies ruled by Council legal acts adopted in the co-decision procedure. If the European Parliament indicates, in a resolution setting out the grounds on which it is based, that draft implementing measures would exceed the implementing powers provided for in the basic instrument, the Commission must re-examine the draft measures and inform the European Parliament of the action which intends to take on its resolution (Comitology Decision, Art. 8)⁷.

⁴ For more details see Council Decision 1999/468/EC of June 28, 1999 laying down the procedures exercise of implementing powers conferred on the Commission, [1999])

⁵ With this aspect has dealt the ECJ in its judgement in the Case *Commission v European Parliament and Council* [2003], Case C—378/00, paras 40—42)

⁶ Case C -378/00 *Commission v European Parliament and Council* [2003] E.C.R. 1—937, paras 43—55.

⁷ See in this connection the agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of June 28, 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [2000]. OJ, L256/19

Advisory committee.

Where the Council has set up an advisory committee, the Commission must obtain its opinion, but is not bound by it. It must take the utmost account of its opinion, however, and inform it of the manner in which its opinion has been taken into account (Comitology Decision, Art. 3).

Management committee.

Where the Council has established a management committee, the Commission must likewise seek its opinion. The committee delivers its opinion by a qualified majority as laid down in Art. 205(2) of the TEC for decisions which the Council is required to adopt on a proposal from the Commission. The Commission then adopts the implementing measures, but has to communicate to the Council forthwith any measures which are not in accordance with the committee's opinion. In that event, the Commission may defer application of the measures which it has decided on for a period to be laid down in each basic instrument but which must in no case exceed three months (Comitology Decision, Art. 4(3)). The EU Council, acting on its own initiative by a qualified majority, may take a different decision within that period (Comitology Decision, Art. 4(4)). If the Council fails to reach a decision within that time-limit, the Commission's measures enter into force definitively.

A negative opinion from a management committee *ipso facto* gives the Council an opportunity to adopt a decision differing from the measures proposed by the Commission. Yet the fact that the management committee has delivered a negative opinion does not necessarily mean that every delegation has the same difficulties in accepting the Commission's measures, as a result of which the Council cannot always muster a sufficient majority in favour of different measures. In practice, the procedure does not often produce negative opinions, since the Commission ensures that its implementing function is conducted smoothly by negotiating with the delegations on the management committee beforehand.

Regulatory committee

Where the Council sets up a regulatory committee, the Commission likewise submits a draft of the measures to be taken. If the committee votes by a qualified majority (determined in the

same way as in the case of a management committee) in favour of the measures envisaged, they are adopted by the Commission. If, in contrast, the committee cannot muster a sufficient majority for a favourable opinion, or if no opinion is delivered, the Commission must submit the measures envisaged to the Council as a formal proposal and inform the European Parliament (Comitology Decision, Art 5(3), (4) and (5)). Next, the Council may adopt the proposal by a qualified majority (or amend it by a unanimous vote: see TEC, Art 250(1)) within a period to be laid down in each basic instrument but which may in no case exceed three months from the date of referral to the Council. If within that period the Council has indicated by a qualified majority that it opposes the proposal, the Commission must re-examine it. It may then submit an amended proposal to the Council re submit its proposal or present a legislative proposal on the basis of the Treaty. If on the expiry of that period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures the proposed implementing act is to be adopted by the Commission (Comitology Decision, Art. 5(6)).

Consultation of expert committees

In implementing the legislation, not only does the Commission have to take regard to the politically sensitive nature of certain measures and to the national interests of Member States but scientific and technical problems also arise. For this reason, various EU policy implementing measures provide for the involvement of a scientific or technical committee with a view to their implementation. Where such a committee is set up, it must be consulted even if the instrument to be implemented does not say so in so many words, because such consultation constitutes the only guarantee that a Community measure is necessary and adapted to the objective pursued⁸. An infringement of internal procedural rules of such a committee which are intended to ensure that Member States' representatives have the time necessary to consult the different national administrative authorities, experts or professional organisations may constitute an infringement of essential procedural requirements and result in the annulment of the measure concerned.

⁸ Compare decision by ECJ, Case C -212/91 *Angelopharm* [1994] E.C.R. 1-171, paras 31—38

4. Conclusion

The Council can control the Commission's implementing role to a greater or lesser extent depending on what sort of committee it sets up. In fact, the Comitology Decision is the expression of continuum, ranging between the two options provided for in the Art. 202 TEC, namely autonomous implementation by the Commission and implementation by the Council itself. Hence, an advisory committee does not really have any effect on the Commission executive role, whilst a management committee or a regulatory committee can result in intervention on the part of the Council. The European Parliament has often claimed that the task of implementation should be entrusted fully to the Commission. The reason is that this would enable both the Council and the European Parliament itself to supervise the Commission by virtue of their constitutional prerogatives. Both institutions should check that the Commission does not exceed the implementing power conferred on it⁹. In addition, the European Parliament may hold the Commission to account politically for the way in which it fulfills its executive role.

Where, in contrast, the Council itself undertakes implementation or makes it subject to a comitology procedure which results in the power of implementation reverting to it, it is not possible for the European Parliament to exercise political control to the same extent. This appears justified where the Council takes decisions not based on a measure adopted by itself, such as where it appoints the members of a committee. However, as far as general implementing measures are concerned, there is a danger of the Council's evading involvement of the European Parliament in the legislative process by adopting a vague piece of legislation and then giving it a completely different scope. Although the Court of Justice may find against such a practice, the European Parliament lacks the necessary means of political control towards the EU Council. It is virtually confined to the right to ask parliamentary questions. All that can be genuinely done about this problem is to allow the European Parliament a power of co-decision on the substance of the provision adopted in the legislative process, including the way in which it is implemented. In matters on which the Council "co-decides" with the European Parliament under the procedure set out in Art. 251 of the TEC, the implementation procedures are in fact determined by consensus between the two institutions.

⁹ If it does, the European Parliament and the Council and also any Member State - can bring an action for annulment of Commission measures in the Court of Justice (for cases which were successfully brought by a Member State, see ECJ, Case C—366/88 France v Commission [1990] E.C.R. I—357, paras. 7—25)

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