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**THE ‘COMITOLOGY PROCEDURE’ UNDER THE
EUROPEAN PARLIAMENT AND COUNCIL
REGULATION (EU) No 182/2011 AND ITS
IMPORTANCE FOR EU BANKING LAW**

by Professor Christos Vl. Gortsos

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The ‘Comitology procedure’ under the European Parliament and Council Regulation (EU) No 182/2011 and its importance for EU banking law*

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January 2016

Abstract

The present working paper provides an analysis of Regulation (EU) No 182/2011, 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concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers”, which repealed Council Decision 1999/468/EC of 28 June 1999, as in force after its amendment by Council Decision 2006/512/EC of 17 July 2006. It is structured in four Sections:

(i) Section 1 examines the Comitology procedures within the system of law-making under the TFEU.

(ii) A closer look into the general aspects of Regulation (EU) No 182/2011 and the ‘Comitology Committees’ provided therein is the subject of Section 2.

(iii) In Section 3, the two main Comitology procedures laid down by the Regulation (the examination and the advisory procedures) are analysed.

(iv) Finally, Section 4 presents the other provisions of the Regulation (namely those on immediately applicable implementing acts and on controls by the European Parliament and the Council, the transitional provisions and arrangements, as well as the review clause).

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* The cut-off date for the information used in this working paper is 13 December 2015.

TABLE OF CONTENTS

Introductory remarks	9
1. The Comitology procedures within the system of law-making under the TFEU ..	11
1.1 General provisions	11
1.2 Application to EU banking, capital markets and insurance law	13
2. The ‘Comitology Regulation’: a closer look	16
2.1 General aspects.....	16
2.2 The ‘Comitology Committees’	18
3. The two main procedures	21
3.1 The examination procedure	21
3.2 The advisory procedure	25
4. Other provisions	26
4.1 Immediately applicable implementing acts	26
4.2 Controls by the European Parliament and by the Council	26
4.3 Transitional provisions and arrangements	27
4.4 Review	27
Concluding remarks	28
Primary sources	29
Secondary sources	31

Introductory remarks

a) After the entry into force of the Treaty of Lisbon, the ‘Comitology procedure’ applies to implementing acts adopted in accordance with Article 291 of the Treaty on the Functioning of the European Union (TFEU). It is governed by **Regulation (EU) No 182/2011** 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”, which repealed **Council Decision 1999/468/EC** of 28 June 1999 “laying down the procedures for the exercise of implementing powers conferred on the Commission”, as in force after its amendment by **Council Decision 2006/512/EC** of 17 July 2006.

This procedure is of particular importance for European Union banking law,¹ since several of the legislative acts (within the meaning of Article 289 TFEU) which constitute its sources empower the European Commission to adopt implementing acts. This applies to:

- **Regulation (EU) No 575/2013** of the European Parliament and of the Council of 26 June 2013 “on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012” (‘Capital Requirements Regulation’ or ‘**CRR**’),²
- **Directive 2013/36/EU** of the European Parliament and of the Council of 26 June 2013 “on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (...)” (‘Capital Requirements Directive IV’ or ‘**CRD IV**’),³
- **Directive 2014/59/EU** of the European Parliament and of the Council of 15 May 2014 “establishing a framework for the recovery and resolution of credit institutions and investment firms (...)” (the ‘Bank Recovery and Resolution Directive’ or ‘**BRRD**’),⁴ and
- **Regulation (EU) No 806/2014** of the European Parliament and of the Council of 15 July 2014 “establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (...)” (the ‘**SRMR**’).⁵

¹ The same holds true for three (3) other branches of EU financial law, namely EU capital markets, EU insurance and EU financial conglomerates law (see below, **under 2.2.1**).

² OJ L 176, 27.6.2013, pp. 1-337.

³ OJ L 176, 27.6.2013, pp. 338-436.

⁴ OJ L 173, 12.6.2014, pp. 190-348.

⁵ OJ L 225, 30.7.2014, pp. 1-90. For an overview of the legislative acts which constitute the sources of EU banking law see **Gortsos (2015a)**, pp. 15-37.

The CRR and the CRD IV provide for the adoption of 37 Commission implementing acts and 62 Commission delegated acts, the BRRD for 4 Commission implementing acts and 18 Commission delegated acts, and the SRMR for 5 Commission implementing acts and 2 Council delegated acts.

(b) The present working paper provides an analysis of Regulation (EU) No 182/2011, structured in four Sections:

(i) Section 1 examines the Comitology procedures within the system of law-making under the TFEU.

(ii) A closer look into the general aspects of Regulation (EU) No 182/2011 and the ‘Comitology Committees’ provided therein is the subject of Section 2.

(iii) In Section 3, the two main Comitology procedures laid down by the Regulation (the examination and the advisory procedures) are analysed.

(iv) Finally, Section 4 presents the other provisions of the Regulation (namely those on immediately applicable implementing acts and on controls by the European Parliament and the Council, the transitional provisions and arrangements, as well as the review clause).

1. The Comitology procedures within the system of law-making under the TFEU

1.1 General provisions

1.1.1 The system of law-making

(a) The legal acts which constitute the sources of European Union law (the ‘EU law’), including EU banking law, are currently adopted pursuant to the provisions of the Treaty on the Functioning of the European Union (the ‘TFEU’).⁶ European banking law is one of the branches of financial law, defined as the set of provisions of secondary EU law aimed at the achievement of the EU’s negative and positive financial integration, with a view to creating a single financial area in the common market, positive financial integration relating to the achievement at EU level of specific financial policy objectives. In particular, EU banking law is defined as the set of provisions of European financial law, aimed at the following two objectives:

- to materialise the two basic freedoms laid down in the Treaties, *i.e.* the freedom of establishment (by setting up branches) and the freedom to provide services, with regard to EU credit institutions, and
- to ensure the stability of the European banking system, which may be disrupted by contagious credit institutions’ failures.⁷

(b) The TFEU contains ‘legal instruments’ and ‘soft law (non-legal) instruments’.⁸ In particular, **Article 288 TFEU** (first sentence) stipulates that “*to exercise the Union’s competences the institutions shall adopt regulations, directives, decisions, recommendations and opinions*”. The legal nature of these instruments is as follows:⁹

(i) Regulations, Directives and Decisions are the main legal instruments. While Regulations have general application, are binding in their entirety and directly applicable in all Member States, Directives are binding, as to the result to be achieved, upon each Member State to which they are addressed, but leave to the national authorities the choice of form and methods. Decisions are binding in their entirety and if they specify those to whom they are addressed, they are binding only on them.

(ii) Recommendations, as defined in **Article 292 TFEU**, and Opinions are soft law instruments and have no binding force.¹⁰

(c) According to the hierarchy of norms instituted by the Lisbon Treaty,¹¹ the constituent Treaties are placed on the *first tier*, along with the 2000 **Charter of Fundamental Rights of the European Union**. Even though initially it did not have any binding legal effect, as of 1 December 2009, with the entry into force of the [Treaty](#)

⁶ OJ C 326, 26.10.2012, pp. 47-200.

⁷ See on this **Gortsos (2015b)**, pp. 2-3.

⁸ On the definition and content of European soft law see, by mere indication, **MacCormick (1989)**, **Trubek, Cottrell, and Nance (2005)**, and **Chalmers (2006)**, pp. 137-140. On the definition of soft law in international law in general see, indicatively, **Boyle and Chinkin (2007)**, pp. 211-229.

⁹ TFEU, Article 288, second-fifth sentences.

¹⁰ On this matter, see the **Grimaldi case** brought before the ECJ (C-322/88, ECR (1989), p. 4407 *et seq.*, especially the paragraph on the degree to which recommendations of European bodies are binding on national courts and can apply by analogy to all acts of European soft law, and the 2007 Report of the European Parliament “on institutional and legal implications of the use of ‘soft law’ instruments” (A6-0259/2007, final, 28.6.2007).

¹¹ This hierarchy is based on **Craig and de Búrca (2015)**, pp. 111-120.

[of Lisbon](#), the Charter became legally binding on the EU institutions and on national governments, and has the same legal value as the [EU Treaties](#) themselves.¹²

The *second tier* in the hierarchy of norms is occupied by the ‘general principles of law’, which can be used for the interpretation of Treaties’ Articles. Regulations, Directives and Decisions may take the form of ‘legislative acts’, as defined in **Article 289 TFEU**, ‘delegated acts’, as defined in **Article 290 thereof**, and ‘implementing acts’, as defined in **Article 291 thereof**.¹³ These acts constitute the *third tier* in the hierarchy of norms.

1.1.2 In particular: the implementing acts (Article 291 TFEU)

(a) According to **Article 291(1) TFEU**, Member States must adopt “*all measures of national law necessary to implement legally binding Union acts*”.¹⁴ If it is deemed that uniform conditions for the implementation of legally binding acts are needed, 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” (the ‘**TEU**’),¹⁵ the Council are entitled to issue implementing acts,¹⁶ based on ‘implementing powers’ conferred on them by means of legally binding acts.¹⁷ For the purposes of implementation of this paragraph, the European Parliament and the Council, deciding by means of a Regulation in accordance with the ordinary legislative procedure, should lay down in advance the rules and general principles concerning mechanisms for control by Member States of the *Commission’s* exercise of implementing powers.¹⁸

(b) Hence, **Article 291(3)** is the legal basis for the ‘Comitology procedure’, which applies for the adoption of implementing acts in accordance with the provisions of **Regulation (EU) No 182/2011** of the European Parliament and of the Council of 16 February 2011 “laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers”.¹⁹ This Regulation is analysed below, **under 2-4**.

¹² **Treaty on European Union**, Article 6(1), first sub-paragraph. The Charter was initially solemnly proclaimed at the Nice European Council on 7 December 2000 by the European Parliament, the Council and the Commission (OJ C 364, 18.12.2000, pp. 1-22). It is currently in force (OJ C 326, 26.10.2012, pp. 391-407) as adapted at Strasbourg, on 12 December 2007, during the Lisbon Treaty negotiations ([OJ C 303, 14.12.2007, pp. 1-17](#)), and is supplemented by the **Explanations relating to the Charter of Fundamental Rights** (OJ C 303, 14.12.2007, pp. 17-35). Since the entry into force of the Lisbon Treaty, the Charter is regularly taken into consideration in the [judgments of the EU Court of Justice](#). For more details on this see: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

¹³ On these acts see **Craig (2010)**, pp. 57-66 and 260-282, and **Schoo (2012)**, pp. 2337-2344.

¹⁴ According to this wording, it cannot be ruled out that the power conferred on the Commission to adopt an implementing act is not only embedded in a legislative act (Article 289 TFEU), but also in a delegated act (Article 290 TFEU), since both are legally binding. See on this also **Craig (2010)**, p. 274, and **Wymeersch (2012)**, p. 254 (at 9.74).

¹⁵ OJ C 326, 26.10.2012, pp. 13-45. Both these TEU Articles refer to the common EU foreign and security policies.

¹⁶ **TFEU**, Article 291(4).

¹⁷ *Ibid.*, Article 291(2).

¹⁸ *Ibid.*, Article 291(3).

¹⁹ **Article 290 TFEU** on the delegated acts contains only *ex ante* control mechanisms to be exercised by the European Parliament and the Council.

1.2 Application to EU banking, capital markets and insurance law

1.2.1 Introductory remarks

The legally binding legal acts which constitute the sources of the three (3) main branches of EU financial law (EU banking, capital markets and insurance law), with the exception of those of the European Central Bank (the ‘ECB’) (on EU banking law),²⁰ are adopted:

- at three (3) levels in accordance with the ‘Lamfalussy process’,²¹ and
- at the upper two of these three levels, in accordance with the above TFEU Articles.

Even though the provisions in certain TFEU Articles constitute the legal basis for issuing the basic legal acts that constitute the sources of European financial law, primary EU law contains no European financial law provisions (as opposed to European monetary law). One could claim that the sole exception in this respect are the institutional provisions of **Article 127(5)-(6) TFEU**, which lay down the tasks of the ECB and the European System of Central Banks (the ‘ESCB’) with respect to micro-prudential supervision of financial firms, and ensuring the stability of the financial system in the EU.²²

1.2.2 The three levels of the Lamfalussy process in a nutshell

(a) At ‘Level 1’, legislative acts are adopted in the form of Regulations and Directives either (most commonly) by the European Parliament and the Council according to the ‘ordinary legislative procedure’, or by the Council under the ‘special legislative procedure’.²³ According to **Article 289(1) TFEU**, the ordinary legislative procedure consists in the adoption by the European Parliament and the Council of a Regulation, Directive or Decision on a proposal from the Commission according to **Article 294 TFEU**.²⁴ On the other hand, **Article 289(2) TFEU** provides that the special legislative procedure consists in the adoption of Regulations, Directives or Decisions either by the European Parliament with the participation of the Council, or by the Council with the participation of the European Parliament.²⁵

(b) (i) At ‘Level 2’, the Commission may be empowered by a ‘Level 1’ legislative act to adopt delegated acts and implementing acts in accordance with **Articles 290-291 TFEU**, respectively.²⁶ These legal acts are adopted on the basis of draft regulatory and

²⁰ On the ECB legal acts see **Smits (1997)**, pp. 102-106, **European Central Bank (1999)**, and **Louis (2009)**, pp. 200-211.

²¹ See on this **Ferran (2004)**, pp. 61-74 and 99-107, **Lastra (2006)**, pp. 334-341, **Hadjiemmanuil (2006b)**, pp. 815-818, and **Sousi-Roubi (2007)**, pp. 24-29.

²² On these Articles see **Smits (1997)**, pp. 193-221 and 355-360, **Hadjiemmanuil (2006)**, pp. 824-825, **Louis (2009)**, pp. 152-173, and **Lastra and Louis (2013)**, pp. 79-95.

²³ On these acts see **Craig (2010)**, pp. 255-260, and **Schoo (2012)**, pp. 2336.

²⁴ The practice of EU institutions to mainly issue Directives, rather than Regulations, is founded on the provisions of **Protocol (No 2)** “on the application of the principles of subsidiarity and proportionality”, annexed to the Treaties. This approach prevailed due to Member State pressures to preserve the principle of subsidiarity and use the form of legal acts (namely Directives) which would provide them with the greatest possible flexibility during the transposition of European law provisions into their national legal orders.

²⁵ On these procedures see **Craig (2010)**, pp. 252-253, and **Schoo (2012)**, pp. 2332-2337.

²⁶ On implementing acts see also above, under 1.1.2.

implementing technical standards developed by the so-called ‘European Supervisory Authorities (the ‘ESAs’), a by-product of the so-called ‘de Larosière Report’ of 25 February 2009,²⁷ namely:

- the European Banking Authority (the ‘EBA’) under **Regulation (EU) No 1093/2010** (the ‘EBA Regulation’),²⁸
- the European Insurance and Occupational Pensions Authority (the ‘EIOPA’) under **Regulation (EU) No 1094/2010**,²⁹ and
- the European Securities and Markets Authority (the ‘ESMA’) under **Regulation (EU) No 1095/2010**.³⁰

*It is worth mentioning that in **Declaration 39** concerning provisions of the Treaties³¹ the Commission states its intention “to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.” According to **Article 10 of the statutory Regulations** of the three ESAs, the European Parliament and the Council are entitled to delegate powers to the Commission to adopt ‘regulatory technical standards’ by means of delegated acts, as defined in **Article 290 TFEU**. In this respect, **recital 22 EBA Regulation** states the following: “There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of depositors, investors and consumers across the Union.*

(ii) In particular, draft implementing technical standards are developed according to **Article 15** of the ESAs’ statutory **Regulations**, which are then submitted to the Commission for adoption by means of implementing acts. These standards:

- similarly to the regulatory technical standards, are technical in nature, and do not imply strategic decisions or policy choices, and
- their content is to determine the conditions of application of the legislative acts on which they are based.³²

They have been broadly used to provide for common templates and instructions, mainly for reporting purposes.

(c) At ‘Level 3’, the EBA, the ESMA and the EIOPA adopt Recommendations and Guidelines. According to **Article 16** of their statutory Regulations, the three ESAs may adopt such acts in areas not governed by regulatory or implementing technical standards, their objectives being to establish consistent, efficient and effective supervisory practices within the ESFS, and to ensure the common, uniform and consistent application of EU law. These acts are addressed to either competent authorities or financial firms, including credit institutions.³³

²⁷ The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière, Report, Brussels, 25 February 2009. The Report is available at: ec.europa.eu/commission_barroso/president/pdf/statement_20090225_en.pdf, and analysed in **Louis (2010)**.

²⁸ OJ L 331, 15.12.2010, pp. 12-47.

²⁹ OJ L 331, 15.12.2010, pp. 48-83.

³⁰ OJ L 331, 15.12.2010, pp. 84-119.

³¹ OJ C 326, 26.10.2012, p. 350.

³² See indicatively **EBA Regulation**, Article 15(1), first sub-paragraph, second sentence.

³³ *Ibid.*, Article 16(1).

1.2.3 An assessment

All in all, the new legislative process enables the adoption of rules by EU institutions with the more active involvement of supervisory authorities, through the ESAs, which *de facto* have a definitely superior technical knowledge of the subject-matters. As mentioned just above, the ESAs have the power to elaborate draft regulatory and implementing technical standards, which are submitted to the Commission for endorsement through the issuance of delegated and implementing acts. This solution was evidently chosen for both categories of technical standards, because the ESAs do not have the power to issue legally binding acts since they are not EU institutions.

Such a power could only be conferred upon them by amendment of the TFEU, which was not an option. Thus, under the then applicable EU institutional framework, the legally binding nature of these technical standards was ensured through the endorsement by the Commission of the drafts developed by the ESAs (in the legal form of Commission Regulations and Decisions).³⁴

TABLE 1				
Procedure for the adoption of legal acts which constitute the sources of European financial law after the entry into operation of the ESFS(*)				
	Level 1 (*): legally binding acts	Level 2 (*): legally binding acts		Level 3 (*): non-legally binding acts (soft law)
Type of legal act	Legislative acts falling within the Authorities' scope of action (Article 289 TFEU)	Regulatory technical standards by means of delegated acts (Article 290 TFEU)	Implementing technical standards by means of implementing acts (Article 291 TFEU)	Guidelines and recommendations (Regulations establishing the Authorities)
Body issuing the legal act	European Parliament and Council (under the ordinary legislative procedure)	European Commission	European Commission	EBA/ESMA/EIOPA (according to the scope of action)
Assistance with the issuance of a legal act	EBC/ESC/EIOPC (**) (as advisory Committees) EBA/ESMA/EIOPA (as opinion-giving bodies)	EBA/ESMA/EIOPA (elaborating draft regulatory technical standards)	EBA/ESMA/EIOPA (elaborating draft implementing technical standards) EBC/ESC/EIOPC (as comitology Committees) (***)	
<p>(*) Reference to these “three levels” depicts the wording that was used (without any explicit legal basis) in the Lamfalussy Report.</p> <p>(**) European Banking Committee, European Securities Committee, European Insurance and Occupational Pensions Committee (see below, under 2.2.1).</p> <p>(***) According to the comitology procedure (Regulation (EU) No 182/2011).</p> <p>Note: The ECB has to be consulted on any proposed EU legal act according to Articles 127(4) and 282(5) TFEU.</p>				

³⁴ *Ibid.*, Articles 10(4) and 15(4).

2. The ‘Comitology Regulation’: a closer look

2.1 General aspects

(a) Before the entry into force of the **Treaty of Lisbon** “amending the Treaty on European Union and the Treaty establishing the European Community”,³⁵ the ‘Comitology procedure’, by which the Member States control the Commission’s exercise of implementing powers, was set out in **Article 202** of the Treaty “establishing the European Community” (the ‘TEC’).³⁶ It was initially governed by **Council Decision 87/373/EC** of 13 July 1987³⁷ and then, since 1999, by **Council Decision 1999/468/EC** of 28 June 1999 “laying down the procedures for the exercise of implementing powers conferred on the Commission”³⁸ (the ‘Comitology Decision’) as in force after its amendment by **Council Decision 2006/512/EC** of 17 July 2006.³⁹

After the entry into force of the Lisbon Treaty, this procedure applies only under **Article 291 TFEU** to the adoption of implementing acts by the Commission.⁴⁰ This procedure is governed by **Regulation (EU) No 182/2011** 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” (the ‘Implementing Acts Regulation’ or ‘Comitology Regulation’).⁴¹ It was adopted on **16 February 2011**, entered into force on **1 March 2011**, and is binding in its entirety and directly applicable in all Member States (but not in the non-EU Member States of the European Economic Area (the ‘EEA’), i.e. Iceland, Liechtenstein and Norway).⁴²

Its legal basis is **Article 291(3) TFEU**, which reads as follows: “*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*”. Accordingly, it requires that:

- these rules and general principles must be adopted jointly by the European Parliament and the Council (and not only by the Council as under **Article 202 TEC**), and
- the legal instrument to be used are Regulations (Article 202 TEC was silent on the form of legal instrument and the Council resorted to the adoption of Decisions).

³⁵ OJ C 306, 17.12.2007, pp. 1-271.

³⁶ OJ C 321, 29.12.2006, pp. 37-186.

³⁷ OJ L 197, 18.7.1987, pp. 33-35.

³⁸ OJ L 184, 17.7.1999, pp. 23-26. See on this **Haibach (2000)**.

³⁹ OJ L 200, 22.7.2006, pp. 11-13. On this Decision see **Chalmers (2006)**, pp. 159-167, and **Christiansen and Vaccari (2006)**.

⁴⁰ On the implementing acts see above, **under 1.1.2**.

⁴¹ OJ L 55, 28.2.2011, pp. 13-20. For a brief presentation of this Regulation see **Schoo (2012)**, pp. 2343-2344, and **Hardacre and Kaeding (2013)**, pp. 15-19.

⁴² **Regulation (EU) No 182/2011**, Article 16. More details on the EEA can be found at: <http://www.efta.int>.

(b) The Comitology Regulation lays down the rules and general principles governing the mechanisms that apply if a legally binding EU act (the ‘**basic act**’) identifies the need for uniform conditions of implementation. It also requires that the adoption of implementing acts by the Commission should be subject to the control of Member States.⁴³

The Regulation repealed the Comitology Decision. Nevertheless, the effects of **Article 5a** of that Decision, on the ‘regulatory procedure with scrutiny’, have been maintained for the purposes of the existing basic acts making reference to it.⁴⁴

(c) Comitology applies when the Commission has been granted implementing powers by a basic act, which also provides for the Commission to be assisted by a Committee composed of Member States’ representatives. It is not compulsory, since some powers can be implemented without the Commission having to go through a Committee (e.g., when allocating certain minor grants).

(d) Taking into account the nature or the impact of the implementing act required and for the purpose of simplification *vis-à-vis* the previous regime, a basic act may provide for the application of any of the following two procedures:

- the ‘examination procedure’, and
- the ‘advisory procedure’.⁴⁵

The choice of procedure is made, depending on the nature of the implementing powers, in the basic act. According to **recital (5)**:⁴⁶ “*It is necessary to ensure that the procedures for (...) control [by Member States] are clear, effective and proportionate to the nature of the implementing acts and that they reflect the institutional requirements of the TFEU as well as the experience gained and the common practice followed in the implementation of Decision 1999/468/EC.*” In addition, **recital (10)** provides the following: “*Criteria should be laid down to determine the procedure to be used for the adoption of implementing acts by the Commission. In order to achieve greater consistency, the procedural requirements should be proportionate to the nature and impact of the implementing acts to be adopted.*”

Before discussing these two procedures in detail (see below, **under 4 and 5**), we need firstly to refer to the ‘Comitology Committees’ which play an important role therein.

⁴³ *Ibid.*, Article 1.

⁴⁴ *Ibid.*, Article 12 and recital (21). This procedure allowed the European Parliament and the Council to oppose the adoption of draft measures if those exceeded the implementing powers provided for in the basic act, or if the draft was incompatible with the aim or the content of that instrument or failed to respect the principles of subsidiarity and/or proportionality.

⁴⁵ *Ibid.*, Article 2(1) and recital 8. On the transitional provisions and arrangements see below, **under 4.3**.

⁴⁶ Unless otherwise specified hereinafter, any reference in this working paper to Articles or recitals is a reference to the Comitology Regulation.

2.2 The ‘Comitology Committees’

2.2.1 Common provisions⁴⁷

(a) When adopting implementing acts under **Article 291 TFEU**, the Commission is assisted by a ‘Comitology Committee’ (the ‘**Committee**’). These Committees are set up by the basic acts, which define the content and scope of the implementing powers and determine the type of comitology procedure to be applied. They are composed of Member States’ representatives and chaired by a representative of the Commission, who is not taking part in the Committee vote.⁴⁸

In the financial sector there are four (4) such Committees:

- the **European Securities Committee** (the ‘**ESC**’), which entered into operation on 7 June 2001 and substituted for the ‘**Securities Contact Committee**’,⁴⁹
- the **Financial Conglomerates Committee**, which started operating in 2003,⁵⁰
- the **European Banking Committee** (the ‘**EBC**’), which started operating on 13 April 2005⁵¹ as the successor to the ‘**Banking Advisory Committee**’ (established by the so-called “**First Banking Directive**” in 1978),⁵² and
- the **European Insurance and Occupational Pensions Committee** (the ‘**EIOPC**’), which also entered into operation on 13 April 2005 and substituted for the ‘**Insurance Committee**’.⁵³

(b) The regular operating procedure of each Committee is the following:⁵⁴

(i) The Chair submits to the Committee the draft implementing act to be adopted by the Commission and, except in duly justified cases,⁵⁵ he/she convenes a meeting,

⁴⁷ These provisions are labeled as common, since they apply to the examination and the advisory procedures (Articles 5 and 4, respectively), as well as to the referral to the Appeal Committee (Article 6), the procedure for the adoption of implementing acts in exceptional cases (Article 7) and the procedure on immediately applicable implementing acts (Article 8) (*ibid.*, Article 3(1)). For the sake of consistency, the provisions of Article 3(7) on the Appeal Committee are presented below, **under 3.1.3**.

⁴⁸ *Ibid.*, Article 3(2) and recital (6).

⁴⁹ **Commission Decision 2001/528/EC** of 6 June 2001 “establishing the European Securities Committee” (OJ L 191, 13.7.2001, pp. 45-46), as amended by **Commission Decision 2004/8/EC** (OJ L 3, 7.1.2004, p. 33).

⁵⁰ **Directive 2002/87/EC** of the European Parliament and of the Council “on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (...)” (OJ L 35, 11.2.2003, pp. 1-27), Article 21.

⁵¹ **Commission Decision 2004/10/EC** of 5 November 2003 “establishing the European Banking Committee” (OJ L 3, 7.1.2004, pp. 36-37).

⁵² **First Council Directive 77/780/EEC** of 12 December 1977 “on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions” (OJ L 322, 17.12.1977, pp. 30-37).

⁵³ **Commission Decision 2004/9/EC** of 5 November 2003 “establishing the European Insurance and Occupational Pensions Committee” (OJ L 3, 7.1.2004, pp. 34-35).

It is worth mentioning that all these Decisions were not based on any specific TEC Article, but on the Treaty in general. It is also noteworthy that the EBC, the ESC and the EIOPC, all established under the ‘Lamfalussy process’, fulfill also advisory functions (which were the exclusive functions of their predecessors), by providing advice to the Commission on policy issues related to banking, securities and insurance activities, respectively.

⁵⁴ **Regulation (EU) No 182/2011**, Article 3(3)-(4).

which must take place at least fourteen (14) days after submission of the draft implementing act and of the draft agenda.

(ii) Before the Committee delivers its opinion, any of its members may suggest amendments, and the Chair may present amended versions of the draft implementing act. The Chair must endeavour to reach consensus and inform the Committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards suggestions largely supported within the Committee.

(iii) The Committee must deliver its opinion on the draft implementing act within a time limit laid down by the Chair according to the urgency of the matter. Time limits must be proportionate and afford Committee members early and effective opportunities to examine the draft implementing act and express their views.

(c) For the sake of simplification,⁵⁶ the Comitology Regulation provides that in “duly justified cases”, determined by the Chair, he/she may obtain the Committee’s opinion by written procedure and not by convening a meeting. In this case, he/she must send to the Committee members the draft implementing act and lay down a time limit for delivery of an opinion according to the urgency of the matter. Any Committee member not opposing the draft implementing act or not explicitly abstaining from voting thereon before the expiry of that time limit is deemed to have tacitly agreed to it. Unless otherwise provided for in the basic act, the written procedure is terminated without result if, within the above-mentioned time limit, the Chair so decides or a Committee member so requests. In such a case, the Chair must convene a meeting within a reasonable time.⁵⁷

(d) In any case, the Committee’s opinion must be recorded in the minutes, and its members have the right to ask for their position to be recorded therein. The minutes must be sent by the Chair to the Committee members without delay.⁵⁸

2.2.2 Rules of procedure

(a) Each Committee must adopt, by a simple majority of its members, its own Rules of Procedure on the proposal of its Chair. These must be based on ‘Standard Rules of Procedure for Committees’ drawn up by the Commission following consultation with Member States and published in the *Official Journal*.⁵⁹ Each Committee decides its operating procedures, based on these rules.⁶⁰

(b) For the sake of transparency, applicable to the Committees are the principles and conditions on public access to documents, as well as the rules on data protection as applied to the Commission.⁶¹

⁵⁵ See just below, **under (c)**.

⁵⁶ **Regulation (EU) No 182/2011**, recital (9).

⁵⁷ *Ibid.*, Article 3(5).

⁵⁸ *Ibid.*, Article 3(6).

⁵⁹ *Ibid.*, Article 9(1). These standard rules are published in: OJ C 206, 12.7.2011, pp. 11-13. Article 9(1) also stipulates that, to the extent necessary, the Committees existing in 2011 should adapt their rules of procedure to these standard rules.

⁶⁰ As an example, the EBC adopted its Rules of Procedure in July 2005, which are in force as amended in December 2010 (available at: http://ec.europa.eu/finance/bank/committees/ebc/index_en.htm).

⁶¹ **Regulation (EU) No 182/2011**, Article 9(2).

In that respect:

- public access to information on Committees' proceedings is governed by **Regulation (EC) No 1049/2001** of the European Parliament and of the Council of 30 May 2001 "regarding public access to European Parliament, Council and Commission documents",⁶² and
- the processing of personal data is governed by **Regulation (EC) No 45/2001** of the same institutions of 18 December 2000 "on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data".⁶³

2.2.3 Information on Committee proceedings

For the sake of transparency as well, the Commission is required to publish an Annual Report on the Committees' work.⁶⁴ It must also keep a 'Register of Committee proceedings' or '**Comitology Register**'. This Register contains a list of all Committees, as well as background information and documents relating to the work of each committee. *Inter alia*, the following documents are included: the agendas of Committees' meetings, summary records of the meetings and the lists of authorities representing the Member States, the draft implementing acts on which the Committees are asked to deliver an opinion, the voting results, the final draft implementing acts following delivery of the Committees' opinion, information concerning the adoption of the final draft implementing acts by the Commission, and statistical data on the Committees' work.⁶⁵ The references to all these documents and the statistical data must be made public in the Register.⁶⁶

⁶² OJ L 145, 31.5.2001, pp. 43-48.

⁶³ OJ L 8, 12.01.2001, pp. 1-22.

⁶⁴ **Regulation (EU) No 182/2011**, Article 10(2).

⁶⁵ *Ibid.*, Article 10(1), points (a)-(h), respectively, and recital (20). On this Register, see: <http://ec.europa.eu/transparency/regcomitology/index.cfm>. Documents prior to 2008 are available from the old comitology register (<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.archive&reset=1>).

⁶⁶ *Ibid.*, Article 10(5).

3. The two main procedures

3.1 The examination procedure

3.1.1 General provisions

(a) The examination procedure applies *in principle*⁶⁷ to the adoption of the following categories of implementing acts:⁶⁸

(i) Implementing acts of ‘general scope’.

(ii) Specific implementing acts with a potentially important impact, such as those relating to programmes with substantial budgetary implications, the common agricultural and fisheries policies,⁶⁹ the environment,⁷⁰ security and safety (or protection of the health or safety) of humans, animals or plants,⁷¹ the common commercial policy,⁷² and taxation.⁷³

That procedure must ensure that, also *in principle*, implementing acts cannot be adopted by the Commission if they are not in accordance with the Committee’s opinion (except in very exceptional circumstances, where they may apply for a limited period of time) and that the Commission is able to review the draft implementing acts if no opinion is delivered by the Committee, taking nevertheless its views into account.⁷⁴

(b) When this procedure applies, the Committee must deliver its opinion with the qualified majority laid down in **Articles 16(4)-(5) TEU** (and, where applicable, **Article 238(3) TFEU**)⁷⁵ in order for acts to be adopted based on a proposal from the Commission.⁷⁶ Depending on the content of the opinion delivered, the Commission must take any of the following courses of action:⁷⁷

(I) Positive opinion

If the Committee delivers a positive opinion, the Commission must *in principle* adopt the draft implementing act. Nevertheless, the European Parliament, the Council and the Commission made the following Statement (attached to the Comitology Regulation): “*Article 5(2) of the Regulation requires the Commission to adopt a draft implementing act where the committee delivers a positive opinion. This provision does not preclude that Commission may, as is the current practice, in very exceptional cases, take into consideration new circumstances that have arisen after the vote and decide not to*

⁶⁷ See also below, **under 3.2**.

⁶⁸ **Regulation (EU) No 182/2011**, Article 2(2) and recital (11), first sentence.

⁶⁹ **TFEU**, Articles 38-44.

⁷⁰ *Ibid.*, Articles 191-193.

⁷¹ *Ibid.*, Article 168.

⁷² *Ibid.*, Articles 206-207.

⁷³ *Ibid.*, Articles 110-113.

⁷⁴ **Regulation (EU) No 182/2011**, recital (11), second and third sentences.

⁷⁵ On these Articles see, by mere indication, **Hix (2012a)**, pp. 211-213, and **Hix (2012b)**, pp. 2086-2087, respectively.

⁷⁶ **Regulation (EU) No 182/2011**, Article 5(1).

⁷⁷ *Ibid.*, Article 5(2)-(4), respectively.

adopt a draft implementing act, after having duly informed the committee and the legislator.”

(II) Negative opinion

If the Committee delivers a negative opinion, the Commission may not adopt the draft implementing act. Nevertheless, if an implementing act is “deemed to be necessary”, the Chair may either submit an amended version of the draft implementing act to the Committee within two (2) months of delivery of the negative opinion, or submit the draft implementing act within one (1) month of such delivery to the Appeal Committee for further deliberation.⁷⁸ This is without prejudice to **Article 7**.⁷⁹

(III) No opinion

(a) If no opinion is delivered (i.e. if there is no qualified majority for or against) the Commission has *in principle* the discretion either to adopt the draft implementing act or to submit to the Committee an amended version thereof, taking into account the views expressed in the Committee.

(b) Exceptionally and without prejudice to **Article 7**, the Commission is not allowed to adopt the draft implementing act, if:

- it concerns financial services (i.e. it is of relevance to EU financial law), taxation, the protection of the health or safety of humans, animals or plants, or ‘definitive multilateral safeguard measures’ in the framework of the EU common commercial policy (the ‘CCP’),⁸⁰
- the basic act so provides, *or*
- a simple majority of the Committee members opposes it.

Nevertheless, similarly to the above-mentioned case when a negative opinion is delivered, if an implementing act is “deemed to be necessary”, the Chair may in any of these cases either submit an amended version of that act to the Committee within two (2) months of the vote, or submit the draft implementing act within one (1) month of the vote to the Appeal Committee for further deliberation.

(c) As a *lex specialis*, for the adoption of draft ‘definitive anti-dumping or countervailing measures’ in the framework of the CCP, if a simple majority of the Committee’s members opposes the draft implementing act, the Commission must conduct consultations with Member States, inform its members of their results, and submit a draft implementing act to the Appeal Committee.⁸¹ By way of derogation from **Article 3(7)**, in this case the Appeal Committee meets fourteen (14) days at the earliest

⁷⁸ See below, **under 3.1.2**.

⁷⁹ See below, **under 3.1.3**.

⁸⁰ On the CCP see **Cremona (2011)**, pp. 226-232, and **Osteneck (2012)**. See also the Commission Statements attached to the Regulation (fifth-seventh paragraphs), in particular with regard to the trade defense instruments (the ‘TDIs’).

⁸¹ **Regulation (EU) No 182/2011**, Article 5(5).

and one (1) month at the latest after the submission of the draft implementing act and must deliver its opinion in accordance with **Article 6**.⁸²

3.1.2 Adoption in exceptional cases

By way of derogation from **Articles 5(3)** and **5(4), second sub-paragraph**,⁸³ the Commission may adopt a draft implementing act, if its adoption without delay is necessary in order to avoid either creating a significant disruption of the markets in the area of agriculture⁸⁴ or a risk for the EU financial interests within the meaning of **Article 325(3) TFEU**.⁸⁵ In this case, the Commission must immediately submit the adopted implementing act to the Appeal Committee. Then, if the Appeal Committee delivers a negative opinion on the adopted implementing act, the Commission must repeal it immediately, and if it delivers a positive opinion or no opinion is delivered, the implementing act remains in force.⁸⁶

3.1.3 The Appeal Committee

(a) In the cases and under the conditions mentioned above, if the Commission is prevented from carrying out its implementing act, it can refer the case to the Appeal Committee. The Appeal Committee, an innovative element of the Comitology Regulation, is not a permanent body, but rather a ‘procedural tool’ giving Member States the opportunity to discuss controversial aspects of the proposed act at a higher level of representation.⁸⁷

(b) The Appeal Committee, which adopted its own **Rules of Procedure** on 29 March 2011 by a simple majority of its members on a proposal from the Commission,⁸⁸ functions like any other Comitology Committee (albeit, as just mentioned, at a higher level of representation): it is made up of Member States’ representatives and is chaired by the Commission. The Chair sets the meeting dates in close cooperation with its members, in order to enable Member States and the Commission to ensure an appropriate level of representation.⁸⁹

⁸² The above time limits are without prejudice to the need to respect the deadlines laid down in the relevant basic acts (*ibid.*, Article 5(6)). On Articles 3(7) and 6 see below, **under 3.1.3**.

⁸³ See above, **under 3.1.1 (b)**.

⁸⁴ See on this in particular the Commission Statements attached to the Regulation (eighth-tenth paragraphs).

⁸⁵ According to this TFEU Article, without prejudice to other provisions of the Treaties, the Member States must coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end, they must organise, jointly with the Commission, close and regular cooperation between the competent authorities.

⁸⁶ **Regulation (EU) No 182/2011**, Article 7.

⁸⁷ According to **Hardcare and Kaeding (2013)**, at p. 18, “the Appeal Committee was created because the Council wanted to have a political body to look at controversial acts (i.e. ones that have been voted against, or received no opinion, in committees - which whilst not significant in number can be very sensitive for the Council)”.

⁸⁸ OJ C 183, 24.6.2011, pp. 13-16.

⁸⁹ **Regulation (EU) No 182/2011**, Article 3(7), first, second, fourth and fifth sub-paragraphs, and recital (7). The fact that the Appeal Committee functions like any other Comitology Committee explains why Article 3(7) is included in the common provisions.

The voting rules of the Appeal Committee are also similar to those of the other Committees, since the Appeal Committee must deliver its opinion by the qualified majority provided for in **Article 5(1)**.⁹⁰ Until an opinion is delivered, any member may suggest amendments to the draft implementing act and the Chair may decide whether or not to modify it.

The Chair must endeavour to find solutions with the widest possible support within the Appeal Committee, and inform it of the manner in which the discussions and suggestions for amendments have been taken into account (in particular as regards such suggestions largely supported within the Committee).⁹¹

(c) If the Appeal Committee is seized, it must meet at the earliest fourteen (14) days, except in duly justified cases, and at the latest six (6) weeks, after the date of referral. Without prejudice to **Article 3(3)**,⁹² the Appeal Committee must deliver its opinion within two (2) months of the date of referral.⁹³

(d) Depending on the Appeal Committee's opinion, the Commission has to act as follows:⁹⁴

(i) If the Appeal Committee delivers a positive opinion, the Commission adopts the draft implementing act.

(ii) If the Appeal Committee delivers a negative opinion, the Commission must abide by this and does not adopt the draft implementing act.

(iii) If no opinion is delivered, the Commission may adopt the draft implementing act.

By way of derogation, for the adoption of definitive multilateral safeguard measures, in the absence of a positive opinion voted with the qualified majority provided for in **Article 5(1)**,⁹⁵ the Commission is not allowed to adopt the draft measures.⁹⁶

The Rules of Procedure for the Appeal Committee contain specific provisions on the convening of meetings (Article 1), the convening of a meeting in cases of draft definitive anti-dumping or countervailing measures (Article 2), the documentation to be submitted to its members (Article 3), its opinions (Article 4), representation and quora (Article 5), third parties and experts (Article 6), the written procedure (Article 7), secretarial support (Article 8), minutes and their summary record (Article 9), the attendance list (Article 10), correspondence (Article 11), access to documents and confidentiality (Article 12), the protection of personal data (Article 13), and the review of the Rules by the Commission (Article 14).

⁹⁰ See above, **under 3.1.1 (b)**.

⁹¹ **Regulation (EU) No 182/2011**, Article 6(1)-(2).

⁹² See above, **under 2.2.1 (b)(iii)**.

⁹³ **Regulation (EU) No 182/2011**, Article 3(7), third sub-paragraph.

⁹⁴ *Ibid.*, Article 6(3).

⁹⁵ See above, **under 3.1.1 (b)**.

⁹⁶ **Regulation (EU) No 182/2011**, Article 6(4).

3.2 The advisory procedure

(a) The second procedure, the advisory, applies, in principle, for the adoption of other implementing acts. In “duly justified cases”, however, it may also apply for the adoption of the implementing acts for which the application of the examination procedure is provided for.⁹⁷

(b) Under this procedure, which (unlike the examination procedure) is identical to the advisory procedure under the Comitology Decision, the Committee must deliver its opinion. If the Committee takes a vote, the opinion is delivered by a simple majority of its members, but the Commission has the discretion to decide whether or not to carry out the proposed implementing act, taking the “*utmost account*” of the conclusions drawn from the discussions within the Committee, and the opinion delivered.⁹⁸

⁹⁷ *Ibid.*, Article 2(3) and recital (15). On Article 2(2) see above, **under 3.1.1 (a)**.

⁹⁸ *Ibid.*, Article 4.

4. Other provisions

4.1 Immediately applicable implementing acts

(a) By way of derogation from **Articles 4-5** on the application of the examination or the advisory procedure, a basic act may provide that on “duly justified imperative grounds of urgency” applicable is **Article 8** on ‘immediately applicable implementing acts’. In this case and unless the basic act provides otherwise, the Commission **may** adopt an implementing act without its prior submission to a Committee, which applies (immediately) and remains in force for a *maximum* period of six (6) months. However, at the latest fourteen (14) days after its adoption, the Chair has to submit this implementing act to the relevant Committee in order to obtain its opinion.

If under the examination procedure the Committee delivers a negative opinion,⁹⁹ the Commission must immediately repeal the implementing act.¹⁰⁰

(b) This procedure must apply when the Commission adopts ‘provisional anti-dumping or countervailing measures’ in the framework of the CCP after consulting or, in cases of extreme urgency, after informing the Member States. In the latter case, consultations must take place ten (10) days at the latest after notification to the Member States of the measures adopted by the Commission.¹⁰¹

4.2 Controls by the European Parliament and by the Council

Even though the main control of the Commission’s implementing powers is exercised by Member States (i.e. by national governments) through the Committees, these powers are also subject to supplementary *ex post* control by the European Parliament and the Council, which have a right of information and a right of scrutiny. In particular:

(a) These two EU institutions must have access to the statistical data on the Committees’ work, while the Commission has to make available to them, at the same time as they are sent to the Committee members, the documents referred to in **Article 10(1), points (b), (d) and (f)**¹⁰² and inform them of the availability of such documents.¹⁰³

(b) If a basic act is adopted under the ordinary legislative procedure,¹⁰⁴ either the European Parliament or the Council may at any time indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for therein. In such a case, the Commission must review the draft implementing act, taking account of the positions expressed by the European Parliament and the Council and the urgency of the matter, and inform them whether it intends to maintain, amend or withdraw it.¹⁰⁵

⁹⁹ See above, **under 3.1.1 (b)(II)**.

¹⁰⁰ **Regulation (EU) No 182/2011**, Article 8(1)-(4) and recital (16).

¹⁰¹ **Regulation (EU) No 182/2011**, Article 8(5).

¹⁰² See above, **under 2.2.3**.

¹⁰³ **Regulation (EU) No 182/2011**, Article 10(3)-(4) and recital (17).

¹⁰⁴ On this procedure see above, **under 1.2.2 (a)**.

¹⁰⁵ **Regulation (EU) No 182/2011**, Article 11 and recital (18), as well as the Commission Statements attached to the Regulation (eleventh-thirteenth paragraphs).

4.3 Transitional provisions and arrangements

As already mentioned,¹⁰⁶ the Comitology Regulation repealed Comitology Decision, as in force. If basic acts adopted before the entry into force of the Regulation provided for the exercise of implementing powers by the Commission in accordance with that Decision, applicable were the rules laid down in **Article 13** (for a summary see **Table 2** below).¹⁰⁷ As a transitional arrangement, the Comitology Regulation did not affect pending procedures, in which a Committee had already delivered its opinion in accordance with the Comitology Decision.¹⁰⁸

TABLE 2	
Equivalence between Articles in Decision 1999/648/EC and in Regulation (EU) No 182/2011	
Decision 1999/648/EC	Regulation 182/2011
Article 3: advisory procedure	Article 4: advisory procedure
Article 4: management procedure	Article 5: examination procedure (with the exception of Article 5(4), second and third sub-paragraphs)
Article 5: regulatory procedure	Article 5: examination procedure
Article 5a: regulatory procedure with scrutiny	Article 5: examination procedure
Article 6: safeguard procedure	Article 8: immediately applicable implementing acts

4.4 Review

By 1 March 2016, the Commission is required to present a Report to the European Parliament and to the Council on the implementation of the Comitology Regulation, accompanied, if necessary, by appropriate legislative proposals.¹⁰⁹

¹⁰⁶ See above, **under 2.1 (b)**.

¹⁰⁷ See also the Commission Statements attached to the Regulation (first-fourth paragraphs). These Statements provided the following:

(a) The Commission should proceed to an examination of all legislative acts in force which were not adapted to the regulatory procedure with scrutiny before the entry into force of the Lisbon Treaty, in order to assess whether they needed to be adapted to the regime of delegated acts under Article 290 TFEU and make the appropriate proposals as soon as possible. During this alignment exercise, the Commission should keep the European Parliament regularly informed on draft implementing measures related to these instruments which should become, in the future, delegated acts.

(b) As regards legislative acts in force which contained references to the regulatory procedure with scrutiny, the Commission should review the provisions attached thereto in each instrument it intended to modify, in order to adapt them in due course according to the criteria laid down in the Treaty. In addition, the European Parliament and the Council were entitled to signal basic acts they considered important to adapt as a matter of priority. The Commission should assess the results of this process by the end of 2012 and prepare the appropriate legislative initiatives to complete the adaptation by the end of 2013.

¹⁰⁸ **Regulation (EU) No 182/2011**, Article 14.

¹⁰⁹ *Ibid.*, Article 15.

Concluding remarks

The Comitology Regulation contains several innovative elements compared to the Comitology Decision, which it repealed, mainly in the direction of bolstering the simplicity of Comitology procedures. Given the fact that four (4) main sources of EU banking law empower the European Commission to adopt a significant number of implementing acts, an understanding of this Regulation's provisions, and in particular of those pertaining to the examination procedure which applies to all cases, allows researchers of this branch of EU economic law to better grasp the dynamics developed among the various institutions involved in the overall law-making process.

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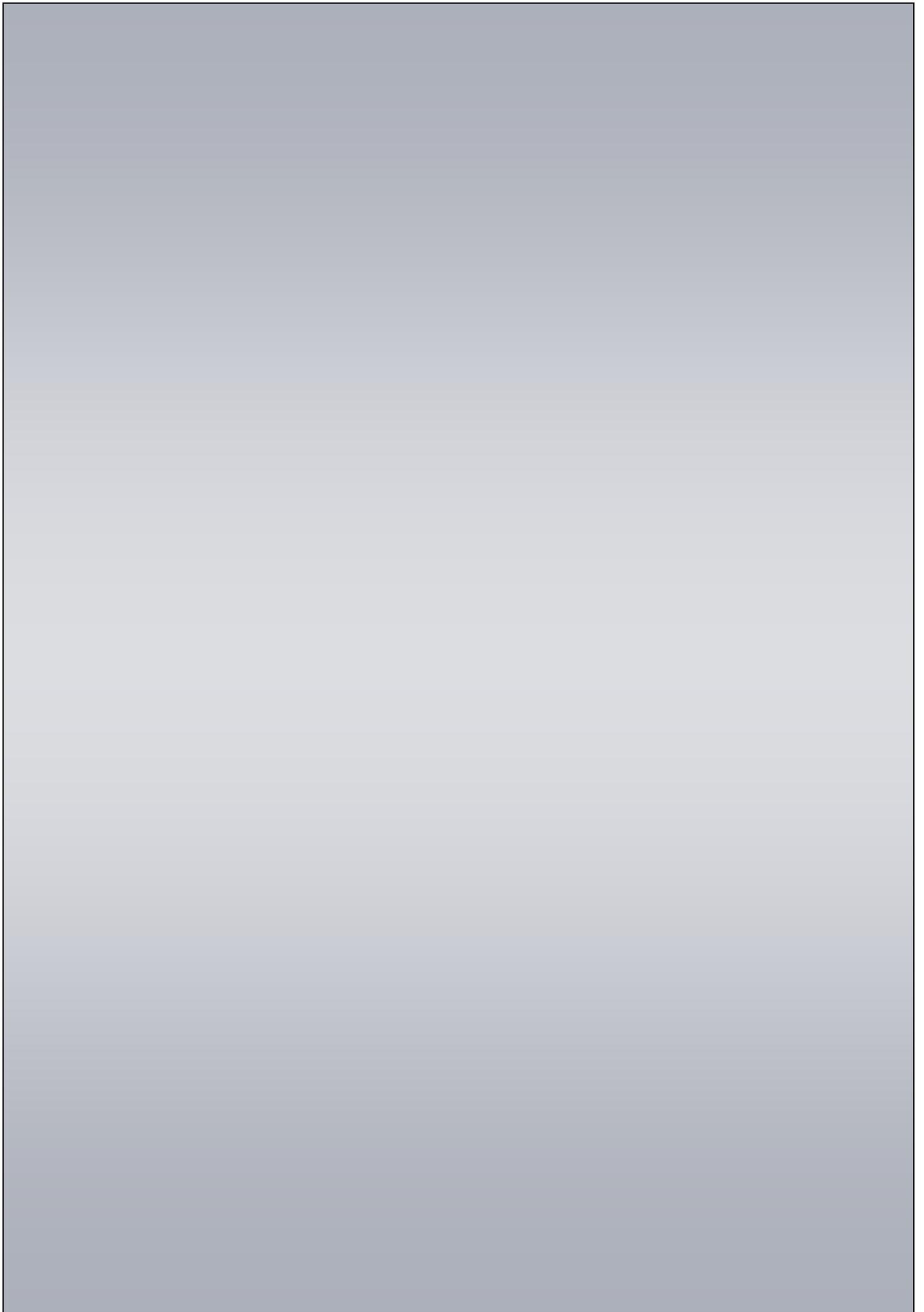
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