Comitology: A Briefer

On February 2, 2016, EU and U.S. negotiators achieved a political agreement on the EU-U.S. Privacy Shield. On February 29, they released the text of that agreement. The deal, however, faces a long road ahead. Approval will require a stringent, months-long review process by stakeholders across the EU to determine whether the proposed U.S. privacy protections for EU citizens meet European standards.

Having prepared a draft adequacy decision, the European Commission will now consult with European Data Protection Authorities (DPAs) and then submit the draft to the Member States, represented through the Article 31 Committee. The draft will also be disclosed to the European Parliament and the Council of Ministers.

This final step of review through a committee of Member State experts, known as comitology, can seem arcane. The aim of this document is to provide stakeholders with a layperson’s explanation of the comitology procedure.

What is Comitology?

In the European Union, the two bodies that approve legislation, the European Parliament and the Council of Ministers, can grant the European Commission the authority to make small, technical decisions in how legislation is put into practice. These decisions constitute an implementing act. The purpose of an implementing act is to simplify the process of harmonizing how EU laws are implemented across the 28 Member States.

The Commission begins by formulating a draft measure of how to implement the EU law in question and then submits it to a committee of expert representatives drawn from the Member States. This process of soliciting an opinion from the committee, which generally takes about three months, is known as comitology.

There are two sets of procedures available under comitology: advisory and examination. The Parliament and the Council of Ministers delineate in the original legislation which procedure the Commission will follow.

Under the advisory procedure, the Commission receives a non-binding opinion from the committee, and is therefore free to decide whether or not to carry out the implementing act it has proposed, although it is obligated to take the committee’s opinion into account. The advisory procedure is therefore used for less important, less controversial measures.

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1 Most EU legislation is passed jointly by the European Parliament and the Council of Ministers. The European Commission has the authority to propose legislation.

2 In the case of the EU-U.S. Privacy Shield, this is the Article 31 Committee.
The examination procedure, meanwhile, is used for acts with “potentially important impact,” a vague term that refers to everything from commercial and taxation policy to agricultural and health regulations. The adequacy decision for the EU-U.S. Privacy Shield will be reviewed through examination. It requires a more detailed explanation.

**What is the Examination Procedure?**

The examination procedure requires the Commission’s draft implementing act to be voted on by the Member State committee.

If there is a qualified majority in favor of or against the draft, then the Commission is bound either to go through with or to drop the measure, as the case may be. If the Commission disagrees with the outcome, it can take the draft to an ad-hoc appeal committee, which is also made up of Member State representatives. Another qualified majority is needed to block the draft.

Throughout the entire examination procedure, in fact, qualified majorities are needed; anything short of one, including a simple majority, leaves the decision up to the Commission’s discretion.

**What are the Checks on Comitology?**

All draft implementing acts proposed by the Commission are immediately disclosed to the Parliament and to the Council of Ministers when they are submitted to the committee for comitology, under what is known as the right of information.

Each body also has the right to intervene in the procedure when it believes the Commission has overstepped its authority. This is known as the right of scrutiny.

If the right of scrutiny is exercised, either the Parliament or the Council of Ministers submits a non-binding resolution that obligates the Commission to review the implementing act, to take into account the positions expressed, and to inform them whether it intends to maintain, amend, or withdraw the draft measure.

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4 A qualified majority constitutes a vote of 55% of the Member States representing 65% of the EU population.