

THE COMITOLOGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

www.eppa.com

#65, July 2020

EDITORIAL

Expert groups: a source of confusion in EU governance

Every time a young co-worker talks to me about “expert groups”, I ask if they mean an expert group in the proposal or implementation stage. The question generally receives no answer. However, there is nothing in common between an agricultural Civil Dialogue Group and an expert group for delegated acts. Failing to master the nature, role and composition of expert groups means you will get lost in the EU labyrinth.

Officially transparent, but totally opaque

By a decision of 30 May 2016, the Commission adopted Horizontal Rules on the creation and functioning of expert groups. There are 724 operating today, a considerable number. It should be clarified that Commission expert groups intervene in either the proposal stage (playing the role of “consultative committees”) or the implementation stage (compensating for the absence of comitology committees for delegated acts). There are no Commission expert groups in the legislative phase.

As we will see in this month’s Newsletter, expert groups are a mosaic, if not a mess: there is no real logic in the naming of groups, no homogeneity in their composition (national civil servants, stakeholders, academics, technical experts, sometimes a mix of all these), no consistency in the chairing (a national official, a Commission official or a professional person? It depends!). In short, it is a mechanism that is formally transparent, but in reality completely opaque and the source of numerous problems.

- Most criticisms focus on the composition. Some NGOs feel aggrieved about the number of seats given to industry. In my opinion, this criticism is hardly valid: it is logical for stakeholders to have a prominent place when the issues under consideration are of a technical or scientific nature.
- The purpose of expert groups is to enlighten the Commission, supply it with expertise and – in the case of consultative citizen groups – to de-bureaucratize it and provide a societal perspective.

Commission expert groups assisting in the preparation of delegated acts

- National experts (1-3 per Member State)
- Chaired by Commission
- May contain sub-groups
- Third parties invited on ad hoc basis



OPINIONS NOT BINDING!

But no such thing ever happens. One of the main reasons is that more than half of expert groups, even in the proposal phase, are chaired by the Commission which, by this very fact, masters the agenda, the timing, studies, summary records and so on.

- These expert groups are generally very “mainstream”. And when the chair of an expert group is entrusted to a stakeholder (professional or NGO), he or she is generally not at ease vis-à-vis the Commission representatives sitting around him or her. The members listen, sometimes ask questions, but do not sufficiently play the role of counter-power (save in exceptional cases).
- There is an urgent need for a profound reform of this nebulous world. We should get rid of the umbrella term “expert groups” denoting a variety of structures with no link between them. More transparency is necessary. We need to promote SMEs, local networks and gender balance. The chairs of consultative committees (in particular the Civil Dialogue Groups) must be trained in the exercise of their mandate and the nature of the powers conferred upon them (powers of which they are often unaware).

This is no small matter. Expert groups composed of Member State officials have a controlling function over the Commission. This function is vital and it must be effective. As for expert groups composed of professionals or NGOs, they must become what they were created for: a tool for dialogue and communication between the EU and its citizens.

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OVERVIEW

Expert Groups: a rapidly expanding form of consultation

Organic farming, chemical labelling, sustainable finance, construction products, aviation safety...there is hardly any area of EU policy that does not currently have its own expert group. New expert groups are appearing every day, and can take many forms: the challenge is to be able to identify which one you are dealing with.

The Commission has always had mechanisms for involving interest groups in the rule-making process. For many decades, comitology committees were the primary forum for consulting Member State civil servants on the implementation of EU legislation. Ad hoc high level groups such as the famous “Wise Men Committee” chaired by Alexandre Lamfalussy, provided crucial input into the development of new legislation on financial services.

But as the EU’s competences expanded, so did the base of stakeholders affected by EU policy. When the Lisbon Treaty effectively abolished comitology committees for an entire category of secondary legislation – delegated acts – suddenly it was necessary to find a new forum in which the preparation of these measures could be discussed. Expert groups fitted the bill.

Expert groups initially operated largely without public oversight or clear rules, a fact which gradually drew criticism. On two occasions the European Parliament (EP) voted to freeze funding; and in 2015 the European Ombudsman issued recommendations for improving the transparency and composition of expert groups. Feeling the pressure, the Commission took action. In 2016 it adopted Horizontal Rules setting down basic standards for every expert group including how its members are appointed, how decisions are adopted and how its activities are made public.

Expert groups: the key facts

A Commission expert group is defined as “a consultative body set up by the Commission to provide them with advice and expertise, composed of public and/or private sector members, which meets more than once.”

At the time of writing, the Commission’s Register of Expert Groups contains a total of 1,130 EGs, of which 724 are currently active.

Of active EGs, a distinction is made between:

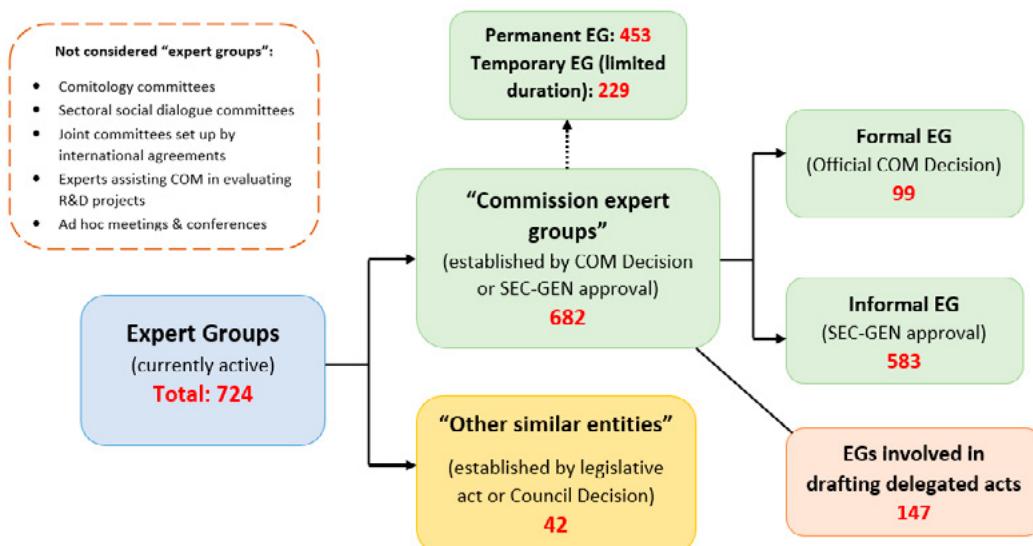
- **682 “Commission expert groups” *stricto sensu***, set up by an act of the Commission. These account for the vast majority of active EGs (e.g. the Expert Group on waste, the Group of experts on tobacco policy and the Expert Group on clinical trials).
- **42 “other similar entities”**, which are basically expert groups established by an EU legislative act or decision of the Council. Prominent examples include the Medical Device Coordination Group (set up under the 2017 Regulation on Medical Devices), the Pharmaceutical Committee, the Consultation Forum on F-gases and the Technical Group on Steel.

Of the 682 active EGs, it is important to distinguish two categories:

- **99 “formal” EGs**, i.e. groups set up by an official Commission decision, e.g. for the DG AGRI Civil Dialogue Groups.
- **583 “informal” EGs**, i.e. groups that merely required the approval of the Secretariat-General and the relevant Commissioner to be established. Informal expert groups account for the vast majority.

In addition, the majority of EGs are classified as “permanent”, while a minority are “temporary” (i.e. of limited duration).

Most EGs are chaired by the Commission (usually the relevant Head of Unit). Having said that, it is possible for the group to be chaired by a person elected from its membership, e.g. the Expert Group for technical advice on organic production (EGTOP). Even where the Commission is not the chair, it nonetheless provides the secretariat and administrative support for the EG, giving it an important role behind the scenes.





FUNCTIONS

Expert groups are active in the upstream and downstream phases

With expert groups, the European Commission has discovered a valuable and flexible tool that allows for consultation with stakeholders across the policy-making process. These bodies often have over-lapping functions and we see them playing an increasingly important role in the preparation of secondary legislation.

A Commission EG can fulfil any of the following five tasks:

1. Help the Commission prepare legislative proposals and other policy initiatives,
2. Assist the Commission in the general implementation of EU legislation, programmes and policies,
3. Assist the Commission in preparing delegated acts,
4. Assist the Commission in preparing implementing acts or Regulatory Procedure with Scrutiny (RPS) measures before their submission to the comitology committee,
5. Coordinate positions and/or exchange views.

Many (if not most) expert groups serve several of these functions simultaneously. In the same meeting, they might advise the Commission on the shape of a new legislative proposal then give input into the content of a draft implementing act. For example:

- The **Competent Authorities for REACH and CLP** (also known as "CARACAL") fulfil all five tasks, reflecting its importance as a forum in the chemicals field;
- The **Expert group for technical advice on organic production (EGTOP)** has three tasks: assist preparation of legislative proposals, advise on implementing acts and co-ordinate/exchange stakeholder views;
- By contrast, the mandate of the 13 **Agricultural Civil Dialogue Groups (CDGs)** is limited to assisting with the preparation of legislative proposals and policy initiatives.

The proposal for the recently-adopted Taxonomy Regulation, which aims to lay down technical criteria for identifying environmentally sustainable economic activities, was heavily based on a **report** delivered in January 2018 by the High-level Expert Group on Sustainable Finance.

Delegated acts: a kind of 'surrogate comitology'

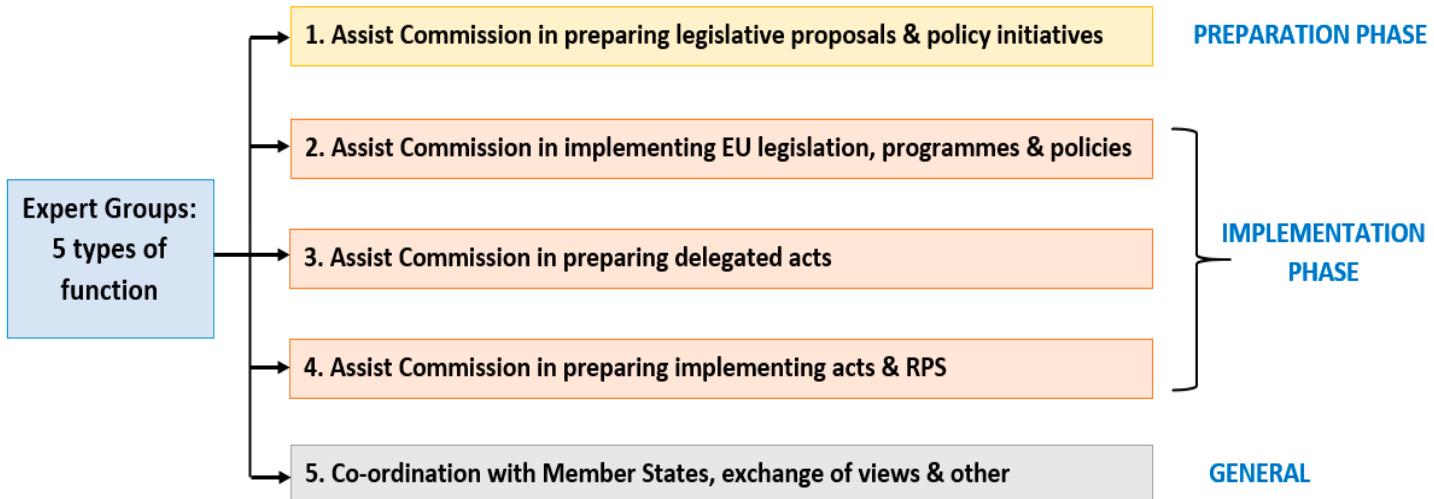
As explained on page 2, the exponential growth in EGs is partly a response to concerns that the Commission might draw up delegated acts without giving Member State authorities and stakeholders a chance to comment on the content. As a result, we currently have **147 EGs whose job is to give input into drafted delegated acts prepared by the Commission**.

The obligations of the Commission with respect to consulting EGs on delegated acts are fleshed out in the **2016 Inter-institutional Agreement on Better Law-making**. In particular, Member State authorities are required to receive draft delegated acts, agendas and other relevant documents in advance of each EG meeting. The EP is entitled to send its own experts to these meetings, but only as an observer (i.e. no voting rights).

A crucial feature of EGs is that – unlike comitology committees – the opinions of its members are not strictly binding on the Commission. Nonetheless, their opinions tend to carry political weight in practice: if the EU executive does not pay sufficient attention to Member States' views in the EG, it might be confronted with a veto in the Council later on. The opinions of EGs are adopted by consensus, or alternatively by simple majority.

Another interesting trend: even though implementing acts are subject to a decision by the comitology committee, the Commission is increasingly using the EG as the forum where preliminary discussions on the draft implementing act take place. Only when the draft is sufficiently agreed upon will the Commission decide to convene the comitology committee for a formal vote (this was for instance the modus operandi of the Medical Device Coordination Group when working on specifications for single-use reprocessing).

An additional characteristic of many expert groups is the existence of subgroups, which the members may decide to set up to work on specific technical topics. For example, EGTOP runs four subgroups dedicated to fertilisers & soil conditioners, plant protection products, feed and salt.





MEMBERS

A mixture of public and private may sit on expert group

Just as with legal status and function, the membership of a Commission expert group can vary considerably. Where there is a combination of national authorities and private stakeholders, the EU executive can benefit from a wide range of opinions, but tensions may arise between the different member categories.

Under the Commission's Horizontal Rules, there are five categories of EG members:

- **Type A: individuals appointed in a personal capacity,**
- **Type B: individuals appointed to represent an interest common to multiple stakeholders** (so not part of stakeholder organisation per se, but speaking for a general policy orientation),
- **Type C: organisations** (e.g. company, trade association, NGO, trade union),
- **Type D: Member State authorities** (whether national, regional or local),
- **Type E: other public bodies** (e.g. authorities of candidate countries, EU agencies, international organisations).

Since 2016 we have seen the Commission install a more rigorous process for selecting EG members. For the 'private' categories (A, B and C), they must undergo a public call for applications. Members appointed in a personal capacity (Type A) must show that they have no conflict of interest.

It is normally the case that an expert group contains a mixture of private and public members. For example, according to the Register:

- 232 EGs are composed of Member State authorities and other public bodies,
- 192 are composed only of Member State authorities (e.g. Expert Group on Waste),
- 132 contain Member State authorities, stakeholder organisations and other public bodies (e.g. Medical Device Coordination Group),
- 27 EGs have only representatives of stakeholders (e.g. the DG AGRI Civil Dialogue Groups).

In addition to the members *stricto sensu*, it is possible for the EG to allow persons to attend meetings as **observers**, meaning they can participate in discussions but can neither vote nor assist in drawing up official advice (the European Parliament enjoys this right when delegated acts are under discussion). **Third-party experts** with specific knowledge on a topic can be invited on an ad hoc basis to give presentations.



CARACAL: who has the say on delegated acts?

When the Regulation on Classification, Labelling and Packaging of substances was aligned to post-Lisbon secondary legislation in July 2019, DG GROW decided to revise the rules of procedure of the relevant expert group, **CARACAL**. However, a conflict emerged over who would have input into draft delegated acts and when.

The Member State experts on CARACAL began putting pressure for draft delegated acts to be discussed only in "closed sessions", i.e. without the stakeholders, who would give their comments only at a very early stage. Naturally, trade associations participating in

CARACAL criticised this move as an affront to transparency.

In the final version of the updated rules, it is provided that a third of national experts may decide that a specific item should be discussed only by Member State authorities, the Commission and the European Chemicals Agency (ECHA) present. So it appears that in the end, Member States mostly got their way.

This case casts light on an interesting discrepancy: according to the 2016 IIA on Better Law-Making, consultation of Member States on draft delegated acts is clearly framed as an obligation ("shall"), whereas the input of stakeholders is apparently optional ("may").

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