THE COMITOLOGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

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#59, September 2019

Towards a sort of rolling Brexit

The word "rolling" is often used in business, especially in financial planning: each stage completed in the plan is followed by a new stage with a projection over time.

The "rolling" nature of Brexit is of a special kind, because it is rolling in time and space, without any concrete result being achieved.

And this will continue. We have already seen two pushbacks of the final deadline and we are not done yet. It seems obvious that a third postponement will be granted beyond 31 October since, unless we entertain the idea that the UK Prime Minister is insane (in the medical sense of the word), no deal is inconceivable in terms of the economic, financial, monetary and commercial devastation that would ensue.

The reality is that the British no longer know where they are! Even the opposition is unable to decide on an option. Deal, no deal, elections, referendum…everything appears to be floating in the air, the legal and technical reality no longer has any value. Cliché, provocation and arrogance reigns supreme.

On-going negotiations concerning the backstop (and its possible tweaking) demonstrate that nothing has been prepared – neither by Johnson's team, nor previously by May's team (even worse). No concrete proposals, not even a concept, no legal protocol…just tinkerers.

Towards Brexit 2.0

Although talks are at an impasse, it does not mean that Brexit is dead. As I have written since September 2016, I believe that Brexit, as it has been negotiated, has no chance of materialising because it was badly conceived on a technical, strategic and political level, even before the referendum was organised by UK authorities.

But the concept of Brexit, that is the idea of separating from the Union, is not dead in public opinion, in the sense that a second referendum would not be a foregone conclusion. And what would a second referendum be on? What proposal?

Holding a second referendum to ask voters whether they want to leave the EU or not makes no sense. If they say "no" it would not solve the problem. And if it was "yes" again, we still would not know what kind of Brexit it will be.

In reality, I think that once the next UK elections have passed, a future government will revisit negotiations FUNDAMENTALLY. Perhaps they will abandon the customs union option chosen by Mrs May and orientate towards a free trade agreement that includes financial services. However, this second option, a 180-degree switch from the customs union idea, will take years of negotiation.

Therefore, the British are destined to remain in the EU for an undefined period of time. If, as I consider desirable, we wish to keep them in the Union long-term, we will have to say it to them clearly and, with their help, improve EU governance which has now become detestable in its complexity, opacity and inefficiency.

What matters today is that we stop looking at the EU in terms of the history of the past 70 years, and instead start to make plans for the next 70 years; to prepare ourselves by imagining a valid institutional framework for the future. We should never forget that this was already done with the Single European Act of 1986. What has been done before can be done again. It is our collective responsibility.

Daniel Guéguen*

New Commission: empowering or destabilising the Institutions?

It only comes around once every five years: the ritual changing of the guard at the Berlaymont is underway, as President-elect Ursula von der Leyen prepares to ascend Olympus and take the cup from Jean-Claude Juncker. Speculation over policy priorities is already plentiful, and candidate Commissioners are being grilled at the European Parliament as we write.

But behind the pomp and circumstance, lofty rhetoric, platitudes and unfortunate portfolio titles, is there a clear direction to be discerned at the institutional level?

Of course it is still early days, but the ***opening address*** delivered by Mrs von der Leyen to MEPs on 16 July gives us an insight into how she sees the inter-institutional balance in the next five years.

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ENVIRONMENT

Commission tables amendment to type approval regulation

After getting knocked back by the courts on its conformity factors for testing emissions from everyday vehicles, the EU executive aims to solve the problem by reshaping the mandate laid down in the legislative act. But the timeframe for adoption is tight and circumstances in the European Parliament might complicate matters.

Cast your minds back to April 2016, when the Commission adopted a piece of secondary legislation via the Regulatory Procedure with Scrutiny (RPS) which set maximum emission limits for nitrogen oxides emanating from light passenger and commercial vehicles in the context of Real Driving Emission (RDE) tests. This measure formed part of a broader package designed to address issues exposed by the Dieselgate scandal – namely the inadequacy of lab-based testing.

The cities of Brussels, Paris and Madrid reacted by launching an action for annulment. They averred that the EU executive, by laying down so-called "conformity factors" intended to assess the vehicle's compliance with the emission limits during RDE, in effect deviated from the 'Euro 6' standard set out in the basic act, which is ***Regulation 715/2007*** (the Type Approval Regulation).

In a ***judgment*** delivered on 13 December 2018, the General Court ruled that the Commission had amended an "*essential element*" of the basic Regulation by introducing these conformity factors. It is a fundamental tenet of EU law that only the European Parliament (EP) and Council, together making up the EU legislator, are entitled to regulate the essential elements of legislation. The measure was thus partially annulled (the overall RDE procedure remains intact).

That was not the end of the story. Taking into account the fact there are a number of car manufacturers that have already received type approval under the new regime, the court decided to postpone the effect of the judgment until 23 February 2020, ensuring a degree of legal certainty while affording the Commission some time to put in place a revised framework.

Faced with such a rebuke, the Berlaymont could not simply re-start the RPS with another draft. Something more fundamental was required. Under the stewardship of outgoing Commissioner Elżbieta Bieńkowska, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) hastily drew up a ***legislative proposal*** that aims at conducting, for want of a better word, a transplant.

Published and submitted to the legislator on 14 June, the explanatory memorandum of the proposal is quick to point out that the Court of Justice did not question the conformity factors per se, only the method by which they were adopted. Therefore, the Commission would like to see said factors integrated – unchanged – into an Annex attached to the Type Approval Regulation.

Admittedly, this is a situation the Newsletter does not witness very often. The general trend in EU law-making over recent years has been for sensitive issues to get bumped down from primary to secondary legislation; it is much rarer to see the reverse, as is the case here.

The Commission would, however, like to reserve itself the right to adapt the final conformity factors to technical progress by use of delegated acts. According to the recital, such adaptations would consist in reviewing the factors downwards.

Alignment: Killing two birds with one stone

Dealing with the conformity factors is not the sole goal of this proposal. The Commission is also seizing this opportunity to align or 'Lisbonise' the Type Approval Regulation, i.e. convert the RPS into delegated acts in three other provisions:

- Laying down specific requirements, procedures, tests and requirements for type-approval;
- Developing technical specifications on how on-board diagnostics (OBD) and vehicle repair and maintenance information is provided;
- Reviewing the particulate mass and particle number limit values, and revising the measurement procedure.

Time is of the essence here because, as noted above, the General Court judgment will not take effect until late February 2020, so the Commission will be hoping that the co-legislators do not dally too much in their deliberations. Indeed, the Council's Working Party on Technical Harmonisation (Motor Vehicles) has already met four times and the Finnish Presidency is manifestly ***keen*** on a swift adoption. But there is noticeably less movement in the EP, where the text is yet to appear on the agenda of the Committee on Environment, Public Health and Food Safety (ENVI).

As we know, the Parliament's attention over September and October will be mostly devoted to vetting the candidate Commissioners for Mrs von der Leyen's College. A further complication is that many climate-conscious MEPs in the previous Parliament were vehemently opposed to the original conformity factors for the perceived leniency granted to the car industry. In February 2016, over 300 tried – unsuccessfully – to veto the measure on grounds of substance (see #Newsletter 24).

Therefore, a few bumps on the road cannot be ruled out.

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CHEMICALS

CARACAL rule change raises concerns over stakeholder inclusion

The first package of Lisbonisation is complete, and the ripples are already being felt in the sphere of EU chemical regulation. In determining the degree of openness on draft delegated acts under the CLP, the Commission has tried to steer a middle course between Member States and industry organisations.

No doubt it passed largely unnoticed in the summer haze, but 25 July saw the publication in the Official Journal of an important new law: ***Regulation 2019/1243***, or the 'Omnibus', which removes the Regulatory Procedure with Scrutiny (RPS) from 64 pieces of pre-2009 legislation and replaces it with the Lisbon Treaty system: mostly delegated acts, although implementing acts are preferred in a minority of cases.While there are still over 100 legislative acts that remain to be 'Lisbonised' in this manner, the recently-adopted Omnibus – which came into force a day after its publication – represents a sea change in EU decision-making. Hundreds of implementing measures that used to undergo a vote in a Member State committee will now be subject to mere consultation in the draft phase (the Council and EP will still have a right of veto).

Practically speaking, the Commission is finding itself obliged to re-write the procedural rules for a wide range of expert groups where Member State officials and occasionally stakeholders typically give input into the Berlaymont's initiatives. The files affected by this transition stretch across all EU policy areas – environment, health, transport and particularly chemicals.

As of 26 July, ***Regulation 1272/2008*** on the classification, labelling and packaging of chemicals (known as the CLP Regulation) is now a member of the delegated act family. This entails changes at the level of ***CARACAL***, the expert group providing a forum for national civil servants, industry and civil society to advise the Commission on the implementation of the CLP and the REACH Regulation (which has not yet been Lisbonised).

At the start of July, the Commission as chair of CARACAL consulted the members on a new version of the rules of procedure (RoP). The comments, published by ChemicalWatch in late August, reveal a concerted effort by certain Member States to convince the Commission that draft delegated acts, especially those concerning harmonised classification under CLP, should be debated in "*closed sessions*" of CARACAL, i.e. excluding stakeholders, who would have a say only in the very early stages of preparation.

As might be expected, non-governmental opinion is diametrically opposed. In general, the NGOs and trade associations within CARACAL prefer open sessions and full involvement in discussions at all stages of the drafting of delegated acts. DUCC, which represents downstream users, has gone on the record publicly, criticising a move that would "*greatly reduce transparency and virtually exclude industry from the future development of the CLP Regulation*." CEFIC has expressed similar sentiments.

How to mediate between such divergent positions? In the latest draft of the RoP circulated, DG GROW suggests the following formulation: "*at the request of a third of Members* [i.e. Member States]", specific agenda points of CARACAL can be discussed in sessions "*consisting of Commission, ECHA* [European Chemicals Agency] *and Members only*".

The Newsletter suspects this compromise will not satisfy everyone, but the case casts light on an interesting discrepancy – one that could well generate similar conflicts in the months and years ahead: according to the 2016 ***Inter-institutional Agreement 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*").

As ever, secondary legislation is highly hazardous, and can cause severe irritation if not handled properly.

Council blocks two delegated acts before summer break

The Council of the European Union has traditionally been quite shy about wielding its power of objection against Commission delegated acts. Prior to the start of this year, it had only two vetoes to its name. By contrast, the European Parliament has notched up ten vetoes thus far.

However, a surge of activity in the first half of 2019 suggests Member State governments are becoming more assertive in utilising their Lisbon Treaty power. Readers will recall that in March the Council unanimously blocked a delegated act adding certain third countries to the EU's money laundering blacklist (see Newsletter #56).

And now two more, adopted in June and July respectively, can be notched on the blackboard:

- On 5 June, a qualified majority voted to ***overturn*** a delegated act adopted under the Emissions Trading System (ETS) Directive. Member States disliked the fact that the Commission, and not national governments themselves, would transmit aviation emissions data to the ICAO. The ***re-drafted text*** published on 18 July rectifies this error.
- A month later, a delegated act on cooperative intelligent transport systems (ITS) was ***nixed*** by a qualified majority of Member States. Foremost among their concerns was the Commission's alleged failure to provide national officials with the impact assessment in advance of adopting the delegated act, as required by the legislation in question.

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More power to the Parliament

Most eye-catching was her support for the European Parliament's right of initiative. As a reminder, the EP has the right to suggest a legislative proposal to the Commission, but the latter – having the famous monopoly of initiative – is not obliged to act upon that suggestion. Mrs von der Leyen aims to give more teeth to the EP's power, committing to respond to every suggestion "*with a legislative act in full respect of the proportionality, subsidiarity, and better law-making principles*."

This strikes us as a potentially problematic commitment in the current climate. It could destabilise the delicate balance between the Council and EP, as well as solidify the recent trend of reducing the Commission to a mere secretariat that acts on the instructions of other Institutions. Granting a right of legislative initiative to the EP would make sense only within the context of a broader reform of EU governance negotiated by Member States. It is certainly inevitable, but must be done with method and with legal rigour.

Future of Spitzenkandidat on the agenda

Another highlight was Mrs von der Leyen's promise to convene a two-year Conference on the Future of Europe which will discuss a number of issues, possibly including what to do with the Spitzenkandidat system. Rumours flying around Brussels say that this idea is a gimmick offered by Emmanuel Macron to keep Guy Verhofstadt sweet. We may be forgiven for remaining sceptical about the outcome of such a Conference, especially as the 2017 White Paper on the Future of Europe, brought out by President Juncker, has no effect. Nevertheless, the very act of reflecting on the future of the Institutions is a necessity.

The new ***Political Guidelines*** also contain this interesting nugget: Mrs von der Leyen commits herself to use the long-ignored "passerelle clauses" in the Lisbon Treaty in key policy areas like climate, energy, taxation and social policy. What this means is that she would like to see unanimity replaced with qualified majority voting, and the consultation procedure replaced with the ordinary legislative procedure (thereby giving the EP "*full co-decision power*"). The ambition is laudable, but remember that you need unanimity from national governments to do this!

On top of that, there are several mechanisms that could usefully be explored as aids to further integration but which do not receive much attention in the initial publicity, namely enhanced co-operation and brake clauses.

Come 1 November, aspiration will give way to reality and we shall see if Mrs von der Leyen can steer the European ship through increasingly choppy waters.

Wait goes on for Comitology Register 2.0

Back in April 2018 the Secretariat-General of the Commission ***announced*** that it was planning a major revamp of the dreaded ***Comitology Register***, the database where the Commission stores all public information about the activity of its 300 comitology committees, including agendas, voting sheets and drafts of implementing acts (see Newsletter #49).

The stated objective is to make the Register, notorious for its impenetrability and labyrinthine structure, more interoperable and user-friendly. Inspiration is no doubt being drawn from the ultra-slick ***Delegated Act Register***

The initial hope was that the refurbished Comitology Register could be ready by the end of 2019 to coincide with the arrival of the new Commission College. The Newsletter however has heard that it might be the middle of 2020 before we see the fruits of the Secretariat-General's work.

Comitology reform remains at standstill

The ***proposal*** to give Member States more responsibility for sensitive implementing acts has become *documentum non gratum* within the Council.

After a damning ***progress report*** issued by the Bulgarians and a solitary discussion organised by the Austrians, the Romanians did not even bother to arrange a working party meeting, preferring to focus on other priorities.

Since 1 July the six-month rotating presidency has been held by Finland, but the Newsletter hears on the grapevine that the Scandinavians have no intention to resuscitate the ailing proposal, given the lack of support from Member States.

Readers may accuse us of repeating ourselves, but this poorly-conceived draft is fit for only one thing: withdrawal. The incoming VdL Commission should do the necessary.

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