THE COMITOLOGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

www.eppa.com

#62, January 2020

EDITORIAL

The Green Deal and the "Delors Experience"

When Jacques Delors became Commission President in 1985, the atmosphere around the European Economic Community was very bad. Put briefly, the system was not working anymore. Unanimity voting had become the rule and the (then 12) Member States divided. There is a striking parallel between 1985, when Delors arrived, and 2019, the end of the Juncker era: an EU cut off from its citizens, bureaucratic and incapable of agreeing on issues big or small.

In the Delors Experience, the "how to" came before the "what"

From his arrival in 1985, the Delors Commission had two priorities: complete the Single Market by 1992 and reform the institutions, leading to the 1987 Single European Act (SEA). The latter had a major impact: conferring a monopoly of legislative initiative upon the Commission, replacing unanimity with qualified majority, and introducing a cooperation procedure between the Council and Parliament (creating the famous Institutional Triangle).

Once the SEA was ratified, the Single Market action plan was put in place – and what a plan it was! Almost 250 directives were adopted between 1987 and late 1992, laying the ground for the great Single Market which from 1 January 1993 guaranteed free movement of goods, capital, services and workers. This fantastic success would never have been reached without the profound changes to EU governance made possible by the SEA. Clearly, the "how to" was seen as a precondition for reaching the desired objective (the "what").

With the Green Deal, the "what" comes before the necessary reform of the "how to"

Single Market and Green Deal are two projects of equal magnitude. In both cases, it is about remodelling the European economy. The Single Market was all about benefiting from a "mass effect." The Green Deal is about inventing a model that is virtuous, innovative, sustainable and competitive. But the question is whether EU governance in its current state is fit to meet the goal set. The answer is "no."

The inadequacy of EU governance to achieve the Green Deal has three causes: the Lisbon Treaty, a source of complexity and opacity allowing the European Council to gain power over a Commission resigned to be a mere secretariat; a laxity permitting trilogues to pilot the EU legislative process in a way that multiplies delegated and implementing acts (also opaque); and the presence of fiefdoms within the Commission. This silo management, where every DG is its own master, originated in the Barroso era. Jean-Claude Juncker claimed to fight against it, but it is more alive than ever. We are embarking upon the Green Deal with an outdated vehicle…

The Conference on the Future of Europe

Wicked minds will say a sort of compensation (for what, exactly?) has been offered to Mr Verhofstadt in the shape of the Conference on the Future of Europe. I don't much like this Conference. First, it has come too late. It will be launched on 9 May 2020, Europe Day. Its duration – two years – is too long, leaving aside the adoption and ratification process. The programme, lightly sketched, is too diluted with two pillars: one on EU priorities (do we really need two years for that?) and the other on the EU and democracy. All of this is too intellectual and not operational enough.

For the much-needed institutional reform, there are, like an iceberg, two levels: the part above water corresponds to Treaty reform, considered impossible given the required unanimity of 27 countries. But the underwater part is the most important: everything that can be decided without recourse to constitutional procedures.

The things that can be done without excessive and onerous formalities involve simply drawing upon a series of recent studies and public hearings (in particular by the European Parliament) geared towards improving EU governance: making the four Institutions more transparent, avoiding systematic recourse to trilogues, simplifying comitology, limiting the margin of interpretation on delegated acts, impact assessments, petitions, guidance, etc. and ending the silo practice so that we can finally talk of THE COMMISSION as a unified entity that speaks the same language, not as a collection of islands with cultures, codes and behaviours that vary from one DG to the next, or even from one unit to the next.

DG

Operated by

eppa

*All signed articles express the views of the author only.

THE COMITOLOGY NEWSLETTER
GUIDING YOU THROUGH THE LABYRINTH

#62, January 2020

COMITOLOGY PROCEDURES

New Commission prepares to withdraw comitology reform

One of the first acts by the newly-minted von der Leyen Commission will be to turn off the life support on the wrong-headed proposal to amend Regulation 182/2011. There will be no overhaul of Appeal Committee procedure to boost Member State accountability…but is the Berlaymont planning a re-write?

Reminder: the comitology reform

The brainchild of former Commission President Jean-Claude Juncker and his erstwhile deputy Martin Selmayr, the ***proposal*** to modify Regulation 182/2011 was an attempt to stem the epidemic of 'no opinions' (i.e. failure to give a qualified majority for or against draft implementing acts) when the comitology committee votes on GMO authorisations or active substances like glyphosate.

Four solutions, all geared toward making governments more accountable for how they vote in the Appeal Committee, were tabled:

- Disregarding abstentions in the voting result;
- Publishing individual national voting positions;
- Option of re-convening an Appeal Committee composed of national ministers;
- Option of asking the Council for a non-binding opinion.

Both the European Parliament (EP) and Council were required to give their consent before it could ever enter into force.

From the get-go, national governments put down the roadblocks and did not budge an inch. An opinion from the Council Legal Service flagged several fundamental issues with the draft – violation of the sincere co-operation principle and failure to respect Member States' identities, for instance – and unpicked pretty much all four of the pillars.

Member States were only too happy to row in behind the lawyers, and eventually the Bulgarian Presidency brought out a progress report in June 2018 which declared a very clear majority against taking discussions any further. From that point on, it was 'Dead Draft Walking', but Juncker took no action for the remainder of his term, presumably to avoid losing face.

Thankfully, it seems the penny has dropped with his successor, whose draft work programme was partially leaked around late November. The entry for the comitology proposal takes stock of the dire state of affairs: neither the EP's Committee on Legal Affairs (JURI) nor the Finnish Council Presidency wish to move forward, and document itself admits that the proposal "does not fit under any of the six headline ambitions [of the new Commission]." Therefore, a withdrawal is suggested.

A revival of the transparency limb?

Rumours of the death of comitology reform may be exaggerated, however. The leaked draft work programme does consider the merit of "tabling a fresh proposal at some point" on the notion of publicising how individual Member States vote in the committees, given the "broad support" of MEPs for the idea, recent criticism from the European Ombudsman and the emphasis being placed by the new Commission on transparency in the EU's legislative and non-legislative process.

Either the folly of the previous regime is contagious, or the author of this document is merely flying a kite he or she knows has little chance of traction. The text notes that the transparency pillar of the 2017 proposal enjoyed "at least some support from a small number of Member States." The phrase 'grasping at straws' springs to mind.

The Commission should know better than anyone that the principle of confidentiality enshrined in the ***Standard Rules of Procedure*** is highly prized by national civil servants, whether that concerns how each country votes or the actual content of comitology discussions. The Council considered the idea disproportionate when evaluating the 2017 draft, and there's little reason to suppose they will treat a new proposal any differently. Transparency is a noble objective in itself, but it has to be politically feasible.

The Parliament soldiers on

To our pleasant surprise, the current proposal was on the agenda of the JURI Committee on 9 January 2020 for an ***exchange of views***. The discussion showed that a number of MEPS (principally from the S&D, Renew Europe and Greens-EFA groups) are not willing to give up on the reform, since they see it as a vital opportunity to boost citizens' trust by increasing transparency and accountability in a notoriously opaque area. They are in favour of pressuring the Council into action, for example via a Parliament resolution.

However, it is appears that the EPP, which holds the pen for the draft report, is more pessimistic. Axel Voss, standing in for rapporteur József Szájer, said the future of the proposal is "rather problematic" given the Council blockage, and called for

THE COMITOLOGY NEWSLETTER
GUIDING YOU THROUGH THE LABYRINTH

#62, January 2020

pragmatism. He posited two options: (1) ask the Commission to withdraw and come up with a new proposal, or (2) try to coax the Council into some agreement on the present proposal. Mr Voss expressed his preference for Option 1 – which of course is in line with the leaked draft work programme mentioned above.

Comitology saw some ***late-night action*** in Strasbourg a week later when the proposal was placed on the agenda of the plenary – an event rarer than Halley's comet. Newly appointed Commissioner for Inter-institutional affairs Maroš Šefčovič invited MEPs (only a handful were present, naturally) to comment on the state of play, but was frank about the bleak prospects: "unless there is a bold move to unblock at the level of the Council, it is unlikely that progress will be made any time soon."

His words echoing across the cavernous chamber, Mr Šefčovič promised to take MEPs' contributions on board and even to try and advance the file with the Council, but it would appear that the wheels have already started moving. At this stage, we should expect the soon-to-be-published 2020 Commission work programme to make withdrawal official.

In the meantime, the JURI Committee plans to re-visit the topic in February when Rapporteur Szájer will apparently present his draft report on the proposal.

Quote of the month

"If we can't explain comitology ourselves, how can we expect voters to understand comitology?"

MEP Karen Melchior (Renew Europe),
speaking at the plenary session on 15 January 2020

Conclusion: no more tinkering

Normally an obituary is no place for the 'I told you so' line, but the Newsletter has been consistent – and ultimately correct – in assessing the prospects of the comitology reform. Right after its publication on Valentine's Day in February 2017, we said the proposal was "doomed from the very beginning" (see Newsletter #35), and so it has come to pass.

But enough back-slapping. In truth, the ill-fated comitology reform emerged out of a wider crisis that has brought the EU's regulatory system into disrepute in the eyes of many citizens. It was the wrong answer to the wrong problem; a bandage on a broken leg that would not have made European civil society any less distrustful of the scientific expertise underpinning EU decisions on GMOs, pesticides and other controversial areas.

Mrs von der Leyen and her cohorts will have to think a bit more outside the box if they want to fashion a viable long-term solution.

What do the new working methods mean for secondary legislation?

1 December brought not only the inauguration of the von der Leyen Commission but also the publication of the ***Working Methods*** governing how her College will function and how it will interact with the services (Directorates-General, or DGs) below.

Here is a summary of the impact the new guidelines will have on how the Commission handles delegated and implementing acts over the next five years:

- "Politically sensitive and/or important acts…including delegated and implementing acts" will be subject to validation by the lead Commissioner and the competent (Executive) Vice-President at each decision-making stage (planning, interservice, etc.);
- All initiatives likely to have significant direct economic, social or environmental impacts should be accompanied by an impact assessment and a positive opinion from the Regulatory Scrutiny Board, in the Commission's in-house scrutinisers for impact assessment;
- Delegated or implementing acts considered by Mrs von der Leyen to be "of exceptional nature or of particular political or strategic importance" will be subject to the oral procedure (i.e. discussion by the College) as opposed to the more frequent written procedure.

By and large, nothing revolutionary. The VdL team seems intent on maintaining the formal processes and mechanisms brought in by former President Jean-Claude Juncker.

More important is what happens in practice, for too often individual Commissioners have been either reluctant or unable to temper procedural 'interpretation' by certain DGs.

THE COMITOLOGY NEWSLETTER
GUIDING YOU THROUGH THE LABYRINTH

#62, January 2020

CHEMICALS

Delegated act on titanium dioxide looks set to avoid veto

Last month (see Newsletter #60) we wrote about a text proposed by the European Commission under the ***CLP Regulation***. The ***delegated act***, which surfaced on 4 October, has sparked controversy for its classification of the substance titanium dioxide (TiO2) as "carcinogen category 2 by inhalation." This change would require labels drawing attention to "hazardous respirable dust" so that prospective users can take necessary precautions.

Hundreds of stakeholders in the chemical sector lobbied the Commission hard to try and force a reappraisal of what they regard as a disproportionate measure, but ultimately they could not stop the submission of the delegated act to the European Parliament (EP) and Council for the customary 2-month scrutiny.

On 8 November, Member State attachés sat down to debate the proposal in the Council's Working Party on Technical Harmonisation. A reportedly heated three-hour discussion ended in only eight delegations (according to ***this source***: Romania, Austria, Bulgaria, Slovakia, Greece, Poland, Czechia and Germany) supporting an objection – falling far short of the super-qualified majority required.

Opponents made a bit more headway in the EP. On 25 November a draft resolution appeared, drafted by ECR MEP Anna Zalewska and accessible ***here***, that called for the delegated act to be blocked on a number of grounds, in particular:

- TiO2 is already undergoing a separate, more in-depth evaluation under the REACH Regulation;
- The reclassification would go beyond what is necessary and proportionate considering the health risks involved;
- Less intrusive options should be considered, e.g. setting a harmonised limit for occupational exposure.

After discussing the motion on 3 December, the EP's Committee on Environment, Public Health and Food Safety (ENVI) took a vote on the following day, which resulted in a resounding defeat for the motion: 46 against, 19 in favour and 4 abstentions. Only a handful of EPP and Renew MEPs joined the ECR in its failed initiative.

The end of the story? Not necessarily: the EP ***Rules of Procedure*** permit a back-up option that involves tabling a motion directly to the plenary, which can be done by a political group or a collection of 38 MEPs. Plenty of attempts have been made over the years to shoot down delegated acts via this avenue, but success is rare (on top of that, it has never occurred after an EP committee rejected the original motion).

No motion was put forward at the plenary session in mid-December, suggesting a low likelihood of blockage by the deadline (extended to 4 February 2020). It appears we will have to wait longer to see the first veto by the 9th European Parliament.

MDR database postponed by two years

The spectre of delays in the implementation of the Regulations on ***Medical Devices*** and ***In Vitro Devices*** has been in the air for a good while, and the Commission has finally bitten the bullet.

The original aim was to get the EUDAMED database – a key tool for market surveillance, registration and notification among others – up and running by March 2020, but the key preparatory steps, namely the independent audit and module functionality, are not going as swimmingly as expected.

Therefore, on 30 October DG GROW ***announced*** that it would put off the launch of EUDAMED until May 2022, i.e. the date of application of the IVDR Regulation. It seems the date of application of the MDR Regulation (due to arrive in May 2020) will not be affected.

There are quite a number of implementing acts that remain to be adopted under this legal framework: a full list can be consulted via DG GROW's own ***rolling plan***.

Time presses for type approval reform

One year ago, the Court of Justice ***shot down*** a controversial piece of secondary legislation for diverging from EU rules on vehicle emission limits, but the judges showed leniency by delaying the effect of the judgment until 23 February 2020, giving the Commission a period of time to get a new measure in place.

In June 2019 the Berlaymont duly produced a ***legislative proposal*** aiming to insert the conformity factors into the Type Approval Regulation itself (see Newsletter #59). The Council has made good progress, adopting on 11 December its mandate for trilogue negotiations.

The European Parliament (EP), however, is behind schedule, for Rapporteur Esther de Lange (EPP, NL) only got round to publishing her ***draft report*** on 18 December. With just one month to go until the deadline, stakeholders who already received type approval under the system annulled by the courts might well be getting nervous.

Comitology Newsletter Editorial Team:

Editor-in-chief: **Daniel Guéguen**, daniel.gueguen@eppa.com

Deputy Editor: **Steven Corcoran**, steven.corcoran@eppa.com