

# THE COMITOLGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

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## Lobbying and public affairs: an evolving profession New procedures and new actors require new skills

This month's Comitology Newsletter sheds notable light on radical transformations in the European decision-making process over the past two or three years. In summary, what do we see?

- A slide from transparency towards opacity – not only in trilogues and delegated acts but also in impact assessments, the European Council, meetings of Council Working Parties, expert groups and comitology – which is disrupting equality of access to documents.
- A shift in the EU acquis from primary legislation (framework laws) to secondary legislation (delegated and implementing acts). In addition to procedural complexity and the many exceptions and derogations, sovereign decisions are being taken via obscure processes which only the EU bureaucracy masters.
- Increased complexity contaminating every file. The Green Deal, Fit for 55: are they economic, environmental, financial, fiscal or social issues? Actually, they are all these things. But paradoxically, every file is treated as unique, ad hoc... We're trying to square the circle!

It has become very difficult to move within an institutional environment that is opaque, unstable, complex... and dangerous. The EU machine advances with growing speed, liable to crush anyone who defends their interests poorly, too late, too weakly, or in an overly scattered fashion.

### The Henley-ETI Partnership's primary goal is to provide the tools suited to this new paradigm

European lobbying is now brain-driven, a cerebral exercise. The old-school methods based on networking, cronyism and position papers: it is time to throw them out.

As governance techniques become more complex, the skills required to confront them become more diversified. Herein lies a great paradox: although you're dealing with a complicated environment, you need to simplify your reasoning, your strategy and your communication.

That is the core of the alliance between Henley Business School and ETI. Experienced trainers who are practitioners. Teaching the processes, but with a pedagogical approach. Supplying the methods to get to the heart of the issue, persuade through priority-based leadership, identify new actors, evaluate the balance of power, communicate with extreme clarity that which is extremely complex.

### Mediation: the cornerstone of leadership

Henley Business School is a world-renowned institution in the field of mediation and leadership. The European Training Institute too has always been focused on these themes: the ability to unify players throughout the value chain, from the producer to the consumer.

At first glance, one might think that mediation and leadership are incompatible; that leadership is about imposing your view, not persuasion or compromise. In reality, it's the opposite. Feeling strongly about something is a reason to move closer to others, try to find partnerships and build joint positions based not on the lowest common denominator, but on a shared vision.

The widening gap between civil society (i.e. NGOs, consumer groups) and the representatives of industry and the general economy is especially worrying, as it is causing positions to harden. For some, everything is too much; for others, nothing is ever enough. This is a sorry version of governance that will produce only losers, because it is an obstacle to progress and people's well-being.

Re-establishing links between stakeholders, teaching them how to speak to each other and to develop solutions together is a challenge which Henley and ETI are prepared to take on; a challenge we will have many opportunities to tackle.

Daniel Guéguen



## CLIMATE CHANGE

## First delegated act on taxonomy approaches finishing line

**Strongly rebuked on its first draft of the EU ‘rulebook’ for sustainable finance, the Berlaymont has come up with a new version that stands a better chance of success. The catch is that the most contentious industries – natural gas, nuclear energy and agriculture – are excluded, to be dealt with at a later date.**

When faced with an intractable problem, one solution is to chop it up into manageable chunks and kick the most difficult elements down the road. It is an increasingly popular regulatory method in a 27-member EU where consensus is harder than ever to find.

As readers should know by now, the **Taxonomy Regulation 2020/852** empowers the Commission to adopt delegated acts setting out “technical screening criteria” (TSC) intended to give businesses and investors an EU-wide classification system, or taxonomy, for identifying those financial products which promote environmentally sustainable activities. A key element of the EU’s goal of net carbon neutrality by 2050, the criteria will determine when an economic activity makes a “substantial contribution” or does “significant harm” to six specific objectives, including the circular economy, reducing pollution and protecting biodiversity.

The Commission’s original intention was to adopt a single delegated act setting down TSC for the twin objectives of climate change mitigation and adaptation. But a flurry of over 46,000 public comments, plus a backlash by the governments of eastern and southern Member States who demanded that natural gas be recognised as an intermediate category of “transition fuel”, caused the EU executive to pause the process. Extra input was sought, particularly from the Platform on Sustainable Finance which delivered an opinion back in March (see Newsletter #69).



For Commissioner Mairead McGuinness (pictured) and her charges in DG FISMA however, time is not a luxury. The Commission has already missed the adoption deadline set down for this delegated act in the Taxonomy Regulation (31 December 2020), and under the same legislation that delegated act must enter into application by 31 December 2021.

The Berlaymont therefore set a target of late April for publication of the revamped taxonomy measure.

### A package deal with notable absentees

The target was met, but what we got on 21 April 2021 was a voluminous raft of documents that will hardly make the already dense topic of taxonomy more digestible to the ordinary public.

The package is crowned by a **Communication** that explains the over-arching goal of “enabling investors to re-orient investments

towards more sustainable technologies and businesses” and outlines the various regulatory measures being proposed. The most significant of these is the **delegated act** (complete with two annexes totalling almost 500 pages) which sets down TSC with respect to climate change mitigation and adaptation. A wide range of industries collectively accounting for the majority of greenhouse gas emissions are covered by the criteria, including forestry, hydrogen, iron & steel manufacturing, waste water systems and transport infrastructure.

The EU executive has been at pains to stress that the delegated act is “a living document” that can be revised and supplemented by additional delegated acts as necessary. Indeed, three especially problematic areas – natural gas, agriculture and nuclear energy – are not addressed by the criteria, a deliberate choice of the Commission which prefers to carry out a further round of expert consultation and assessment before making a final determination on how these sectors should be classified within the framework.

Having previously indicated autumn 2021 as the target for publishing a draft on gas and nuclear, Commissioner McGuinness conceded in late October that more time will be needed due to the existence of “very divided views” among Member States (of whom a group of ten including France, Poland and Hungary are openly pro-nuclear). A further complication is that the issue, already political to begin with, is now very much tied up with the on-going crisis in energy supply and associated rising costs. The revised estimate for publication of a proposal is now end 2021.

It being impossible to satisfy everyone on taxonomy, the latest draft was bound to provoke condemnation. A group of prominent green NGOs including WWF, T&E and BEUC slammed what they see as overly lax criteria for forestry and bioenergy, apparently a result of lobbying by the Swedish and Finnish governments. In protest at this perceived disregard for science, they temporarily suspended their participation in the Platform on Sustainable Finance.

The 21 April **package** also included a legislative proposal to upgrade the requirements for reporting on corporate sustainability, and six amending delegated acts aiming to ensure that financial advisers, asset managers and insurers incorporate sustainability factors into their investment advice to clients.

### A process like no other

Once adopted by the College of Commissioners, delegated acts are usually sent immediately to the European Parliament and Council for the required two-month scrutiny. However, the taxonomy measure, while approved by the College on 21 April, was published on the same day only in its English form, without being formally sent to the co-legislators. The Commission clarified that the EP and Council would not officially receive the text until it had been translated into all official EU languages.

In other words, the delegated act for 6 weeks occupied a curious limbo between ‘adoption’ and ‘scrutiny’, allowing stakeholders and decision-makers to study the text while the procedure remained essentially paused.

The next big surprise was to see Mairead McGuinness appear before a **joint meeting** of the ECON and ENVI Committees on 17 May to explain the content of the delegated act and field questions from MEPs. The Newsletter is not aware of any past case where a Commissioner has come to an EP Committee specifically to discuss a piece of secondary legislation; normally

such duties are dumped upon the civil servants of the relevant Directorate-General.

On 4 June the delegated act, fully translated, was officially transmitted to the EP and Council, giving them a deadline of 8 October 2021 (i.e. four months) for a potential veto.

As expected, it has not been completely smooth sailing. Three motions to object were tabled and defeated on 27 September during a joint ECON-ENVI meeting. Two more resolutions prepared by the ECR and ID groups respectively failed to win a majority in the plenary in early October, confirming the EP’s non-opposition to the measure. The Council, meanwhile, is not in any mood to rush. In late September the Working Party of Financial Services and Banking Union asked for the scrutiny deadline to be pushed back to 8 December, thereby allowing time for extra discussion.

It is amazing to see taxonomy, an aid to decision-making, become a decision-making tool in itself. And so, the future of nuclear and gas in Europe’s energy mix will be decided via delegated act (i.e. an implementing measure). It is an absurd demonstration of the power of the bureaucracy which reigns in Brussels.

## Staying in the loop: delegated acts and Perm Reps

**Whatever happens in the weeks and months ahead, the taxonomy file makes a mockery of the basic premise enshrined in Article 290 of the Lisbon Treaty that delegated acts are supposed to regulate only “non-essential” elements of a legislative framework while leaving the “essential” elements untouched.**

The reality is that many delegated acts (and even some implementing acts) often go right to the heart of the EU law from which they are derived; taxonomy is merely an extreme example of a decade-long trend. It is reasonable to suppose that the “political” nature of a measure receives a corresponding level of political scrutiny in the decision-making process for that measure. As we know, Member State authorities are closely involved in the drafting phase of delegated acts (via expert groups) and implementing acts (via comitology committees). But what about the Council representatives?

One of the unspoken rules of EU secondary legislation is that the national diplomats based in the Brussels Perm Reps do not play a proactive, systematic role in the upstream procedure. In general, they prefer to leave such matters to be dealt with by their colleagues in the relevant ministries and agencies back in the capital. (If they do play a role, it is limited to potential vetoes against adopted delegated acts, and attending the Appeal Committee in rare cases where there is deadlock on an implementing act).

In many ways this is logical, as Perm Rep attachés and ambassadors who sit in COREPER already have their hands full with legislative files, and simply do not have the time to immerse themselves in the thousands of technical comitology acts adopted every year. But when an issue like taxonomy comes along, this logic breaks down. Given the far-reaching economic and societal significance of the delegated act, Council

representatives suddenly had an interest in keeping track of what exactly was happening in the process.

In recent months the Newsletter decided to find out more. We met with high-ranking officials from the Perm Reps of two important Member States, and the feedback was startling to say the least. Both confirmed that, in many cases, Perm Reps are not kept up to date by their capitals about the activities of Commission expert groups or comitology committees. In some instances, they had to make strenuous efforts to get their hands on agendas, minutes and draft delegated acts. If you are not vigilant enough, you are in danger of being shut out of the process completely.

Of course, all Member States are different, and some have the good sense to maintain close lines of communication between Brussels and the capital. However, it is clear that many countries do not. More organic links and mechanisms for information-sharing should be established across the board. Indeed, Perm Reps should draw inspiration from the “flagging” mechanism set up by the Juncker Commission in 2017, aimed at ensuring that the political representatives in the College receive early warning from the DGs about any secondary legislation deemed “sensitive”.

As one of our interlocutors put it: if the situation does not improve, the contract of trust between the Commission and Member States is at risk of being broken.

## COMITOLOGY PROCEDURES

## Electronic voting more than doubles since start of pandemic

**The use of the written procedure to decide on draft implementing acts was already on an upward curve, but the Commission's latest Comitology Report starkly illustrates just how much Covid-19 has accelerated the trend.**

On 9 September 2021 the Commission Secretariat-General brought out its annual *compendium* of figures from the EU-level system of adopting implementing acts and Regulatory Procedure with Scrutiny (RPS) measures. Covering the period January to December 2020, it comes only six months after the *report* for 2019, which was significantly delayed due to disruption caused by the pandemic.

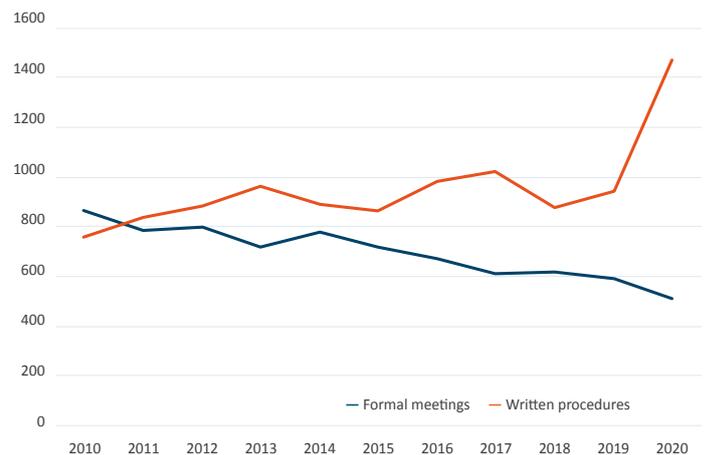
A number of statistics are worth citing. Firstly, the number of active comitology committees in 2020 hit an all-time high: 322, up from 275 in 2018. Secondly, a total of 1,529 implementing acts were adopted in 2020. This is up from 1,456 in 2018 but nonetheless indicative of a downward trend (by comparison, 2007 saw 2,522 implementing acts).

But the most significant lesson from this document is the confirmation of two long-term trends. First, a consistent decrease in the number of formal committee meetings (i.e. Member State officials travelling to Brussels to attend meetings chaired by the Commission, or alternatively holding such meetings virtually via Webex/Zoom). These hit an all-time low of 514, down from 590 in 2019.

Secondly, we see a remarkable spike in the use of the written procedure: 1,469 cases, i.e. a 55.6% increase since 2019. This refers to the process by which the Commission holds a vote on a draft implementing act not in a physical meeting but by circulating the proposal to the Member State experts via email and asking them to give their opinion within a certain timescale (normally 1-2 weeks).

Even before March 2020, Commission officials were increasingly resorting to the practice of devoting the face-to-face comitology meetings to finding consensus on the substance of the text and resolving disagreements, thus allowing the text to be finalised in the days after the meeting before circulating it for long-distance voting.

But even still, the explosion of the written procedure in 2020 is quite striking. It naturally reflects an adherence to public health guidelines which required most meetings to migrate online, leading to a corresponding growth in remote decision-making. While it does not necessarily imply a relaxation in the scrutiny exercised by Member State experts over the Commission, it does represent a new paradigm to which stakeholders will have to adapt.



### When Sherlock Holmes tracks comitology votes...

Respected Brussels think tank *VoteWatch Europe* has announced that it is expanding its data collection and analysis activities to include Member State voting in the comitology process (implementing acts and RPS measures).

Feeding three years' worth of information from the Comitology Register (mainly 3,000 voting sheets over the period 2018-2021) into an algorithm, VoteWatch has provided fascinating breakdowns of how often each Member State votes against or abstains on drafts, the policy areas in which this happens, the alliances they take part in, and how their behaviour differs from when they vote in the Council.

For example, one graph shows that the countries most often finding themselves in a minority position are Germany, Austria,

Sweden and Denmark (naturally, the UK enjoyed first place until it left last year). Governments of northwest Europe are more likely to vote no or abstain on chemicals decisions; likewise, the central and eastern governments on climate action.

This development is very welcome, and reflects the extent to which interest in comitology matters has grown in recent years. It shows that size is not everything; small countries are very able to forge coalitions and leave larger states isolated. It also hammers home the lack of transparency that continues to plague the system, and one hopes it will spur the Commission to disclose more information. At the end of the day, individual voting positions of Member States ought to be published as a matter of course; we should not have to resort to a complex algorithm to work it out!

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