THE COMITOLOGY NEWSLETTER
GUIDING YOU THROUGH THE LABYRINTH
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EDITORIAL

Taxonomy: the Commission refuses to provide its draft delegated act to Member States

Is this about bureaucracy or democ

The word *"taxonomy"* has the whiff of authority and makes one think of a kind of economic statism. That's precisely what it is. Regulation 2020/852, adopted via co-decision, sets a *"framework for sustainable investment"*, i.e. investment that contributes to protecting the environment. It is inspired by the 2015 UN Sustainable Development Agenda, the 2016 Paris Accord and the 2018 Commission Action Plan for financing sustainable growth. The Taxonomy Regulation falls under the Green Deal agenda but, in reality, predates it.

Although 40 pages long, Regulation 2020/852 can be summarised in a few words: abandoning all legislative ambition, it entrusts the Commission with adopting delegated acts to determine whether or not an economic activity is sustainable or does significant harm to the environment. Thus, the Commission becomes the power that will regulate issues of vital importance. The same goes for the draft Climate Law which proposes giving the Commission the power to fix the trajectory for reducing Europe's carbon footprint via delegated acts.

Delegated acts: fine, but not without counter-powers

Article 290 TFEU states: *"A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act."* The measures subject to delegated acts under Regulation 2020/852 are obviously essential, but the European Parliament and Council decided otherwise.

When the co-legislators empower the Commission to adopt delegated acts, they do so via a mandate set down in the legislative act. This mandate can be wide (leaving discretion to the Commission) or restrictive by requiring an impact assessment or setting other conditions. But Regulation 2020/852 gives the Commission a very broad power to propose and adopt delegated acts *"for an indeterminate period."*

Some will recall that comitology committees no longer apply to delegated acts (one of the disastrous results of the Lisbon Treaty). At most the Commission is supervised by an expert group of Member State representatives, chaired by the Commission and having only an advisory role with no right to vote. To ensure adequate consultation, the Commission is also accompanied by a Platform on Sustainable Finance which includes the whole European industry: aeronautic, chemicals, metals, construction, transport, energy and even forestry, demonstrating just how broad taxonomy is in its scope.

The problem is that the Member State expert group and this stakeholder platform meet at regular intervals, but the Commission still has not communicated to them its draft delegated act, supposed to be adopted by 31 December 2020. In short, there is a lot of talk but much is vague or unmentioned, and essential dialogue is replaced by widespread suspicion. This deliberate opacity marginalises discussion on subjects as important as nuclear energy (which is not explicitly included in the Taxonomy Regulation) and carbon capture & storage (CCS) whose current status remains unclear. Since a public consultation on the first delegated act is envisaged at an advanced stage, the draft will end up being leaked, but too late and in a completely inappropriate climate of suspicion.

Bureaucratic abuse or democratic denial?

Huge swathes of industry will be affected by the delegated acts. For some sectors, it will have financial consequences with higher credit rates and even administrative constraints, leading to outsourcing of factories outside the EU at a time when relaunching our economy should be the priority.

But it gets worse. The philosophy of the Green Deal involves sociologically intrusive impacts: it affects our travelling, our diet, our habitat. Therefore the fear is that Taxonomy eventually bans certain activities: fatty or high-calorie foods, alcohol, etc. could be under threat as *"nutritionally unsustainable"*. Forestry might not be spared!

Shackling the EU economy, granting bureaucracy a kind of state tutelage over business, all via opaque and unfair decision-making processes…this, I'm sorry to say, is the epitome of folly.

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COVID TIMES

Parliament and Council set for collision on Covid recovery fund?

As the continent continues to chart an uncertain course out of the Coronavirus maelstrom, action is already being taken to breathe life back into the EU economy. The Commission has come up a mechanism to disburse funds to struggling Member States, but the devil of secondary legislation is in the detail.

In 28 May 2020 the Commission published a ***proposal*** for a Regulation to establish a *"Recovery and Resilience Facility."* Part of the EU's over-arching Recovery Package, the RRF is intended to offer *"large scale financial support"* to Member States, not only to help them bounce back from the economic trauma caused by Covid-19 lockdowns but equally to ensure this happens in a manner that is sustainable and contributes to vital EU objectives. These include climate neutrality, digital transformation and the clean energy transition.

The essentials of the scheme – that is, the amount of cash that can be doled out under the RRF – is of course tightly linked to broader discussions about the next Multiannual Financial Framework (MFF) for 2021-27. Following a marathon summit in July, EU leaders agreed on a total recovery fund of EUR 750 billion, consisting of EUR 390 billion in non-repayable grants and EUR 360 billion in loans.

The procedure envisaged under the RRF is as follows: a Member State would submit to the Commission by 30 April each year a reasoned *"recovery and resilience plan"* attached to their National Reform Programme in the context of the European Semester process. The Berlaymont will evaluate the plan, checking in particular whether or not it makes a sufficient contribution to the key objectives outlined above.

If satisfied that all the criteria have been fulfilled, the Commission will within four months of the plan's submission adopt an implementing act setting out the financial contribution to be allocated to the Member State (including, if necessary, loan support), the reforms and investment projects to be implemented, and any related milestones and targets.

That implementing act would be subject to the examination procedure as set out under Regulation 182/2011, therefore requiring a binding vote from a comitology committee composed of Member State representatives (and possibly an additional vote by the Appeal Committee if a qualified majority is not reached).

Given the far-reaching significance of the proposed Fund, it is not surprising that the European Parliament (EP) is keen to get a piece of the action. As readers should know well by now, the EP's role in the procedure for implementing acts to next to non-existent; it possesses nothing more than a non-binding right of objection which the Commission is free to ignore.

Therefore, according to the ***draft amendments*** published on 1 September by the Committees on Budgets and Economic & Monetary Affairs (operating as Joint Committees under the EP's internal rules), the approval of each Member State plan would be granted via a delegated act rather than an implementing act. In this scenario, the EP would have a right of veto alongside the Council, with no room for a comitology vote prior to adoption (presumably there would be provision for an Expert group).

On top of that, MEPs would also like to see a mechanism allowing for RRF payments to be suspended in the event of *"generalised deficiencies as regards the rule of law"*, a provision that is certain to get the Orban camp's blood boiling. Under the draft report, such a suspension could be adopted by the Commission via an implementing act under the examination procedure.

However, it seems national governments are not enthusiastic about using comitology for such a politically charged process. A Council document seen by the Newsletter, dated late September, proposes amendments which indicate that Member States want to keep a firm handle on the disbursement of Covid recovery funds by ensuring the decision is taken by the Council itself, via qualified majority, on a proposal from the Commission.

It remains to be seen if a genuine conflict over secondary legislation will flare up in trilogues, but given the uniquely urgent circumstances in which this proposal was developed, the EU Institutions cannot afford to get too bogged down in a dispute over delegated and implementing acts.

IN OTHER NEWS: On 1 October, the Commission published a roadmap setting out plans for a revision of the VAT Directive whereby the VAT Committee, right now having purely advisory competences, would be converted into a full comitology committee with binding voting powers under Regulation 182/2011. Following a consultation scheduled to end on 29 October, publication of the final proposal is expected before the end of 2020.

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EUROPEAN PARLIAMENT

Controversial food additive opposed by MEPs

After the summer break it's back to the grind for MEPs, as September saw the Committee for Environment, Public Health and Food Safety (ENVI) reaffirm their commitment to the precautionary principle by casting their vote against the use of titanium dioxide as an additive in food.

Titanium dioxide – or *"E171"* to give its technical name – is used to add colour to a range of common consumer snacks, including biscuits, cakes, ice cream and chocolate bars. For the past decade E171 has been authorised under ***the Food Additive Regulation 1333/2008***, while subject to specifications as regards origin and purity criteria.

In line with the legislative framework, the additive has undergone a series of evaluations by the European Food Safety Authority (EFSA), all of which have attested to its basic safety for humans. However, one Member State does not agree: in April 2019 the French authorities, concerned about the potential effects of E171 on human health, decided on a year-long suspension of foodstuffs containing it.

This move prompted an additional EFSA opinion, published in July 2019, which recommended amending the definition of E171 as a food additive as well as adding a new specification concerning constituent particles. On this basis, a Regulatory Procedure with Scrutiny (RPS) measure was put to the comitology committee in May 2020. Every Member State bar France voted in favour.

As required by the RPS, the measure next went to the European Parliament (EP) and Council for scrutiny. During August a cross-party group of MEPs, sympathetic to the ultra-cautious French approach, banded together to table a ***motion*** to block the draft. Beyond asserting that the additive has no nutritional value, they argued that the EFSA was not able to dispel the concerns over E171's possibly carcinogenic health effects due to significant data gaps, and therefore the Commission should come forward with a new text proposing to remove E171 from the Union list as a precaution.

After meeting to discuss the motion on 7 September the ENVI Committee voted by a decisive majority to throw out Commission proposal: 51 for, 11 against, 16 abstained. On 7 October the plenary made the veto ***official***, voting by 443 in favour and 118 against.

We shall find out in the months ahead if the Commission is willing to move more in the direction of the precautionary French stance.

Veto on maximum residue limits: a creative use of procedures

Back on 21 April, the ENVI Committee adopted a motion to block an RPS measure that purported to amend maximum residue levels (MRLs) for a series of active substances used in pesticides. However, since it would have been impossible for the plenary to vote before the RPS deadline (in this case, 6 May 2020), the Commission very charitably agreed to the ENVI Chair's request to withdraw the measure in order that it could be re-submitted in September.

Fast forward five months, and the Commission indeed re-submitted the (unchanged) text to the EP on 22 July. In a bid to expedite the procedure, the ENVI co-ordinators decided that the motion should be tabled directly to the plenary without an additional ENVI vote (on the logic that the April vote was still valid). On 17 September the plenary duly made the ***objection*** official.

There is no doubt that we live in exceptional times, and it is understandable that EU representatives might make ad hoc arrangements to ensure that normal scrutiny work can continue in the midst of the Covid-19 crisis. The ENVI Committee was late to the party in April because everyone's attention was on adopting emergency measures to tackle the pandemic.

But on the other hand, we know from past experience that allowing the Institutions to cut corners in the decision-making process is a slippery slope, especially in the comitology field where the procedures are labyrinthine and often subject to 'interpretation'. The Orphacol case was a particularly infamous example.

It is unlikely that this gentleman's agreement broke any specific legal rule, although one could wonder if, in instances where it chooses to withdraw, the Commission ought to re-start the procedure completely by holding another vote of the comitology committee (which did not occur in this case: the initial Standing Committee vote from February 2020 was considered to be still effective).

The EP was busy this month, also voting to block a draft RPS measure on the grounds that it allowed excessive levels of acrylamide in certain foods for young children. The plenary endorsed the ENVI motion by 469 to 137.

Together these mark the second, third and fourth RPS vetoes adopted by the European Parliament since the 2019 elections, following on from the earlier blocking of a REACH measure on lead (see Newsletter #63).

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GREEN DEAL

ENVI Committee adopts amendments to draft Climate Law

As outlined in our recent special edition of the Newsletter (#64), the ***draft Climate Law***, proposed by the Commission on 4 March, is intended to be the guiding light of the European Green Deal by legally enshrining the target of achieving climate neutrality by the year 2050.

But the proposal must first negotiate the ordinary legislative procedure. A significant hurdle was passed on 11 September when the Committee on Environment, Public Health and Food Safety (ENVI) voted through its amendments to the report drafted by S&D MEP Jytte Guteland (pictured left): 46 in favour, 18 against.

The most eye-catching change is the call for a 60% reduction in greenhouse gas emissions by 2030 (compared to the 50-55% target preferred by the Commission), reflecting the EP's desire for greater ambition. But the Newsletter was also interested to see important modifications to the secondary legislation contained in the text.

The Commission proposal initially foresaw a delegated act to set the *"trajectory"* for achieving the 2050 target. However, the EP (backed up by an opinion of its in-house legal service) sees this as an *"essential element"* of the legislative act, i.e. it cannot be delegated to the Commission and must instead be determined by the EP and Council acting in their capacity as EU legislator.

Therefore, the delegated act has been removed, replaced by a provision which states that the Commission should by 31 May 2023 make an assessment and if necessary produce a legislative proposal to set the 2050 trajectory. Any subsequent changes to the trajectory would also be done via codecision. In other words, the issue has been moved from Level 2 up to Level 1, ensuring that the MEPs (along with the Council) will keep a firm political grip.

On 8 October Ms Guteland obtained ***formal approval*** from the EP plenary for the amendments and her negotiating mandate, setting the stage for trilogue talks.

As we write, the Council under the leadership of the German Presidency has produced a ***partial general approach*** on the proposal. It seems there may be common ground with the EP, for the Council has also deleted the delegated act in question, preferring a mechanism whereby the Commission would table a legislative proposal to set a further interim target for the year 2040.

COMITOLOGY PROCEDURES

Veto on maximum residue limits: a creative use of procedures

The famous Juncker ***proposal*** to introduce more transparency and accountability into the procedure for implementing acts was given a new lease of life in January 2020 when the von der Leyen Commission decided to maintain it in the latest ***Work Programme***. It seems that Maroš Šefčovič, Vice-President for Interinstitutional Relations and Foresight, still believes a breakthrough can be made, despite three years of evidence to the contrary.

There has at least been some movement in the European Parliament. On 1 October the Committee on Legal Affairs (JURI) finally adopted its report on the comitology reform, after months of inter-group negotiation led by Rapporteur József Szájer. (The amendments will be analysed in the next Newsletter.)

But as outlined in these pages many times, the main obstacle to the comitology reform has been the near-unanimous opposition of Member State governments, who do not fancy the idea of taking on more responsibility for their failure to reach decisive majorities on sensitive measures (particularly authorisations of GMOs and certain active substances). Their position was summed up in the ***progress report*** prepared by the Bulgarian Presidency in 2018.

Did the recent push have the desired effect? On 4 March, the Croatian Presidency touched base with the Council Working Party for Comitology Revision to assess where national attachés stand on the file. According to information received by the Newsletter, the meeting revealed that there has been no change in the lack of majority support for moving forward with the proposal.

There might, however, be a chink of light. We also heard that a significant number of Member States are open to exploring alternative ways to increase transparency on votes taken in the Appeal Committee (presumably involving publication of which Member States voted and how). Such a move would not necessarily require a legislative change to Regulation 182/2011; it could be achieved via an amendment to the Appeal Committee Rules of Procedure, a far simpler route.

This is a highly minimalist reform that would not make the comitology procedure any less of a black box (given how rarely the Appeal Committee is convened each year). It is not known how the Commission reacted, but it may be a welcome opportunity to salvage something from what is a pretty bleak state of affairs

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