



THE COMITOLOGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

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A very bad trip, ...

At regular intervals, I organise an immersion in the high spheres that govern us. The objective is to identify and meet a dozen senior officials working for the European institutions. The aim is not to discuss this or that file, but to take the temperature. To measure what is going well and what is not. To exchange views on possible options. Four strong messages have emerged from these recent exchanges.

- European leadership is clearly in the hands of the European Council of Heads of State and Government. With the re-election of President Macron, this control will continue and will probably be extended.
- Due to the dominating role of the European Council, the Commission counterbalances its political weakness by a growing bureaucratic complexity it uses to its own advantage.
- The evidence-based decision-making method introduced by Better regulation (scientific input + impact assessment + Call for evidence) is excellent in its conception but suffers from a case-by-case application that encourages exceptions, derogations, interpretations and dissatisfaction.

- The Commission, holding the monopoly of initiative seems paralysed in its action by fear of displeasing: displeasing the European Council; displeasing civil society. The defensive and resigned vision of the industry must be highlighted here.

All this gives the impression of an institutional system in agony, with an inadequate level of decision-making, a multiplication of priorities, and a lack of adaptation of objectives to circumstances. The work of the Conference on the future of Europe is enlightening in this respect. The 49 proposals (and 325 sub-proposals) put forward by the citizens' panels portray an ideal European Union that is far distant from reality and where virtual prevails over realities, theoretical over practical.

Given the global crises that have hit us (and are still hitting us) – climate change, Covid, Ukraine - it is unthinkable that clear answers to the real questions are lacking. Some questions are thematic: the Green Deal, its ambitions and timetable, the adjustment of the CAP to world food needs, etc. Touching marginally seems to be the key message here. But most questions are systemic and revolve around the idea of “Which European Union in 2030?” It is understandable that no one has the answer to this question. But it is unacceptable that no Institution has mandated any Foresight Unit or equivalent to provide an answer.

In terms of immersion in the upper floors of the Institutions, it was actually a very bad trip.

Daniel Guéguen*

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

Push the 'pause' button for taxonomy Use the revocation right

Taxonomy, originally a 'technical' tool to facilitate decision-making on sustainable investments, finds itself at the heart of the EU's strategic discussions on energy, agriculture and industry in general. The “nuclear - gas” saga revealed a lack of scientific rigour in the decisions taken and demonstrated the unsuitability of delegated acts as a regulatory tool for decisions of such high importance. Delegated acts are based on a mandate given to the Commission by the co-legislators and it is their right to revoke it. Taxonomy is THE file to exercise this right for the first time in our view.

When delegated acts made their appearance in the EU legal framework after the entry into force of the Lisbon Treaty in December 2009, two mechanisms were created to allow the European Parliament and Council of Ministers to 'control' the EU Commission's power to adopt delegated acts, i.e. the objection (veto) right and the revocation right. The European Parliament and the Council of Ministers first and foremost define in legislative acts, the mandate for delegation they want to provide the Commission with. The objection right then allows either one of them to object to a specific delegated act and the revocation right allows them to 'take back' the delegated power altogether.

Some would argue that the 'privileged' role the COM for delegated acts is justified and is the most pragmatic solution when dealing with the technical and operational side of EU legislation. Others would argue this imbalance has gone too far.

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Operated by



Essential or not essential?

Delegated acts can complement or potentially amend certain provisions of legislation, but should not deal with what is essential. Practice shows that delegated acts do lead to political discussion and in numerous cases one can ask whether a given measure should be dealt with outside the scope of legislative discussions. In many thematic areas, the 3 Institutions have managed to find a modus operandi although conflict and distrust are never distant.

Over time Parliament and Council have 'learned' to pay attention to the mandates for delegation and - on some rare occasions - they have used their veto/objection right, not once have they used (or even contemplated using) their revocation right.

Several reasons could be enumerated for failing to use this tool (too high majority threshold, insufficient political traction, sufficient other means to put pressure on the COM, shying away from one's power(?) ...). The most important one is the fact that the revocation has been conceived and is viewed as an 'ultimate recourse', a sort of 'mini-censure' to be used only in cases of profound (political) disagreement between the legislator(s) and the EU Commission in how a delegated power should actually be used, a profound discrepancy between the will and intent of the legislators and the executive, the EU Commission.

Among 'comitology' geeks, we would sometimes discuss if and when we may expect a first revocation. Today there is a file on the table that - in terms of the orientation it is taking - dissatisfies stakeholders and decision-makers alike. If ever a revocation would be appropriate because of political divergencies, this file seems to be the occasion to use it.

The Taxonomy file, the best example of how 'political' and conflictual delegated acts can become

The "Taxonomy Regulation", EU Regulation 2020/852, aims to establish a system for classifying economic activities considered "sustainable". Presented by some as a voluntary, non-binding scheme, a tool to facilitate decision-making on financial investments, Taxonomy has in reality become the decision-making scheme determining the pathway towards climate-neutrality.

A crucial element to operationalize Taxonomy is the adoption of a series of delegated to adopt technical screening criteria, i.e. defining the criteria which makes certain sectors/economic activities sustainable or not given them easier access to financing and investments. The first delegated act has been adopted by the EU Commission and concerns the adoption of technical screening criteria for climate change adaptation and mitigation, adopted in June 2021.

Taxonomy's flaws: failing governance, distorted balance of power, lack of scientific basis

The delegated act in question gave rise to numerous comments, opposition and lively discussions among economic operators,

NGOs as well as MEPs notably when scrutinizing the act. The origins of the opposition were diverse. Inappropriate governance with criticism oriented at the composition of the Platform on Sustainable and the Member state expert group which was unable to really weigh in on the discussions and was to a certain extent treated quite disrespectfully. Discussions on content and not in the least emerging political quarrels. To address the contentious nature of this act, nuclear energy, gas and agriculture were removed from its scope and would be dealt with in a complementary delegated act.

Kicking the 'nuclear and gas' can down the road evidently didn't solve anything and the discussions on this complementary delegated act have only invigorated the tensions, clashes and opposition at the highest political level with MEPs, in Member states and among stakeholders, accusing the COM of bad governance, and acting without any scientific basis whatsoever against the backdrop of rising energy prices and the war in Ukraine. Taxonomy has become the summum of political agitation and quarrels. It is therefore inconceivable to continue on the track that has been laid out in the Regulation, not in the least because the context and circumstances have radically changed.

Revocation to everyone's rescue

Can one only stand idly by and accept or are there means to get the train back on track or? Yes, revocation! Taxonomy would be the first justified case for the legislators to use their revocation right. Not so much to 'sanction' the COM but to push the pause button and re-assess the situation in today's circumstances and given the political sensitivity of the file.

Time to reflect on how to improve the governance, to rethink the system, time to discuss at the appropriate regulatory level, which clearly doesn't seem to be the level of delegated acts, but rather a more political level.

The only precondition to exercise the right of revocation is attaining the majority prescribed by the Treaty, i.e. absolute majority of seats for the European Parliament and qualified majority for Council. Furthermore, a revocation occurs if just one of the legislators activates it; no joint action is required.

What are the chances of achieving a revocation? Formally the majority threshold is high, even very high which may complicate achieving it. However, given the state of the file and the aggravating political difficulties, it would be a sign of political courage to use this right now, not the sanction anyone but to pause and reflect on how to do better, be more effective and more inclusive in future.

In short, to genuinely contribute positively to achieving the Green Deal ambitions, beyond political turmoil and conflict, bringing objectivity and scientific rigor in the debate.

Vicky Marissen*

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

The Conference on the Future of Europe. Should we complain or welcome it?

Europe is at the heart of Emmanuel Macron's political project. We remember his speech at the Sorbonne in September 2017 on his vision of the European Union, his speech in Strasbourg on the eve of the French Presidency in January 2022. And most recently his statements on May 9 at the closing of the Conference on the Future of Europe. There is both conviction and wishful thinking in these statements, as it is daring to call for a reform of the European treaties at a time that 13 out of 27 Member States have declared that they are opposed to it.

The Conference on the Future of Europe: a Macron initiative

The Conference on the Future of Europe is an idea of Emmanuel Macron. When he presented it to his colleagues in the European Council, it received little feedback, or at least little favourable feedback. In order to force the decision, the French President had to accept a corset that made the Conference an imbroglio where it was no longer clear who was in charge of what and how. To avoid giving Guy Verhofstadt - a well-known federalist - the leading role, the presidency of the Conference will be tripartite: Mrs. von der Leyen, Mrs. Metsola and Mr. Beaune for the French Presidency of the Union. Associated with this group are an Executive Committee of 25 members and a Plenary Assembly (433 members).

As the months went by, the Council showed a pronounced lack of interest in the Conference, as did - it must be said - the Commission. Only the European Parliament, with Guy Verhofstadt finally appointed as its "coordinator", would act in support of the project. In reality, the innovation of the Conference will come from the creation of a digital platform involving citizens in a possible reconfiguration of the European Union. This citizens' platform is directly inspired by the Citizens' Climate Convention initiated by the French government in October 2019 and personally led by the French President.

The digital citizens' platform: the only concrete asset of the Conference's work

By contrast with previous attempts to reform the institutions, the Conference on the Future of Europe is intended to be profoundly citizen-oriented. With a bottom-up approach in its genes, it is organising citizens' forums at national and European level.

On May 9, 2022, as a prelude to President Macron's speech in the hemicycle in Strasbourg, the contributions of the citizens' forums were made public. The 98-page report contains 325 measures structured around 49 proposals. To avoid an exhaustive reading of a rather repetitive document, we will limit ourselves to copying the first 4 proposals of the citizens' forums, which set the tone of the whole document:

- Safe, sustainable, just, climate responsible and affordable production of food;
- Protect and restore biodiversity, the landscape and oceans, and eliminate pollution; Enhance European energy security and achieve the EU's energy independence;

- Provide high level quality, modern, green and safe infrastructure, ensuring connectivity, including of rural and island regions, in particular through affordable public transport.

To scoff at or to take on board the message sent?

Over dozens of pages, there are many proposals structured into 8 chapter headings: Climate change and the environment; A stronger economy, social justice and jobs; EU in the world; Values and rights, rule of law, security; Digital transformation; European democracy; Migration; Education, culture, youth and sport.

All these proposals describe an ideal European Union, a re-enchanting Europe. Given what awaits us in the coming months and years, one might scoff, but that would be a mistake. Basically, the European citizens associated with the Conference forums are sending us a double message:

- Very clearly, the forums are defending "a European model" based on education, equal opportunities, social justice, health and employment for all, a protected environment, sustainable development, individual and family security. These messages are the exact opposite of the European trends that have prevailed for too long: competitiveness, growth, free trade. These notions are clearly banned.
- Just as significantly, they aspire to a European democracy: a more federal vision, a more legislative Parliament, a less bureaucratic governance, a more modest European civil service that is more responsive to change.

A European model? Yes, but which one?

As the European Union has become diluted and the status quo is no longer an option, the definition of a «new European model» could be based on three criteria:

- A clear definition of the perimeter of the Union. An EU of 27? A 33? A European Political Community? A 2-circle Europe? A 3-circle Europe? This point is a priority because once the perimeter of the Union has been defined, everything else will follow.
- The return to European sovereignty as a reminder of the old «community preference»: which food sovereignty? Which energy sovereignty? Which trade agreements? Which alliances?
- Finally, a complete overhaul of governance, whose level of integration (federalist? Intergovernmental?) will depend directly on the response to the Union's perimeter.

Regrettably, there is no consensus on each of these three criteria among the Member States. The Commission should inspire change. Is this indeed the reality? Let us therefore forget any well-reflected reform project and prepare ourselves to be hit hard and unprepared by a clash of civilisations, for which the climate emergency, the health crisis and the Russia-Ukraine war have provided the bedrock.

Delegated acts vs Implementing acts: the ESPR proposal becomes a major battlefield for secondary legislation post-Lisbon

On 30 March, the Commission released its flagship initiative to deliver on its "circularity" promises – the Sustainable Products Initiative. This "Ecodesign for Sustainable Products Regulation (ESPR)" initiative replaces the current Eco-Design Directive as the new EU's product legislative framework. The key feature of the ESPR is the extended and systematic use of delegated acts (Article

290 TFEU) to establish the eco-design requirements (as well as many other elements) on the various product groups. These delegated acts will regulate sustainability and circularity aspects of products (durability, reusability, upgradability, recycled content, energy efficiency, ...).

The modus operandi of using secondary legislation to regulate product aspects is not new as the Ecodesign Directive (2009/125/EC) already allowed for the establishment of eco-design measures on energy-related products via the pre-Lisbon Regulatory Procedure with Scrutiny (RPS). In essence, the RPS involves Member States' experts in a comitology committee, voting on the proposed Commission eco-design measure and granting the Council of the EU and the European Parliament (EP), the power to veto the measure.

Transitioning from RPS to delegated acts has left no one indifferent in Brussels and some of the EU Capitals, where some see the wide use of delegated acts as potentially giving too much power to the EU Commission and very little room to amend the proposed acts. In that light, some voices call for replacing delegated acts with implementing acts, which would leave the comitology committee in place to approve any proposed eco-design measure. With delegated acts, Member States' experts will lose "weight" in parallel to the increase of power of the EU Commission, which will have the responsibility to adopt the different delegated measures.

Expert groups, composed of relevant stakeholders and Member States' experts, would only be consulted.

What should be the system to replace RPS? The Parliament considers, as a general rule, that that most legal acts referring to the RPS should be included under the regime of Article 290 TFEU (delegated acts). This seems to be the way of thinking of the Commission as well. However, Member States might be quite reluctant to use delegated acts as it would de facto mean they will have no power to vote on the measures during the process. This might spark their interest to push for implementing acts under the ESRP proposal.

What is certain is that given the substantial impact that future eco-design measures will have on the EU market for products and services, we can expect this point to be on of the most contentious ones during the Ordinary Legislative Procedure on the Commission's ESRP proposal.

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Impact assessments: the status quo is not an option

EU procedures are often a maze even for specialists. And this is certainly the case for impact assessments. Having been confronted with them for several decades, I have always seen them as a perfect example of subjectivity at the service of decision-making. The various impact studies on biofuels are the best example, serving as an alibi for previously defined strategies. I have also always seen it as a kind of terra incognita where companies and sectoral associations do not dare to venture, are sorry about the often imperfect results in their eyes and suffer the consequences without ever contesting them.

Impact studies are an essential component of evidence-based policy making

Faced with the delicate balance between scientific analysis and political constraints, the Commission, in its Better Regulation package, has «invented» a new decision-making concept: evidence-based policy making. Through the opinion of an agency such as EFSA, EMA, ECHA and/or an impact study accompanied by a Call for Evidence, the Commission is giving itself the means to receive analyses combining the scientific basis, economic constraints and societal expectations. Armed with this data, which is - a priori - the source of an objective vision, the Commission has all the elements it needs to draw up its legislative or regulatory project in a fair manner. This is the theory.

In practice, the reality is quite different:

- The Commission, which is very proud of the procedures it has put in place, guarantees the objectivity of the impact studies thanks to the involvement of the Regulatory Scrutiny Board, which initially rejects a large third of the impact studies submitted to it at the draft stage. This rigorous filter is not enough reassurance.
- Indeed, the delicate balance between the announcement of the political choice (e.g. the 50% reduction in chemical pesticides

announced in Farm to Fork) annihilates in practice any impact study on this essential point.

- Furthermore, cultural differences between Directorates General, the choice of external service providers responsible for carrying out impact studies, the choice of questions asked, the selection of stakeholders consulted, the choice of options, etc. all give rise to subjectivity and therefore doubt.
- The Commission is aware of this and is surprised at the timidity of the professional sectors with regard to the content of the impact studies. You are too passive,» it says. If you are dissatisfied, intervene. The levers for action are many: the General Secretariat, the Ombudsman, the Parliament, the media, etc. On the upper floors of the Berlaymont building, it is suggested that we pass on the following message: «Do not hesitate to carry out counter-impact studies and to make this known. In short, be proactive.
- The last contentious point is the simultaneous publication of the impact assessment and the legislative or regulatory proposal. Our interlocutors tell us that any disconnection between the publication of the impact study and the publication of the draft act would reduce the Commission's power of initiative. This is not our view.
- Keeping the publication of the impact assessment and the draft act together is in some ways a negation of the very principle of the impact assessment, whose primary role is to evaluate different options. Publishing the two documents simultaneously means that the co-legislators and stakeholders are faced with a policy choice that has already been made and on which they cannot comment, independently of any (legislative or regulatory) proposal it is linked to.

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