



# THE COMITOLOGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

[www.eppa.com](http://www.eppa.com)

#55, December 2018-January 2019

## EDITORIAL

### The EU in hibernation

The bear is sleeping soundly in its lair. The Parliament is in a kind of early recess. The Commission is waiting for the next College. The Member States are self-centred. Elsewhere, everything is moving. Here, nothing is moving.

#### **Brexit: when things are beyond us, let's pretend we are the instigators**

Nobody has control over this issue, neither in London nor in Brussels. Anything can happen, even the worst, just at a time where the economic mistake of Brexit is beginning to become clear for the British and for the continent. The negotiations have been well handled by Michel Barnier's team and the red lines well set by the European Council. But nothing has been solved. We may fear electoral manoeuvres in the UK. And the tightness of the legislative, regulatory and commercial links between the United Kingdom and the Union in practice means that any 'clean' separation cannot be envisaged.

I have said it often: a big country cannot leave the European Union. And a big country cannot leave the Euro. But the withdrawal of the UK cannot be excluded. All other options clash with the upcoming European Parliament elections. Extending the two-year period fixed by Article 50, new elections, a second referendum...none of these options are suitable less than five months out from the European vote.

#### **Preventing the United Kingdom from losing face**

It is time for Europeans to make a declaration of love to the United Kingdom. They must express massive support for the UK staying in the EU and give the British a guarantee that today's Union – paralysed by too many countries, too many Commissioners, too much bureaucracy – will be reformed.

One fall-back option is to organise Europe around two circles: a federal centre for the Eurozone countries and a trade circle for the countries that are more interested in business and competitiveness than in deepening integration. Why wait to make this plan a reality? Messrs Juncker and Tusk, you have to stop presiding over a

Page 2: Review of 2018 and prospects for 2019

Page 3: EFSA transparency reform enters trilogues

Page 4: PEST findings, consultations and other news

defensive Europe and launch this process. And why not entrust this technical task to one of your colleagues who has supported Michel Barnier so well: I am speaking here of Mr Didier Seeuws.

This imperative need to bring major changes to the governance of the European Union is equally valid for the European elections. Are we very sure that these 'populists' and 'Eurosceptics' are anti-European? Is there not an important fringe of unsatisfied pro-Europeans in their ranks? Critical Europhiles, in other words? Just as with Brexit, these are people that need to be won back over.

#### **Brexit and *gilets jaunes*: destroying or rebuilding the EU?**

One of the main criticisms we can make of the EU is that it is too much focussed on the past. The rest of the world is on the offensive and we are on the defensive: in the domain of competition (see the Alstom-Siemens file) and trade negotiations (our lack of authority vis-à-vis the Trump administration), not forgetting our softness in international relations (Iran, among others).

The movements against the Union are multiplying; the *gilets jaunes* are one expression of that, Brexit is another. So are all the anti-system candidates in the upcoming European elections. But that is not all. All over the world we are seeing the creation of protest movements opposed to neo-liberalism and centralism: Extinction Rebellion/Rebel for Life in the UK, the Green New Deal in the US.

They want to destroy the European Union. The goal should be to rebuild it. The status quo is not an option.

DG



Next ETI Training on  
'The Basics of Post-Lisbon Secondary Legislation'

12 MARCH 2019 IN BRUSSELS

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

## REVIEW OF 2018

## Plenty for the next Parliament and Commission to deal with

Having undergone revamp in the wake of the PACT-EPPA merger, 2018 was a year of regeneration for the Comitology Newsletter. The past 12 months have been no less exciting in the field of delegated and implementing acts which remains a veritable *monde qui bouge*, and there is much to look out for in 2019.



### Comitology reform: writing is on the wall

The grim prospects for the Commission proposal to revise Regulation 182/2011 were laid bare in 2018 as Member State governments, buttressed by a critical opinion from the Council Legal Service, refused to assent to most elements of the draft. Only one working party meeting took place under the Austrian Presidency – evidence of how low-priority the file has become.

The question now is whether President Juncker (above) has the good sense to bite the bullet and withdraw the moribund proposal before his mandate ends in 10 months' time.

### Glyphosate: the fallout continues

The European Parliament (EP) is determined to get to the bottom of what sparked the glyphosate saga. A specially-created PEST Committee held 12 meetings over 2018 and interviewed countless experts; the final touches have been put to the report (see page 4), which will be of purely political import for the Commission.

The latter took its own action with a legislative proposal to inject more transparency into the risk assessment procedure at the level of the European Food Safety Authority (EFSA). The EP and Council have begun trilogues with the hope of a deal before the elections, but will the text provide the necessary panacea for the EU's scientific-regulatory malaise?

### Watch out for the 2019 election recess!



Between March and July this year, EP scrutiny of delegated acts and RPS measures will be put on hold while everyone is out on the campaign trail. But for implementing acts and comitology committees, it will be business as usual.

### Can we do better on Better Regulation?

That's the essential question at the heart of the stocktaking exercise launched last April by the Commission Secretariat-General. The initiative spearheaded by President Juncker and Vice-President Timmermans is, like most things in life, a curate's egg: some good and some bad. Work-ons include ensuring rigour and impartiality in impact assessment, as well as due consideration for stakeholder comments on draft measures. The intention is to bring out the main conclusions in early 2019, leaving the next Commission to take concrete action (if any). Of course, many observers are wondering if the next Commission will be as committed to the 'Better Regulation' ideal.

### Court of Justice keeps itself busy

No landmark judgments on secondary legislation sadly, though there were still some rulings of interest. In March, the General Court concluded that the three Institutions must justify their refusals to grant access to **the fourth column in trilogue talks**, and thus cannot hide behind a general presumption of non-disclosure. A month earlier, the judges chose not to follow the advice of the Advocate-General by relaxing the admissibility rules for annulment actions against **non-binding 'soft law'**, despite the ever-growing volume of such measures in the EU regulatory landscape.

### Talks on lobbying transparency stall

There were high hopes two years ago that the Commission, Council and European Parliament could find common ground on a Mandatory Transparency Register applicable to all three Institutions. Three-way negotiations began in April 2018, but progress has been stop-start ever since, with conditionality being a particular bone of contention. In the meantime, the EP is in the process of **revising** its internal rules to subject rapporteurs, shadow rapporteurs and committee chairs to enhanced transparency obligations. Will the Council, a traditionally more opaque body, follow suit next year?

### A new Comitology Register in 2019?

The main online resource for tracking implementing acts is set for a long-overdue makeover after the Commission launched a study in April to make the Comitology Register more interoperable and user-friendly. Inspiration can no doubt be drawn from the new and ultra-slick Delegated Acts Register.



## TRANSPARENCY

### Institutions dive into trilogues on General Food Law reform

**After numerous twists and turns, and a brief wobble over the precipice, the Commission proposal to increase transparency in the risk assessment process at the European Food Safety Authority (EFSA) is ready to enter the arena of three-way inter-institutional talks. Will a deal be done before the elections?**

It is not every day that a European Parliament (EP) Rapporteur resigns in protest at the final shape of his or her **report**, but that is exactly what happened last month when the plenary voted by 427 in favour (172 against, 67 abstentions) of amendments to the draft EFSA reform on 11 December 2018.



It seems that drama is not far behind wherever MEP Renate Sommer (EPP, DE – pictured) goes. Back in October (see Newsletter #53), she floated the possibility of delaying the adoption of the EP's position until after the 2019 election recess, causing a storm among her MEP colleagues and her counterparts in the Commission who are dead set on pushing

the legislation through before Europeans go to the polls. No doubt following some vigorous arm-twisting, Ms Sommer backed down and the original timetable was restored.

But she was determined not to go along with a text she could not endorse. Chief among her concerns about this proposal was that the burden for demonstrating that product information is commercially sensitive (and therefore not required to be revealed to third parties) should fall on EFSA, and not on the company submitting the application for product authorisation.

However, in the end she was outvoted; a majority of MEPs opted for a provision requiring applicant companies to prove that their

information is sensitive. In stepping down, Ms Sommer slammed the decision as a “populist” move that will harm innovation and “endanger the whole food chain”. Spanish MEP Pilar Ayuso González has come off the bench to represent Parliament in trilogues, although the fact that she also voted against the final EP report makes that an odd decision.

Similarly in the Council, an **internal position** was found in December, but not without dissent. The Dutch government criticised several elements, in particular the notion of granting EFSA more funds to fulfil the required extra tasks, despite no impact assessment having been done (indeed, the lack of impact assessment was a sore point for many MEPs as well).

Nevertheless, it is full speed ahead for the General Food Law reform: two trilogues have already taken place in January 2019.

#### The cascade effect strikes again?

**Point of interest for comitology nerds: the Council wants to replace the proposed delegated act on a risk communication plan with mere guidelines (Article 8c). This is an example of the ‘cascade effect’, whereby binding secondary legislation is replaced with non-binding soft law.**

## IN THE COURTS

### General Court annuls Commission rule on car emission limits

Another piece of secondary legislation bit the dust in Luxembourg on 13 December.

In April 2016, the Commission adopted a measure via the Regulatory Procedure with Scrutiny (RPS) setting maximum emission limits for nitrogen oxides emanating from light passenger and commercial vehicles during Real Driving Emission (RDE) tests. The cities of Brussels, Paris and Madrid reacted by launching action for annulment, alleging that the EU executive was not entitled to deviate from the ‘Euro 6’ standard set down in the relevant legislation.

The General Court agreed with the three applicants and **annulled** the crucial provision of the text. The Commission had in effect amended an “essential element” of the basic Regulation (something only the European Parliament and Council as legislator are entitled to do) by applying “correction coefficients” to address supposed technical uncertainties in the RDE tests.

The annulled provision will remain in force for a certain period of time to allow the Commission to adopt a new text.

## BETTER LAW-MAKING

### Austrian Presidency signs off with report on IIA implementation

A **progress report** published on 30 November shows that the Council is still making efforts to implement the 2016 Inter-institutional Agreement on Better Law-making.

Probably the biggest achievement is the near-final compromise on **criteria for delineating delegated acts from implementing acts**, a constant source of friction in legislative negotiations. Technical-level talks have been wrapped up, and all that remains is for the hierarchy to make it official.

As for **alignment** from pre-Lisbon to post-Lisbon comitology, trilogues at technical level have been on-going since last summer, and the Council has updated its general position. However, the Newsletter hears that the most difficult issues of the Omnibus proposal have not been broached yet, meaning it could be a long time before we see a breakthrough in this file.

The report also notes progress on setting up a **joint database on the state of play of legislative proposals**: an IT structure and display will be hopefully be agreed in the coming months, followed by an estimation of the necessary costs.

## PARLIAMENT

### AFCO Committee takes stock of Lisbon Treaty scrutiny powers

**Tempus fugit: this December it will be ten years since the Treaty of Lisbon entered into force. On paper MEPs gained quite a lot, but the question is whether they have utilised those new-found competences to the fullest.**

Article 290 of the Treaty on the Functioning of the European Union (TFEU) furnished the European Parliament with two substantial powers in relation to delegated acts: a right of objection (i.e. veto) against an individual delegated act, and a right of revocation with regard to the Commission's general power to adopt delegated acts under a given piece of legislation.

The right of veto was nothing new in practice, since MEPs already had substantially the same right concerning measures proposed under the Regulatory Procedure with Scrutiny (RPS). The right of revocation, however, was an innovation – some have labelled it a kind of 'mini-censure' option against the Commission.

It is one thing having a power; it is another thing to use it. Both objection and revocation are subject to the onerous threshold of an absolute majority (376 out of 751 MEPs), not just a majority of votes cast. This can be a difficult to bar to reach in most cases.

Moreover, the EP has generally been prudent in its resort to objections: of the over 600 delegated acts adopted since 2009, only 8 have been blocked by the Parliament. Could we put this down to neglect on the part of MEPs? Maybe in some instances, but the reality is subtler than that.

In the vast majority of cases, there is no need to consider a veto thanks to the EP's observer status within Expert Groups, where an

administrator from the relevant committee secretariat can already see the draft being discussed between the Commission and Member State officials. Problems, if they exist, are usually ironed out at this early stage, before the delegated act even reaches Strasbourg.

Despite this, an own-initiative **report** prepared by Mercedes Bresso on behalf of the Committee on Constitutional Affairs (AFCO) calls for vigilance, encouraging the EP to "*reinforce its scrutiny*" over both delegated and implementing acts. On the latter, where the EP power is almost non-existent, the report believes national parliaments should up their game in ensuring sufficient oversight.

Overall, it is a recognition of an obvious fact: secondary legislation can be just as political as it is technical. The plenary is expected to vote on the report on 12 February.

**According to Politico, DG SANTE is optimistic that a qualified majority of Member States in the Standing Committee on Plants, Animals, Food and Feed (SCoPAFF) will support the new implementation plan for the Bee Guidance Document. It is not yet clear when a formal vote will take place**

#### 4-week consultation mechanism

##### Key secondary legislation submitted for public comment:

- **Recognition of US soybeans for biofuel as compliant with EU environment criteria**  
*Open 19/12/2018 to 16/01/2019*
- **Authorised wine-making practices in the EU**  
*Open 21/12/2018 to 18/01/2019*
- **EU emission trading registry and allowances**  
*Open 09/01/2019 to 06/02/2019*
- **Limits on formaldehyde & aluminium in toys**  
*Open 09/01/2019 to 06/02/2019*
- **Limits for pharmacologically active substances prohibited in animal products**  
*Open 11/01/2019 to 08/02/2019*

#### Final PEST Committee **report** adopted by EP plenary on 15 January 2019

##### 3 main recommendations on comitology:

- Conflict of interest policy for members of the Standing Committee on Plants, Animals, Food and Feed (SCoPAFF);
- More transparency in SCoPAFF proceedings, including detailed minutes and making Member State votes public;
- Better efforts by Commission to meet decision deadlines after EFSA review.

Will the Commission take up MEPs' advice?

#### Comitology Newsletter Editorial Team:

Editor-in-chief: **Daniel Guéguen**, [daniel.gueguen@eppa.com](mailto:daniel.gueguen@eppa.com)

Deputy Editor: **Steven Corcoran**, [steven.corcoran@eppa.com](mailto:steven.corcoran@eppa.com)