THE COMITOLOGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

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#61, November 2019

EDITORIAL

Modernising Commission management

In the last issue, Daniel Guéguen rightly drew attention to the fact that the EU, instead of moving towards better regulation, is moving backwards.

In order to increase efficacy of delivery but at the same time improving the balance between technocratic and democratic governance, at a time of decline of functionalist economic views in favour of more ecological, cultural and social needs, deep innovation in the EU public sector will be needed. But the gap between promises, made again by the new Commission in the European Parliament, and delivery has only been widening over the years.

Instead of yet another round of grand discussions about the future of Europe, the real concern should be on efficacious management of policy objectives. This requires evidence-based policy-making and complementing political-legalistic thinking about competences with deep management reforms, operationally and culturally. Pragmatic and experimental forms of governance are needed, better adjusted to a digital age.

Instead of seeking to fit new policies into existing steering models designed for other objectives decades ago, the operational models of the EU need adaptation to the new policies. This will help the EU to deliver its key tasks better.

Learn from high performers

The operation of the Commission should be inspired by those countries which have made innovative public management reforms and created steering mechanisms for policy innovation, and by the most innovative examples in the corporate sector.

Public sector innovation is of such importance that it should be included in the European semester evaluation; after all, it is about economic effectiveness. There should be systematic peer review with best practices in the Member States (those at the top of innovation and competitiveness ranking).

Instead of a traditional secretary general, the Commission needs a "COO" (Chief Operating Officer) to move policy implementation from a hierarchical and procedure-based approach towards a managerial one focussed on delivery. Its relationship with Directorates-general should be based on the task force management model and related to strategic missions.

Like Ministries correspond to the big functions of governments, so Directorates-general should be re-organised according to the key functions of the EU, taking into account its strategic missions, and be (co-)responsible for their delivery.

Learn from free thinkers

Cabinets of Commissioners should include members which can bring fresh ideas and networks from outside the system, and others which can bridge policy and delivery. Overall, EU policy needs radical innovation strategies to respond to new contextual conditions and to move towards user-centred and co-created models.

Human resources policy must be modernised and create more open career paths, based on achievements; more mobility with the private sector; more temporality, ending lifelong appointments. Delivery and non-delivery must have clear consequences.

Learn to listen

But most importantly, to reduce the tension between technocratic and democratic governance, one must resort in the first place to meaningful dialogue methods. The lobbies in Brussels are not as representative for European citizens as many like to believe, and the anchoring of national parliaments is of course much deeper than the Strasbourg one, so why are they not really involved?

Real dialogue starts with problem definition, an exercise as equally important as solving any problem identified. If this is organised in ways stimulated by open innovation thinking and methods, then it should not be seen as an extra burden. Time spent upfront will be time saved later on, not to mention increased quality of and adherence to policy or regulation.

It requires starting with a clean sheet, for example in hearings with multiple and diverse stakeholders present, to define needs and objectives. Internal and external knowledge must be combined, precisely because it can upset the established internal cognitive patterns.

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LISBON TREATY

The legacy of Lisbon: increased complexity and opacity

1 December 2019 marked the ten-year anniversary of the entry into force of the Treaty of Lisbon, but the Newsletter is not rushing to join in the celebrations. For secondary legislation, the goals of simplification and legal certainty have patently

The Treaty was in theory the culmination of a process that had been on-going since the 1997 Treaty of Amsterdam. But in reality it began its existence almost as an afterthought; a hastily re-packaged version of the 'European Constitution' which failed to pass muster with the French and Dutch. Lest we forget, the new incarnation required two separate referenda to cajole a 'yes' out of the pesky Irish. Suffice to say, the omens were not good from the outset.

The list of reforms brought by the Lisbon Treaty to the EU's institutional and decision-making architecture is so dense and varied that it would require a tome to analyse them fully. Let's therefore focus only on the implications for secondary legislation.

The overall objective (already present in the ill-fated Constitution, but later rehashed) was to streamline the categories of binding EU legal acts, replacing the previous mishmash with a simple trifecta: (1) legislative acts adopted by the European Parliament (EP) and Council, followed by (2) delegated acts to amend or supplement that legislation and (3) implementing acts to flesh out the more technical and administrative details.

These two types of "secondary legislation" were each given ther own home in the Treaty on the Functioning of the European Union (TFEU), a significant innovation: Article 290 TFEU for delegated acts and Article 291 TFEU for implementing acts, with an enumeration of their nature and modalities. What could possibly go wrong?

Welcome to the grey zone

Sadly the Treaty was tainted with original sin, for the drafters did not precisely mark the boundary between a delegated act and an implementing act. While certain areas can be undeniably attributed to each one (e.g. amending annexes, granting authorisations), there is a massive grey area in the middle, particularly when it comes to adding extra rules to the relevant law.

The result? Year after year we hear of legislative negotiations being consumed (and on occasion, derailed) by the Council, EP and Commission bickering over whether a delegated act or implementing act should be chosen to regulate a given topic. In an ideal world, the EU Court of Justice would have stepped in and restored some legal order, but when called upon in 2014, the judges regrettably chickened out and took a ***hands-off approach***.

In short, the choice of secondary legislation is now determined by the brute force of an institutional tug-of-war (which the Council invariably wins). The recently-adopted ***delineation criteria*** are a feeble creature that will do little to resolve this morass.

Did Member States know what they were signing up to?

Prior to December 2009, pretty much all secondary legislation passed through the sausage machine known as "comitology". No measure saw the light of day unless the Commission services first put the draft to a committee of national civil servants for discussion and vote. It was a power Member States cherished very deeply, a crucial and tangible check on the EU executive's discretion.

So imagine their horror when, just 8 days after the entry into force of the Treaty, the Commission hit them with a ***Communication*** announcing there would be no prior vote on draft delegated acts: the Council (and EP) would receive them for scrutiny only AFTER they had been legally adopted by the College of Commissioners.

Granted, Article 290 TFEU says the EP and Council can veto any delegated act put to them, but this power is hedged with considerable constraints: the deadline is short (generally two months), the majority required is demanding, and neither co-legislator can amend the text submitted. It is no substitute for the more invasive control mechanism characterised by comitology.

Legally speaking though, the Commission was on firm ground, for Article 290 TFEU says absolutely nothing about any scrutiny of delegated acts in the upstream drafting phase. The Berlaymont was clearly aware of this fact; national governments evidently were not, having failed to read the small print.

Ever since then, numerous attempts have been made to chip away at the Commission's margin of manoeuvre with the instruments available, the most effective being the 2016 ***Inter-institutional Agreement on Better Law-making*** which makes provision for systematic consultation of Member State expert groups on draft delegated acts. The EP can send officials to attend expert group meetings as observers.

For stakeholders and citizens meanwhile, the Commission has helpfully and on its own initiative introduced a ***four-week consultation mechanism***.

But in the longer term, none of this provides the requisite standard of transparency and legal certainty. What is needed is a "Regulation 182/2011" for delegated acts; a binding legislative framework, equivalent to that for implementing acts, that sets down in unambiguous terms the procedural steps to be followed in the conception of a delegated act.

At the next round of treaty revision (whenever that might be), Article 290 TFEU should be re-drafted to provide for the necessary legal basis for such legislation.

The infernal duality of systems continues

Before you can streamline secondary legislation, you first need to get rid of all the pre-Lisbon comitology procedures. In this respect, the Lisbon Treaty has been an abject failure.

The Regulatory Procedure with Scrutiny (RPS), a pre-2009 procedure originally present in over 300 pieces of legislation, was supposed to be smoothly aligned (a.k.a. "Lisbonised") to delegated acts. The Commission was ***initially confident*** of completing the process by May 2014 – so much for that! At the time of writing, this Lisbonisation has been only partially achieved: the Newsletter counts 115 legislative acts that still contain the RPS, including key files like REACH, Cosmetics and Type Approval.

Not that the Commission hasn't made efforts to accelerate Lisbonisation as much as possible – it is just that they did not anticipate Member States going on strike. Indeed, in late 2013 the Council unanimously declared that they would agree to no further alignment of pre-2009 legislation until the EU executive gave them a bigger role in the drafting of delegated acts. This was one of the reasons we got the IIA on Better Law-making (see above).

But despite the concessions, national governments are still extremely wary of parting with the RPS. The file will be returned to in the coming months, but the potential for conflict is severe: the EP wants a simple transition to delegated acts which will guarantee its prized right of veto; Member States increasingly favour switching the RPS with implementing acts, preserving their binding voting power…but this would exclude MEPs from any meaningful role.

Meanwhile, the rest of us are faced with two over-lapping regimes, which is a huge source of confusion to many and makes a mockery of the Lisbon Treaty drafters' goal of "simplification."

Rumours in the corridors

The Newsletter hears from a trusted Member State source that the RPS will never be completely abolished, if national governments have their way! Perhaps we will be mired in this transitional system forevermore…or at least until the next Treaty revision.

Traditional comitology: a scarcely better record

Regulation 182/2011 replaced the previous four procedures with just two (examination and advisory) and set down a body of rules for how implementing acts should be agreed between the Commission and Member State officials. However, not even a binding legal framework such as this is immune to creative 'interpretation' of process; the nadir was surely the ***Orphacol Saga***, when DG SANTE bureaucrats shamefully cut corners to prevent a life-saving medicine from reaching the market.

Thankfully the Court of Justice intervened in that case and others to rein in the Commission. But without clearer rules, there is always the danger of such situations rearising – and not every stakeholder has the will and resources to embark upon protracted litigation.

The biggest change made by Regulation 182/2011 was the abolition of the call-back right, a mechanism which used to take any intractable issues out of the Commission's hands and move them up to the Council for final adjudication. But now, the ultimate arbiter of contentious draft implementing acts is the Appeal Committee, composed of Perm Rep officials but chaired by the Commission. This has proven to be a troubled forum, particularly in the area of GMOs and pesticides where stalemate among Member States constantly results in the controversial decision being left in the lap of the Berlaymont (a rule the Commission was originally in favour of!).

President Juncker (pictured) and his deputy Martin Selmayr reacted with a hasty and poorly-conceived ***proposal*** that has languished pitifully in the Council for over two years. Granted, the EU's problem with science is rooted in much deeper issues (e.g. public distrust of expertise), but the response to cases like 'glyphogate' demonstrates a dismal lack of strategic thinking.

As our old friend Lenin once asked: what is to be done? As we already alluded to, many of the shortcomings of post-Lisbon secondary probably cannot be solved in the long term without revisiting the text of the Lisbon Treaty. European leaders may cringe at the notion, but the status quo is simply not sustainable.

Perhaps Mrs von der Leyen's proposed ***Conference on the Future of Europe*** could present a valuable opportunity to broach the topic.

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Some countries are quite innovative with stakeholder consultation processes; these can inspire new European ones. Digital technologies can help to build networks of consultation across sectors and countries which go beyond box ticking, such as Skype consultations, video conferences, use of specially designed algorithms. If business can use them to learn about consumer preferences, why do Commission and governments not use them to understand better citizen preferences? Eurostat provides a useful tool to test opinions in the Member States, provided it does not fall into the trap of seeking specific outcomes; however, it does not constitute a system of dialogue.

New technologies can help to bridge the tension between technocratic and democratic governance through the development of innovative systems of stakeholder engagement and co-creation. The current systems of consultation are often just an appearance: (self-selected) stakeholders are invited to comment on a prepared text or questionnaire, to listen to speeches or to tick boxes.

The Commission supports the public sector innovation work of the OECD, so it is time that it starts a serious discussion about experimenting with new management methods.

Prof. Dr. Stefan Schepers is former director general of the European Institute of Public Administration and chairman of EPPA.

Are we about to witness the first shooting down of a delegated act by the 9th European Parliament?

Last month (see Newsletter #60) we wrote about how stakeholders in the chemical sector are bristling at the prospect of a ***text***, proposed by the Commission on 4 October, which aims to give the substance titanium dioxide (TiO2) a stricter classification under the CLP Regulation.

Most Member States in the Council have given a green light, but a Polish ECR MEP, Anna Zalewska, has put forward a resolution (accessible ***here***) to veto the delegated act on the grounds of disproportionality, among others.

The EP's Committee on Environment, Public Health and Food Safety (ENVI) will discuss the resolution on 3 December before taking a vote the following day. Watch this space!

Ombudsman rebuffed on bee guidance

The Newsletter suspects there are many who would be glad to see the back of Emily O'Reilly, for the European Ombudsman has been a very effective thorn in the side of the EU Institutions these past five years, especially when it comes to transparency on legislative and regulatory documents.

Her most recent target was DG SANTE and its famous ***guidelines*** on how plant protection products should be assessed for their potential risks towards bees. Back in May 2019 Mrs O'Reilly found the Commission guilty of "maladministration" for refusing to publish upon request the individual positions of Member States on this guidance, based on discussions in the relevant ***comitology committee***.

The Commission responded to her non-binding conclusion on 11 November with a ***letter*** justifying this refusal by invoking Regulation 182/2011 and the ***Standard Rules of Procedure*** for comitology committees, which refer to the "confidential" nature of committee discussions.

What next for subsidiarity?

A pile of reports (one could call it "unfinished business") is being handed over from Jean-Claude Juncker to his successor, one being the ***conclusions*** of the Task Force on Subsidiarity, Proportionality and "Doing Less More Efficiently".

Chaired by Frans Timmermans, the cadre of political heavies wrapped up their work in July 2018 and made a host of recommendations. In particular, the EU needs to improve its decision-making processes and use available resources more efficiently with the concept of "active subsidiarity".

According to the report, this requires a common understanding of subsidiarity and proportionality, and a greater participation by national parliaments as well as regional and local authorities in EU decision-making.

It remains to be seen whether and to what extent the new Commission of Ursula von der Leyen will take up and implement the Task Force's recommendations.

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