The New Comitology reform

Overhauling the balance of powers or institutional tinkering?

Law constitutes one of the fundamental pillars of democracy, but it is more than this. Law is also a vital cog in the EU decision-making system. In a way, it facilitates relations between the political and the operational. A judicial system that functions badly, inconsistently or not at all, is bound to fall apart. Trust is lost and social consensus disintegrates.

Comitology, far from being an obscure legal topic, is a crucial link between framework legislation and the technical regulations that implement it. It is at the heart of the European project. With a comitology system that works, voilà, Europe runs smoothly. With a faulty comitology system, the EU machine stalls.

In this way, comitology lies at the heart of both law and practical action. This is why I present myself to the reader with a two-fold role: a lobbyist (and therefore a man of action) and also a Professor of Comitology at the College of Europe (and thus as a legal expert).

**From beginnings to 2006: the Commission proposes and implements, the Member States validate**

Comitology is almost as old as the EU itself. Its origins date back to the first Common Agricultural Policy (CAP) of 1962. To allow agricultural markets to function on a daily basis, the CAP granted the Commission the power to take quick decisions on imports, exports, restitutions, storage, etc. This gave birth to the famous ‘agricultural management committees’.
A major development in the process of creating a Single Market was the creation of regulatory committees overseeing technical aspects of environmental policy, food regulation, transport, energy and all other areas relevant to promoting the four freedoms.

For decades, the distribution of comitology powers between the Council and the Commission was clear: The Commission proposed and implemented, while the Council validated or blocked. Simply put, the ‘power of implementation’ belonged to Member States, which delegated it to the Commission while reserving the right to take up the file again if the Commission failed to secure agreement on a draft at the committee level.

Management committees and regulatory committees were structured identically. Each Member State sent a specialized civil servant to each committee (like in Council Working Groups), but the Commission chaired the committee. There were around 250 such committees in the period 1995–2000. The chairperson was generally a Head of Unit within the Commission, though in some cases it was the Director of a DG. This fact clearly illustrated how, in practice, the Commission was pre-eminent in the field of comitology.

In the management and regulatory committees, voting was done by ‘qualified majority’. A qualified majority means achieving a certain threshold of Member States’ votes, with said votes weighted roughly in proportion to states’ populations. When the regulatory and management committees were operating, a qualified majority required the support of 15 out of 28 Member States representing 260 out of the 352 population-weighted votes. If no qualified majority was reached, this was known as ‘no opinion’. This voting system has now been replaced by a double majority system requiring at least 55% of Member States (16 out of 28) representing at least 65% of the EU population.

Although votes were calculated identically for both regulatory and management committees, the consequences of the vote were different:

- For the management committees, only a qualified majority vote against was enough to block the Commission from adopting the measure, since ‘no opinion’ was regarded as a vote in favor. There was, therefore, hardly ever a negative opinion. In practice, agricultural unions, the Commission and the Member States managed to tame the management committees: the relevant actors would consult and inform each other beforehand, negotiating and generally coming to an agreement prior to the vote. The system was the crucial mechanism by which the CAP functioned in practice, based on a three-way management of agriculture: the Commission, Member States and COPA (the federation of European agricultural unions).

- In the regulatory committees, things worked differently, since ‘no opinion’ was treated as such. When a qualified majority in favor was not reached, the Commission’s draft could be adopted and the measure would be sent up to the Council. This was known as the ‘call-back right’, a term we will return to. A simple blocking minority (93 out of 352 votes) was enough to send the Commission’s proposal up to the Council, which could either reject, revise or adopt the proposal. This rarely-used system (there were usually no more than a dozen cases
per year) was very good for lobbyists, but it also offered the advantage of a clear distribution of powers between the Commission and the Council of Ministers.

**Substantial reform in 2006: The Parliament comes into play**

The EU was initially administered only by the Commission and Council, but the Maastricht Treaty introduced the European Parliament into the system as a third actor, giving it co-legislative power. Historically deprived of any executive power, the Parliament – which was not at the time involved in the management or regulatory procedures – tirelessly struggled to obtain a role in the comitology process. An initial success came with the draft Constitutional Treaty, though it was ultimately rejected by the Dutch and French people in the 2005 referenda. However, the Parliament persisted until 2006, when it would become the sole beneficiary of a significant overhaul of comitology.

The reform of 2006, negotiated in opacity, made sense in its structuring and division of powers. First of all, it grouped implementing measures in two categories:

- **Comitology stricto sensu**, covering the most technical, administrative or individual measures.

- Quasi-legislative measures which amend or supplement non-essential elements of laws adopted by the Parliament and Council.

In order to solidify this new distribution of powers, the Commission and the co-legislators proceeded to examine the entire **acquis communautaire** (representing around 250 legislative acts) between 2006 and 2009, so as to distinguish what fell under comitology **stricto sensu** and what constituted a quasi-legislative measure within each act.

Looking back, the system was simple:

- Nothing changed for comitology **stricto sensu**,

- As for quasi-legislative measures, they are subject to a first phase of comitology, with the regulatory procedure functioning as before. Then, in the second phase following their approval by the committee, they are sent to the Council of Ministers and the European Parliament, with each having the right to veto the measure on certain grounds.

The 2006 reform complicated secondary legislation, which nonetheless retained its ‘comitology’ dimension. The complexity was relative, since procedures were generally uniform, with very few exceptions and derogations. Once the system was almost fully in place by 2009, the relevant actors would have a rather positive view of the system.

**2009: The Lisbon Treaty distorts implementing measures**

I was probably the first person, in 2009, to say that the Lisbon Treaty was a bad treaty. And this is particularly true for secondary legislation, because just as comitology (**stricto sensu**) and quasi-legislative measures were finally being clearly disentangled, the Lisbon Treaty came into force with its famous Articles 290 and 291.
To be honest, I almost fell out of my chair when Philippe Brunet, an official in the Commission’s Secretariat-General, informed me just before Christmas in 2009 that the Lisbon Treaty would now authorize the Commission to propose AND adopt delegated acts without the intervention of Member States, and so without recourse to comitology committees! Since Lisbon, we cannot use the word ‘comitology’ to describe secondary legislation. Along with my partner Vicky Marissen, I coined the term ‘secondary legislation’. To be very precise, it is necessary to use a more cumbersome term: ‘delegated acts and comitology’.

As delegated acts (Article 290) are not our main focus here, let us concentrate on Article 291. The first surprise was that, in the Lisbon Treaty, Article 291 is, dare I say it, an empty article. It limits itself to inviting the Commission and the co-legislators to propose and adopt a reform of comitology stricto sensu. This is Regulation 182/2011, adopted in February 2011, 15 months after the entry into force of the Lisbon Treaty. It is precisely this Regulation that the new comitology reform aims to revise.

Regulation 182/2011 modified a system that worked well, turning it into one which works badly:

- As is so often the case at the EU level, terminology poses a problem. The management committees (which manage) and the regulatory committees (which regulate) are replaced by examination committees (which examine). That says it all!

- The system would from then on be composed of two levels: an examination committee at first instance, and an appeal committee where the process is so complex (and ad hoc) that it is best not to go into the details here.

- What is certain is that the appeal committee must secure a qualified majority (currently 16 out of 28 Member States representing 65% of the EU population) in order to block a Commission proposal. Securing such a majority is very difficult because the timeframes are tight and the decision is often more political than technical.

- When the appeal committee vote results in ‘no opinion’ with neither a qualified majority for nor against, the Commission may adopt its proposal. It is important to stress that ‘may’ does not mean ‘shall’. Thus, the Commission has a margin of discretion, to be applied depending on the situation. It is this margin of discretion which is at the root of the new proposal for reform.

If the appeal committee does not block the draft by a qualified majority, the initiative passes to the Commission.

There are at least two parties responsible for the problems of Regulation 182/2011:

- The Commission, which was very favorable to the post-2011 system, as it granted extra decision-making powers,

- The Member States, who came up with the idea of behind the appeal committee which was not in the original Regulation 182/2011 proposal.
But the Commission’s thirst for power collided with reality, since it found itself forced to take responsibility for a range of sensitive and controversial subjects, including glyphosate (currently a hot topic) neo-nicotinoids, GMOs, and plant protection products in general.

In the absence of a qualified majority vote for or against at the level of the appeals committee, it is up to the Commission to take a final decision on these diverse issues. In reality, the Commission can either take the decision or decline to. In either case, it will be criticized, either by NGOs, industry, or the media. Stuck between a rock and a hard place, the Commission, naturally, is not very fond of this system.

As a result, during his State of the Union address to the European Parliament in October 2016, Commission President Jean-Claude Juncker declared his determination to reform comitology once again.

**The 2017 reform: an institutional tinkering**

Above I have explained the various features of comitology and the ins and outs of the process. What we see in reality is the Commission, faced with risky policy choices, is trying to return to the ‘call-back right’.

You might remember this ‘call-back right’ from before: it involved sending the regulation back to the Council when there was a blocking minority at the level of the regulatory committee. It is as if the Member States were telling the Commission: “*We delegated implementing powers to you and you have exercised them poorly because you failed to secure our experts’ consent, so we are taking over the wheel and will decide for ourselves*”.

Yet, there is a small problem: this ‘call-back right’ no longer exists since the Lisbon Treaty, and to re-establish it would require treaty change (itself requiring unanimity). This is essentially impossible with 28 Member States. The only option is therefore to draw inspiration from the spirit of the old ‘call-back right’ and more or less return to the old system. As I wrote in my Euractiv blog, it is a kind of Canada Dry reform, being the color of whisky while lacking its authentic taste.

The proposal to amend Regulation 182/2011 is based on four measures:

1. Making public the voting positions of Member States in the appeal committee. Of course, one cannot but favor increased transparency in most areas, but the underlying idea is more about reinforcing Member States’ political accountability for their own decisions by publicizing their positions, whether they are pro or anti-GMO, pro or anti-pesticides, etc.

2. Discounting abstentions in the calculation of qualified majorities in order to push Member States to declare whether they are for or against any given policy. This measure would immediately see effects as soon as one or various large countries that traditionally seek refuge in abstention would suddenly see their votes ignored. However, I am sorry to say that this is like breaking the thermometer so as to not see the temperature in the bathtub.
3. Creating a higher-level variant of the appeal committee. It will no longer be senior officials who represent Member States but the relevant national ministers, with the relevant Commissioner as chair. This measure is already in the rules of procedure of appeal committees and is therefore nothing new, but it has never actually been used in practice.

4. This final measure consists in the Commission asking the relevant composition of the Council of Ministers for a non-binding advisory opinion in the hope that Member States will produce a common position, having failed to agree in the appeal committee.

One can expect strong opposition to this proposal from the Member States as it passes through the ordinary legislative procedure. The European Parliament might be tempted to benefit from the situation by getting its foot in the door with regard to implementing acts, where its power is currently very weak.

Conclusion: first, confidence must be restored!

The mere tinkering implied by these four measures requires little further comment. What is striking is that, when faced with ‘no opinion’ in the appeal committee, the Commission finds itself so exposed and uncomfortable in having to be the sole actor deciding on such sensitive policies.

In reality, in the face of such issues, the Commission is not alone. It can lean on the agencies which it has itself created - in this case the European Chemicals Agency (ECHA) and the European Food Safety Authority (EFSA). The scientific advice of such Agencies is constantly challenged by various NGOs, usually without the Commission’s intervention or assistance.

Before any reform of comitology, the EU should recognize that it desperately needs to reinforce the credibility of and trust in its agencies, to ensure that their opinions have an indisputable scientific basis, allowing the Commission to rely on this foundation every time it has to take a decision.