



THE COMITOLOGY NEWSLETTER



GUIDING YOU THROUGH THE LABYRINTH

SPECIAL 8-PAGE
GREEN DEAL
EDITION

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EDITORIAL

The European Commission's legislative ambition for the Green Deal will be profoundly impacted by Covid-19.

For some, re-starting the EU economy is an opportunity to achieve the goal of carbon neutrality and a genuine circular economy. For others, these goals should take a back seat during recovery from the crisis.

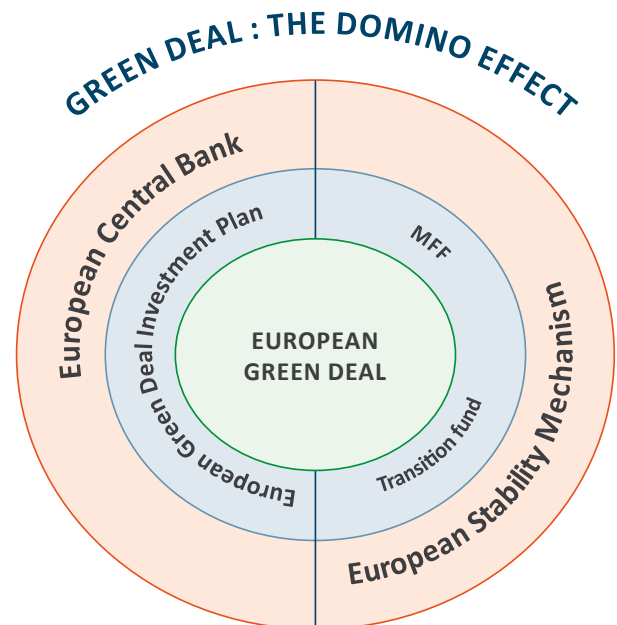
This special "Green Deal" Comitology Newsletter explores the legislative and regulatory labyrinth of the European Green Deal agenda and analyses lobbying strategies in the current turmoil.

While the Single Market of 1992 was based on the notion of scale, the Green Deal is based on a change of paradigm.

It represents a hugely ambitious project that, even before Covid-19, was being frustrated by a European Council reluctant to provide the Commission with the necessary funds.

The Covid-19 crisis has moved the European Union into unknown territory, full of danger. The risks are such that every economist, political scientist and forecaster is now wondering about the sustainability of the European Union and the Euro.

- First, the financial perspectives revealed a multiannual budget of € 1,000 billion for the 2021-27 period. With Covid-19, the figure has to be multiplied by 10. In effect, a total of +/- 10,000 billion (i.e 75% of the annual EU-27 GDP!) could be needed in 2020-2022 to absorb the shock and relaunch the economy. This massive sum will be financed by the MFF, Transition Fund, Green Deal Investment Plan, European Stability Mechanism, European Central Bank and national plans.
- Who is going to pay? The EU will be divided between resistant countries and assisted countries. The resisters include the new "League" (Ireland, Netherlands, Denmark, Sweden, Baltic states) and the Visegrad group. Among the assisted, there are Italy and Spain for sure, but no doubt France too. The Franco-German competitiveness gap will become huge, with Germany reinforcing its economic leadership, and France in agony.



- Some renowned economists say the Euro could either fail or rupture. This scenario is not foreseeable as it is not feasible: how could we live day to day with a currency that no longer exists? Most likely scenario: the Euro survives in the medium term, but with the weakest members losing major purchasing power. In Italy, Spain and France we may expect large-scale social movements that will endanger the very existence of the EU in its current form.
- The EU Institutions will enter into a long battle marked by a structural alliance between the Commission and Parliament, while a divided European Council will try to dilute the Green Deal and slow down its implementation.
- This same logic of conflict will prevail at stakeholder level, with a civil society eager to change the world ("no more business as usual") and a business sector focussed on its survival in an economic and social environment deteriorating long term both in the European Union and worldwide.

Instability and conflict are the two words that come to mind when analysing the Green Deal after Covid-19. Institutional balance, Member State relations, stakeholder interaction: nothing will be like before. We have to get prepared.

Daniel Guéguen*

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OVERVIEW

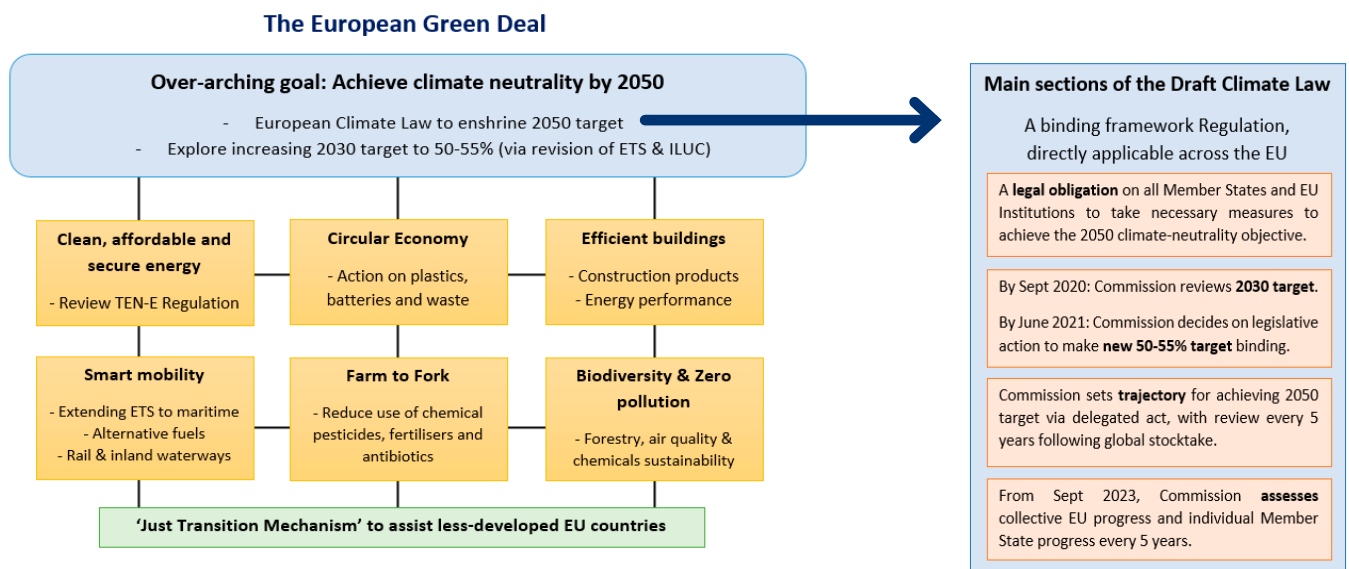
European Green Deal: a project years in the making

In the words of President Ursula von der Leyen, the European Green Deal will be “Europe’s new growth strategy” and the EU’s main weapon in the fight against climate change. The current drive for a European Green Deal is the culmination of a political process that began some years ago.

Spurred by the objectives of the 2016 Paris Accord, the Heads of State and Government who make up the European Council in March 2018 called upon the European Commission – then headed by Jean-Claude Juncker – to develop a comprehensive EU strategy for long-term reduction of greenhouse gas emissions. The result was a **Communication** entitled “A Clean Planet for All”, published in November 2018, where the Commission floated the idea of making

the EU climate-neutral by 2050, alongside other goals outlined in the diagram below.

Following the 2019 elections, fresh momentum was provided by the European Council which endorsed the objective of net-zero greenhouse gas emissions by 2050 in its **conclusions** of December 2019 as well as in its **Strategic Agenda 2019-2024**.



On 11 December 2019 the newly-arrived von der Leyen Commission unveiled a **Communication** which in reality is heavily based on the earlier Juncker Commission document, but supplemented by concrete indications of the legislative and regulatory measures required to implement the Green Deal. **Frans Timmermans, Executive Vice-President in charge of the European Green Deal**, played a key political role in producing the Communication.

Mrs von der Leyen also promised within 100 days of entering office a draft Climate Law to legally enshrine the 2050 climate-neutrality target. This proposal, **published** on 4 March 2020, can be traced back to the “Clean Planet for All” Communication in 2018, for which the public consultation garnered over 2,800 contributions. Building on this foundation, the Commission released a roadmap in January 2020 which received almost 1,000 replies.

No impact assessment

It is notable that the **Berlaymont decided not to do an impact assessment** on the draft Climate Law on grounds that the **in-depth analysis** carried out by the Juncker Commission on the 2018 Communication sufficiently evaluated the implications of the 2050 target.

We could question if this was the right move, given that the **Better Regulation Guidelines** in principle require an impact assessment to accompany all initiatives likely to have significant economic, environmental or social impacts. And is it politically wise for a new Commission to rely on assessments done under previous Colleges?

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CALENDAR

Green Deal legislation: what is the anticipated timeframe?

Below is a non-exhaustive overview of the key legislative initiatives (in total it may translate to more than 30 individual proposals) envisaged over the next three years, plus an estimation of the timeframe for drafting, adoption and implementation. Keep in mind however that the timetable has already been affected by Covid-19.

INITIATIVES	PHASE	Q2 2020	Q3 2020	Q4 2020	Q1 2021	Q2 2021	Q3 2021	Q4 2021	Q1 2022	Q2 2022	Q3 2022	Q4 2022
Climate Law on the 2050 climate-neutrality target	Adoption											
	Implementation											
New 2030 targets: revisions ETS, EED, RED, Effort Sharing, LULUCF, etc.	Preparation											
	Adoption											
	Implementation											
Carbon border adjustment mechanism for selected sectors	Preparation											
	Adoption											
	Implementation											
Circular Economy Action Plan (incl. sustainable products initiative and CPR review)	Preparation											
	Adoption											
	Implementation											
Review of energy infrastructure framework, e.g. TEN-E Reg	Preparation											
	Adoption											
	Implementation											
Revision of the Energy Taxation Directive	Preparation											
	Adoption											
	Implementation											
Revision of the Batteries Directive	Preparation											
	Adoption											
	Implementation											
Revision of Alternative Fuels Infrastructure Directive / Review of TEN-T Reg	Preparation											
	Adoption											
	Implementation											
Revision of CO ₂ emission rules for cars and vans	Preparation											
	Adoption											
	Implementation											
Farm to Fork: reducing use of chemical pesticides	Preparation											
	Adoption											
	Implementation											

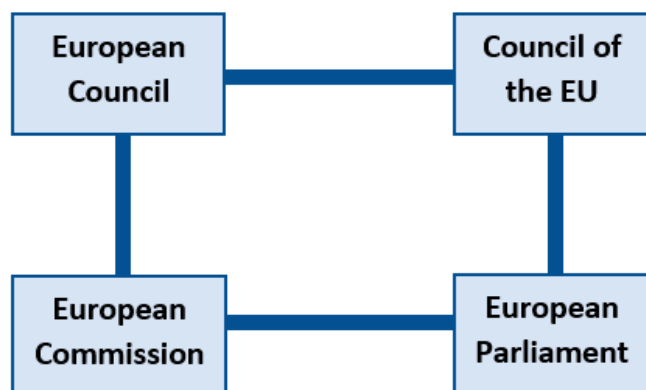
30+ legislative proposals...
and potentially several hundred delegated and implementing acts!

PREPARATION PHASE

Institutional battle over initiative on legislation creates instability

The draft Climate Law is out, but there is still plenty in the pipeline to implement the different strands of the European Green Deal (page 3). Multiple steps and players are involved before the Commission lifts the pen.

The classic Institutional Triangle (the Commission, Council and European Parliament) is now an Institutional Square.



Dominance mixed with paralysis equals instability

Already over a decade ago we saw the importance of the European Council in legislating on the environment. In December 2008 the French Presidency, led by Nicolas Sarkozy, engineered an agreement between Heads of State and Government on the Energy and Climate Package, effectively side-lining the European Parliament.

Since the Lisbon Treaty of 2009, which made the European Council an EU Institution in its own right, the role of Member States in the upstream conception of EU policy has only increased. Little by little, they have *de facto* captured power. More recently, it was the European Council that kick-started the process eventually resulting in the concrete Green Deal today (see page 2).

But despite their dominant role, the Heads of State and Government are paralysed, firstly by strong political divergences and secondly, by the fact that they take most decisions by consensus or unanimity (the latter being used to decide on the Multiannual Financial Framework). These two factors together generate instability, and as a result, the Commission is in a position to take advantage of the paralysis and push its own Green Deal ideas forward.

The European Parliament adds to this instability

While famously lacking the same power of initiative as the Commission, the EP does have the right to request the Commission to put forward a legislative proposal, although the Berlaymont is not obliged to present the requested proposal.

However, new President von der Leyen has expressed a commitment to respond to every formal EP request with a legislative proposal, within the bounds of proportionality, subsidiarity and better law-making principles. Will the Commission fulfil its promise and act

upon each Green Deal initiative supported by an absolute majority of MEPs? In the current climate, this is an unstable, ad hoc power.

The result is a state of confusion where everyone wants to be first to act but is moving at different speeds. Knowing that European Council instruction will be late coming, Executive Vice-President Timmermans wants to move quickly. The same goes for the European Parliament which wants to push certain policies forward: for instance, the ITRE Committee is currently working on an own-initiative report about boosting the energy efficiency of buildings. However, Member States – the slowest actors – are the ones who must first decide on financial commitments!

Upstream drafting: a multiplication of tools

Another major change is the proliferation of tools in the process of drawing up a legislative proposal. This is especially the case since the unveiling of the Better Regulation agenda in May 2015, which in practice means almost every legislative proposal is preceded by an evaluation/fitness check, a roadmap, an impact assessment and a public consultation (sometimes general, sometimes targeted).

During these exercises the Commission might collect hundreds, even thousands, of contributions from citizens, NGOs, companies, associations and national authorities. For example, the Roadmap on the draft Climate Law got 929 responses: the great majority were submitted by individual citizens, individual companies, NGOs and national associations. Around 70 came from EU trade associations.

In recent years the Commission has received criticism for using impact assessments and consultations to confirm an already pre-determined position, so bilateral contacts are still the best route for stakeholders to achieve success.

Why is it called the draft Climate “Law”?

The use of the term “Law” has caught people’s attention, causing some to wonder if this is a new kind of measure. In reality, the significance is mostly symbolic and political. By using the term “Law”, the Commission is underlining the core objective of enshrining the 2050 climate-neutrality target as a legal obligation upon the EU Institutions and Member States. This method has been used for other proposals, e.g. the Common European Sales Law.

Legally speaking, the Climate Law will be a regulation like any other, binding and directly applicable in Member States. It is important to note however that this is a “framework regulation” which merely defines the general direction; the nitty-gritty of how the 2050 target will be achieved, remains to be determined in upcoming changes to sectoral legislation (ETS, CAP, Batteries, etc.).

ADOPTION PHASE

The decision-making happens in trilogues, real-life or virtual

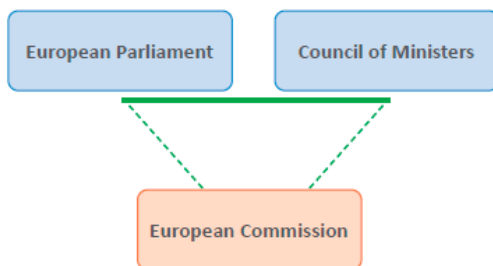
The European Parliament (EP) and the Council will be kept very busy in the coming months and years with proposals to concretise the European Green Deal. The initial reactions to the draft Climate Law of 4 March 2020 give an indication of where the main flashpoints will be situated.

In the Council, Member States like Poland, the Czech Republic and Hungary doubt they can make the necessary transitions and hit the 2050 climate neutrality objective unless they receive significant EU funding. In December 2019, Poland obtained an official recognition that it cannot commit to the 2050 goal for the time being.

As for the EP, broadly speaking MEPs are very supportive of the 2050 objective, but there is some disagreement on revising the 2030 target. S&D Rapporteur Jytte Guteland is advocating a more ambitious target of 65%, which the Greens and GUE are understood to support; but the EPP is reluctant to go as high as 55% without conditions. The ECR and far-right are strongly opposed to 65%.

It is likely these differences will be carried over to the sectoral legislative proposals due to be unveiled in the short to mid-term: revision of ETS & CAP, carbon border adjustment mechanism, etc.

Trilogues: a further source of confusion



The reality of EU law-making is that the core negotiations take place not in the EP committee or plenary, or in the relevant Council configuration, but in the three-way talks between the EP, Council and Commission. Held behind closed doors between a limited number of figures, these are commonly known as “trilogues.”

While basic information on trilogue meetings (when and where they take place) is sometimes made public beforehand, it is usually very hard to find out who is attending these meetings, what the agenda is and what the outcome was. For stakeholders, the priority is to get the four-column document, used to guide the discussions.

There have been efforts to increase trilogue transparency. In the second half of 2019, the Finnish Presidency reported that the Council had started publishing not only the mandate for negotiations but also the four-column document (although without the vital fourth column, where the compromises are inserted). These reforms were very positive, and we may hope that the Croats – and after them, the Germans – show the same commitment. We cannot allow transparency to diminish, especially in these Covid times.

The trilogue is where the essentials of the final legislative text are hammered out, including the distribution of delegated and implementing acts. The three Institutions commonly avoid stalemate by pushing contentious issues into secondary legislation (leaving them to be addressed by the Commission post-adoption).

Another key feature of trilogues is the dominant role of the Commission, which controls the four-column document. Although the EP historically has suffered from a relative lack of expertise, we will likely see a strong Parliament in Green Deal talks, and they will possibly even team up with the Commission on certain issues. In short: trilogues are a battle, and an additional source of instability.

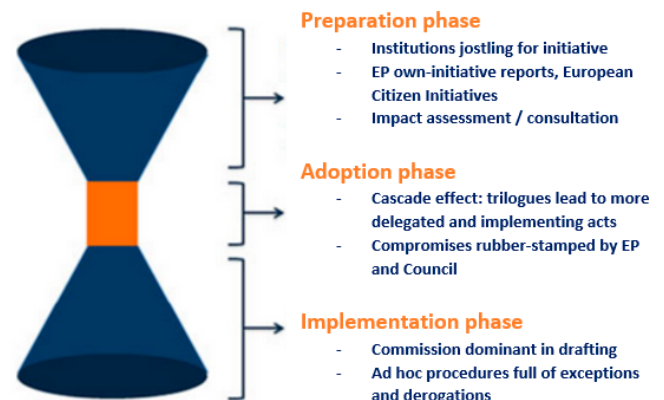
Ordinary or special? QMV or unanimity?

The vast majority of legislative proposals under the European Green Deal will be subject to the ordinary legislative procedure: the EP and Council as equal co-legislators, Member States deciding via qualified majority. However, certain initiatives will be subject to the “**special legislative procedure**”: here the EP has a non-binding consultative role and Member State governments in the Council must take **decisions on the basis of unanimity**. This will be the case for the revision of the Energy Taxation Directive.

What about the envisaged “**carbon border adjustment mechanism**”? So far it is unclear what shape it will take. Will it be a “tax”, applying inside the EU? If so, unanimity from Member States is needed. Alternatively, it could take the form of an obligation on importers to surrender emission allowances under the EU ETS; in this case, EP involvement and qualified majority would be more likely.

In reality, with the rise of “blocs” like the Visegrad group and the more recent “New Hanseatic League” (Ireland, Netherlands, Sweden, Denmark...), achieving unanimity is more difficult than ever. The Commission could consider using one of the “**passerelle clauses**” in the Treaties: while taxation measures in the environment field are subject to unanimity, the Council can decide (unanimously) that the ordinary legislative procedure should apply instead.

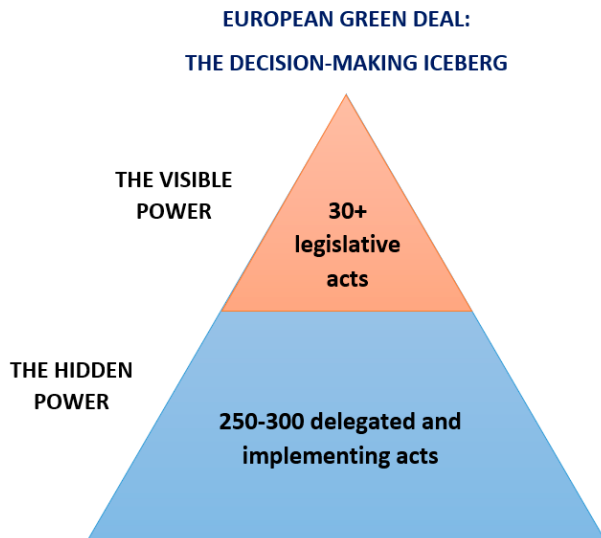
Post-Lisbon lobbying: the sand-timer



IMPLEMENTATION PHASE

Hundreds of delegated and implementing acts expected under Green Deal

It is clear that secondary legislation, and notably delegated acts, will play a pivotal role in the Green Deal. But the decision-making process for delegated and implementing acts is full of opacity and variability.



EU decision-making these days is like an iceberg, with a small part you can see on the surface and a large part hidden underneath the water.

On the surface is the primary legislation adopted by the EP and Council on a proposal from the Commission.

Below the water are the thousands of delegated and implementing acts adopted by the Commission each year. This is the “hidden power” of the EU, and will certainly account for a huge portion of regulation (probably up to 300 measures) under the European Green Deal.

The Treaty says delegated acts are intended to amend or supplement “non-essential” elements of a legislative act, while implementing acts are supposed to add “technical detail.” However, official terms can be deceptive. In reality, secondary legislation is frequently used to regulate aspects of the EU legal framework that are considered vital from the perspective of stakeholders.

Under the Green Deal, we will see not only new laws but also several revisions to existing pieces of EU legislation which already provide for a large amount of secondary legislation. For example:

- The ETS Directive already has 11 mandates for delegated acts and 10 for implementing acts,
- There are 8 delegated mandates in the Construction Products Regulation, and
- The Ecodesign Directive has so far led to the adoption of over 30 RPS measures.

Put briefly, even 2-3 mandates can generate a high number of delegated and implementing acts. As the Green Deal gets realised, this volume will only increase.

What is “essential”? The case of the Climate Law

The recent unveiling of the [draft European Climate Law](#), and the reaction to it, underlines just how important delegated acts have become in EU decision-making. Article 3 of the draft Law mandates the Commission to adopt delegated acts establishing a “trajectory” for achieving the objective of EU climate-neutrality by 2050, with reviews of the trajectory at 5-yearly intervals.

Within a week of publication, the ENVI Committee decided to request an opinion from the EP’s in-house legal service on the legality of this provision. On 31 March, the EP lawyers concluded that, based on case law and past practice, the setting of the

2050 trajectory is an “essential element” entailing fundamental policy choices. Therefore, it falls within the competence the EU legislator (i.e. the EP and Council) and cannot be delegated to the Commission.

So already at this early stage there is doubt about the use of a delegated act to determine the pathway to 2050 climate neutrality. But what are the alternatives?

One option is that the trajectory would be laid down in the Climate Law itself – after all, that is the method used in the [Effort-sharing Regulation](#) for the 2021-2030 period – or that a decision of the European Council by unanimity could be inserted, according to a high-level Member State source. In reality, delegated acts are often the most useful tool for responding to developments at international level, and let us recall that the 2050 trajectory will be heavily influenced by COP discussions. A delegated act could be acceptable on condition that the mandate is limited in order to keep the Commission under control.

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Taxonomy: important gaps to be filled

Although not strictly part of the Green Deal package, the recently agreed **Taxonomy Regulation** is key to achieving the Paris targets and climate neutrality as it aims to help businesses and investors identify environmentally sustainable economic activities.

The Regulation envisages delegated acts to set “technical screening criteria” for determining under which conditions a specific economic activity is considered to contribute substantially to the EU’s environmental objectives. The criteria on climate change mitigation and adaptation must be adopted by the end of 2020, with full application by end of 2021. For the other objectives (e.g. circular economy), adoption is required by the end of 2021.

So now that the legislative phase is more or less done, the battle ground of secondary legislation will begin. The content of the delegated acts will be based on recommendations from the Technical Expert Group on Sustainable Finance (TEG), while the Member State Expert Group on Sustainable Finance (a distinct entity!) will also be consulted. Already there are disagreements between Member States over the criteria (e.g. references to energy neutrality and nuclear) and it will be crucial for interested stakeholders to navigate the procedural maze and deal with the politics behind these delegated acts.

The critical element is the mandate in the basic act

The choice to use delegated acts is largely a political decision taken by the EU co-legislators when the basic act is under discussion. Will the delegated act be used to modify an annex, or adopt a methodology? Is an impact assessment required? Should the Commission have to adopt the delegated act by a precise deadline? These are the issues determined by the mandate. In short, stakeholders aiming to influence the shape of delegated acts are well-advised to take action at a very upstream phase.

Implementing acts: a system of great complexity

The post-Lisbon regime of implementing acts is complex, opaque and can lead to legal uncertainty and excessive interpretation of procedures. The common denominator is that the Commission is in the driving seat. In every case, the relevant DG chairs the

committee, sets the agenda, drafts the implementing act, leads the discussion and makes the ultimate decision on moving to a formal vote. Only with a negative qualified majority in the Appeal Committee can a Commission draft be definitively blocked.

Delegated and implementing acts: advice for action

- **Determine your strategy.** Is it better to have the issue regulated in the text of the basic act; an implementing act, which is adopted under a relatively closed procedure but with a key role for Member States; or a delegated act, which undergoes a process with more limited competence for Member States and an objection option for the EP?
- **Assess the balance of power between the Institutions.** The EP likes delegated acts as it gives MEPs a right of veto, but the Council often prefers implementing acts.
- **Amend the mandate.** For both types of measure, evaluate the need for impact assessment, consultation and deadlines, as well as the precise wording of the empowerment. Take action at the level of the basic act!
- **To influence an individual delegated or implementing act,** identify the Commission chair and all the national experts on the Expert Group or comitology committee. The 4-week consultation often comes too late for effective results!
- **Explore the possibility of your EU trade association getting a seat on an Expert Group that allows for mixed membership.** This is the case for example with the Detergents Working Group and the Medical Devices Coordination Group.
- **Vetoes against delegated acts are more frequently exercised by the European Parliament than the Council,** given MEPs’ enthusiasm for upholding health and environmental protection.
- **Employ a more technical as well as political communication style** when engaging with the Commission/Member States on the comitology committee or Expert Group as secondary legislation has become more politicised over the years and subject to public opinion scrutiny.

3 key stages of a delegated act



Public affairs: the urgent need to upgrade your methodology

With the Green Deal and the unfortunate consequences of confinement, the margins of influence remain, but the criteria for success have been very much upgraded.

To address the challenges posed by the current EU environment, here are our recommendations for upgrading your lobbying toolbox:

1. Confinement has not stopped the work of the Institutions.

Commissioner meetings, Coreper meetings and trilogue talks are taking place ONLINE. Your first priority should be to stay alert and avoid getting trapped. In this online environment, the Commission can manoeuvre to perfection.

2. Your monitoring tools must be reinforced and adapted.

Already we are seeing bad surprises: political decisions dressed up as technical decisions (via simplified procedures). Fake consultations intervening after the decision has been taken. Impact assessments deliberately forgotten. Risk is everywhere.

3. More than ever, each file will have its own institutional setting. Your strategy must be customised. Analyse the relevant decision-making system in depth. Do not confuse the RPS and delegated acts; comitology committees and expert groups; examination committee and appeal committee, etc.

4. It will be vital to maintain relationships of trust with desk officers, but also to expand them to the hierarchy and politicians in the proposal and legislative phases, which lack clarity and transparency. The personal factor is vital. Show up, meet and make proposals! Be genuine.

5. We are moving into a long-term period of conflict between Institutions and between stakeholders. Let's not forget that successful lobbying is mediation first and foremost. Credibility, the ability to persuade, pedagogy and an aptitude for negotiation will be essential.

6. In lobbying, there are too many senders and not enough receivers. Too many EU trade associations express themselves on the same file with the same messages. Better to have one strong sender than several weak ones. The consequence of multiple senders is a very limited number of followers.

7. Modern communication is not just a few images, tweets and emails. A good communicator sees things in a trajectory: what is the result to be achieved? With which arguments? For which public? Communication for communication's sake is useless.

All of this is simply the deepening of an age-old idea: lobbying is a profession that requires a method. And it is up to each person to convince himself or herself that it is necessary to privilege "qualitative lobbying" over "quantitative lobbying."



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