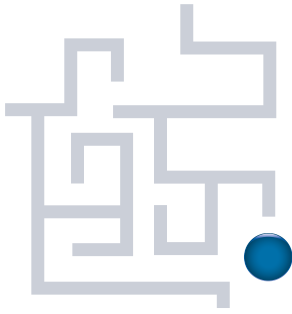

THE COMITOLOGY NEWSLETTER

GUIDING YOU THROUGH THE LABYRINTH

www.eppa.com

#58, May-June 2019

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Brexit is dead. Towards Brexit 2.0?

Since the very beginning I have said that Brexit will not work. Today, we can clearly speak of a "Brexit failure", considering that the 31 October deadline will not help to unblock the situation.

This document aims to examine rapidly the reasons for the failure of Brexit and possible scenarios for the next two years.

1. The reasons for Brexit failure

One of the principal reasons lies with the unpreparedness of the United Kingdom: the poorly-prepared referendum, a poor understanding of the EU system and the inability of May's government to define a clear negotiating strategy.

Three options were possible: remain in the customs union (thereby excluding the signature of free trade agreements with third countries), sign a free trade agreement with the EU (with the risk of not including financial services), or stay in the internal market (with the obligation to respect free movement of workers, which the UK will not accept).

Conservative or Labour, their political leaders are torn between free trade partisans (the Boris Johnson/hard Brexit wing) and defenders of a customs union (Labour/soft Brexit).

It is obvious that the package negotiated with Brussels amounts to a customs union. But it was presented by Theresa May as a "temporary customs union", creating the impression that it would evolve in the direction of the free trade agreement option (and believing against all reason that it would not be necessary to create a physical border between Northern Ireland and the Republic of Ireland).

This imbroglio is at the origin of the failure, including the failure of negotiations with Labour. To win the support of the Commons during the recent votes, Theresa May should have built a mixed majority of Conservative and Labour MPs favourable to a soft Brexit and customs union – mission impossible, politically speaking.

Operated by

2. Scenarios for 2019 and 2020

The present situation is very clear. Mrs May having resigned with effect on 7 June, a Prime Minister now has to be appointed. Around 15 Conservative MPs are potential candidates.This vote will take place during the week of 22 July. All signs point towards Boris Johnson succeeding Theresa May as he will have the support of the Conservative "popular base".

The first decision of the new Prime Minister will be to ask the EU for a re-negotiation of the agreement obtained by Mrs May. The EU's response will be first be "No, but..." then probably a "Yes, but..." But at that moment, the 31 October deadline will have been reached and a new deadline will have to be requested. This new extension could not be less than 18-24 months, given the complexity of the issue – which will bring us to the end of 2021!

In my view, the no-deal option, whereby the UK would leave the EU unilaterally, is ruled out. Tied to the EU by about 15,000 laws and regulations, and to the World Trade Organisation by around 400 multilateral and bilateral trade agreements, the no-deal option is quite simply unforeseeable for the UK, politically as much as economically. Leaving the EU without a deal would be like launching a thermo-nuclear bomb at the EU with London as the point of impact. Unthinkable.

Let us also note – and the history of the second half of the 20th century shows it – that between the extremist positions of an opposition leader and the concrete action of a person who has just become Prime Minister, there is an ocean of difference. The cliff edge no-deal option has been the trademark of Boris Johnson while opposing Theresa May. As candidate for Prime Minister, he will favour renegotiation with the EU. And as Prime Minister – should he get there – he will like all his predecessors opt for realpolitik.

Therefore I believe we should expect the United Kingdom to remain a member of the European Union for the next two years, and probably beyond.

Daniel Guéguen

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

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COMITOLOGY PROCEDURES

Greens to keep up the pressure for reform in new Parliament

May was a fruitful month for the Greens-European Free Alliance (EFA). Just before boosting their EP representation to 69 seats, the group brought out a *detailed report* that points an accusing finger at the EU system of secondary legislation and calls for sweeping changes to how that system operates.

Whatever your philosophy or interests, it never hurts to confer a veneer of academic respectability upon your opinions, which is what the Greens-EFA group did earlier this year when they commissioned Cécile Robert of Sciences-Po Lyon to draw up a report entitled "The political use of expertise in EU decision-making: the case of comitology."

The underlying motives are not hard to discern: many of the flashpoints that have flared up around comitology in recent times – GMOs, glyphosate, Dieselgate, endocrine disruptors – touch upon issues of public health and environmental safety that are central to the Green manifesto. Thus they have, collectively, been much more vocal on the topic compared to their peers in Strasbourg.

The Newsletter has always considered questions of policy substance to be above its station; what interests us above all are procedural matters and how comitology functions. In this regard, the Greens-commissioned study, despite its obvious ideological biases, makes an important contribution to the debate.

First, the report highlights a fundamental defect in the framework of secondary legislation, namely the tenuous (and at times, artificial) distinction between 'the political' and 'the technical'. In theory, comitology is meant to deal only with the latter; the former is to be managed by the EU legislators. In practice, decisions taken at comitology level sometimes carry a strong political element. Worse, these measures can on occasion contradict the terms of the primary legislation under which they are adopted (the recent Court ***ruling*** on car emissions may be held up as an illustration).

Second, the author traces the roots of this problem to the perennial horse-trading between the three Institutions that regularly results in political issues getting pushed down into secondary legislation in the hope of avoiding legislative stalemate (a phenomenon dubbed the 'cascade effect' by ***certain experts***).

Thirdly, the report laments the "*instrumentalisation of expertise*" whereby the parties most capable of making their views prevail in the comitology arena are those with the know-how and the resources to do so – namely national officials and the private sector. NGOs and trade unions, by contrast, tend to get muscled out in their efforts to engage.

The overall conclusion is that the transparency and democracy of secondary legislation processes need to be improved, otherwise "*a two-fold crisis of confidence*" will see the public grow defiant against EU decisions and distrustful of the political system itself.

As for concrete proposals, the Greens-EFA group published alongside the report a ***summary*** of the changes they would like to see. Many of them are familiar to the Newsletter (details on how each Member State voted, no product approval without a QMV in favour); others however we had not seen before:

- Better attendance by Commission members at EP committee discussions on secondary legislation;
- Postponing the comitology process if the EP does not receive information within the required deadline;
- Systematic invitations for EP committee chairs to attend comitology committees and expert groups;
- Review by the EP and Council of general implementing powers if individual files constantly cause problems;
- Making primary legislation as detailed as possible in order to avoid shifting 'political' issues down to comitology.

Love or hate their policies, the reality is that few political groups within the Parliament have been as zealous as the Greens-EFA in working to keep the undeniable failings of the EU comitology process in the public eye. For that, they deserve plenty of kudos.

Many of their ideas make eminent sense. Secondary legislation should never be used to regulate overtly political matters, nor should it ever contradict the basic act. Minutes, participant names and country-by-country voting records ought to be systematically public. And the concept of reviewing implementing powers would be a very logical counterpart to the existing competence of revoking delegated powers.

However, the chicken-and-egg conundrum arises here. The Greens report alleges that the dysfunctioning of comitology generates public antipathy; the Newsletter would argue that it is the other way round. Broader distrust of scientific expertise (after all, these comitology committees are basing themselves on assessments made by independent EU agencies), along with vehement disagreements among civil society, stakeholders and governments over competing economic and agricultural models, have combined to bring the EU regulatory process to a standstill. No amount of procedural tweaking is going to untie that Gordian knot.

In any case, as the Parliament prepares to take up its new mandate, we can expect the Greens-EFA to continue fighting the good fight over the next five years and keep comitology firmly on the agenda.

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ENVIRONMENT

Delegated act restricting palm oil in biofuels arrives safely

A pivotal measure put forward under the revised Renewable Energy Directive has made it to *publication*, although time pressures meant the principles of Better Regulation might not have been fully respected.

The ***2018 Directive*** targets the phenomenon of indirect land-use change (ILUC), which involves the conversion of non-agricultural land into agricultural land to produce food or feed. ILUC is capable of generating greenhouse gas emissions, particularly in forests, wetlands and other areas with high carbon stocks. Member States must therefore respect national limits (eventually reducing to zero) for biofuels considered to be "high ILUC-risk", and such biofuels cannot be counted in renewable energy targets.

The Directive also mandated the Commission to develop a delegated act setting out specific criteria for determining high ILUC-risk feedstock involving a significant expansion of production into land with a high carbon stock, as well as for certifying low ILUC-risk biofuels that would be excluded from the aforementioned limits.

The catch is that the EU executive was given a pretty tight timeframe to adopt the text: 1 February 2019, barely two months after the Renewable Energy Directive entered into force. In their efforts to ensure adequate preparation, DG CLIMA and DG ENER inevitably over-ran the deadline.

On 9 February, a first draft of the delegated act was made available for the customary 4-week ***consultation*** and by the time it closed on 9 March, the proposal had received over 68,500 comments, by far the highest total for any piece of secondary legislation yet. The final delegated act was adopted four days later, on 13 March.

The inclusion of palm oil in the high-risk list provoked furious but ultimately unsuccessful lobbying from the governments of Malaysia and other south-east Asian nations, prominent producers and exporters of this substance. In the end, no objections were forthcoming from either the Council or the European Parliament.

The extremely short timeframe involved brought back memories of the infamous formaldehyde case, when DG SANTE moved to a comitology vote barely 24 hours after the public consultation ended. In that instance, 'Better Regulation' was reduced to a mere formality and box-ticking exercise.

It must be admitted that there are mitigating factors here. To the Commission's credit, it made changes to the text of the delegated act before moving to adoption (in particular limiting the exceptions to high ILUC-risk status). Moreover, it was constrained not by its own negligence but rather the very strict deadlines set down by the European Parliament and Council.

This case illustrates one of the dilemmas of EU policy-making: on one hand, there is a political imperative is to put rules in place as quickly as possible in order respond to pressing challenges (climate change undeniably being one) and demonstrate tangible 'wins' to the public; on the other, there is an expectation, enshrined in the Better Regulation agenda, that policy will be prepared in a thorough and evidence-based manner that gives stakeholder input due consideration. The challenge, as always, is to find a happy medium between the two.

Medical device industry on edge

Faithful readers might recall our piece in July 2018 about the new EU medical device laws and how stakeholders were expressing concerns about delays in building the regulatory edifice in good time. One year on, those concerns have morphed into full-blown anxiety.

A crucial component of the framework is the existence of notified bodies, which have responsibility for assessing various types of medical devices before they go on the market. But according to a ***press release*** and ***quirky video*** brought out last month by the EU association Medtech Europe, the designation of these bodies by the Commission and Member States is still incomplete. Without designation, (re-) certification of medical device products cannot begin.

The two Regulations, adopted in 2017, are due to begin applying on 26 May 2020. The clock is ticking.

Commission under pressure on plastics

Single-use plastics is another big file that was wrapped up before the European Parliament elections, but recent news indicates that the implementation will be no picnic.

When COREPER met on 15 May to give its official seal of approval to the reform, the Commission took the opportunity to voice "concern about the feasibility" of complying with the "short deadlines" envisaged in the ***Directive*** for adopting various implementing acts and guidelines.

For important issues such as the methodology for calculating and verifying the reduced consumption of beverage cups and other items, the Commission will have 18 months (from the date of entry into force, which arrives on 3 July) to come up with a final text. In other provisions, e.g. harmonised specifications for packaging markings, the deadline for adoption is as short as 12 months.

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AFTER THE ELECTIONS

European Union 2019 – 2024: such a great sun...

The Robert Schuman Foundation has published a paper entitled**: "Juncker or European added value: The positive legacy of the European Commission (2014-2019)."**

One can never talk enough about the harm that subsidised associations do to the cause of the EU.

Even for the most pro-European of Europeans, the Juncker Commission has been a failure in the sense that the traditional Commission as the engine of the "European car" has transformed into a mere secretariat of the European Council. The College of Commissioners, composed of eminent personalities, has resigned itself to keeping a low profile (see the Selmayr affair, for example).

A European Parliament more mature than the European Council

The European Council, composed of the Heads of State and Government, meets regularly to decide upon new EU leaders: President of the Commission, High Representative for Foreign and Security Affairs, and President of the European Council. A bit more of this, a bit less of that... Little concerned about the separation of powers, the European Council includes the nomination of the European Parliament President in its shortlist! What a curious time we live in...

More pragmatic, the Parliament is trying to build around the four dominant parties a common programme from which a president chosen by MEPs themselves should emerge, rather than chosen by unwise guardians. Therefore is a Parliament often considered more superficial and more frivolous giving a lesson to a European Council seen as more pragmatic and more realpolitik but in practice more concerned about precedents and respect for egos? The world has turned upside down.

Before choosing the "who", first define the "what"

Perhaps it will be Vestager, perhaps Timmermans, or Manfred Weber, or Barnier? Yes, but what about the programme? The selection of the European Commission President is being organised as if the ship were sailing on a calm sea while a storm threatens nearby.

There is indeed a storm in our internal waters that poses some major questions:

- First (and it is not a trivial point), will the current President impose his Secretary-general on the new one?
- What about Brexit? Would we prefer the British to remain? If so, what can we propose them?
- Can we accept long-term a loss of control over public debt (France, Italy, etc.)?
- Should we encourage the hopes of Albania, Serbia and even Kosovo about joining the EU?
- Should we not consider reform of the EU's bureaucratic governance as a priority?

But also on the external level: a trade war with the USA, tensions in the Gulf, the spread of Chinese hegemony and a European Union on the defensive.

Those of you who rule us, I ask you: dare to choose leaders and not followers. And fix the CAP!

DG

Lisbonisation, Round 1 completed

The Council as we write is dotting the i's and crossing the t's of the ***Omnibus***, which will transition 64 pre-Lisbon laws from the 'old comitology' – i.e. the Regulatory Procedure with Scrutiny – to the 'new', that is delegated acts and implementing acts.

It all feels like an anti-climax however, given that the original 2016 proposal contained a total of 168 pieces of legislation. Member State governments, skittish about the prospect of losing their traditional comitology voting powers, took a scalpel to the text and excised the most sensitive files – REACH Regulation and Cosmetics Regulation, among them.

The Commission, Council and European Parliament will return to the table in the second half of 2019 to deal with the remaining 104 laws still stuck in pre-Lisbon comitology. Round 2 promises to be a much tougher battle.

US-EU aircraft dispute hots up

Comitology has a central role to play in the on-going trade stand-off between the United States and the European Union.

Under ***Regulation 654/2014***, the Commission can undertake a "rebalancing of concessions" granted to another WTO member, which in practice can involve a suspension of concessions or even an increase in customs duties. This action takes the form of an implementing act subject to a qualified majority vote by Member State representatives in the Trade Barriers Committee.

The procedure was ***already used*** last year in response to the steel and aluminium tariffs imposed by Trump. Now the prospect of fresh measures is on the cards after DG TRADE ***consulted*** the public on a draft list of products to be targeted in the event that the US takes action against allegedly unfair European subsidies to Airbus.