

Shining a light on decision-making

The path towards a more transparent and accountable comitology system

May 2017

Summary

In recent years, there have been numerous examples of Member States hiding behind Brussels' procedures such as the opaque comitology procedure. Member States managed to significantly weaken implementing legislation, such as air pollution limits, or refusing to take a decision at all. It was up to the Commission to take a final, often unpopular decision—for which the Commission was then blamed— which led to the infamous Brussels Blame Game. As a response, Commission president Juncker proposed a targeted reform of the Comitology Regulation 182/2011.

While T&E welcomes any attempt to make Member States more accountable and procedures more transparent, we believe the reform is not going far enough. Concretely we demand that:

- the transparency requirements must be significantly scaled up;
- the reform must apply to comitology in its entirety;
- trade-offs at ministerial level must be avoided;
- and the European Parliament be put on equal footing if new responsibilities are created for the Council.

1. Introduction

Have you ever wondered why Member States' public statements don't always add up with the actual outcome of a proposed EU measure? The answer is simple: lack of accountability and transparency. Let's take one recent example: the UK publicly promised to help British steel workers, but then voted against imposing anti-dumping duties on Chinese steel.ⁱ In this case, the public found out about the contradiction because Council of the European Union ("Council") working documents were leaked. How often do Member States actually hide behind opaque procedures?

The Council, representing the governments of the EU Member States, has long been under fire by civil society and the European Parliament (EP) for its total lack of transparency and accountability.ⁱⁱ Preparatory bodies, such as the more than 150 working parties and committees, have a particularly bad track record on transparency. Minutes of the meetings, progress reports or compromise texts are not published.ⁱⁱⁱ For instance, it has been reported that Member States deliberately wanted to keep documents relating to EU legislation on vehicle emissions away from the public.^{iv}

As they are usually meetings behind closed doors, governments can do whatever they want and then blame "Brussels" for everything that goes wrong even though they were at the table when it was decided—thus the *Brussels Blame Game*. Additionally, governments will make promises to citizens on certain issues in national media; but in Brussels it will water down or block the very law that could deliver those promises.^v Member States' positions are not adequately recorded, leaving the public in the dark about their countries' take on a certain file.^{vi} Access to these documents is key as it is the only possible way for the public to become informed about the decisions being taken and hold their governments accountable.

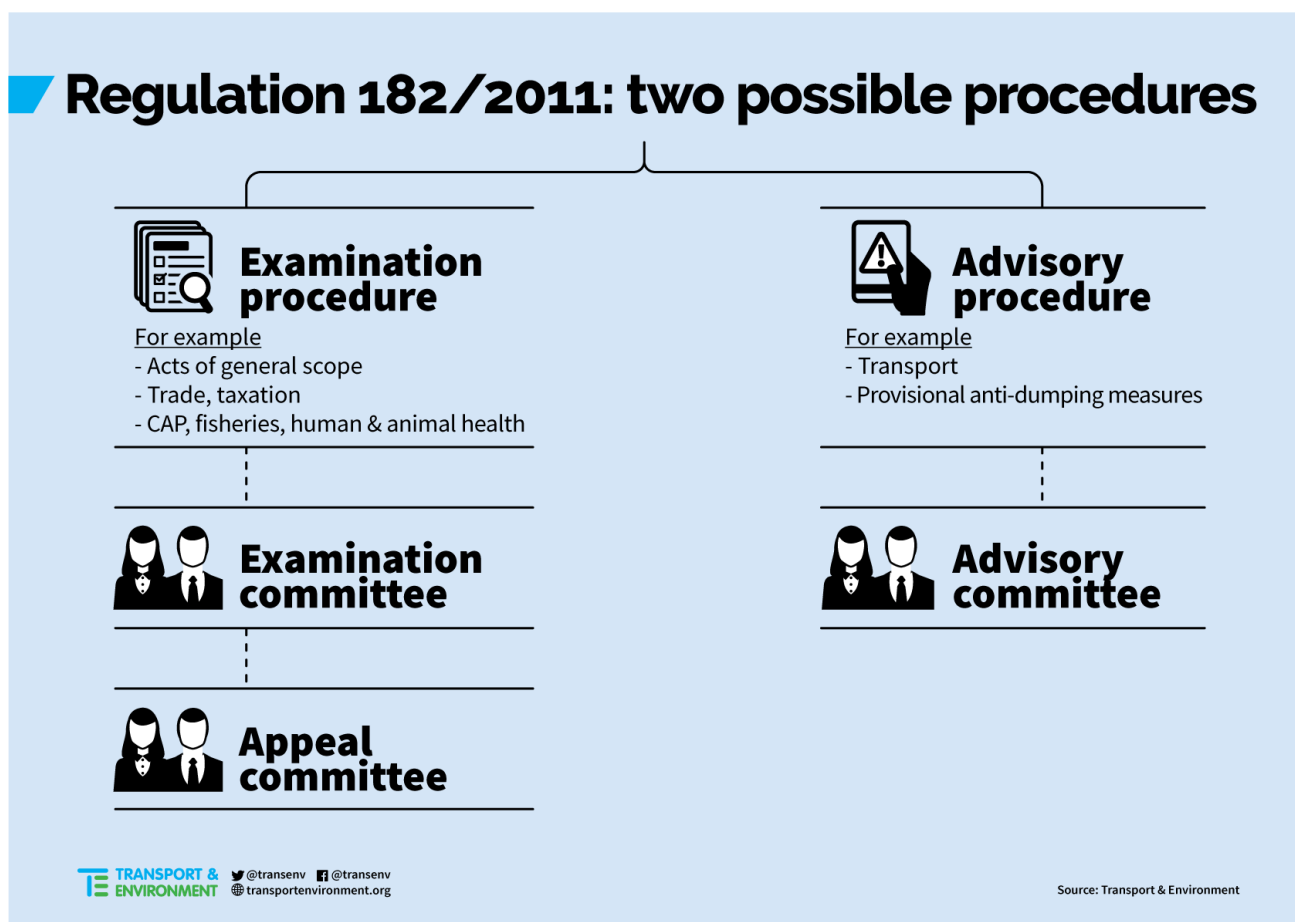
This practice stands in stark contrast to the Commission and the EP's significant transparency efforts and therefore weakens the entire European project. It has also been recently criticised by the European Ombudsman.^{vii} As there is no fixed set of rules at the Council, each Council Presidency can decide on the level of transparency.^{viii}

One example of Member States hiding behind procedures is the infamous comitology procedure, whereby EU legislation is adjusted or implemented through committees composed of Member State government national experts.^{ix} Comitology is not a Council procedure.^x However, the national experts in the comitology committees are appointed by Member States and thus also report to them. It is precisely these Member States that are hiding behind the committee outcome. Notoriously, in the aftermath of the VW scandal, national representatives voted to weaken air pollution limits.^{xi} Votes were secret and there is no information who represented the Member States. This makes it very easy for Member States to make false promises in public, but not stick to them when it comes down to the final vote on an implementing act. In 2016 alone, the Commission adopted 1494 implementing acts.^{xii} This high number shows that implementing acts have become more and more relevant in the legislative process with often far-reaching consequences.^{xiii}

The lack of transparency is becoming increasingly problematic. We, therefore, welcome the Commission's proposal to amend the comitology Regulation 182/2011 in order to make Member States more accountable and procedures more transparent.^{xiv} However, we believe that the restrictive approach tackling only a part of the procedure, which is often not used (i.e. the Appeals Committee) is not enough. Comitology in its entirety needs to be reformed. We acknowledge that a treaty revision is close to impossible given the current political situation, but believe that a holistic reform is necessary. In the following we provide our position on the planned reform.

2. A reform that is not going far enough

The current Commission proposal has a very limited scope. Rather than bringing comitology out of the shadow, the proposal leaves it in the twilight zone. It applies only to the Examinations Procedure, and then just to the Appeals Committee (see graph for explanation of procedures).^{xv} The objective of greater Member State accountability and transparency as demanded in the proposal must be achieved throughout the whole comitology procedure.^{xvi} Furthermore, the transparency requirements remain very limited with merely the votes in the Appeals Committee that should be made public. This is not going far enough.



There are already examples of very transparent comitology committees such as the Standing Committee on Biocidal Products, which decides on the Union market authorisation of biocidal products such as drinking water disinfectants.^{xvii} The Committee has a very good track record of making public the various documents related to its work. These documents can be found on the Commission's online resource platform CIRCABC (Communication and Information Resource Centre for Administrations, Businesses and Citizens),^{xviii} which is a collaborative platform through which expert group documents are distributed. The Committee publishes documents from agendas, meeting notes, stakeholder letters, written comments by Member States, outcomes of votes and minutes of the discussions and are thus more comprehensive than for other comitology committees.^{xix}

The reason for this greater transparency is not entirely clear; the relevant Regulation does not require extraordinary transparency.^{xx} Long-standing practice and political will are most likely the drivers here. If greater transparency is possible in one committee, it begs the question why other comitology committees

can still hide in the shadows. The approach must clearly be scaled up.

Our concrete demands for more transparency are:

- Proposals (“draft measures”), written comments, amendments and votes need to be public
- Voting decisions (including voting intentions when no formal vote takes place) need to be detailed by country
- Livestream of discussions on certain particular, sensitive issues related to environmental protection and public health
- Identities of national representatives
- Stakeholder participation as observers in meetings

Fuel Quality Directive

Article 7a of the Fuel Quality Directive (FQD) is a law aiming to reduce the carbon intensity of Europe's transport fuels by 6% by 2020. Its real impact depends on its implementing measures ranking types of biofuels and fossil fuels based on their greenhouse gas emissions. It also sets up rules requiring oil companies to report the carbon intensity of the fuel they supply.²¹ Dirty fuels such as tar sands should accordingly be labelled as highly polluting. The implementation rules on fossil fuels dragged on for more than four years. A first Commission proposal in 2011 would have discouraged the use of high carbon fossil fuels, but the vote in the relevant comitology committee ended with a stalemate. Some Member States were easily influenced by heavy oil industry lobbying, including Canadian companies.²²

There was very little transparency regarding the detailed reasons for each Member State's vote. Also, following the stalemate, the European Commission could have directly sent the proposal to the Council. Instead, the Commission decided to launch an impact assessment, only because of request by some Member States. The absence of a decision in early 2012 prevented the adoption of a crucial environmental and climate measure. It also triggered a new delay in the implementation of the article 7a. It was only in October 2014 that the Commission released a new, but weakened proposal for implementing the FQD, which was then adopted in April 2015.²³

Dieselgate and Real-world Driving Emissions tests

In 2007, the Euro 6 Regulation set emission limits for new diesel cars and mandated the Commission to develop a more representative emissions test cycle to comply with the new emission limits.²⁴ This was followed by many years of work in comitology to develop the new on-road tests, called the Real-world Driving Emissions (RDE) test.

However, just after the VW emissions scandal broke out, the Technical Committee on Motor Vehicles (TCMV) in charge of the process, met in October 2015 to adopt the main package of the RDE test for NOx emissions. The Member State experts in TCMV de facto weakened the existing Euro 6 standards through the backdoor of comitology. They voted to give carmakers 210% flexibility over the Euro 6 limits for the first two years after introduction in 2019, and a further 50% thereafter starting in 2021. This changed the original Euro 6 NOx emission standards agreed in co-decision years before.

None of the TCMV discussions or individual positions of Member States that led to this decision was made public, allowing countries to hide behind the opaque system. Had the RDE decision not been agreed at TCMV, it would have had to go to the Environment Council where the discussions are public. In short, the intransparent comitology procedure was used to weaken the standards and give advantage to the national car industry.

3. Dissecting the proposal

3.1. Transparency: Making votes public

Increasing voting transparency at the Appeal Committee level by **publishing the votes of Member States'** representatives is generally welcomed. Transparency is key, even in sensitive cases like definitive anti-dumping measures. Fear of retaliation cannot be an argument to act in a twilight zone. In order to ensure a comprehensive approach to much needed transparency, the requirement must be extended to votes in the Examinations Committee.^{xxv} It is exactly in cases which do not end up in the Appeals Committee, but still have far reaching consequences for the environment and citizens, such as air pollution limits,^{xxvi} that Member States often publicly state one thing, but vote for another.

3.2. Excluding MS which abstain from voting

Many Member States have opted for conflict avoidance in politically sensitive cases in order to avoid a clash of interests.^{xxvii} However, when Member States abstain they are also avoiding a truly open public debate on the advantages and disadvantages of a certain implementing measure. Moreover, they are also abdicating their responsibility to exercise control **of the Commission's implementing power**. The effectiveness of reducing the use of abstentions by only taking votes in favour or against into account is, however, doubtful. Member States' responsibility is unlikely to increase.

3.3. Referral to political level: Asking the Ministers

The idea of asking a Ministerial Appeals Committee to decide on a comitology measure when national experts do not take a position is viewed critically. This essentially means moving away from a technical level towards a political level. Comitology was originally developed to deal with technical decisions. Implementing acts are procedural, laying down how legislation should be implemented. These can be timelines or concrete procedures.^{xxviii}

However, the line between a supposedly technical decision and a more political one has become increasingly blurred.^{xxix} As seen, the EP and the Council have decided on the level of environmental protection to be achieved (and the consequences if it is not). But the industry attempts to wriggle out of its obligations via the small print, i.e. the implementing measure which determines how to measure the exact level of protection.

If these decisions are more political, there is a risk that the real topic at stake is forgotten or deals are struck over entirely unrelated issues. A difficult public debate of national ministers then takes place behind closed doors.^{xxx} This runs counter to any transparency efforts and also against the very essence of comitology—namely making technical decisions.

3.4. Last resort: re-introducing the Council

Both the European Parliament and the Council have only a limited role in the adoption of implementing measures. **It is the Member States' governments and their experts that have been given the implementing powers** with the 2011 comitology reform. The EP and the Council only have a right of scrutiny.^{xxxi} Requesting a non-binding opinion only from the Council if the Appeal Committee is unable to take a position raises two very important issues. On the one hand, the Council as an institution is re-introduced into the comitology procedure. It almost seems like the old call-back is introduced right through the backdoor.^{xxxii} A Treaty change would be necessary here. On the other hand, the second issue is balance of power. While the Council can give its views about the repercussions if an implementing measure is not adopted, the European Parliament does not have this right. If the Commission seeks political backing for a measure instead of technical expertise, the European Parliament as co-legislators must also be able to

exercise its prerogative of political and democratic oversight.^{xxxiii}

4. Conclusions

The reform proposal could have put a spotlight on comitology and brought it out of the shadows. However, the proposal remains very targeted and fails to properly address key issues such as transparency and Member State accountability.

First, and foremost, the transparency requirements must be scaled up. This includes making the proposals, written comments, amendments and votes public. Voting intentions, even if no vote took place, must be detailed by country. Discussions on sensitive issues need to be livestreamed, stakeholders should have observer status in meetings and the identities of the national representatives must also be made public.

Secondly, the reform should cover all committees, including the Examinations Committee. Our examples show that it is precisely the files which do not end up in the Appeals Committee that have far-reaching consequences for the environment and public health.

Thirdly, trade-offs at Ministerial level need to be avoided. The process should not become even more politicised. Transparency at the Ministerial Appeals Committee is then needed to track the discussions and outcome of the final decision.

Finally, if new responsibilities are created for the Council, then the European Parliament needs to be involved as well. The Council and Parliament as co-legislators must be on equal footing without giving one priority over the other.

Only a comprehensive reform of the comitology procedure can rectify the flaws of the current system. Given that the bulk of legislation nowadays is passed in comitology, a reevaluation is necessary. This will also give stakeholders and citizens a greater opportunity to follow the procedures and hold their governments accountable.

Further information

Kristina Wittkopp
Legal Analyst, Better Trade and Regulation
Transport & Environment
Kristina.wittkopp@transportenvironment.org
Tel: +32 (0)488 927946

Endnotes

- ⁱ British steel: UK Government blocked EU plans to allow tougher tariffs on 'aggressive' Chinese imports. Available at <http://www.independent.co.uk/news/uk/politics/tata-steel-uk-government-accused-of-failing-to-protect-british-workers-by-blocking-eu-plans-to-allow-a6962446.html> and UK accused of leading efforts to block limits to Chinese steel dumping. Available at <https://www.theguardian.com/politics/2016/apr/01/steel-crisis-uk-accused-blocking-eu-attempts-regulate-chinese-dumping> (retrieved 18. 4. 2017)
- ⁱⁱ For example: T&E submission to public consultation on mandatory transparency register <https://www.transportenvironment.org/publications/public-consultation-proposal-mandatory-transparency-register>: Draft Report 'Transparency, accountability and integrity in the EU institutions (2015/2041(INI))' to be voted on in plenary on 31. 5. 2017 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-567.666+01+DOC+PDF+V0//EN&language=EN> (retrieved 4.5.2017)
- ⁱⁱⁱ According to the General Secretariat's *Guide for the drafting of documents* (2011) p. 8 meeting documents do not get a Council document number. Available at https://delegates.consilium.europa.eu/xnet_docheq/documentation/presidency/Guide%20redaction_EN_int.pdf (retrieved 5. 4. 2017)
- ^{iv} POLITICO Pro Brussels Influence from 15. 3. 2017 available at <http://www.politico.eu/newsletter/politico-brussels-influence/politico-brussels-influence-ombudsman-takes-aim-at-council-edelmans-soul-searching-ce-matin-un-lapin/> (retrieved 4.5.2017)
- ^v See example on FQD and RDE in text bubble
- ^{vi} In C-280/11 P, *Council of the European Union v Access Info Europe* the Court of Justice confirmed the General Court's judgment annulling the Council's decision refusing public access to parts of a note from the GSC to the Working Party on information which contained proposals for amendments tabled by a number of Member States.
- ^{vii} The European Ombudsman opened an inquiry into the transparency of the Council's legislative work on 14 March 2017. See case OI/2/2017/AB
- ^{viii} The Slovak presidency published compromise texts on legislative proposals quite frequently. This practice has, however, stopped in 2017.
- ^{ix} Art 291 TFEU
- ^x The Commission controls the committee procedures.
- ^{xi} "Governments double and delay air pollution limits for diesel cars" available at <https://www.transportenvironment.org/press/governments-double-and-delay-air-pollution-limits-diesel-cars> (retrieved 5.4.2017)
- ^{xii} Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers COM(2017) 85 final, p. 2 ("Proposal")
- ^{xiii} See examples in text bubble
- ^{xiv} Regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers COM(2017) 85 final
- ^{xv} Proposal, p. 3
- ^{xvi} This would also include the less used Advisory Procedure.
- ^{xvii} Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products Text with EEA relevance OJ L 167, 27.6.2012
- ^{xviii} CIRCABC - Communication and Information Resource Centre for Administrations, Businesses and Citizens
- ^{xix} Biocides - Regulation 528/2012 - Public' https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp?FormPrincipal:_idcl=FormPrincipal:left-menu-ig-link&FormPrincipal_SUBMIT=1&javax.faces.ViewState=GnEcDEStvOavdalxMIOXghwqec%2BfBsHRIsx4cNAXkie1QzD3pInFeOHZ4bl7%2BW1CtLhA7XopLGBGO1T1M%2FdR9etdjOhhXfgMwNYdKSFT3SNBnS%2BiPD%2FDpz2mCga2D8199bRadOvJOGB6rLrtnEXrdwsH56O%3D (retrieved 5.4. 2017)
- ^{xx} See Art 10. Regulation 182/2011 for transparency requirements
- ^{xxi} Art. 7a (5) Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC (Text with EEA relevance) OJ L 140, 5.6.2009
- ^{xxii} The EU was negotiating CETA at this time.
- ^{xxiii} For further reading: "Canada, Big Oil and the Frequently and Quietly Delayed FQD" available at <https://www.transportenvironment.org/newsroom/blog/canada-big-oil-and-frequently-and-quietly-delayed-fqd> (retrieved 5.4. 2017) Council Directive (EU) 2015/652 of 20 April 2015 laying down calculation methods and reporting requirements pursuant to Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels OJ L 107, 25.4.2015
- ^{xxiv} This was done under the old regulatory procedure with scrutiny.
- ^{xxv} And to the lesser used Advisory Procedure.
- ^{xxvi} See examples in text bubble.
- ^{xxvii} Member states 'hiding' behind Brussels on glyphosate available at <https://www.euractiv.com/section/agriculture-food/news/member-states-hiding-behind-brussels-on-glyphosate/> (retrieved 19. 5. 2017)
- ^{xxviii} For further information: ClientEarth, 'Introduction to Delegated and Implementing Acts' March 2014
- ^{xxix} See examples of politicisation of comitology in "Dieselgate and RDE" in text bubble.
- ^{xxx} In fact, the Appeals Committee Rules of Procedure already foresee the possibility, but it has never been used. See Art 1 (2) Rules of procedure for the appeal committee (Regulation (EU) No 182/2011) — Adopted by the appeal committee on 29 March 2011. OJ C 183, 24.6.2011
- ^{xxxi} Art 11 Regulation 182/2011
- ^{xxxii} In the pre- Lisbon comitology system the Council had a right to call back when the committee opposed a draft.
- ^{xxxiii} In fact the EP has criticised the current comitology procedure. See European Parliament resolution of 25 February 2014 on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers (2012/2323(INI))