



The Lesser Known Parts of the EU Legislative Process: Consultation, Comitology, Better Lawmaking

Università degli Studi di Ferrara

Dr Justus Schönlaue

Structure of the Presentation

- Introduction/Disclaimer
- The EU legislative cycle
- Key concepts
- Consultation
- Comitology
- Review/ Better Law Making
- Practical example: Vehicle Emissions legislation
- Conclusion - Debate

The concept of a legislative (or regulatory) cycle

- Non-linear but circular notion of EU legislative process (=regulatory)
- Political/ PolSci approach!
- Link to the debate about the ‘finalité’ – ever closer union = ever more legislation?
- Normally: focus on the central part (decision-making in the institutional triangle)
- Here: focus on the ‘periphery’: pre-legislation, implementation, review

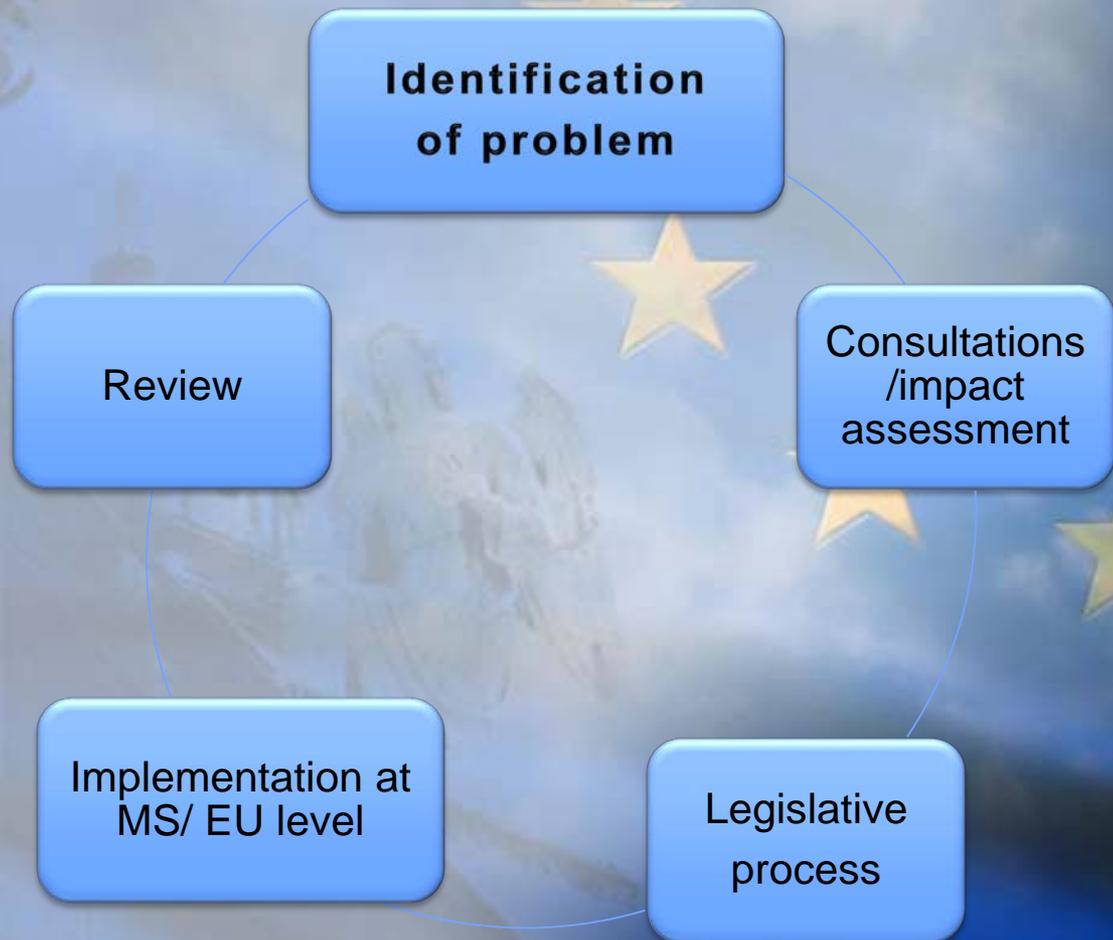
Key concepts

- Democracy (Art 10 TEU)
- Limited competencies - conferral (Arts 4/5 TEU)
- Subsidiarity/ Proportionality (Art 4/ protocol No 2 TEU)
- Consultation/ Participation (Art 11 TEU)
- Effectiveness/ Efficiency (Better Law-Making)
- Legitimacy (no legal basis!)
- Transparency/ Openness
=> POLITICAL vs 'technical' decisions?

Regulatory Cycle I

- Identification of the 'problem' (by whom, when, how?)
- Formal/ informal right of initiative
- Institutional activism/ Lobbyism
- Consultation – impact assessments – evaluation (ex ante)
- Legislative process 'strictu sensu'
- Implementation
- Evaluation (ex post)
- Review/ Revision
- New legislation?

Regulatory Cycle II



Regulatory Cycle III

- Initiating Legislation
 - Formal monopoly of the Commission (Art 17.2)
 - Council (Art 241) and EP (Art 225) can request the COM to make proposals
 - MSs, national Parliaments, regional authorities, sectoral interests try to 'make' the COM propose legislation
 - 1 Mio citizens via an ECI (Art 11.4 TEU/ Art 24 TFEU) – no obligation for COM to respond (change in the future?)

Consultation I

- Consultation (Art 11.3) (https://ec.europa.eu/info/consultations_en)
- Formal: Green Papers, White Papers, Communications
- Consultation process (Minimum 12 weeks)
- Stakeholders/ Consultative Bodies/ Public
- Better Regulation Guidelines: (SWD (2015) 111) on:
 - Planning
 - Impact assessments
 - Preparing proposals, implementation, transposition
 - Monitoring
 - Evaluation/Fitness checks
 - Stakeholder consultations

Consultation II

- Stakeholder Consultations (pp 63-88) Art 11
 - ‘normally’ a minimum 12-week public (internet) consultation should be part of *any* initiative subject to impact assessment/evaluation/ Green papers – special rules for environment
 - Usually involves more than one DG (inter-service group) and/ or COM Sec Gen
 - Key principles: participation, openness, accountability, effectiveness, coherence + 5 minimum standards (clear, targeted, public, in time, responsive)

Consultation III

- Based on a 'consultation strategy' prepared by ISG
- 'dynamic', on-going process
- Def. of Stakeholder: 'consult broadly and transparently among s. who might be concerned'(P 73) -> no clear criteria? COM decides!
- Based on 'stakeholder categories' –previous experience, contacts, MS suggestions, transparency register, expert groups, standing groups
- Types: s. who are: affected, implementing, interested
- Publicise consultation (web sites, conferences etc)
- Limited possibility for stakeholder feedback on delegated acts (under committee control) (4 weeks)

Moving beyond Consultation

- After consultation, Commission proposes
- Legislative process 'proper' takes its course:
- 'ordinary legislative procedure' (with or without *consultation* of CoR/EESC)
- EP-Council 'negotiate'
- 'Problem': 1st reading adoption (-> transparency)
- Tendency for legal acts to be more general
=> Challenge for implementation:

Implementation of EU law

- https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/applying-eu-law_en
- Regulations-decisions: directly -> MS implement
- Directives: national transposition -> MS implement
- COM: monitors – annual reports, infringement procedures
- Some EU legislation itself needs to be made ‘applicable’ through implementing measures (-> comitology, see below)
- 2016 Communication: ‘new focus’ on “EU Law: better results through better application”
- -> invitation to citizens to complain about incomplete application!

Comitology I

- Def (according to COM web-site) ‘...set of procedures through which EU countries control how the Commission implements EU law’! (but: COM proposes)
- Not foreseen in Treaty of Rome, but started already 1961 (mainly to set prices under CAP)
- Committees to be consulted before COM can adopt a detailed implementation act ‘where uniform conditions for implementation are needed’
- BUT: primary responsibility for implementation remains with MS! (=> comitology only where the basic legal act confers powers on COM – role for both legislators)

Comitology II

- Formalised under Dec 1999/468/EC (amended 2006):
- 5 different procedures: advisory, management, regulatory, reg. w. scrutiny, safeguard - 2009: 266 committees, 894 meetings
- BUT: NEW comitology after Lisbon Treaty
- Arts 290-291 TFEU: 2 Types: delegated/implementing
- Art 290 'Delegated Acts' – based on old regulatory procedure with scrutiny BUT: case-by-case
- Meant for 'non-essential but sensitive issues' => more control for co-legislators
- NO comitology committees but direct negotiations between legislators + expert groups – co-legislators can object to draft implementing measure or even withdraw delegation on ANY ground

Comitology III

New Comitology based on Art 291: Implementing Acts

- only ‘scrutiny’ by EP/ Council – QMV in Comitology Committee
- **Comitology Regulation (EU) No 182/2011** (co-decided!)
 - Examination procedure (general scope/ important impact) -> QMV in favour- adopted / QMV against – appeal/ no opinion - appeal – non binding scrutiny (EP/Council)
 - Advisory procedure (as before, for uncontroversial issues such as small grants)
 - Appeal Committee – second round at ‘higher level of representation’ (= “**Council in anything but name?**”)

Comitology IV

- Important: democratic control of Comitology:
- EP and Council have
 - Right to information (transparency)
 - Art 290: EP- Council equal – objection on any ground => contestation
 - Art 291: scrutiny on co-decision legislation, EP or Council can signal that proposed implementation act exceeds COM powers =>
 - COM is obliged to review (= but: no full call-back as before (still applies to about 300 existing acts until amended))

Comitology V

- Committees of one representative per MS/ chaired by the Commission (+ 'experts')
- Comitology Register ('new' since 2008)
- Document search via:

<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.Search&NewSearch=1>

- In total currently around 320 Comitology Committees
- Example: Motor Vehicles – CO2 emissions
- Reg EC 715/2007 -> implementation: regulatory procedure w. scrutiny -> by 2014 all legislation should have been 'moved' to new system
- 2013 'omnibus' proposal to adapt 168 basic legal acts BUT no agreement
- New inter-institutional agreement – new omnibus proposal 2016 (including Reg 715/2007)

Expert Groups

- Not to be confused with Comitology Committees! (BUT: under Art 290: experts!)
- Set up by the Commission - public calls for expression of interest or direct
- Details <http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>
- Currently around 1200 Expert groups listed
- Experts can represent private interests, common interests, organisations, MS or other public entities (also sub-national)
- Involvement pre-legislative or post-legislative

Better regulation I

- Political programme: Started with Maastricht (principles of subsidiarity/ proportionality) -> post Single Market
- Protocol 18 of Maastricht: consultation and evaluation based on 'cost-benefit' analysis
- Strengthened under Amsterdam-> Declaration 30: call on EP-COM-Council to 'establish guidelines on improving 'quality of drafting/ codification » => inter-institutional agreements (last renewed 2016)
- 2001 White Paper on Governance (Prodi)
- Three pillars: simplification- impact assessment- reducing administrative burden

Better Regulation II

- Simplification:
 - repeal (of obsolete legislation) and
 - Codification (political or not?)
 - Recast (new legislative act/ improvement)
- Changing legislative approach:
 - Replacing directives with regulations (or vice-versa?)
 - Alternatives: self-regulation/ co-regulation, standardisation by independent bodies

Better Regulation III

- Screening of EU legislation
- Remove 'unnecessary' legislation
 - Impact assessments (integrated approach since 2002)
 - Criteria: economic, social, environmental, territorial (?)
 - Different options (including the no-action scenario)
 - Additional 'filters' (internal market test)
 - Reducing administrative burden (compliance cost and information cost)- gold-plating - methodology

Better Regulation IV

- REFIT = part of the better regulation agenda
- Annual list of REFIT initiatives (COM work programme)
- Consultation:
 - public: <https://ec.europa.eu/info/law/better-regulation/lighten-load/suggestions/add>
 - REFIT platform–former Stoiber Group
 - Government group
 - Stakeholder group
- 119 initiatives in 2015-16: 90 initiatives withdrawn

Consultative Committees I

- European Economic and Social Committee:
 - Since 1957
 - Employers, trade unions, others (Civil society)
 - Lisbon: 350 members (plus 350 alternates)
- Committee of the Regions
 - Since 1991
 - Elected representatives of local and regional authorities
 - Lisbon: 350 member (plus 350 alternates)

Consultative Committees II

- Both EESC and CoR: non-binding opinions
- Have to be consulted according to legal basis (Treaty provisions)
- Extension of 'obligatory consultation base' (esp for the CoR)
- Can issue 'own-initiative opinions'
- Try to influence COM and co-legislators (both at pre-legislative and legislative stages)
- CoR: right to enforce subsidiarity before ECJ
- So far limited role in implementation BUT: involvement in REFIT, call for more impact assessments

Example: CO2 emissions of cars

- Air quality legislation in the EU since early 1970s
- Initially purely as single-market measure (to avoid distortion of competition through national measures)
- 'ping-pong' with US legislation
- mid-1980s: first proposals for emission limits ->
- But: de-blocked only after Single European Act (QMV!)
- 1995: Community Strategy for reducing CO2 emissions
- 1998: COM-European Automobile Manufactureres Association 'agreement' 140g/km 2008 for all new cars -> review foreseen for 2003 (to prepare for 120g/2012 and intermediate target of 165-170g/2003)

Example: CO2 emissions

- 2004: review
- 2006: pre-legislative consultation for further measures
- 2007: (Feb) Commission Communication – consultation
- => Regulation EC 715/2007 (20.6.2007) on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information
- This regulation repeals 26 other regulations and numerous other implementing measures
- Reference to 'implementing measures' in whereas 3 (for technical details), whereas 20 (repeal of other directives), whereas 24 (reference to 1999 comitology regulation), whereas 25

Example: CO2 emissions

- In parallel: Proposal (COM 2007) 856 of 19.12..2007 ON «Setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO 2 emissions from light-duty vehicles”- consultation: 2390 responses
- legislative procedure => Regulation 443/2009 (23.4.2009)
- Target for 2008: 140g/km => additional measures to reach 120 g/km by 2012
- Amended by Regulation 397/2013 (30.4.2013)
- Consolidated version: 08.04.2013
- Amended again by Reg (EU) 333/2014
- 20.7-28.10.2016: Consultation on post-2020 targets (95 g/km) -> 203 replies https://ec.europa.eu/clima/consultations/articles/0030_en

Example: CO 2 emissions

■ Consultation 2016 Summary report

https://ec.europa.eu/clima/sites/clima/files/consultations/docs/0030/summary_report_en.pdf

- Respondents: 82 individuals, 10 public authority, 6 academic, 4 international organization, 33 civil society, 30 professional organisation, 28 private enterprise, 10 other
- Sample questions: how important do you think is setting CO2 limits at EU level?
- What do you think would happen without EU action (MS individual action likely-unlikely-neutral) – market fragmentation? (167 said likely!)
- How important is technology neutrality/ competitiveness of EU industry/social equality/ promoting zero-emission vehicles
- Preferences for the policy options: Setting Emission targets EU/ Vehicle or fuel tax at MS level/ voluntary agreement with industry/ emission zones or other MS measures to influence choice/international standards/ no action (Scale 1-7)

Example CO2 emissions

- **Implementation:** measures listed (complete?)
-
- Comitology Committee on cars: Technical Committee – Motor Vehicles (TCMV)
- Organised by DG GROW – internal market, industry, entrepreneurship and SMEs (not Clima/ENV)
- Responsible for 11 base legal acts (emissions, type approval, test procedures)
- Interest Group: Automotive Industry Committees and Working groups + CARS 21 stakeholder group
- List (Comitology register) incomplete
- http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.dossierdetail&Dos_ID=12926&dos_year=2016&dc_id=4826

Example CO2 emissions

- Numerous 'technical' parameters:
 - Mass vs. 'footprint'
 - Fleet (not individual car)
 - Reduction of consumption AND other technical means (eco-innovation bonus)
 - Alternative fuels
 - Super-credits for very-low emission vehicles
 - Exemptions (small/ niche manufacturers)
 - Pooling of manufacturers
 - Phasing in (timing)
 - Sanctions
 - Measuring/ data-collection (MS!)

Example CO2 emissions

- Expert group register – search ‘vehicles’: 187 groups: http://ec.europa.eu/transparency/regexpert/index.cfm?do=search_resultNew
- Dieselgate: great public interest
- Comitology committees: at least six
<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=List.list>
- Some in DG Move, some in DG Env, DG Grow – consistency?
- Critical NGO activity (for example Corporate Europe Observatory (www.corporateeurope.org) or Alter EU
- https://www.alter-eu.org/sites/default/files/documents/DGENTR-driving_0.pdf

Conclusion

- Great variety of interested parties, non-institutional players in legislative cycle
- Challenge for democracy: complexity-transparency
- Multiple access points – but: no equal accessibility
- Efficiency vs transparency (timing!)
- Information sources – public/media interest?
- National democratic control?

References - resources

Lucas, Pauline (2013) <http://www.europeanpublicaffairs.eu/commission-expert-groups-behind-closed-doors/>

Tosiek, Piotr (conference paper 2010) <http://www.jhubc.it/ecpr-porto/virtualpaperroom/026.pdf>

[Wetendorff Nørgaard, Peter Nedergaard & Jens Blom-Hansen](#) Journal of European integration No 36 (5) 2014: Articles „Lobbying in the EU Comitology

Gueguen, Daniel : (Euractive 19.4.2013) <http://www.euractiv.com/section/public-affairs/opinion/bad-news-for-eu-decision-making-comitology-no-longer-exists>

EIPA practical guide to the new comitology 2013.

EPRS Page on Comitology (2012) with useful links (both to legislation and academic literature) <https://epthinktank.eu/2012/09/24/delegated-and-implementing-acts/>

List of Expert Groups: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=search.result>

Comitology Committee List (103 pages, 317 entries):

<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=List.list>

- Contact: j_schonlau@hotmail.com

**Grazie per la vostra stimatissima
attenzione!**