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Policy Brief

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Comitology and regulatory burdens
A blind spot?[1]

The reduction of regulatory burdens is one of the new spearheads on the European Commission's agenda. Several tools have been developed to prevent and cure EU legislation from excessive regulatory burdens such as reduction action programmes and the continuous improvement of impact assessments (IA). However, in the depths of EU decision-making, comitology is allegedly still one of the remaining sources of high and unnecessary regulatory costs. This policy brief examines these indictments and comes to the conclusion that comitology is something which should be taken seriously. The current reduction tools bypass this step in decision-making, which is why it remains a blind spot. Possible improvements to the EU quality control mechanism might include an improved IA system that includes substantive compliance costs as well as an ex post or interim control mechanism. Furthermore, cost reduction cannot be obtained by the Commission alone, and member states are indispensable to tackle the myth about regulatory burdens stemming from comitology.

Introduction

One of the main successes of European integration is also one of its weaknesses: The body of legislative work that makes the internal market possible is – unavoidably – sizeable. By some calculations the stock of EU legislation comprises more than 170 000 pages.[2] The overall size of the *acquis* has, rightly or wrongly, resulted in the fact that 74% of the European population believe the EU produces too much red tape.[3] The regulatory burdens of EU legislation has been a point of discussion for quite some time now.[4,5]

The allegedly immense volume of comitology[6] acts and its rather opaque image harm

1 This policy brief has been written on the basis of a project for ACTAL (the Dutch Advisory Board on Regulatory Burden) as part of its contribution to the conference "Smart EU Regulation, Better Business" on 7 May 2014 in The Hague. We would like to thank Erik Akse for his very useful comments on earlier drafts.

2 Open Europe (2013) *Just how big is the acquis communautaire?* Briefing Note.

3 Commission (2013) *Standard Eurobarometer 80: Autumn 2013*, QA 13.4.

4 Mandelkern group (2001), *Mandelkern Group on Better Regulation*, Final Report, 13 November.

5 European Council conclusions of 27-06-2014.

6 Brandsma, G. (2013) Seeing the forest for the trees: Three myths about the number of European Union legislative and executive acts, Paper for the EGPA Conference 2013.

the trust in EU legislation. 'Comitology' is the system through which the details of EU legislation are arranged – and the numbers of details to be arranged in the EU's internal market are immense. It refers to the procedures to decide on delegated and implementing acts. Hence, comitology is one of the sources of the stock of EU legislation.[7]

This Policy Brief offers an initial assessment of regulatory burdens stemming from comitology by mapping what is known about its output volume. Although there is a growing amount of literature on comitology, it has thus far hardly been linked to the EU's regulatory burdens. 'Regulatory burdens' is used here as compliance costs[8] following a recent Commission statement that regulatory costs should include "not only administrative but any unnecessary burden within the integrated approach explained in the Communication on 'EU Regulatory Fitness'".[9] Compliance costs, in turn, are divided between substantive compliance costs[10] and administrative costs.[11] The latter have been a priority on the EU agenda since 2007 with the Action Programme for Reducing Administrative Burdens in the European Union[12] (now followed up by REFIT).[13]

Substantive compliance costs should be in the equation although they do not figure prominently in the two programmes mentioned.

This policy brief explores the extent to which regulatory burdens resulting from comitology are on the political agenda. Limitations of time and space prevent a more in-depth treatment of the regulatory burdens of comitology. To grasp the full weight, this would require detailed assessments of comitology and case studies of regulatory burdens specifically (see the conclusions). We limit ourselves here to report on interviews and literature concerning the impact of comitology and we assess the arrangements (governance mechanisms) of comitology. The central question is the following: is a sufficiently reliable quality control mechanism in place to prevent excessive regulatory burdens from comitology?

Comitology: basic procedures

All political decision-making systems rely on forms of regulatory delegation. The delegation of executive power to the European Commission already started with the European Coal and Steel Community. Since then, comitology has seen many different forms and procedures and has been reformed on several occasions. The current comitology framework partly followed from the objective, formulated by the European Council in the Laeken Declaration (2001), to simplify legal instruments. Specifically, the Heads of State posed the leading questions: "… should a distinction be introduced between legislative and executive measures? Should the number of legislative instruments be reduced: directly applicable rules, framework legislation and non-enforceable instruments (opinions, recommendations, open coordination)?" These objectives have been regularly repeated.[14] The objective of simplification has been complemented by

7 Although officially delegated and implementing acts are non-legislative acts. Art 289 TFEU.

8 The costs of complying with regulation, with the exception of direct financial costs and long-term structural consequences (*Action Programme for Reducing Administrative Burdens*, COM(2007) 23 final).

9 Commission (2012) *EU Regulatory Fitness*, COM(2012) 746 final, 12 December, p. 10.

10 The costs of obligations to act or omit actions and behaviours. In: Regiegroep Reguldruk (2008) *Meten is Weten II: Handleiding voor het definiëren en meten van administratieve lasten voor het bedrijfsleven*

11 The costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties. In: Commission (2007) *Action Programme for Reducing Administrative Burdens*, COM(2007) 23 final, 24 January, pp. 5.

12 Commission (2012) *Action Programme for Reducing Administrative Burdens in the EU – Final Report*, SWD(2012) 423 final, 12 December.

13 Commission (2012) *EU Regulatory Fitness*, COM(2012) 746 final, 12 December.

14 Piedrafita, S. & S. Blockmans (2014) *Shifting EU Institutional Reform into High Gear: Report of the CEPS High-Level Group*, CEPS Task Force Report.

principles of good governance (to increase transparency and efficiency of policy making to speed up internal market legislation and to ensure trust in EU legislation).

Comitology finds its present legal basis in the 2009 Lisbon Treaty. Similar to Laeken, the Lisbon Treaty aimed to strengthen democratic control and, hence, to put the Council of Ministers and the European Parliament on a more equal footing.
It introduces two non-legislative acts: the delegated act (Art. 290 TFEU) and the implementing act (Art. 291 TFEU) that arrange the non-essential elements of a legislative act (see Table 1). As a rule, delegated acts address the 'what', and the implementing acts concern the 'how' of secondary legislation. In contrast, essential elements require *political consideration* and are drawn up in the basic act: the regulation, directive or decision that delegates executive powers to the Commission. Officially the term 'comitology' only refers to 'implementing acts', but in Eurospeak it covers delegated and implementing acts, and we will also use comitology to refer to both the delegated and implementing acts.

The Council and the European Parliament decide (although sometimes the Council decides by itself) in the basic act on whether the implementation of non-essential elements is organised via delegated or implementing acts. Despite conceptual differences, in practice the co-legislators negotiate on whether to lay the primary responsibility on the Commission via a delegated act (with a stronger role for the European Parliament) or via an implementing act (with a stronger role for the member states). Not surprisingly, the Council prefers the latter and the European Parliament the former, which leads to recurring debates in the negotiations on the basic act.[15]

For a delegated act, the Commission works with so-called 'expert groups', which have a consultative character and are composed of member state representatives complemented with 'outside' experts from academia or the private sector. In addition the European Parliament can request the Commission to join the expert group which in practice is always permitted. An implementing act is supported by a 'committee', that consists solely of member state representatives, and gives advice on a Commission opinion via voting procedures. The implementing act is established via one of several procedures, of which the most often used are the advisory and the examination procedure. In the advisory procedure the committee's simple majority vote is non-binding as opposed to the examination procedure with its binding qualified majority vote (QMV) (see Table 1). Furthermore, the co-legislators still have some control over all procedures, be it ex post via the right to object and/or the right to revoke delegated powers in delegated acts [and in implementing acts] member states have [ex ante] control via the voting procedure in the committees.

Concerning the institutional balance of power, interviewees are hesitant regarding the current situation where there is a constant battle for influence. Especially the 'Lisbon' aim of an enhanced role of the Parliament in comitology is a recurring item for debate. Business representatives, as well as representatives from academia have their reservations whether the European Parliament can actually play a major role in comitology since, according to one representative, MEPs "lack the capacity, knowledge and manpower to deliver"[16] on the amount of technically (and non-political) detailed delegated acts.[17]

Opinions differed in the interviews on preferences for a delegated or implementing act among business representatives. Some favour the implementing act since they have the feeling that it is slightly less opaque so that they consequently have more possibilities to influence the process.

15 Hardacre, A. & M. Kaeding (2013) *Delegated & Implementing Acts: The New Comitology*, EIPA Essential Guide, 5th Edition.

16 Interview 4.

17 Christiansen, T. & M. Dobbels (2012) 'Comitology and delegated acts after Lisbon: How the European Parliament lost the implementation game', *European Integration online Papers* (*EIoP*), 16(13).

Table 1. Comparison of delegated and implementing acts.

	Delegated Act (Art. 290)	Implementing Act (Art. 291) ('Comitology')	
Function of act	Supplements/Amends ('What')	Implements ('How')	
Preparation of act	Commission consults 'Expert group' consisting of national representatives and others. If EP so requires, Commission may invite Parliament's experts to attend expert group meetings.	Commission submits draft implementing act to the 'Committee' consisting of national representatives.	
Voting procedure	Commission adopts after non-binding opinion of the expert group.	Advisory Procedure: Commission adopts after non-binding opinion (by simple majority vote) of the committee.	Examination Procedure: Commission adopts after binding opinion (by QMV) of the committee.
Type of control	Ex post control by the Council and the EP via the right to object and/or the right to revoke Commission rights	Ex ante control by member states via voting in committees	

One of the tools that offer transparency is the comitology register of 'implementing' committees, which is fairly up to date, although the Commission is now making improvements in its 'delegated' expert group register as well.[18]

The image of comitology

It has been noted on many occasions previously that comitology is a rather unknown beast. We are specifically interested in how insiders from ministries, the EU Commission and industry assess the functioning of comitology in relation to regulatory burdens. Two major conclusions resulted from our interviews:

1) even insiders give the volume of comitology little thought,
2) there is little idea on the regulatory burdens stemming from comitology.

The interviews resulted in assumptions such as "I assume … that the influence of comitology is far-reaching. However, I do not have any concrete examples that support this notion"[19], "All sorts of weird and wonderful things are hidden in the delegated and implementing acts. Beyond that, a number will have various burdens within them. Time will tell what they are"[20] and "I asked if we had any figures on the costs of comitology, but no-one – so far – is aware of anything".[21] This underlines that comitology is not in the 'safe zone'. Comitology still seems mythical and as such contributes, as these quotes from experts indicate, to general impressions of uncontrolled processes and unwieldy costs. Trust in EU legislation is incompatible with impressions of comitology as (still being) a process that is out of control.

Similarly, during an expert workshop, in which stakeholders displayed considerable insights into the functioning and technical relevance of comitology in their specific areas, little seemed to be known about the overall size of comitology, the balance between delegated and implementing acts, and the costs involved. There is a great deal of attention for the micro-level, but little concern for the macro-level consequences. For example, when asked how many delegated and implementing acts were adopted in 2012, 'guesstimates' in the

18 Interview 15.
19 Interview 2.
20 Interview 17.
21 Interview 10.

workshop from experts well informed in their specific fields ranged from 40 acts to 500 delegated and 500 implementing acts (compared to the actual 82 delegated acts and 1657 implementing acts).[22, 23]

Quality control on regulatory burdens

The EU has devoted considerable energy to fighting regulatory burdens. Leaving aside discussions on the precise meaning of the achievements (including complaints about 'low hanging fruit' or gross versus net costs[24]), the Commission boosts an administrative burden reduction of 25% (running up to 30.5%) out of a potential € 123.8 billion.[25] REFIT (the Regulatory Fitness and Performance Programme) is the follow-up to the earlier Action Programme, and the first results look promising due to its systematic approach.[26]

A second procedural innovation aimed at monitoring the development of regulatory quality has been the introduction of the EU's impact assessment (IA) system in 2002. It followed the Commission's Better Regulation agenda which contributed to more evidence-based policy-making.[27] Since then the Commission has expended a great deal of energy on the improvement of impact assessments and more specifically on assessing the costs and benefits of regulation.[28] The process of getting these new procedures up and running are far from finished. Further steps are necessary, as also recently concluded by the Commission's Chief Scientific Advisor, Anne Glover, who claims that evidence-gathering processes are strongly connected to the "political imperative" and who also advocated a more independent position of the IA system (to be based outside the Commission).[29] The necessity for reliable impact assessments is also reflected in the new IA unit of the European Parliament.

Although REFIT is primarily aimed at the *acquis*, such a horizontal programme would suggest that it would include the burden from comitology. However, our findings suggest that nobody has clear insights into regulatory burdens stemming from comitology. Four factors seem to substantiate these impressions. Firstly, after the initial impact assessment is carried out and the proposal goes into the political negotiations, the end result is not submitted to a reassessment of the costs and benefits – although, in the words of a workshop participant, "a monster of regulatory burden may come out at the end of the process".

Secondly, when looking at the extent to which comitology appears to be on the radar of administrative burden reduction programmes, we actually found few references. In the documents of the Action programme and of REFIT, on no account were there references made to comitology or delegated and implementing acts. This suggests a lack of attention for the issue. In addition, interviews point to limited attention for regulatory burdens among the negotiating partners of the EP and the Council.[30] Here, too, there is a lack of any overview of regulatory burdens.

22 Commission (2013) *Practical implementation of Articles 290 and 291 TFEU*, Workshop on Implementation of Delegated and Implementing Acts, European University Institute, 18 April.
23 This excludes the output of EU agencies.
24 Schout, A. & J. Sleifer (2014), 'A public administration take on legitimacy: Better Regulation as multilevel governance challenge', in: Ambrus, M., K. Arts, E. Hey, H. Raulus (eds), *The Role of 'Experts' in International Decision-Making: Advisors, Decision-Makers or Irrelevant*, Cambridge University Press.
25 Commission (2012) *EU Regulatory Fitness*, COM(2012) 746 final, 12 December.
26 Commission (2014) Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, Com(2014) 368 final.
27 Commission (2001) *White Paper on European Governance*, COM(2001) 428 final, 12 October. Schout and Sleifer *supra*.
28 Akse, E. (2013) *Influencing the Preparation of EU Legislation: A Practical Guide to Working with Impact Assessments*, (London: John Harper Publishing).
29 Euractiv (2014) *EU twisting facts to fit political agenda, chief scientist says*, 27 May.
30 Interview 9.

Thirdly, it is difficult to assess whether regulatory burdens can be directly attributed to comitology. In general, impact assessments are conducted on the basis of the initial Commission proposal and focus on administrative costs and tend to leave substantive compliance costs aside. Afterwards the Council and the European Parliament amend the proposal in the basic act. These amendments made by the co-legislators might negatively affect administrative costs, but the blame is placed on the experts in comitology as the main drivers of these costs. This view is also reflected in the process of case selection, which was one of the main challenges in this research. The dossiers that were brought to the fore included supposedly clear administrative costs deriving from comitology (e.g. due to monitoring mechanisms). However, when examining the details, it was nearly impossible to attribute costs directly to comitology. For example, the Nitrates Directive[31] was claimed to be a "clear example" of administrative burdens because of its cumbersome monitoring mechanism related to yearly derogation requests from member states. Experts assumed that this arrangement followed from comitology but it was already in the directive. Besides this, one expert claims that the additional costs of the monitoring system do not nearly outweigh the benefits of harmonisation.[32]

Finally, out of the 110 impact assessments in 2013, 5 concerned implementing legislation. This number seems to confirm the image of limited attention for comitology. In these IAs, the issue of administrative costs, and how to prevent them if applicable, has been taken seriously. However, the Commission fails to address the substantive compliance costs, which might even result in a heavier toll on business. Furthermore, it suggests that comitology has become part of the regular ex post examination of the total stock of regulation. In any case it only gives an ex ante overview of potential costs, but does not account for ex post evaluation of what comes out of comitology. Therefore it is still unknown what the burdens stemming from comitology amount to.

A recent Commission communication[33] discusses the update of the IA Guidelines for better data and scientific advice via a public consultation. It discusses systematic ex post evaluations of EU regulation to verify whether the expected results and impact of EU regulation have been achieved. This might counter the alleged discrepancy between the initial IA or even the implementing IA and the actual costs and benefits.

Apart from the European processes, there is also room for improvement in the national process of the prevention of additional compliance costs in comitology. One potential 'national' tool at the beginning of the process is to include a focus on regulatory burdens while negotiating the basic act. In some cases the Commission is obliged to perform an impact assessment as part of a specific set of criteria that is included in the basic act.[34] This leaves room for more focus on regulatory burden by the member states.

Another myth surrounding additional administrative costs is the role of national experts in that they only look at expert objectives. During a year, thousands of civil servants are active in committees and expert groups. In the case of the Netherlands, administrators involved in comitology are briefed on comitology before they attend the meetings. Herein administrative burden is one of many briefing points. After the briefing, it lacks a monitoring or evaluation system to assess their activities. In addition, interviews indicate that administrative burden is often not mentioned in preparatory meetings (whether this is actually true or another myth requires further study).

31 Council Directive of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (91/676/EEC).

32 Interview 12.

33 Commission (2014) Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, Com(2014) 368 final.

34 Alemanno, A. & A. Meuwese (2013) 'Impact Assessment of EU Non-Legislative Rulemaking: the Missing Link of 'New' Comitology', *European Law Journal*, 19(1), pp. 76-92.

These findings do not suggest that there are major costs emanating from comitology per definition. The point is: apart from general statements, there is simply little insight into costs – and hence a basis for trust in regulatory quality is lacking. In general, assessments are unclear. In the case of similar suspicions research[35] seems to suggest considerable extra costs in implementation[36]; however, others derive opposite conclusions from the same report.[37] One could attempt to make a case that the costs of comitology might not be huge because of controls within the system. For example, interest groups that extensively lobby the comitology system[38] might also complain about costs and consequently succeed in their efforts. Moreover, civil servants and experts might themselves be aware of the importance of cost reductions. Nonetheless, it is safe to say that suspicions that all will be right are not enough.

Conclusions and Recommendations

More research is needed to identify cases of comitology leading to high and unnecessary regulatory costs. However, the sheer volume and the widely-shared doubts (rightly or wrongly) surrounding the quality of comitology decisions warrant a careful examination of the stock of comitology decisions in line with the growing attention for REFIT types of programmes. Facts are needed to clarify myths about EU legislation and comitology.

A lot of work has been done in recent years to reduce administrative burden. However, there is ample reason for taking comitology seriously. REFIT is still primarily aimed at administrative costs, however it bypasses substantive compliance costs and seems to ignore comitology. In general there is also a lack of ex post assessments at all levels of government. Furthermore, there is a deficiency in the oversight of regulatory burden and its different types of costs. To get a better grip on regulatory burdens from comitology, the EU quality control mechanism:

- can benefit from a reform of the Impact Assessment system to specifically include substantive compliance costs. Similarly, an ex post burden control mechanism might provide an insight into the actual costs for business and citizens.

- will benefit from an independent quality control (or IA) institution. The sheer amount of acts requires a good overview of the impact. Furthermore, it might limit complaints about the regulatory process as presented by e.g. the Commission's Chief Scientific Advisor.

- has to become more transparent where is concerns comitology (particularly in relation to delegated acts).

Furthermore, this research indicates that also member states should invest in examining costs at all stages of the policy process e.g. Member States, as co-legislators, need to help to deliver facts and keep the political pressure on their own cost reduction ambitions. Cost reduction cannot be achieved by the Commission alone.

Without further actions, the EU risks nurturing the myths about comitology.

35 Deloitte Consulting BV (2013) *Onderzoek naar lastenluwe implementatie van Europese Regelgeving*, August.

36 Actal *(2013)* 'Advies Lastenluwe implementatie aan de minister van EZ'. pp. 1.

37 *Kamerstukken II* 2013/14 , 29362, nr. 224, 'Verzamelbrief Regeldruk'. pp. 17.

38 Wetendorff Nørgaard, R., P. Nedergaard & J. Blom-Hansen (2014) 'Lobbying in the EU Comitology System', in: *Journal of European Integration*, 36:5, pp. 491-507,

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