

# The Effect of Removing Voting Rules: Consultation Practices in the Commission's Delegated Act Expert Groups and Comitology Committees

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## Abstract

The Lisbon Treaty changed the system of delegating executive powers to the European Commission: it introduced the delegated acts system as an alternative to comitology, which continues to exist in parallel. This new system allocates veto power to the European Parliament and the Council, in which Member State expert groups are consulted without having a formal vote. The Council fears that the absence of formal voting will tempt the Commission to ignore Member State input in the expert groups. This article investigates to what degree this fear is justified. To what degree do formal voting rights affect the consultation of Member State experts? On the basis of interviews with Member State experts who participate both in expert groups as well as in comitology committees, we demonstrate how consultation patterns differ between the two settings.

## Introduction

Legislatures routinely empower the executive to adopt administrative rules that supplement or implement legislation (Epstein and O'Halloran, 1999; Page, 2012; Voermans *et al.*, 2014). This is also the case in the EU system, where the EP (European Parliament) and the Council extensively delegate rule-making powers to the European Commission. In fact, most EU legal acts are executive acts: over the past years the Commission published between 2,000 and 3,500 executive acts in the *Official Journal* per year, while the number of legislative acts adopted through the ordinary legislative procedure has been around the 100 mark (Brandsma and Blom-Hansen, 2016).

As in most political systems, this delegation of power to the executive is mostly accompanied by control procedures that seek to keep the executive in check with the legislature's preferences. Until the year 2010, the default control procedure used in the EU was a form of administrative control that is known as 'comitology'. Its workings are well documented: committees of Member State policy specialists would discuss draft executive acts and vote on them immediately prior to their adoption by the Commission (e.g. Bergström, 2005, Blom-Hansen, 2011, Héritier *et al.*, 2012).

But the Lisbon Treaty radically changed this system. This treaty introduced delegated acts as a new type of executive measure, and only the EP and the Council can exercise control over these measures. Member State civil servants are still consulted for delegated acts in 'expert groups', but in an advisory capacity. By contrast to comitology, which continues to exist for other executive acts, they do not vote, which implies that the Commission can pick and choose freely from input given in the expert groups and is not bound by a majority

opinion any longer. Moreover, since the expert consultation system is not formalized, the Commission may even decide not to consult Member State experts at all.

This article investigates the degree to which the shift toward informal modalities of consultation that lack a formal vote affects the consultation of Member State experts in practice. Do practices of consulting experts differ between delegated act expert groups and implementing act comitology committees? On the basis of 15 interviews with participants in both types of bodies, we observe that committees and expert groups do not differ in the nature of the discussion; the interaction in both groups is geared towards pursuing Member State preferences. By contrast, there is a significant difference in the behaviour and attitude of the Commission towards the groups. The Commission is less open and less inclined to listen to all Member States in expert groups than in comitology committees.

## I. Control Games and Member State Expert Consultation

The comitology system dates back to the early 1960s when the Commission presented its legislative proposal on a common cereals market; the first legislative proposal of the common agricultural policy. It proposed that the Commission was to manage the everyday management through administrative rule-making. Several Member States, however, were not ready to endow this (then) new supranational institution with the authority to autonomously adopt significant numbers of executive rules. After protracted negotiations, the Commission and the Member States agreed on a compromise: committees of Member State experts would examine draft executive measures and vote on them. In the case of a qualified majority against, the Council would be authorized to adopt a different decision instead. This solution soon spread to numerous policy areas, representing the birth of the comitology system (Bergström, 2005; Blom-Hansen, 2008).

Since comitology did not include any form of parliamentary participation or parliamentary oversight, the EP has been critical of it ever since its inception (Bergström, 2005; Brandsma, 2013). Its criticism intensified after it gained co-decision powers under the Maastricht Treaty. The EP was now able to co-legislate, but because comitology remained an exclusive Member State affair it was not able to oversee executive rule-making on the basis of those legislative acts. This problem was particularly salient with regard to annexes of legislative acts which, in the EU system, can be amended through executive acts. The EP feared that the Commission and the Member States would sneak politically sensitive matters into executive rules, bypassing the EP as a co-legislator (Bradley 1997).

The failed Constitutional Treaty, and finally the Lisbon Treaty, sought to end this controversy by creating a distinction between two kinds of executive acts. The first category, dubbed 'delegated acts', consists of acts of general scope that amend or supplement non-essential elements of legislation. In other words, they flesh out further details of legislation before it can be applied. The second category, dubbed 'implementing acts', consists of executive acts that provide uniform conditions for Member State administrations to implement EU law. Arguably this distinction is not phrased in mutually exclusive terms, so that the definitions are in part overlapping – a problem that creates significant legal and political uncertainty when choices between applying either of the two regimes need to be made (Christiansen and Dobbels, 2013; Craig, 2016; Brandsma and Blom-Hansen, 2016; Voermans *et al.*, 2014).

This new distinction also affected the consultation and control regime for Member State experts. Whereas implementing acts come with a slightly amended form of the age-old comitology system, in which Member State experts still deliberate and vote on draft Commission executive acts, the delegated acts system moves control into the hands of the EP and the Council, which both face higher thresholds for vetoing a delegated act than Member State experts do in comitology when vetoing an implementing act (Kaeding and Stack, 2015). The treaty does not mention any form of Member State expert consultation for delegated acts, which leaves the system of expert consultation based on political, non-binding commitments by the Commission (Brandsma, 2013; Christiansen and Dobbels, 2013). Consultation takes place in the form of expert groups, which implies that the Commission is free to take into account any part of expert input given as it sees fit, and is not bound by a vote. Table 1 below summarizes the differences between the consultation and control regimes in place.

Table 1: Procedures to control powers delegated to the Commission

	<i>Pre-Lisbon</i> Comitology	<i>Post-Lisbon</i> Implementing acts	<i>Post-Lisbon</i> Delegated acts
<b>Ex-ante controls (before the Commission formally adopts an executive measure)</b>			
Type of actors	Committee of MS representatives	Committee of MS representatives	Expert group of MS representatives and, upon request, EP administrators
Control powers	Full veto powers over individual measures when not acting under 'advisory procedure'	Full veto powers over individual measures when not acting under 'advisory procedure'	None
Veto rule	Varying: QMV against, or no QMV in favour	Varying: QMV or simple majority against, or no QMV in favour	None
Appeal by Commission	Commission can appeal a negative decision at the Council	Commission can appeal a negative decision at a special 'appeal committee' of MS representatives	None
<b>Ex-post controls (after the Commission formally adopts an executive measure)</b>			
Type of actors	Council and EP	Council and EP	Council and EP
Control powers	Varying: No binding powers, or limited veto powers	No binding powers	Full veto powers over individual measures, full power to revoke delegation to Commission entirely
Veto rule	Council: QMV, EP: absolute majority, either within 3 months	None	Council: Super-QMV including 72% of MS, EP: absolute majority, either within (usually) 2 months, extendable by another 2 months
Appeal by Commission	None	None	None

For Member State experts who used to operate in the comitology system, it has become harder to understand their role in the new system. For some matters, they deliberate and vote as always, because they discuss an implementing act. For other matters, they do not vote, because they discuss a delegated act. What makes their situation even more confusing is that the existing body of legislation is only slowly being aligned to Lisbon Treaty requirements, so that many committees still work under pre-Lisbon comitology rules but will be transformed into expert groups sometime in the near future.

The reason why alignment takes place so slowly is closely related to the role of Member State experts in the delegated acts system. Because the experts no longer vote, and because firm rules on the consultation of Member State experts are absent, the Council of Ministers fears that the Commission will sideline the Member States in the preparation of delegated acts. For that reason, they have deliberately stalled political negotiations on legislative package proposals that seek to align existing legislation to the delegated acts regime (Council of Ministers, 2014b).

But is this fear really vindicated? Little is known about consultation practices within expert groups that prepare delegated acts, and how this compares to consultation practices in implementing acts committees. Some information is available on practices in the pre-Lisbon era, but how have consultation practices developed now that a significant number of comitology committees have been transformed into expert groups, and no longer vote? A small number of cases have come to light in which the Council was not happy with the treatment of Member State experts (Christiansen and Dobbels 2013, Council of Ministers 2014a), but there is no information available on consultation practices in the general population of expert groups, and how this compares to comitology committees. This contribution seeks to fill this lacunae.

## II. Patterns of Consultation

### *Existing Perspectives on Consultation of Member States*

Several studies of the pre-Lisbon comitology regime have investigated consultation practices within committees. Generally, all studies fall within either of two schools. The first and oldest school sees comitology committees as *inter-governmental bargaining* arenas. The relation between the Council and the Commission is typically modelled as a principal–agent relationship. Like any legislative body, the Council is aware that legislation mostly cannot cover all necessary details, and therefore delegates executive powers to the Commission. However, to avoid slippage or shirking, it also installs a police-patrol type of control in the form of comitology committees. Since the voting procedures of the committees constrain the Commission to varying degrees, these are considered the key mechanism for keeping the Commission in check. Simultaneously, these voting procedures also allow Member States to pursue their own preferences in the committees. Therefore there is competition not only between the Commission and the Member States, but also between the Member States themselves (Steunenberg *et al.*, 1996; Pollack, 2003; Ballman *et al.*, 2002; Franchino, 2000). A recent large-scale study reveals that in about a quarter of issues voted upon by comitology committees, at least one delegation does not support the final outcome, making comitology in practice less consensual in its voting outcomes than the Council (Dehousse *et al.*, 2014).

The *supranational deliberation* school challenges this view of committees as ‘mini-Councils’ and argues that the dominant mode of interaction is deliberative problem-solving rather than bargaining. Joerges and Neyer (1997), who introduced the term, point to two drivers of this interaction mode. First, the committees deal with technically complex issues, the distributive effects of which may be unclear to its participants. Therefore, a spirit of expertise prevails in the committees. Rather than formal voting rules, scientific evidence matters a great deal in deciding on the final outcome of the committees’ deliberation. Second, they point to socialization effects. Committees meet regularly and often have the same participants for several years. This is said to foster common understandings of problems and solutions. The resulting interaction style is deliberative in nature and aimed at finding technically superior solutions. The Commission needs the Member States to ensure successful implementation, and hence conflict is not in its interest (Joerges and Neyer, 1997; Wessels, 1998). In the search for the best technical solution, the interaction between the representatives is friendly and aimed towards knowledge exchange (Wessels, 1998). The interaction takes place within a scientific discourse; power is represented by the capacity to defend a position with scientific arguments and common standards. Influence is exercised by reason rather than by power play (Joerges and Neyer, 1997).

Several studies have investigated the degree to which these two pictures hold true for the pre-Lisbon comitology system, and findings are mixed. Since supranational deliberation and inter-governmental bargaining are analytically different concepts, these should be seen as separate concepts rather than two ends of the same continuum (Blom-Hansen and Brandsma, 2009). There are cases where either logic dominates, but also cases where both occur or very tame committees in which neither occurs. Various case studies display significant variance across this spectrum. Several studies show that the Commission uses the voting procedures to push GMO regulation through the committees (Hofmann and Toeller, 1997; Bradley, 1998), and that national preferences dominate interaction in the committees (Philip, 1998). Likewise, there is survey evidence demonstrating that national identities generally precede European ones in committee participants’ role orientations (Egeberg *et al.*, 2003; Trondal, 2004). On the other hand, some case studies show that arguing rather than bargaining is the dominant interaction mode in some committees (Joerges and Neyer, 1997; Geuijen *et al.*, 2008), and survey research shows that most committees are characterized by little confrontation between the Commission and the Member States (Brandsma, 2013, pp. 98–9). The presence of a voting rule with binding effects seems to make the Commission behave more accommodatingly, but the strength of the voting procedure does not seem to matter (Brandsma and Blom-Hansen, 2010).

### *Toward a Richer Typology of Interaction Styles*

Modes of Member State expert consultation by the Commission thus cannot be grasped by means of a single encompassing perspective. But the existing typology comes with a number of drawbacks that call for a more fine-grained typology of interaction patterns. A first drawback is that some characteristics of deliberative supranationalism and inter-governmental bargaining are not mutually exclusive. Some authors, for instance, argue that an accommodating attitude of Member States towards the Commission is indicative of putting a common interest first, and hence a strong sign of deliberative supranationalism (Joerges and Neyer, 1997, pp. 290–1). But at the same time, it can also be seen as an

effective strategy by Member States to pursue their own national interest, since the Commission in the end writes the proposals and adopts the eventual measures. Member States may thus very well defend their own national interests under the guise of an accommodating interaction style.

A second drawback is that the current typology neglects some aspects of negotiation styles that allow for a fine-grained mapping of interaction modes within committees. Naurin (2007), for instance, shows that putting a common interest first need not be connected to deliberation, but can also be part of integrative bargaining: representatives aim to maximize their own interests, but in such a way that, as much as possible, representatives are content (Naurin, 2007, p. 563). Also, representatives can drive a hard bargain in meetings where the best technical solution is debated. There can be lack of agreement about certain technical insights and the debate can run high. These two aspects are neglected when sticking to the traditional typology.

We propose a more fine-grained typology of interaction styles by moving beyond the two traditional concepts of deliberative supranationalism and inter-governmental bargaining. We identify four different interaction styles that vary along two dimensions: content and process. Content can be political or apolitical. In political consultation, the Member States are consulted about their preferences and their interests. Participants bring their positions into the discussions, possibly supported by arguments for more insight into the context of the position (Naurin, 2007, p. 563). In apolitical consultation, the Member States are consulted about the effectiveness of policy solutions, and they may back up their point of view by relying on extensive scientific arguments.

The process can be characterized by competition or co-operation. A meeting is competitive if outcomes result from a power struggle, and the goal is to find the smallest possible majority. Different positions are being explored minimally; coalitions are formed behind closed doors and participants exert pressure on each other and on the decision-making process. On the other hand, a meeting is co-operative if an optimal solution is found consensually. Openness is a condition; all Member States must have access to the positions of others, to know where everybody stands (Van de Kerkhof, 2006, p. 282).

The combination of these two dimensions results in a new typology of interaction styles. It includes the two classic perspectives of inter-governmental bargaining and deliberative supranationalism, but it also shows that two different interaction styles can be distinguished. One is integrative bargaining, in which Member State participants aim to find consensus through exploring each other's interests, and elaborating on this extensively and openly. The other is technical debate, in which the participants have competing ideas on the best technical solution. Arguments to be exchanged are selected strategically, and there is no open discussion. The end goal is to find a narrow majority. Table 2 below shows the full typology.

### III. Hypotheses and Data

Recent contributions on comitology and the delegated act system have typically employed a rational choice institutionalist perspective that assumes institutional actors aim to maximize their power in a control system (e.g. Brandsma and Blom-Hansen, 2016; Héritier *et al.*, 2012). These studies have in common that they focus on the development of the institutional rules that govern the comitology and delegated acts systems, and on the selection of control systems by legislative actors. Both cases represent bargaining by the three EU institutions,

Table 2: Consultation typology

Content	Political	1. Integrative bargaining	2. Inter-governmental bargaining
		<i>Problem:</i> Lack of agreement due to conflicting interests <i>Contribution participants:</i> Pursuit and explanation of Member State interests <i>Interaction:</i> Positions and views are explored extensively and openly <i>Goal:</i> Consensus	<i>Problem:</i> Lack of agreement due to conflicting interests <i>Contribution participants:</i> Pursuit and explanation of Member State interests <i>Interaction:</i> Strategic selection of positions to be explored <i>Goal:</i> Narrow majority
	Apolitical	<b>3. Deliberative supranationalism</b> <i>Problem:</i> Lack of agreement due to conflicting technical visions. <i>Contribution participants:</i> No interest-based arguments <i>Interaction:</i> Positions and views are explored extensively and openly <i>Goal:</i> Consensus Co-operative	<b>4. Technical debate</b> <i>Problem:</i> Lack of agreement due to conflicting technical visions. <i>Contribution participants:</i> No interest-based arguments <i>Interaction:</i> Strategic selection of positions to be explored <i>Goal:</i> Narrow majority Competitive
<b>Process</b>			

and their preferences as to the design and application of control systems are different. In our study, however, we focus on the workings of one particular element of control systems (namely, consultation of Member State experts by the European Commission) once the decision to delegate executive powers to the Commission has been made, including control through comitology or through delegated act expert groups.

For the purposes of this study, we therefore rely on principal–agent theory. We assume a utility-maximizing agent (i.e. the European Commission) and focus on its interaction with a set of principals which we assume to have conflicting preferences (i.e. the Member States).<sup>1</sup> The agent is constrained by a control system selected by the principal, and the available control systems constrain the Commission to varying degrees.

In the delegated acts system, Member State representatives are merely consulted by the Commission and they do not vote. Only the Council and the EP enjoy veto powers, but they do face several constraints exercising their veto rights. First, they only have little time to formally pass a veto: depending on the exact provisions in the basic legislative act, this can range from one to six months. Second, vetoes need to be supported by relatively large majorities: an absolute majority in the EP, or a super-qualified majority in the Council consisting of at least 72 per cent of its members representing at least 65 per cent of the EU’s population (Article 238(2) TFEU). Hence, the Commission can afford to care less about finding majorities in the delegated act expert groups, since it only needs to avoid a veto

<sup>1</sup> We are aware of the legal distinction between the Council as a co-legislator having veto power under the delegated acts regime, and the Member States having veto power under the implementing acts regime. Since the Council represents the Member States we consider this difference unproblematic for the purposes of our study.

in the EP and the Council: only when large numbers of Member State experts express their concern with a draft measure may the Commission realistically expect a veto in the Council.

In the comitology committees, however, the degree to which the committees constrain the Commission depends on the voting rules used in the committees. Under the advisory procedure, which is used relatively rarely, Member State experts are required to vote on the Commission's draft measures, but this vote has no binding effect. Under the examination procedure, which is normally used, the committee can block the Commission's proposals by a normal qualified majority or even by a simple majority, and in several cases the Commission even needs the explicit support of a qualified majority.

We therefore expect that the difference in voting rules between the comitology committees and the delegated act expert groups produces different interaction patterns within the committees. In general, we expect that the Commission is more keen to build support in comitology committees than in expert groups, which makes the interaction style in the expert groups more competitive than in the comitology committees.

*H1 : In delegated act expert groups, the interaction style is more competitive than in comitology committees.*

Second, we do not expect to see a significant difference between the expert groups and the comitology committees in the degree to which their deliberations are political or apolitical. The two delegation regimes exist because of the legal distinction between delegated and implementing acts, and the spheres of application of the two regimes are specified in institutional terms as well as in the scope of the measure to be adopted, but not in terms of policy substance. To a large degree the choice between applying either regime is political in nature and not technical (Brandsma and Blom-Hansen, 2016; Craig, 2016). In terms of the policy substance they address, there is no difference between the two regimes. Regarding political or apolitical interaction styles, we therefore expect to find similar variation in the delegated act expert groups as in comitology committees.

*H2 : There is no difference between delegated act expert groups and comitology committees in the degrees to which interaction styles are political or apolitical.*

Our study was carried out in the spring of 2015. At that time, 287 comitology committees existed which are consulted before adopting implementing acts, as well as 62 expert groups which are consulted during the preparation of delegated acts (European Commission 2015a, 2015b). Since many committees and expert groups address overlapping issues, the number of participants sent by each country is lower than the number of committees.

For our study we conducted 15 semi-structured interviews with participants in expert groups and comitology committees. Since our respondents' perceptions of the interaction styles in the committees may be influenced by cultural differences between countries and their administrative systems, we decided to hold nationality constant and conduct our interviews in one country only; the Netherlands was selected for practical purposes. We created a sample in two stages. First, we listed the 62 delegated act expert groups included in the Commission's expert group register, broke it down along 14 policy areas, randomly picked one expert group per policy area so as to avoid bias towards specific policy areas and traced the Dutch representative. All contacted representatives were willing to participate.



Second, we traced comitology committee participants. It appeared that 10 out of the 14 expert group participants also participate in comitology committees, which allowed for a direct comparison of consultation styles between both settings. Nevertheless, we also recruited one extra respondent who only participates in a comitology committee, bringing the total number of respondents to 15.

## IV. Results

### *Content*

First, we discuss the distribution of our findings on the content dimension. It differentiates between political and apolitical discussions, referring to either conflicting *interests* or conflicting *technical visions* respectively. In the case of the first type, we expect to see participants who behave like Member States' representatives by using political arguments; in the case of the second, we expect to see participants who behave like experts and use technical arguments.

First, we examine consultation in expert groups. The issues discussed during the expert group consultation are highly specialist and detailed. They range from ways to measure the size of a farm to which ingredients a certain type of baby food may contain. Most of the respondents first and foremost use the meetings in their expert groups to promote their national interest. They co-ordinate the expertise and interests in their countries, weigh these, formulate a point of view and take it to Brussels (R3, R4, R6–R9, R12–R14). This points to the content of the consultations being political; the participants state political positions during meetings.

This is not at all in contradiction with the detailed level of discussions, according to respondents: 'The more technical it is, the more it affects the calculations. It is in the details ... and not in the outlines' (R9). How the size of a farm is measured, for example, matters a lot if the amount of subsidy is dependent on the size of the farm. Or a country may have a major industry which produces ingredients that risk being banned from baby food.

Several interests can be discerned which each and every Member State tries to defend. First, Member States try to align the proposed delegated acts with the existing rules in their country, so that as little as possible needs to be changed at home. All countries are in favour of harmonization, but on the basis of their own legislation (R5, R7–R9, R13–R15). Second, the goal is to align the delegated acts not only to the policy positions preferred within member states, but also to particular drafting styles. The Netherlands, for example, prefers more general rules, as opposed to other countries which favour detailed rules (R3, R4, R7, R8, R11–R14). Third, Member States aim to control the Commission. They are afraid that the Commission will pull too much power toward it (R3, R6, R9, R11, R14). 'What you can notice strongly, is that Member States have cold feet to give up things to the Commission. It gives people an unpleasant feeling. ... It's also because the Commission sometimes goes too far in pulling things towards her' (R14).

Most of the respondents state that the Commission wants to hear these political positions (R3, R4–R8, R11, R12–R14, R18). In order to come up with a proposal supported by a sufficient number of Member States, it 'tests the water' in the expert groups (R5). According to respondents, this is also exactly the reason why administrators of the EP are sometimes allowed a presence during meetings of expert groups: the Commission

wants to be aware of the balance of forces in the EP, because the delegated act may be vetoed by them as well as by the Council (R5). In this way, the expert group functions as a *proxy* for a Council working group meeting. Two respondents, however, declare that they do not promote their countries' interest really explicitly in the expert group. In the words of one of them: 'We don't say, this is good. That's not our task in our expert group.... They will notice from our reactions and the way meetings go on what we agree and on what we don't agree' (R13).

The last aim of the meeting, according to the respondents, is to exchange knowledge and expertise. Then sometimes technical arguments are used (R1, R3, R5–R8, R12, R13, R17). For some respondents this is in fact the most important aim (R1, R5, R8). But these respondents also recognize that they have a 'dual role': they stay Member State representatives (R5). Moreover, excessive technicality is not desirable: in one meeting, a respondent said, the Latvians sent a scientist and 'everybody switched off' (R1). Hence, it turns out that the expert groups do not live up to their name: the consultation is mainly political.

When asked to compare their experiences in expert groups to those in comitology committees, respondents don't notice a significant difference. 'The most important is... independently of what is proposed, that you try to give Dutch input the best you can. And if the discussion structure changes, as has happened now, then we still try to manage [our interests] the best we can' (R7).

Just as in expert groups, the subjects discussed in committees are highly specialist. The discussions are first and foremost about political positions and in addition expertise is exchanged. It is important to single out one difference. As mentioned above, some respondents state that they do not express the positions of their Member State to the same extent in an expert group as in a committee. The explanation they give for this is that this is not the task of the expert group. In some expert groups, therefore, the political positions and arguments may be less dominant, but they are nevertheless present.

### *Process*

Now we know *what* is at stake during the consultation, we can examine *how* participants try to find a solution. Are positions and views openly and extensively discussed, or is the exchange kept to a minimum and are most of the deals made behind closed doors?

First, we focus on expert groups. There is a lot of variation in the interaction of Member State participants as regards process. More than half of the respondents characterize it as open. Positions are discussed freely before and during meetings (R1, R3, R5, R7, R8, R12, R18). Participants, attempting to find consensus, try to find out what the interests of the other participants are: 'Of course you just have conversations, trying to make clear what the issues are, what is at stake and why you want certain things. And thereby you must have [an] eye for the situation in other countries and their interests' (R7). But not everything happens openly: almost everyone talks bilaterally to each other or the Commission. It is a 'game' that must be played (R3).

The other respondents characterize the interaction beforehand and during the meetings more as a fight (R4, R6, R9, R11, R13). 'You don't send around e-mails with the question, "how do you think about this", because Member States will not say that just like that' (R4). There is a lot of co-ordination between Member States that are like-minded. Deals are made and there is discussion about the best way to deal with the meetings.

Arrangements are prepared, even on the level of who says what when: 'The trick is not to be the one who says the first thing, because then it won't get lost' (R9, R4). During meetings, strategies are executed, and there is not much room for discussion. Member States state their positions and sometimes react to other states with a counter-position. Most things are achieved by sending the Commission text proposals before meetings.

The attitude of the Commission is more univocal in the expert groups. The Commission allows all the respondents in the expert groups access to draft versions of the delegated acts (R1, R3–9, R11–R14, R18). This goes further than the Commission is obliged to do by the Common Understanding, which states that the Commission only has to consult the Member States.

In two expert groups the Commission is always very late in sending the draft delegated acts to the participants. Consequently, the participants do not have time to discuss the items with each other before the meeting. Respondents think the Commission does this on purpose: it 'benefits from less co-ordination' between Member States who, because of that, cannot organize resistance against the Commission (R6, R14). In one of the expert groups where this happens, it is said that the Commission does not listen to the Member States, which causes annoyance: 'You were sitting there, trying to make a comment, but you never notice something happening with it. .. And then they nod nicely; yes, you're right, but they don't change a thing' (R14).

In two other expert groups, the Commission discusses points with the big countries before the meeting. 'They [the big countries] discuss their important points with members of the Commission.. .. they precook the discussions. And then they do an official round with us' (R9, R12). What the Commission does exactly with the big countries is not visible, but the outcome is.

The Commission thus gives the Member States in most expert groups the chance to discuss the delegated act openly. The following question is what the Commission does with the positions of the Member States. Does it try to find consensus, or only the smallest possible majority?

A few respondents indicate that the Commission searches explicitly for majorities in their expert group. It literally asks during the meeting if every Member State can agree with the proposal (R4, R14). In two other expert groups this is not so explicit, but the Commission does work together with the Member States toward a proposal that makes everybody happy (R5, R11). Most of the respondents, however, state that Member States just have to await what the Commission does with their input (R3, R6–R8, R12, R13, R18): 'The Commission takes note of the [positions]. .. and then it's up to her to dot the i's and cross the t's' (R7). Most expert groups thus just have to wait and see regarding the delegated act. The Commission uses its extended discretion under the delegated acts procedure: it does not need to agree on a version of the act together with the expert group.

The procedure of a delegated act does not end with the meeting in the expert group. The Commission has the possibility to adjust the act afterwards and Member States may thus continue to influence the Commission. But do they do that? Most respondents describe that neither the Commission nor Member States use this extra space. Two respondents notice that Member States send written statements to the Commission after the meeting (R4, R6). A respondent in another expert group experienced, to his great surprise, the Commission changing something fundamental after the meeting. Germany and France arranged this together with the Commission. 'If that would have happened during the meeting, we would

have said, if Germany and France want that, then we provide a “may clause” Member States may opt for, then both options would be possible’ (R2). Although the Commission thus uses freedom to consult who it wants whenever it wants, even after meetings with Member States, respondents normally do not try to exert influence after the meetings. But a few respondents state that they are involved in a learning process at the moment, and are waiting to see how things will develop (R1, R3, R5, R7).

Practices in committees resemble those in expert groups to a certain degree. Most respondents state that Member States and the Commission act almost the same in the preparation of meetings and the discussions during the meetings as in expert groups (R3–R5, R7–R9, R11, R13). Some of them, however, feel that the Commission listens to them better in committees than in expert groups (R6, R14), or is more inclined to listen only to the big Member States (R9, R12).

Moreover, almost all the respondents notice different processes at the end of the process. Because voting is mandatory in committees, the Commission has to shift and adjust its proposal until it is capable of surviving a formal vote. In most of the cases the Commission is looking for very broad support and does not listen to the big Member States alone. It responds favourably towards most requests from Member States, within the scope of the basic directive or regulation. The Commission wants the Member States to support the implementing acts, since most of the time the Member States are responsible for the implementation of those acts (R1, R3–R6, R11, R13).

When we compare this to the attitude and behaviour of the Commission during the consultation in expert groups, we see that the Commission is less open and less inclined to listen to all Member States in expert groups than in committees. While the Commission gives Member States insight into the whole decision-making process with committees (as it has to), the whole decision-making process after the meeting of an expert group is a black box to Member States. This gives the Commission the chance to make a deal with only the big Member States, which gives it sufficient security that the Council will not vote against the delegated act. The case mentioned above where Germany and France changed something after the expert group meeting already shows that this is not just a hypothetical risk: in fact it occasionally happens for real.

To conclude, processes in expert groups are more competitive than those in committees. The Commission is less open and less inclined to search for consensus.

## **Conclusion and Discussion**

The above results confirm our hypotheses. The evidence for the first hypothesis, which states that processes are more competitive in expert groups than in committees, is strong. Both in expert groups and in committees the discussion can be open, with the Member States and the Commission working together, as well as closed, with the Member States and Commission opposing each other. However, towards the end of discussions as well as immediately after the meeting, there is a significant difference because the Member States cannot vote in expert groups. This gives the Commission the opportunity to change draft delegated acts without consulting the Member States. The Council has signalled this in a few isolated cases and lamented this practice. In general, however, it shows that the process of adopting an implementing act is clear to Member State representatives, since

generally they need to be in the room when it is being adopted. The process of adopting a delegated act is less clear, though, since things might change in the aftermath of an expert group meeting. This makes the interaction in delegated act expert groups more competitive than that in comitology committees.

According to the second hypothesis, there is no difference between expert groups and committees regarding the content of consultation. The interviews support this. The Commission uses both the expert groups and the comitology committees to gather expertise about matters of detail, but the content of consultation is mainly political. Member States send their public servants to pursue the national interest and the Commission is responsive to this, because it uses both the expert groups and the committees as a proxy for Council preferences. However, in a few cases, public servants are less outspoken in expert groups because they take the view that it is only their task to give a technical opinion. Although they *want* to state their positions, they feel they are not allowed to do so. Overall, the discussions are political in both groups.

In other words, using the consultation typology we presented before, proceedings in delegated act expert groups tend to be closer to inter-governmental bargaining, while the proceedings of old-style comitology committees are closer to integrative bargaining. Nonetheless, this observed difference in consultation practices is not very big. Despite a more competitive interaction style in expert groups, the Commission still lets the Member States take on a lot of political influence. This is because, in any event, the Commission needs the support of the Member States, because the latter physically implement EU law. Therefore the Commission is willing to inform them, hear them and meet certain of their wishes. However, the voting rules for delegated acts allow the Commission to ignore certain input from Member States if it feels it to be necessary.

Our results have three important consequences. First, they show that our new typology of expert consultation makes sense. The interviews clearly demonstrate that there is a difference between the content and process of the consultation. For example, representatives can defend the national interest *and* have an eye for common solutions. This observation has important theoretical implications. The concepts of deliberative supranationalism and inter-governmental bargaining do not suffice for an understanding of how Member States and the Commission interact during consultation. By making a distinction between content and process, we are able to map out practices more comprehensively. Further research is needed to explore the use of the new typology in other bodies of the EU, such as Council working groups.

Second, the results do not only have theoretical meaning; they also matter in real life. As shown above, the Member States feared that by making a distinction between delegated acts and implementing acts and through the removal of Member States' voting rights for delegated acts, the Member States would lose influence. Also, the voting rules in the Council for blocking a delegated act are such that the Member States lose influence under the delegated act system (Kaeding and Stack, 2015). Our findings add further evidence to this by demonstrating how Member State experts and the Commission interact with each other under the new system. Although Member State experts are consulted extensively by the Commission for delegated acts, they do not oversee the whole process, as the Commission creates a black box. Because the Council will almost never veto delegated acts, there are fewer incentives for the Commission to meet the preferences of all Member States. This is the second lesson that we can learn from the results: the

Member States lost a little bit of influence, but after alignment of the entire *acquis* to the Lisbon Treaty there is a realistic chance that the Member States will lose even more.

This brings us to the third consequence. The creation of a black box has implications for democratic control of the Commission. While it has become easier for the EP to exercise control over the Commission in the realm of delegated acts, it is not able to carefully check *all* delegated acts (Brandsma, 2015). With the current lack of transparency surrounding the adoption process of delegated acts, no account is given to citizens and interest intermediaries – at least not by formal means. The EP and the public would need to rely on insider groups who simultaneously act as lobbyists and ‘fire alarms’. The Commission’s Better Regulation agenda seeks to address the opaqueness of the delegated acts system. With a view to the discretion enjoyed – and at times exercised – by the Commission in the adoption of delegated acts, we consider such efforts timely and necessary.

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## References

- Ballman, A, Epstein, D. and O’Halloran, S. (2002) ‘Delegation, Comitology and the Separation of Powers in the European Union’. *International Organization*, Vol. 56, No. 3, pp. 551–74.
- Bergström, C.F. (2005). *Comitology: Delegation of power in the European Union and the committee system* (Oxford: Oxford University Press).
- Blom-Hansen, J. (2008) ‘The Origins of the EU Comitology System: A Case of Informal Agenda-setting by the Commission’. *Journal of European Public Policy*, Vol. 15, No. 2, pp. 208–26.
- Blom-Hansen, J. and Brandsma, G.J. (2009) ‘The EU Comitology System: Intergovernmental Bargaining and Deliberative Supranationalism?’ *JCMS*, Vol. 47, No. 4, pp. 719–40.
- Blom-Hansen, J. (2011) *The EU Comitology System in Theory and Practice: Keeping an Eye on the Commission?* (Houndmills: Palgrave MacMillan).
- Bradley, K. (1997) ‘The European Parliament and Comitology: On the Road to Nowhere?’ *European Law Journal*, Vol. 3, pp. 230–54.
- Bradley, K. (1998) ‘The GMO-Committee on Transgenic Maize: Alien Corn, or the Transgenic Procedural Maze’. In van Schendelen, R. (ed), *EU Committees as Influential Policymakers*, pp. 207–33 (Aldershot: Ashgate).
- Brandsma, G.J. and Blom-Hansen, J. (2010) ‘The EU Comitology System: What Role for the Commission?’ *Public Administration*, Vol. 88, No. 2, pp. 496–512.
- Brandsma, G.J. (2013) *Controlling Comitology: Accountability in a Multi-Level System* (New York, NY: Palgrave Macmillan).
- Brandsma, G.J. (2015) ‘Holding the European Commission to Account: The Promise of Delegated Acts’. *International Review of Administrative Sciences*, DOI: <http://dx.doi.org/10.1177/0020852315583195>.
- Brandsma, G.J., and Blom-Hansen, J. (2016) ‘Controlling Delegated Powers in the Post-Lisbon European Union’. *Journal of European Public Policy*, Vol. 23, No. 4, pp. 513–49.
- Christiansen, T. and Dobbels, M. (2013) ‘Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts’. *European Law Journal*, Vol. 19, No. 1, pp. 42–56.

- Council of Ministers (2014a) Initiative to complement the Common Understanding on delegated acts as regards the consultation of experts. 6774/14, 21 February 2014.
- Council of Ministers (2014b) *Examination of the Omnibus I and III proposals from the Commission by the Friends of the Presidency (Comitology) – Progress Report*. 11146/14, 20 June 2014.
- Craig, P. (2016) 'Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains', in Bergström, C.F. and Ritleng, D. (eds) *Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford: Oxford University Press), pp. 173–204.
- Dehousse, R., Fernandez Pasarín, A. and Plaza, J. (2014) 'How consensual is comitology?' *Journal of European Public Policy*, Vol. 21, No. 6, pp. 842–59.
- Egeberg, M., Schaefer, G. and Trondal, J. (2003) 'The Many Faces of EU Committee Governance'. *West European Politics*, Vol. 26, No. 3, pp. 19–40.
- Epstein, D. and O'Halloran, S. (1999) *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge: Cambridge University Press).
- European Commission (2015a) Report from the Commission on the workings of Committees during 2014 (Brussels: European Commission). COM(2015) 418 final.
- European Commission (2015b) Register of Commission Expert Groups and other similar Entities. Available at «<http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faqandaide=2andLang=NL>».
- Franchino, F. (2000) 'Control of the Commission's Executive Functions: Uncertainty, Conflict and Decision Rules'. *European Union Politics*, Vol. 1, No. 1, pp. 63–92.
- Geuijen, K., 't Hart, P., Princen, S. and Yesilkagit, K. (2008) *The New Eurocrats* (Amsterdam: Amsterdam University Press).
- Héritier, A., Moury, C., Bischoff, C. and Bergström, C.F. (2012) *Changing Rules of Delegation: A Contest for Power in Comitology* (Oxford: Oxford University Press).
- Hofmann, H. and Toeller, A. (1997) *Zur Reform der Komitologie: Gen-Mais in der Filet-Falle*. Working Paper (Hamburg: Hamburg University).
- Joerges, C. and Neyer, J. (1997) 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology'. *European Law Journal*, Vol. 3, No. 3, pp. 273–99.
- Kaeding, M., and Stack, K.M. (2015) 'Legislative Scrutiny? The Political Economy and Practice of Legislative Vetoes in the European Union'. *Journal of Common Market Studies*, Vol. 53, No. 6, pp. 1268–84.
- Kerkhof, M. (2006) 'Making a Difference: On the Constraints of Consensus Building and the Relevance of Deliberation in Stakeholder Dialogues'. *Policy Sciences*, Vol. 39, No. 3, pp. 279–99.
- Naurin, D. (2007) 'Why Give Reason? Measuring Arguing and Bargaining in Survey Research'. *Swiss Political Science Review*, Vol. 13, No. 4, pp. 559–75.
- Page, E. (2012) *Policy without Politicians: Bureaucratic Influence in Comparative Perspective* (Oxford: Oxford University Press).
- Philip, A. (1998) 'The Eco-Label Regulatory Committee'. In van Schendelen, M. (ed), *EU Committees as Influential Policymakers* (Aldershot: Ashgate), pp. 164–78.
- Pollack, M.A. (2003) 'Control Mechanism or Deliberative Democracy? Two Images of Comitology', *Comparative Political Studies*, Vol. 36, pp. 125–55.
- Steunenberg, B., Koboldt, C. and Schmidtchen, D. (1996) 'Policy Making, Comitology, and the Balance of Power in the European Union'. *International Review of Law and Economics*, Vol. 16, No. 1, pp. 329–44.
- Trondal, J. (2004) 'Re-socializing Civil Servants: The Transformative Powers of EU Institutions'. *Acta Politica*, Vol. 39, No. 1, pp. 4–30.
- Voermans, W., Hartmann, J.M.R., and Kaeding, M. (2014) 'The Quest for Legitimacy in EU Secondary Legislation'. *The Theory and Practice of Legislation*, Vol. 2, pp. 1–28.
- Wessels, W. (1998) 'Comitology: Fusion in Action. Politico-administrative Trends in the EU System'. *Journal of European Public Policy*, Vol. 5, No. 2, pp. 209–34.