

Transparency of the European Commission's expert groups: which fingerprints can be traced back?

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The Lisbon Treaty came as a surprise as far as secondary legislation is concerned. The reform broke with the well-established tradition of comitology and forced the EU machinery to adapt its workings (be it administrative, legal or simple lobbying practices) around the so far unexplored distinction between delegated and implementing acts. Years after Lisbon, the new system has shown some deficiencies, leading the Commission to consider revisiting the rules laid down in Regulation 182/20011.¹ Ever since its implementation, the functioning of the so-called “Commission expert groups” envisaged in Article 290 has been at the core of institutional debates. The rather opaque regime has given rise to lingering debates on their composition and openness, as evidenced by the Ombudsman inquiry back in 2014, when the watchdog recommended the Commission to tackle the shortcomings in the composition of the groups and to facilitate better public scrutiny of their work. However, the proposal presented by the Commission in February 2017 concentrates in Article 291, thus leaving aside any reflection on delegated acts.

This paper aims to bring the Commission expert groups back to the debate. It sheds some light on the degree of transparency shown by their functioning. It focuses on three illustrative examples of ongoing groups providing policy advice to the EU executive.

The paper is structured as follows: in Section I, we analyze the case of the Expert Group on Food Information to Consumers. Section II and III examine the cases of the Medicinal Products for Human Use and Tobacco Policy expert groups, respectively. Finally, some policy considerations are included. Conclusions are drawn on the basis of the cases examined.

¹ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *Official Journal L55*, 28.2.2011, pp. 13–18.

Expert Group on Food Information to Consumers

The expert group on the provision of food information to consumers aims to assist the Commission in the preparation of delegated acts by coordinating among Member States the measures that are to be implemented. Through informal exchanges of views on several technical aspects related to secondary legislation on food information to consumers, the expert group fails to meet some criteria as regards to the transparency of their activities.

Between 2013 and 2014, the expert group met five times² and the last time a public consultation was held was in 2015³. Further information on subsequent activities is not available. Therefore, attention is going to be given on the meetings held between 2013 and 2014 and a light shed on three factors which undermine the transparency of such meetings: the composition of the expert group, the background documents used during the meetings and the activity reports made public.

Food information to consumers is regulated under the Regulation (EU) No 1169/2011 on the provision of information to consumers⁴, and numerous technical aspects such as definitions were left for the Commission to prepare a delegated act on its implementation. Consequently, the expert group, composed of members of DG SANCO, ENV, the Joint Research Center, Norway and representatives from all the EU Member States with few exceptions, met between 2013 and 2014 to clarify the definition of “engineered nanomaterials” and provide further elucidation on “intentionally manufactured” materials. Nevertheless, it should be mentioned that the European Parliament objected to the Delegated Regulation in March 2014 considering that the Commission, by not including certain food additives from the scope of the

² European Commission, *Food - Expert Group on Food Information to Consumers*, https://ec.europa.eu/food/safety/labelling_nutrition/labelling_legislation/expert_grouphttps://ec.europa.eu/food/safety/labelling_nutrition/labelling_legislation/expert_group_en_en

³ European Commission, *Food Information to Consumers - legislation*, https://ec.europa.eu/food/safety/labelling_nutrition/labelling_legislation_en

⁴ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance

definition, exceeded its delegated powers⁵. Given event led to the expert group meeting, for the last time, in June 2014, and culminated in the incorporation of the Parliament's requests in the revised draft.

Considering the degree of transparency imprinted in the meetings mentioned above, the Report on control of the Register and composition of the Commission's expert groups⁶ from the European Parliament, drafted by the Budgetary Control, Legal Affairs and Budgets Committees, by identifying several general flaws present in most expert groups, pinpointed some practices that the expert group in question, already lags behind.

Specific composition of the expert group

Firstly, when analyzing the composition of the group, it is only possible to conclude that 28 Member States' authorities (type D) and one "other public entity" (type E)⁷ take part in the meetings, while the specific composition of the expert group is not available, that is, for example, the balance between economic and non-economic interests or the level of expertise.

Disclosure of background documents

On a second note, no background documents used during the meetings were made available, such as reports and statistics, which leads to the questions: to what extent is the data used in these meetings reliable? To what extent isn't there a bias?

Information of the activity reports

Lastly, following the recommendations of the Parliament and the Ombudsman, the activity reports and the minutes of the meetings should be meaningful and complete, whereas in the expert group on food information to consumers, the information available is rather vague

⁵ European Parliament, *Motion for a Resolution pursuant to Rule 87a(3) of the Rules of Procedure on the Commission delegated regulation of 12 December 2013 amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers as regards the definition of 'engineered nanomaterials' (C(2013)08887 - 2013/2997(DEA))*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B7-2014-0185+0+DOC+PDF+V0//EN>

⁶ European Parliament, *Report on control of the Register and composition of the Commission's expert groups (2015/2319 (INI))*, 12/01/2017 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0002+0+DOC+XML+V0//EN>

⁷ European Commission, *Register of Commission Expert Groups and other Similar Entities - Expert group on the provision of food information to consumers (E02857)*, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2857>

and somewhat inconclusive, leaving room for questions concerning the degree of dissent among members or the topics that were actually discussed.

In this regard, the expert group on food information to consumers constitutes an example of malpractices towards transparency of decisions taken and, subsequently, accountability.

Expert Group on safety features for medicinal products for human use

Transparency on Members

This group consists of experts from the national authorities of all the Member States, which are responsible for implementing the delegated acts once they have been adopted. Representatives of 24 national administrations from 23 Member States and Norway are registered. The list of participants specifies the represented National Competent Authorities (e.g. Federal Office for Safety in Healthcare). It is however unclear whether each delegation is composed of one representative or more.

Transparency of the meetings

Each activity report of the group entails the agenda and the debriefing of each session. The agenda is quite detailed. For instance, the agenda for the meeting which took place on 12 December 2016 gives the schedule, the exact location and precise orders of the day: e.g. Commission feedback on questions by Member States; state of play of national repositories; updates from Member State working groups.

The attached debriefing follows the structure of the agenda by giving content under each title and subtitle. This document reveals essential and non-essential information alike. The names of the Commission officials appear in bold and their role is pretty much described: *“The Chair, Dominik Schnichels, Head of Unit B4, welcomed the experts and asked the new participants to introduce themselves (...) The Chair informed Member States (MS) about the first European Medicines Verification Organisation (EMVO) - MS Workshop on the 13th of December and highlighted the importance of MS participation in this event.”*⁸

Even the name of some representatives is given in the section dedicated to Member States working groups. However, in most cases the acronym of the country is given instead of a

⁸ “Draft minutes of the 15th meeting of the expert group on the delegated act on safety features for medicinal products for human use”, 12 December 2016, p.1.

name: *“FR proposed the issue of barcodes aggregation for discussion.”*⁹ Remarks and questions of NCAs and the Commission are reported under the form of indirect speech: *“LT asked if parallel importers could designate wholesalers, as trusted wholesalers, and those would be exempted of checking the safety features.”* (...) *“The MS asked to have information and ideas to fulfil their needs.”*¹⁰ (...) *“COM explained there is no legal definition of pharmacy in the EU pharmaceutical legislation.”*¹¹

The debriefing also displays in annex a table showing the foreseen extension of scope of the safety measures by Member State in the alphabetical order. Each NCA filled in the table mostly by answering “yes” or “no” to questions (e.g. on anti-tampering device requirements). Opacity remains for a few answers though for countries like Greece and Slovenia: *“possibly but not ready to divulge”*; *“under discussion”*; *“May be extended but discussion ongoing”*. In a few cells, no response was provided.¹²

A last point of note is the announcement of the next meetings: *“COM scheduled the next meetings of the expert group on the Delegated act on the safety features are tentatively planned for 28 March, 30 June, 3 October and 15 December 2017. Formal invitations will be sent out at a later stage.”*¹³ This information is useful to outside people who may request to attend the meetings.

Disclosure of documents used during the meetings

In spite of the transparency on meetings depicted above, the documents of the presentations done by the Commission and any Member during the sessions are not available on the register page of the group. Those documents tend to give an overview of the policy implementation and evaluation in the Member States and also highlight the different ambitions that the Commission may want to pursue for the future of some policy. That is why the disclosure of such documents is of interest for their citizens as they may want to understand how their country deals with safety features for medicinal products and how the EU tackles the issue over time.

⁹ *Ibid.*, p.6.

¹⁰ *Ibid.*, p.7.

¹¹ *Ibid.*, p.2.

¹² *Ibid.*, p.8.

¹³ *Ibid.*, p.7.

Expert Group on Tobacco Policy

Soon after the controversial Tobacco Products Directive entered into force,¹⁴ the Commission set up the expert group on Tobacco Policy (hereunder EGTP). The aim of this group is to help the EU executive in preparing policy initiatives and the implementation of EU legislation on tobacco. It also purports to act as a forum through which Member States' experts can be consulted and to facilitate cooperation between Member States and the Commission on matters relating to tobacco control policies.¹⁵ Monitoring the operations of this important group seems to be an uneasy task in light of the rather obscure rules governing its functioning, which do not establish the necessary conditions for sufficient public scrutiny.

Opacity on positions and names

First, the position of the experts appointed by the Member States (including dissenting opinions) is not clearly shown. The individual opinion of the attendants is concealed under vague references to "one MS", "6 MS" or even the imprecise formula of "some MS". In fact, the identity of the experts appointed by the States remains shielded from the public eye. The same goes for their qualifications and experience. The information provided in this regard varies significantly regarding the respective attendants of the Commission and countries: whilst the name of Commission representatives is normally visible, the minutes of the meetings do not contain any similar information for the latter.

No disclosure of documents used during the meetings

¹⁴ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, *OJ L 127*, 29.4.2014, pp. 1–38.

¹⁵ Article 2 of the Commission Decision of 4 June 2014 setting up the group of experts on tobacco policy, Brussels, 4.6.2014 C (2014) 3509 final.

Second, the disclosure policy followed by the group does not facilitate a comprehensive tracking of the EGTP works. Reports, figures, technical data and other documents circulated are kept confidential¹⁶.

Little transparency on meetings

Third, the minutes published in the register allow limited traceability of forthcoming deliberations. Despite making available the draft agendas in the website, one may wonder whether the information contained in such documents could be more exhaustive. Also, stakeholders need to navigate through the minutes to determine the date when new meetings will take place.

Fourth, it is not clear whether and how the Commission echoes effectively the concerns of different social groups. The rules applying to the Group leave to the discretion of Member States the choice to nominate its representatives. Hence, no formal requirement for a balanced composition of the group is envisaged. It is nonetheless important to note that Member States have so far appointed representatives of their respective Ministries of Health. This issue is of particular importance notably when the commercialization of tobacco products is a highly controversial activity with profound social and economic implications.

¹⁶ Article 4(4) of the Group's Rules of Procedure provides that "Members shall not disclose the documentation of the expert group unless the author of the documentation and the Chair give their consent".

Concluding Remarks

Expert groups do not often get much attention by the media and the public, however, they are useful to gather experts from national administrations who can provide information about the implementation at national level, facilitate cooperation between Member States and the Commission and help shaping new policy initiatives. As bodies which take part in policy formulation and implementation, transparency should be expected. We focused on three expert groups in order to scrutinize three compelling issues which undermine both transparency and accountability in the decisions taken, insofar as the composition of the groups, the disclosure of background documents and the information made available in the activity reports are rather inexistent or vague.

A common characteristic between the three groups is the lack of details on the composition of members, especially the number of seats allocated and the possible link of members with other interest groups. Another common point is clearly the non-disclosure of background documents, which could provide valuable information on the current implementation and on points of view of the Commission and NCAs. Conversely, transparency on discussions differs between the meeting reports of the different expert groups. While discussions are clearly displayed in the reports of the expert group 'Delegated act on safety features for medicinal products for human use', there is less accuracy in the two other expert groups. These transparency variations may be due to the issue salience or to the goodwill of the Commission's administration alike.

From our conclusions, the recommendations we draw, are as follows:

1. Raise the bar for transparency by granting access to comprehensive minutes of the meetings. This would help avoiding public concerns on the functioning of expert groups and would raise public trust in the broad system on secondary legislation.
2. It is desirable to ensure that an adequate balance between economic and non-economic interests is always met.
3. Ensure that Member States can be held accountable: disclose the individual position of Member States in the minutes and the background documents, even when they display data whose validity is temporary.