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## OPINION OF THE LEGAL SERVICE<sup>1</sup>

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From: Legal Service  
To: General Affairs Group - Comitology Revision  
Subject: Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers - Questions related to the procedure of the appeal committee

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### I. INTRODUCTION

1. On 14 February 2017, the Commission presented a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers ("the proposal")<sup>2</sup>, based on Article 291(3) TFEU.
2. During the examination of this proposal in the General Affairs Group - Comitology Revision on 10 November 2017, the opinion of the Council Legal Service was requested on a number of issues raised by the proposal, among which the compliance of the proposal with the

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<sup>2</sup> Document 7804/17, COM(2017) 85 final.

proportionality principle<sup>3</sup>. The present opinion presents the Council Legal Service's analysis of the proposed amendments.

## II. CONTENT OF THE PROPOSAL

3. Regulation (EU) No 182/2011 (the 'Comitology Regulation') sets out the mechanisms for control by Member States of the Commission's exercise of implementing powers under Article 291 TFEU. According to this Regulation, the Commission is assisted by a committee made up of representatives of the Member States. Under the "examination procedure", the committee gives an opinion on the draft implementing act by the majority laid down in in Article 16(4) and (5) TEU and, where applicable, Article 238(3) TFEU, for acts to be adopted on a proposal from the Commission<sup>4</sup>.
4. As the Comitology Regulation currently stands, if there is no qualified majority *for or against* the proposal in the committee, the Commission *may* adopt the draft implementing act, or may decide not to adopt it, unless Article 5(4), second sub-paragraph applies. This is known as the "no opinion" situation. However, if there is no opinion and Article 5(4), second sub-paragraph applies, the Commission is legally prevented from adopting the implementing act, and may decide to refer the proposal to an appeal committee composed of representatives of Member States<sup>5</sup>. This is the case if :
- the act concerns taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures;
  - the basic act provides that the draft implementing act cannot be adopted in such a situation;
  - a simple majority of the component members of the committee opposes the draft act<sup>6</sup>.
- If, again, there is a "no opinion" situation in the appeal committee, the Commission has discretion as to whether or not to adopt the draft<sup>7</sup>.

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<sup>3</sup> See also Opinion of the Parliament of the Czech Republic, Chamber of Deputies, expressing concerns in relation to compliance with the principle of proportionality and doubts about the Commission's view that the proposal does not require an impact assessment (doc. 10385/17).

<sup>4</sup> Article 5(1), Comitology Regulation.

<sup>5</sup> Alternatively, the Commission may decide to submit an amended version of the draft act to the same committee (see Article 5(4) *in fine*, Comitology Regulation).

<sup>6</sup> Article 5(4), Comitology Regulation.

<sup>7</sup> Article 6(3), Comitology Regulation. A derogation is provided for the adoption of definitive multilateral safeguard measures where the Commission is prevented from adopting the measures in the absence of a positive opinion.

5. The proposal under analysis is limited in scope with regard to the rules governing the appeal committee. Even if Regulation (EU) No 182/2011, in most cases of "no opinion", does not oblige the Commission to adopt any act ("*the Commission may adopt...*"), this proposal seeks to address situations where the Commission is required by the basic acts conferring implementing powers on it to take decisions on politically sensitive matters in the absence of an opinion from Member States at the end of the examination procedure. In order to address this perceived absence of political responsibility, the Commission proposes four specific amendments to Regulation (EU) No 182/2011:

First, the Commission proposes that, if a "no opinion" result is delivered in the appeal committee, a further meeting of the appeal committee may be held, this time at ministerial level. Secondly, the Commission proposes amending the voting procedure in the appeal committee, such that only members of the appeal committee who are present or represented at the time of the vote and do not abstain, will be taken into account for the calculation of the qualified majority, provided that a vote is considered valid only if a simple majority of Member States participate in the vote within the appeal committee. Thirdly, the Commission proposes that, if the appeal committee, ultimately, does not deliver an opinion, the matter may be referred to the Council for an opinion. Fourthly, the Commission proposes making the votes of appeal committee members public.

### **III. FACTUAL AND LEGAL FRAMEWORK**

6. The proposed regulation was designed as a response to various "problematic cases" relating to the authorisation of genetically modified organisms (GMOs)<sup>8</sup> and the active substance glyphosate<sup>9</sup>. According to the Commission, there has *never* been a qualified majority amongst Member States in favour or against a draft decision authorising GMOs and genetically modified

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<sup>8</sup> The appeal committee is most frequently convened to decide on the authorisation of GMOs and GM food and feed (see Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) 182/2011, 26 February 2016, COM(2016)92 final).

<sup>9</sup> After a meeting of the appeal committee on 24 June 2016 in which the proposal for renewing the approval of the active substance glyphosate did not secure a qualified majority, the Commission revised its draft and sought the opinion of the committee again. On 27 November 2017, a qualified majority was reached in the appeal committee in favour of the proposed five-year renewal, allowing the Commission to adopt the implementing act on 12 December 2017 (Implementing Regulation (UE) 2017/2324).

food and feed. In all such cases, there was a "no opinion" outcome in both the committee and the appeal committee.

7. Out of the 58 referrals to appeal committees between 2011 and 2016, 52 resulted in "no opinion" outcomes<sup>10</sup>. In the vast majority of cases, "no opinion" outcomes concerned the protection of the health or safety of humans, animals or plants. A few cases concerned the community customs code and mobility and transport.
8. The draft acts on the protection of the health or safety of humans, animals or plants concern requests for approval or authorisation for the placing on the market of a substance or a product<sup>11</sup>. The basic acts, on the basis of which such requests are made, entail a duty for the Commission to adopt an implementing act<sup>12</sup>, or at least an obligation to inform the marketing authorisation applicant of the decision taken<sup>13</sup>. Moreover, in accordance with the right to good administration embodied in Article 41 of the Charter of fundamental rights of the EU, "*[e]very person has the right to have his affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*". The Commission is therefore under a duty to adopt a decision on the application for approval or for a marketing authorisation within a reasonable time frame. In the absence of authorisation from the Commission, the marketing of these products or substances in the EU is prohibited<sup>14</sup>. The relevant basic acts usually do not impose a deadline for the Commission to adopt its decision<sup>15</sup>, which allows the

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<sup>10</sup> Report from the Commission on the implementation of the Regulation (EU) 182/2011, 26.2.2016, COM(2016) 92 final; Report from the Commission on the working of Committees during 2015, 5.12.2017, COM(2016) 772 final and Report from the Commission on the working of Committees during 2016, 16.10.2017, COM(2017) 594 final.

<sup>11</sup> Recital (6) of the Proposal.

<sup>12</sup> See, for instance, Article 9 Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ L 167, 27.6.2012, p. 1; Article 13(2) Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1; Article 18(1) Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms, OJ L 106, 17.4.2001, p. 1.

<sup>13</sup> Article 7(3) and (4), Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ L 268, 18.10.2003, p. 1.

<sup>14</sup> See, for instance, Article 4(2), Regulation (EC) No 1829/2003 and Article 17(1), Regulation (EU) No 528/2012.

<sup>15</sup> See, however, Article 18(1) Directive 2001/18/EC imposing a 120-day deadline.

Commission in certain instances to revise its draft implementing act and seek the opinion of the committee anew, as this was the case in the glyphosate file.

9. As a result, the Commission is responsible, based on the basic acts conferring implementing powers onto it, to adopt decisions in politically sensitive areas in the absence of an opinion from the Member States. As such, the Commission considers that Member States should "*also assume their responsibilities in the decision-making process to a greater extent*"<sup>16</sup>. The explanatory memorandum of the proposal states that "*[t]he sole objective of these amendments is to improve the functioning of the comitology procedures at the level of the appeal committee in order to ensure wider political accountability and ownership of politically sensitive implementing acts*" (emphasis added)<sup>17</sup>.
10. It should be reminded in this regard that comitology committees are "*mechanisms for control by Member States of the Commission's exercise of implementing powers*" (Article 291(3) TFEU). As such, they are not designed to share the decision-making power or to assume the political responsibility of the Commission when that Institution is exercising its own implementing powers. Under the current Comitology Regulation, in case a qualified majority is not reached within the appeal committee, Member States simply leave the decision to the Commission. Hence, the Commission is not impeded to act. For these reasons, "no opinion" situations are in line with the division of powers set out in Article 291(3) TFEU and are not problematic from a legal point of view.

#### **IV. LEGAL BACKGROUND**

11. Member States are primarily responsible for adopting the measures necessary to implement legally binding Union acts. First articulated by the Court<sup>18</sup>, this principle is now enshrined in Article 291(1) TFEU.
12. Where uniform implementing conditions were needed, the implementing powers originally lied with the Council, which could confer these powers on the Commission, unless it reserved the right to exercise directly implementing powers itself<sup>19</sup>.

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<sup>16</sup> Explanatory memorandum, p. 4.

<sup>17</sup> Explanatory memorandum, p. 3.

<sup>18</sup> Joined cases 205-215/82, *Deutsche Milchkontor GmbH e.a.*, paragraph 17

13. However, with the introduction of the co-decision procedure, the Council was no longer deciding on implementing modalities on its own. The Lisbon Treaty therefore provided that "*[w]here uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council*" (Article 291(2) TFEU) and "*the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.*" (Article 291(3) TFEU)
14. The proposal, which the Commission made in 2010, was designed to reflect the new Treaty provisions and accordingly exclude the Council from the Commission's exercise of implementing powers, as well as to provide flexibility to the Commission when consulting representatives of the Member States. It was based on the wording of Article 291 TFEU, which only refers to the intervention by the representatives of the Member States, and excluded any recourse to the Council<sup>20</sup>. With the agreement of the European Parliament, the Council added an instance placed above the examination committee, namely the appeal committee in which Member States would be represented at an appropriate level, leaving open the option of permanent representatives or even ministers<sup>21</sup>. A degree of flexibility was left to the Commission only in the absence of opinion of the appeal committee. Regulation (EU) No 182/2011 was adopted on 16 February 2011.

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<sup>19</sup> Article 155, fourth indent, EEC read as follows: "*En vue d'assurer le fonctionnement et le développement du marché commun, la Commission [...] exerce les compétences que le Conseil lui confère pour l'exécution des règles qu'il établit*". The principle of conferral of implementing powers to the Commission was later established as a rule in Article 145 EC: the Council shall "*confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. [...]*"

<sup>20</sup> Proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, 9 March 2010, COM(2010) 83 final.

<sup>21</sup> J.P. Jacqué, "The Evolution of the Approach to Executive Rulemaking in the EU" in *Rulemaking by the European Commission*, C.F. Bergström & D. Ritlind ed., Oxford University Press, 2016, pp. 33-35.

15. A review clause was included in this Regulation, whereby the Commission was to present a report on its implementation, "*accompanied, if necessary, by appropriate legislative proposals*"<sup>22</sup>. On 26 February 2016, the Commission issued a report on this basis, in which it concluded that "*[t]he existing framework allows for an efficient and constructive cooperation between the Commission and Member States*" and that "*[t]he Commission has not identified issues that would require or warrant a legislative proposal to amend Regulation (EU) 182/2011 at this point of time*". At the same time, the Commission referred to the high level of absence of opinions in appeal committees, particularly in the case of GMOs<sup>23</sup>.

## V. LEGAL ANALYSIS

16. In this section, the Council Legal Service assesses the legality of the proposal to refer the matter to the Council for an opinion (1). It will then assess the legality and the compliance with the proportionality principle of the proposals to hold a further meeting of the appeal committee at ministerial level (2), to publish the votes of the appeal committee members (3) and to change the voting rules of the appeal committee (4). As regards compliance with the proportionality principle, it is for the Council as co-legislator to weigh up the different policy options available to it, and to determine whether each amendment is appropriate and does not go beyond what is necessary to achieve the objective pursued. It should however be noted at the outset that the Commission did not present an impact assessment or a detailed statement weighing different policy options.

### 1. Referral to the Council

17. The Commission proposes provision for a further referral to the Council in the case of a "no opinion" outcome in the appeal committee, by adding the following paragraph 3a to Article 6: "*Where no opinion is delivered in the appeal committee, the Commission may refer the matter to the Council for an opinion indicating its views and orientation on the wider implications of the absence of opinion, including the institutional, legal, political and international*"

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<sup>22</sup> Article 15, Comitology Regulation.

<sup>23</sup> COM(2016) 92 final. Similarly, the 2015 Communication from the Commission reviewing the decision-making process on GMOs concluded that "*[t] he Commission does not consider it justified to depart from horizontal procedural rules agreed to implement the EU acquis*" (COM(2015)176 final, p. 8).

*implications. The Commission shall take account of any position expressed by the Council within 3 months after the referral. In duly justified cases, the Commission may indicate a shorter deadline in the referral."*<sup>24</sup>

18. Regulation (EU) No 182/2011 was adopted on the basis of Article 291(3) TFEU. It is clear from the text of Article 291(3) that, in contrast to the situation prevailing before the entry into force of the Treaty of Lisbon, the Council no longer has a role to play in the exercise of implementing powers where the Union act has conferred these powers on the Commission<sup>25</sup>. Instead, Article 291(3) TFEU confers this role on the Member States. While the Council does, as co-legislator together with the European Parliament, lay down the mechanisms for control by Member States, this does not confer on the Council a role in these mechanisms<sup>26</sup>.
19. In addition, in accordance with Article 16 TFEU, "[t]he Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties". The Treaties do not define the role of the Council as being advisory or indicate that the Council is tasked with assisting other institutions in their decision-making by providing political guidance or orientations in the form of non-binding opinions regarding non-legislative functions<sup>27</sup>.

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<sup>24</sup> This proposal echoes the solution, which was in force under Council Decision 1999/468/EC (old Comitology Decision). Under Article 5(4) thereof, the Commission was under a duty to submit a proposal to the Council, both in the case of a negative opinion and a "no opinion" outcome. This was in line with the then applicable Treaty provisions. Article 202 EC read as follows: "[...]the Council shall [...] confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament." (Amsterdam consolidated version, OJ C 340, 10.11.1997)

<sup>25</sup> See in this sense, J.P. Jacqu , *op. cit.*, p. 33 ; cf para 13 above, and footnote 19.

<sup>26</sup> Except for the right of scrutiny conferred to the European Parliament and to the Council by Article 11 of Regulation (EU) No 182/2011. This right derives from the EU legislator's power to define the scope of the implementing powers.

<sup>27</sup> In contrast to the Economic and Social Committee or the Committee of the Regions, which may be consulted by the European Parliament, by the Council or by the Commission "*in all cases in which they consider appropriate*" (Article 304 and Article 307 TFEU) or the European Central Bank in the areas falling within its responsibilities (Article 282(5) TFEU and Protocol N 4).



20. For these reasons, the conferring of an advisory role on the Council - when Union acts have conferred implementing powers on the Commission alone - would go beyond the role envisaged by the Treaties for the Council and would be in breach of the principle of institutional balance, according to which the EU's institutions must act within the limits of their respective competences as set down in the Treaties (Article 13(2) TEU). This would also encroach on the competence of the Member States as foreseen by the Treaties.

## 2. Meeting of the appeal committee at ministerial level

21. The Commission proposes the addition of a sixth subparagraph to Article 3(7) of Regulation (EU) No 182/2011, as follows: "*Where no opinion is delivered in the appeal committee pursuant to the second subparagraph of Article 6(3), the chair may decide that the appeal committee shall hold a further meeting, at ministerial level. In such cases the appeal committee shall deliver its opinion within 3 months of the initial date of referral.*" (emphasis added)

22. This proposed amendment raises the question of whether it is legally possible and appropriate for a Union legislative act to entitle the Commission (chair of the appeal committee) to determine which internal level in the Member States concerned should sit in a committee governed by Regulation (EU) No 182/2011, taking account of the respect national identities (i), and the principle of sincere cooperation (ii).

23. i) First, Article 4(2) TEU states that "[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." As the Court has stated, this provision protects the division of competences within a Member State.<sup>28</sup> In this respect, imposing the internal level of representation of the Member States in a committee representing Member States affects the political structures of the Member States.

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<sup>28</sup> As regards internal reorganisations of powers and reallocation of competences within a Member State, see Case C-51/15 *Remondis*, EU:C:2016:985, paragraph 41. As regards the division of competences between regional entities, see Case C-156/13, *Digibet and Albers*, EU:C:2014:1756, paragraph 34.

24. Moreover, Article 5(1) of the Treaty on European Union provides that "*[t]he use of Union competences is governed by the principles of subsidiarity and proportionality.*"<sup>29</sup> According to the settled case-law of the Court of Justice, the principle of proportionality, which is a general principle of EU law, requires that "*acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.*"<sup>30</sup>
25. In the light of this, it is for the Council as co-legislator to consider the different policy options available to it, and to determine whether the proposal is appropriate and does not go beyond what is necessary to achieve the objectives pursued. This is an exercise to be carried out on the basis of the information provided by the Commission in the explanatory memorandum and, where available, on the basis of the impact assessment and the report on the stakeholder consultation, as well as on the basis of information in the possession of delegations regarding the impact of the proposal on their national systems.
26. Besides, Article 5 of the current Rules of Procedure of the Appeal Committee (the "Rules of Procedure") provides that "*[e]ach member of the appeal committee shall decide on the composition of its delegation and inform the chair and the other Member States with a view to achieving a level of representation as homogenous as possible at the meeting of the appeal committee.*" In addition, the Rules of Procedure already foresee the possibility of convening a meeting of the appeal committee at ministerial level, as follows:

*"Member States may [...] indicate the level of representation that they consider appropriate which should be of a sufficiently high and horizontal nature, including at Ministerial level. As a general rule, representation should not be below the level of members of the committee of Permanent Representatives of the governments of the Member States. The Commission shall take the utmost account of such suggestions."*<sup>31</sup>

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<sup>29</sup> The principle of subsidiarity set out in Article 5(3) TEU is not applicable to the current proposal as Article 291(3) TFEU confers to the EU legislator an exclusive competence, i.e. the power to lay down the rules and general principles concerning mechanisms for the control of the Commission's exercise of implementing powers.

<sup>30</sup> See, for example, Case C-547/14, *Philip Morris*, EU:C:2016:325, paragraph 165.

<sup>31</sup> Article 1(5), Rules of procedure for the appeal committee (Regulation (EU) No 182/2011)

27. In this respect, the proposal does not indicate whether this possibility has unblocked "no opinion" outcomes<sup>32</sup>. In a similar vein, the assumption that the Member States' positions would change between a first meeting of the appeal committee at a lower level and a second meeting convened at ministerial level lacks substantiation. In this respect, the proposal fails to provide a detailed statement that would make it possible to assess whether this amendment would effectively contribute to achieving the proposal's objective. In light of the proportionality principle, the proposed amendment therefore encroaches, without sufficient justification, upon the national political structures of the Member States protected by Article 4(2) TUE.
28. ii) Second, according to Article 4(3) TEU, "*[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*". In this respect, the proposed amendment is based on the assumption that votes expressed at a lower national level are not as representative as votes expressed at ministerial level. This assumption goes against the mutual respect between the Union and the Member States, which is at the heart of the sincere cooperation principle enshrined in Article 4(3) TEU.
29. In conclusion, the Council Legal Service considers that defining the level of representation of the Member States in the appeal committee and entitling the Commission, in Regulation (EU) No 182/2011, to determine this level unnecessarily encroaches upon the national political structures of the Member States protected by Article 4(2) TUE and goes against the principle of sincere cooperation enshrined in Article 4(3) TEU.

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— Adopted by the appeal committee on 29 March 2011, OJ, 24.6.2011, C 183/13.

<sup>32</sup> In 2014, the Commission reported with regard to the Appeal Committee that "*[a]s regards the level of representation, experience so far has shown that ministerial level representation is not the norm; usually it is at the level of the permanent representative. Member States decide on their representative in the appeal Article 1(5) of the RoP offers sufficient flexibility to adapt the level of representation to the case at hand*" and that "*[t]he experiences with the appeal committee so far confirm that the RoP reflect the provisions of Regulation 182/2011 well, that they provide an efficient basis for the work of the appeal committee*" (Report from the Commission on the working of committees during 2013, 16.9.2014, COM(2014)572 final).

### 3. Publication of the appeal committee members' votes

30. The Commission, with a view to enhancing the transparency of voting results in the appeal committee, proposes an amendment to Article 10 of the Comitology Regulation regarding the information contained in the register of committee proceedings. Point (e) of paragraph 1 would be replaced by the following: "*the voting results including, in the case of the appeal committee, the votes expressed by the representative of each Member State*"; and paragraph 5 would be replaced by the following: "*The references of all documents referred to in points (a) to (d), (f) and (g) of paragraph 1 as well as the information referred to in points (e) and (h) of that paragraph shall be made public in the register.*"
31. According to Article 15(1) TFEU, "*[i]n order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.*" This provision applies to all Union acts<sup>33</sup>. Accordingly, as such, providing for the publication of voting results on draft implementing acts in the appeal committee seems in line with the principle of transparency enshrined in the Treaties.
32. However, it should be assessed whether the proposed amendment is appropriate and does not go beyond what is necessary to achieve the objective pursued (see above paragraph 24) and complies also with other Treaty principles. In this respect, the proposed amendment is based on the assumption that the votes expressed by the representatives of the Member States could be different if published. Again, this assumption seems to lack substantiation in terms of proportionality and adversely affects the mutual respect between the Union and the Member States, which is at the heart of the sincere cooperation principle enshrined in Article 4(3) TEU (see above, paragraph 28).

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<sup>33</sup> The authors argued that, while the Treaty defines a higher threshold of transparency for legislative procedures (see Article 16(8) TEU, Article 15(2) and (3) *in fine* TFEU), the principle of transparency applies to delegated and implementing acts, too, even though the Treaty does not specify the duties that derive therefrom (see J. Mendes, "Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design", *European Law Journal*, Vol. 19, No 1, January 2013, pp. 22-41).

33. Therefore, the Council Legal Service is of the opinion that providing for the publication of voting results on draft implementing acts in the appeal committee is not sufficiently justified in the current proposal in terms of proportionality and adversely affects the principle of sincere cooperation enshrined in Article 4(3) TEU.

#### 4. Changes to the voting rules for the appeal committee

34. The Commission proposes an amendment to Article 6 of Regulation (EU) No 182/2011 with a view to changing the voting procedure in the appeal committee, by adding the following second subparagraph to paragraph 1: "*However, only members of the appeal committee who are present or represented at the time of the vote, and do not abstain from voting, shall be considered as participating members of the appeal committee. The majority referred to in Article 5(1) shall be the qualified majority referred to in Article 238(3)(a) TFEU. A vote shall only be considered to be valid if a simple majority of the Member States are participating members.*"

35. This proposal raises several questions: first whether it is possible to depart from the voting rules set out in the Treaties (i); second whether the proposal is in line with the principle of representative democracy (ii); and third whether this amendment is appropriate and necessary as regards achieving the objective of the proposal (iii).

36. i) As regards the first question, the Council Legal Service has previously considered that it is not possible for the Council to decide to vote, in a situation of simple or qualified majority in the Council, by discounting abstentions<sup>34</sup>. Indeed, this would have the effect of abolishing the right of abstention, which would introduce a new type of voting rule not compatible with the Treaties<sup>35</sup>.

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<sup>34</sup> Contribution by the Legal Service on the Proposal to amend the basic anti-dumping and anti-subsidy Regulations - Voting rule : possibility of discounting abstentions? - Doc. 11035/03 COMER 103, 12 December 2003, Doc.16068/03.

<sup>35</sup> The right of abstention is protected by Article 238(4) TFEU, which reads : "*Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity*". This Treaty provision can be read as meaning that abstentions are always possible in a Council vote, but in the other voting rules, i.e. simple and qualified majority, abstentions may prevent the adoption of acts by the Council.

37. The Court confirmed that "[...] as the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves, the Treaties alone may, in particular cases, empower an institution to amend a decision-making procedure established by the Treaties".<sup>36</sup>
38. However, the rules regarding the manner in which the appeal committee arrives at an opinion are not laid down in the Treaties. The appeal committee set up by the Comitology Regulation, despite being composed of representatives of the Member States, is a body controlling the Commission in the exercise of implementing powers. As such, it is not subject to the Treaty provisions governing voting rules within the Council. Moreover, there does not seem to be a general principle of EU law giving a right to abstain and still be counted as participating in the vote. In this context, it is to be noted that Article 238(4) TFEU mentions one specific voting rule where abstentions are not taken into account and do not prevent the adoption of acts which require unanimity.
39. Further, Article 291 TFEU states that "*the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.*"
40. The voting procedures to be used within the appeal committee form part of the "*rules and general principles*" mentioned in Article 291 TFEU. Accordingly, it is therefore possible for the European Parliament and Council, by means of a regulation, to decide on a different method of voting to be followed in the appeal committee as long as it respects all relevant general principles of EU law. In such a case, it is however to be noted that the regulation should not refer to the voting rule laid down for the Council in the Treaties, which cannot be amended by secondary law. The new method of voting to be followed in the appeal committee should therefore be detailed in the regulation itself<sup>37</sup>.

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<sup>36</sup> Joined cases C-643/15 & C-647/15, *Slovak Republic & Hungary v. Council*, ECLI:EU:C:2017:631, paragraph 149 and Case C-363/14, *Parliament v Council*, EU:C:2015:579, paragraph 43.

<sup>37</sup> It is to be noted that the rules should foresee a specific quorum in situations where not all Member States are allowed to participate in the vote. This might be the case of an enhanced cooperation and could be solved by mentioning that a vote shall only be considered to be valid if a simple majority of the Member States allowed to participate in the vote are participating members.

41. ii) As regards the second question, Article 10(1) TEU provides that "*[t]he functioning of the Union shall be founded on representative democracy*". In the Commission's view, the representativeness of the opinion would be ensured by the introduction of a quorum: a vote shall only be considered to be valid if a simple majority of the Member States are participating members, which means, according to the proposal, members "*who are present or represented at the time of the vote, and do not abstain from voting*".
42. In this respect, the Council Legal Service is of the view that the voting rules devised should not be such as misrepresenting the expression of the votes by the Member States' representatives or undermining the share of powers among members of the appeal committee. The legislator could not for instance introduce qualified majority voting arrangements that would change the distribution of weighted votes among Member States. This would indeed violate rights inherent to the Member States' membership of the Union. The specific voting rules should therefore respect the spirit and the logic of the voting patterns existing in the Treaties.
43. In this regard, despite their originality and complexity, the proposed voting rules - i.e. assimilating abstentions to non participating Member States for the purpose of the calculation of the qualified majority combined with a simple majority quorum, do not seem contrary to these requirements, considering that abstaining is a choice made by Member States. Nevertheless, it could be considered necessary to raise the quorum in view of the fact that the application of the proposed voting rules may result in a situation where an act is adopted more easily than with the simple majority applicable in the advisory procedure.
44. iii) Finally as regards the third question, the Commission's stated objective is "*to reduce the risk of no opinion being delivered and to provide an incentive for Member State representatives to take a clear position*"<sup>38</sup>.
45. In this respect, the proposal raises the question of whether it is appropriate and necessary to change the general voting rules applicable to the appeal committee, whereas the aim of the proposal is to address "no opinion" outcomes in specific sectors where an implementing act is necessary.

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<sup>38</sup> Recital (9) of the Proposal.

46. The fact that referrals to the appeal committee between 2011 and 2016 led, in the vast majority of cases (52 out of the 58 referrals to the appeal committee), to "no opinion" outcomes and concerned implementing acts deemed to be necessary is not, in the Council Legal Service's view, an objective criterion sufficient to conclude that the proposed amendments are appropriate with regard to meeting the objective. First, one cannot predict with certainty the nature of the draft acts that will be submitted to the appeal committee in the future. Second, the glyphosate file shows that it is possible to gather a qualified majority in the appeal committee even on sensitive cases. Finally, it cannot be excluded that the quorum will not be reached, resulting in "no opinion" outcomes, as is the case today<sup>39</sup>.
47. It is therefore for the Council as co-legislator to consider the various policy options available to it, and to determine whether the proposed amendment is appropriate and does not go beyond what is necessary to achieve the objective pursued.
48. In this respect, alternatives to the proposed amendment may be devised, e.g. narrowing down its scope as follows:
- either to "no opinion" outcomes only, by changing the effects of a "no opinion" outcome. The second sentence of Article 6(3) of the Comitology Regulation could be modified to specify that in a case where no opinion is delivered, the Commission *shall*<sup>40</sup> / *shall not*<sup>41</sup> adopt the draft implementing act;
  - or to "*implementing acts deemed to be necessary*"<sup>42</sup> (or with regard to specific fields, e.g. those relating to the authorisation of products or substances in the field of the protection of the health or safety of humans, animals or plants), for instance by specifying specific procedural and voting rules<sup>43</sup>;

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<sup>39</sup> Explanatory memorandum, p. 7 *in fine*.

<sup>40</sup> This solution was applicable before 2011 under the regulatory procedure: if no opinion was delivered in the committee and if the Council had not indicated its position, the Commission had to adopt the draft implementing measures (Article 5(6), Council Decision 1999/468/EC).

<sup>41</sup> A similar solution is applicable for the adoption of definitive multilateral safeguard measures where a positive opinion is needed (Article 6(4) Comitology Regulation).

<sup>42</sup> This terminology is already used in Article 5(4) *in fine*, Regulation (EU) No 182/2011.

<sup>43</sup> As an example of a specific procedural rule, the Comitology Regulation provides, as regards the adoption of draft definitive anti-dumping or countervailing measures, that the Commission shall conduct consultations with the Member States, where no opinion is delivered by the examination committee and a simple majority opposes the text (Article 5(5) Comitology Regulation).



- or both, by creating a specific rule for "no opinion" outcomes for the adoption of acts deemed to be necessary (or with regard to specific fields). This solution is currently foreseen for the adoption of definitive multilateral safeguard measures, where, in the absence of a positive opinion, the Commission is prevented from adopting the draft measure<sup>44</sup>.

49. In conclusion, the Council Legal Service considers that it is possible for the legislator, by means of a regulation, to decide on a method of voting in the appeal committee, which diverges from the voting rules applicable to the Council, provided that the spirit and the logic of the voting patterns existing in the Treaties are respected and subject to the above-mentioned appropriate rewording and precisions.

## **VI. CONCLUSIONS**

50. In conclusion, it is the opinion of the Legal Service that:

- the conferring of an advisory role on the Council - when Union acts have conferred implementing powers on the Commission alone - would go beyond the role for the Council envisaged by the Treaties and would be in breach of the principle of institutional balance, according to which the EU's institutions must act within the limits of their respective competences as set down in the Treaties (Article 13(2) TEU). This would also encroach on the competence of the Member States as foreseen by the Treaties;
- defining the level of representation of the Member States in the appeal committee and entitling the Commission, in Regulation (EU) No 182/2011, to determine this level unnecessarily encroaches upon the national political structures of the Member States protected by Article 4(2) TUE and goes against the principle of sincere cooperation enshrined in Article 4(3) TEU;
- providing for the publication of voting results on draft implementing acts in the appeal committee is not sufficiently justified in terms of proportionality and adversely affects the principle of sincere cooperation enshrined in Article 4(3) TEU;

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<sup>44</sup> Article 6(4), Comitology Regulation.

- it is possible for the legislator, by means of a regulation, to decide on a method of voting to be followed in the appeal committee, which differs from the voting rules applicable to the Council, provided that the spirit and the logic of the voting patterns existing in the Treaties are respected. When doing so, the specific voting rules should be laid out without reference to the Treaty provisions applicable to the Council.
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