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Delegated Acts

BELGIAN PRESIDENCY – EUROSTAT
PAPER

ON GUIDING PRINCIPLES
FOR STATISTICAL LEGISLATION

DRAFT DOCUMENT

(to be submitted to the 39th Partnership Group Meeting
10th December 2010)

The "what"

Setting the frame for the guiding principles for statistical legislation

The aim of the present document is to reach a common understanding on some features introduced by the new institutional context established by the entry into force of the Lisbon Treaty on 1st December 2009, and to agree on a pragmatic approach, including some guiding principles, for the preparation of future legislative proposals, delegated acts and implementing measures in the field of statistics.

The entry into force of the Lisbon Treaty and the changes it brought about for EU decision-taking procedures as regards legislation have given rise to questions and discussions within the ESS. Relevant issues are, on the one hand, the scope and formulation of statistical legislation, and, on the other hand, the respective roles of the legislator, the Commission and the committees composed of representatives of Member States, respectively, within the specific domain of statistics. The last-mentioned aspect includes also the practical arrangements for the cooperation and coordination between the partners within the ESS.

The Common Understanding on delegated acts that is under preparation between the Union institutions will set out the practical arrangements and agreed clarifications and preferences applicable to delegations of legislative power. That Common Understanding builds further on the Commission Communication of 9 December 2009¹ and streamlines the practice established thereafter by the European Parliament and the Council.

In line with this forthcoming Common Understanding, the ESS would also benefit from a common understanding by all its members of how these issues should be dealt with more specifically within the field of European statistics. The resulting guiding principles could be understood as part of the realistic legislative policy for the ESS as referred to in the European Statistical Programme 2008 to 2012².

Taking into account the specific character of the statistical domain and the partnership existing among members of the ESS as laid down in Article 4 of Regulation (EC) No 223/2009 on European Statistics³, these guiding principles would build on past and present experiences, in order to define a pragmatic approach for the future. The Treaty provisions and the [current or future] comitology decision would constitute the ultimate frame of the approach while

¹ "Communication to the European Parliament and the Council on the Implementation of Article 290 of the Treaty on the Functioning of the European Union adopted by the Commission on 9 December 2009, [COM\(2009\) 673 final](#)."

² See Section 3.1. "Better Regulation" in Annex I of [Decision No 1578/2007/EC](#) of the European Parliament and of the Council of 11 December 2007 on the Community Statistical Programme, OJ L 344, 28.12.2007, p. 15.

³ Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics, OJ L 87 of 31.3.2009, p. 164.

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other constituent parts would be the joint ESS strategy paper⁴, the vision on the production method of EU statistics⁵ and related documents.

Furthermore, both practical and more conceptual elements should be covered, for example, the way national statistical authorities will be involved by Eurostat in the preparation of draft delegated acts (the workflow) and how new basic legal acts could be formulated, including some standard limitations of delegated powers (and examples of their formulation) .

The changes introduced by the Lisbon Treaty in December 2009 are described in Annex I, together with an overview of actions taken at both Presidency and Eurostat levels since then in order to present and explain these changes.

⁴ Joint ESS strategy paper endorsed by the ESSC at its meeting on 20 May 2010.

⁵ Communication from the Commission to the European Parliament and the Council on the production method of EU statistics: a vision for the next decade; [COM\(2009\) 404 final](#) .

The "how"

Guiding principles – efficiency and transparency in preparation of statistical legislation

The guiding principles aim at combining the flexibility necessary to ensure an efficient production of European statistics with the security required by all stakeholders.

The efficiency and transparency of the workflow described below, and of the consultations and exchanges of views concerning statistical legislation in general within the ESS, can only be achieved on the basis of mutual efforts by all ESS members. Proper circulation of information on draft texts, on discussions, on disagreements or informal agreements, etc. has to be ensured at both national and European level, respectively. To this effect, the role to be played by the participants in the different steps indicated below, and the national practices to ensure information sharing, are of particular importance.

The ESS workflow for draft delegated acts: Cooperation based on coordination

As regards the preparation of draft delegated acts, general guidelines are under preparation by the central services of the Commission. In addition, Eurostat has clearly stated its intention to continue involving the relevant statistical bodies, in particular the ESS Committee (EESC), as before, the main difference being that there will be no voting. This will notably include preparation in working groups and in directors' groups, before final presentation and discussion in the relevant committee. The existing reporting lines as described in the document "ESS Organisational Issues – Mapping of committees and directors' groups, related themes of the work programme" (2009) will be used also for these measures; see Annex II.

The work-flow described under this heading relates directly to draft delegated acts. At the same time, the preparatory stages concerning basic legal acts and implementing acts are very similar.

The typical workflow will include the following steps:

- Preparation in working group;
- Preparation in Directors' group;
- Presentation and discussion in EESC or other committee.

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The focal point of the discussions in each of these steps may vary depending on the composition of the group (technical, financial, high level management...) but the information serving as a basis for discussions will be as exhaustive as possible from the out-set, with transparent communication of developments. For the important issue of cost-effectiveness evaluation the competent Directors' group is considered as the best forum, taking into account Directors' typical responsibilities, knowledge base and position within their authorities.

In some cases additional steps may be preparation by an ESSnet or in dedicated task forces or sponsorships in place. Where appropriate other statistical bodies like the CMFB, ESAC or ESGAB will also be informed and their views sought. Since the Partnership Group (PG) has the role of facilitating the work of the ESSC and since it is informed of the agenda of ESSC meetings, it may take the initiative to discuss beforehand a draft delegated act mentioned therein.

Eurostat is committed to organising a timely and appropriate exchange of views on all draft delegated acts, with the objective of ensuring broad consensus among the ESS members. Consultations in accordance with the work-flow will normally be carried out in plenty of time, thus giving the national statistical authorities the opportunity to make a useful and effective contribution to Eurostat. The current practice – and necessity – of planning and preparing all meetings between ESS members well in advance, with for example established routines for exchanges of agenda and documents, will be continued. This is practice for all the above-mentioned steps 1)-3). Another existing practice that will ensure appropriate information sharing at high management level is the transmission of the agenda of future PG meetings and the documents that will be discussed in those meetings to all members of the ESS with the possibility to present comments.

Eurostat is equally committed to ensuring that the above-mentioned exchange of views is based on draft texts of the measures to be adopted, as well as other relevant background documents. The level of completeness and finalisation of the documents may evolve from one step to the other and transparent communication of developments is important. Typically, the text provided will be the draft delegated act which should include an explanatory memorandum describing, *inter alia*, the consultations made with stakeholders.

Finally, Eurostat will inform the national statistical authorities of the conclusions drawn from the discussions and of the next proceedings.

New Basic Legal Acts Consolidating the activities of the ESS

Questions have been raised within the ESS about the usefulness of involving the European Parliament and the Council at a level which is too detailed and technical in areas which could be best dealt with by statisticians. Another concern is that the Commission, by way of delegated powers, would be given the power to decide on statistical matters without a proper consultation and involvement of the national statistical authorities which will be responsible for implementing the delegated acts once they have been adopted. This could have a negative impact on the good cooperation and efficiency of the ESS, inter alia due to a perceived lack of shared ownership among the ESS partners.

Future proposals for new basic legal acts should be carefully formulated in order to respond to these concerns. For every new proposal, the right balance between basic, delegated and implementing acts should be evaluated by Eurostat and the result presented to the ESSC. Typically, it can be expected that a basic statistical legal act will contain both delegated powers and implementing powers. In addition, an initial assessment of what should be subject to legislation and what could be left out appears justified. It should be added that Articles 290 and 291 are mutually exclusive. This means that powers that can be delegated under Article 290 are necessarily different from implementing powers that can be conferred under Article 291, and vice versa.

In addition, a reference can usefully be made to the Commission Communication on "Smart Regulation in the European Union"⁶. The key messages of that Communication are that smart regulation does not only mean adopting legislation but also carefully implementing and revising it when necessary, that this process remains a shared responsibility of the European institutions and of Member States, and that the views of those most affected by regulation have a key role to play.

Basic legal act combined with manuals and guidelines

Moving towards less detailed framework legislation would leave more flexibility to the ESS for deciding on technical issues but it would also mean that some elements may fall outside the binding scope of legislation.

The basic regulation can instead include a reference to manuals or guidelines, which is already the case in some statistical domains. For instance, as regards structural business statistics, the basic legal act refers to a recommendations manual which shall contain "supplementary guidance" as regards the common methodology for the statistics to be produced. Likewise, the basic regulation on Community statistics on the structure and activity of foreign affiliates (FATS)

⁶ Commission Communication "Smart Regulation in the European Union", [COM\(2010\) 543 final](#)

foresees the adoption of a manual which shall contain the relevant definitions and supplementary guidance for the purposes of these statistics.

Basic legal act with provisions on implementing powers for the Commission

Another possibility is to foresee implementing powers for the Commission. This would imply that the Commission's margin of manoeuvre is limited to defining the necessary "uniform conditions" for the implementation of the framework legislation as foreseen in Article 291 of the Treaty. In the statistical domain, some detailed and technical elements would correspond to implementation measures for the establishment of uniform conditions. As examples could be mentioned common technical definitions of statistical variables or characteristics, provisions on accuracy of statistics or other quality assurance measures, provisions concerning reference documents, exchange of information and transmission format, and technical issues related to the collection of data.

Basic legal act with delegation of powers to the Commission

Finally, a delegation of powers to the Commission in a basic legal act should be explicitly defined. The scope and consequence of the delegation should therefore be explained by clear, precise and detailed provisions. Standard elements or limitations of the delegated powers could concern, inter alia, the costs, the necessary cost-effectiveness analysis, and the burden on Member States. Member States would then know the frames of the possible future delegated acts.

Standard formulations and limitations

Some first few examples of standard formulations and limitations for delegated powers in the specific domain of statistics could be listed already at this point but the list would necessarily have to be updated as more experience is gained within the ESS.

- Burden on respondents and the cost-effectiveness: "*In carrying out the evaluation it shall ensure that no significant additional administrative or financial burdens are placed on respondents and Member States.*"
- Sunset clause: "*The power to adopt the delegated acts referred to in Article X shall be conferred on the Commission for a period of 5 years following ... The Commission shall make a report in respect of the delegated powers not later than 6 months before the end of the 5 year period. The delegation of powers shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article ...*"

It should not be excluded that the understanding of notions like "essential elements" or "non-essential elements" can change over time, which means that

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any list of elements of each category could only be indicative and subject to revision. Essential elements are typically the scope of the legal act – the principle of an obligation being put on the Member States – and the basic definitions setting the frame for that obligation. It can be observed that the terms "scope" and "definitions" as used in existing statistical legislation do not always automatically and necessarily correspond to elements that are essential in the sense just out-lined, in particular as regards the definitions. The specificity and technical character of the statistical domain may require an adaptation of the terms used.

Existing Basic Legal Acts Ensuring transparent pragmatism

Following the changes in comitology procedures in 2006, existing statistical basic legal acts containing provisions on comitology were amended to take account of the newly introduced regulatory procedure with scrutiny. This last-mentioned procedure was to be followed when the Commission intended to adopt measures necessary for the implementation of the basic legal act which were of general scope and designed to amend non-essential elements of that act, *inter alia* by amending some of those elements or by supplementing it.

The description of delegated acts in the Treaty and the description of measures under the regulatory procedure with scrutiny are similar. Both acts are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument.

The Commission has prepared a draft statement on the adaptation of existing legislative instruments to Article 290 of the Treaty. This statement refers to the need to review provisions referring to the regulatory procedure with scrutiny in existing legal acts and indicates a calendar for the process of alignment reaching into 2014.

It should also be noted that the Council in the context of a proposal for a Regulation by the European Parliament and of the Council amending the Directive 2009/42/EC on statistical returns in respect of carriage of goods and passengers by sea adopted a statement confirming that amendment of this directive does not imply that the regulatory procedure with scrutiny should automatically be transformed in delegation of powers under the treaty on the functioning of the EU.

Without prejudice to the final inter-institutional agreement between the European Parliament, the Council and the Commission on how to align the whole EU acquis to the new Treaty provisions, a negotiated case by case approach could be suggested.

Conclusion

The aim of the Treaty of Lisbon was to amend the existing Treaties notably with a view to enhancing the efficiency and democratic legitimacy of the Union. The new distinction introduced in the Treaty on the Functioning of the European Union between delegated acts and implementing measures contributes to achieve this objective and should therefore be regarded as a positive move.

At the same time, the partnership was established among ESS members in order to reinforce the cooperation and coordination between the statistical authorities that contribute to the development, production and dissemination of European statistics at both national and Union level. This partnership represents a specificity that needs to be preserved. As already underlined by the Partnership Group at its March 2010 meeting when the Joint ESS Strategy was discussed, the concept of partnership should be ensured also under the new Lisbon rules for implementing legislation.

The new momentum provides however a further opportunity to revisit the legislative policy in the field of statistics that takes account of all these dimensions. Such a review has already started to reflect the implications of the Vision regarding the new production method of European statistics and of the Regulation on European statistics and actions will be continued in this direction according to the 2011 Annual Statistical Programme (see Section 2.4.4. "Legislation fit for the system").

The principles that have been identified in this document should therefore be seen as part of this reviewed policy and will guide future work on legislative proposals, delegated acts and implementing measures in the field of statistics. It also represents a pragmatic approach particularly at a time when budget constraints are so heavy and priority setting so important. In this context, delegated acts should not entail significant additional financial burden on Member States, and if such would be the case, this should be balanced by negative priorities identified for other statistics.

On the basis of this common understanding, Eurostat is fully committed to following this approach. As a first and concrete illustration of this commitment as far as the preparation of delegated acts is concerned, it has to be noted that the first ever delegated act in the field of statistical legislation (i.e. the forthcoming delegated act to amend certain elements of Directive 2009/42/EC on statistical returns in respect of carriage of goods and passengers by sea) will be prepared with the full involvement of the national statistical authorities as it would have been the case for an implementing measure. As another concrete example, it is expected that, with the support of Eurostat, the negotiations between the Parliament and the Council on the recast proposal for a Regulation on statistics on carriage of goods by road will allow to apply a more balanced approach as far as the distinction to be made in a basic act between delegated acts and implementing measures is concerned.

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The document is an attempt to span a bridge between the common practice of the past and the new context established by the entry into force of the Lisbon Treaty. Our hope is to preserve the mutual trust between all parties involved and to consolidate and develop the partnership of the ESS. Within this framework, this document should be a dynamic instrument, which may help to implement the new practices we are confronted with.

Annex I

The "why" Changes explained, ...

ESSC 11 February 2010 : by reason of the novelties introduced by the Lisbon Treaty and its direct impact on the European/statistical legislation, Eurostat presented a room document containing the "*Communication to the European Parliament and the Council on the Implementation of Article 290 of the Treaty on the Functioning of the European Union* adopted by the Commission on 9 December 2009⁷. It also gave an overview of the main changes that would take place following the ratification of the Lisbon Treaty, giving information on the two different types of acts that would be used: delegated acts (Article 290) and implementing acts (Article 291).

On this occasion, during the discussion it was highlighted that this important change should not have an effect on the spirit of partnership in the ESSC. The Commission (Eurostat) would continue discussing draft acts in the ESSC even if, in the future and for delegated acts, voting would not take place .

Eurostat

- confirmed that the preparatory work before adoption of any act was still important and that it would work in close partnership with the Committee members
- agreed to submit a new document to the ESSC, giving typical examples of existing statistical legislation identified by Eurostat and indicating the changes.

Meeting of the Standing committee for agricultural statistics of 17-18 May 2010: general presentation of the issue by Eurostat and ensuing discussion.

ESSC 20 May 2010: Eurostat presented the document "*Entering into force of Treaty of Lisbon – Changes in comitology procedure*"⁸, giving typical examples of existing statistical legislation. It illustrated, on the basis of the concrete example of the **Regulation proposal on European environmental economic accounts**⁹, how the new distinction between delegated acts and implementing acts was applied. Furthermore, there was a general overview of the main topics which could be included in a new basic act in the field of statistical legislation. Of course, it was clearly only an indicative list.

⁷ COM(2009) 673

⁸ ESSC 2010/05/20/EN only

⁹ COM(2010)0132 adopted by the Commission on 9 April 2010.

On the one hand, the discussion raised the following concerns from MS:

- need for a clarification on how the Commission intended to consult the Member States
- suggestion to introduce a systematic assessment framework was supported by a few delegations.
- the new legislation has to guarantee transparency for Member States about the costs for the national statistical systems and the burden on respondents.

On the other hand, having in common the interest to guarantee sufficient flexibility and have the technical discussions needed, Eurostat

- assured the ESSC of its commitment to continued collaboration also in legislative matters
- intends to continue consulting the ESSC as at present, albeit without voting

Therefore, the same examples given in the document presented in May could be now reconsidered on the basis of experience/recent discussions/developments at interinstitutional level.

37th PG meeting on 25 June 2010: the item "Lisbon Treaty - changes in comitology" was added.

Concerns were expressed that the implementation of the new provisions in the Lisbon Treaty would imply more detailed European Parliament and Council legislation, leaving little for statisticians to decide upon, i.e. a loss of flexibility. Given the importance of the basic legal acts in the future, communication at national level between NSIs and the political level to safeguard the interest of statisticians would become even more important. Eurostat reiterated its intentions to continue consulting the ESSC as before, the only difference being that there would be no voting. It was felt possible to still find the right balance between basic and delegated acts also in the future.¹⁰

It was agreed that the Belgian Presidency and Eurostat would prepare a paper outlining some guiding principles for consideration at the December PG meeting.

Council STATIS WP on 7 October 2010: large exchange of views on the delegated acts issue at the initiative of the Belgium Presidency, including an extensive presentation by the Legal Service of the Council.

¹⁰ PG Minutes

The "why" ... changes introduced

The Lisbon Treaty substantially modifies the framework for implementing powers that are conferred upon the Commission by the legislator.

- **Article 290 on delegated acts**
- **Article 291 on implementing measures**

The new Treaty makes a clear distinction between the powers delegated to the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act (Article 290, delegated acts) on the one hand and the powers conferred on the Commission to adopt implementing acts (Article 291) on the other hand.

They are subject to entirely different legal frameworks.

Article 290

In order to avoid a piecemeal approach and establish a "framework" for the exercise of delegated powers, the Commission adopted a Communication on 9 December 2009¹¹.

The purpose of this Communication is to set out the Commission's views on the scope of the delegated acts, the framework for delegations of power, the working methods the Commission intends to use for preparing the adoption of delegated acts and, finally, the conditions under which the legislator might exercise control over the way the powers conferred on the Commission are implemented.

Right of revocation and Right of opposition

Article 290(2) specifies the two conditions to which the legislator may subject the delegation of power: firstly, the right to revoke the delegation of power, and secondly the right to express objections, that is the right of opposition.

The right of revocation might particularly be envisaged in cases where the legislator wishes to have the possibility of withdrawing at any time the powers it has conferred on the Commission, in order to take account of new circumstances that would justify a legislative intervention. The exercise of the right of revocation should be accompanied by a duty to explain the reasons behind it and by an exchange of information between the institutions.

Where provided for in the legislative act, the right of opposition should fulfil certain requirements in terms of procedure. Once it has adopted a delegated act, the Commission will notify it to the legislator, i.e. simultaneously to Parliament

¹¹ COM(2010) 673. Communication from the Commission to the European Parliament and the Council - Implementation of Article 290 of the Treaty on the Functioning of the European Union

and the Council, if the basic instrument is governed by the ordinary legislative procedure. The right of opposition would then be triggered and would act like a suspensive condition: the entry into force of the delegated act adopted by the Commission would be suspended for a period specified by the legislative act, during which the legislator would have the right to lodge objections.

Article 291

The general procedures for the exercise of implementing powers conferred on the Commission are set out in Council Decision 1999/468/EC (known as the Comitology Decision). This Decision was amended in 2006 by Council Decision 2006/512/EC in order to strengthen the role of the European Parliament and the Council in controlling the Commission's exercise of these powers. The most important change concerns the new regulatory procedure with scrutiny.

According to the above Communication, purely in terms of the wording, the definition of delegated acts in Article 290(1) is very similar to that of acts which, under the Comitology Decision, are subject to the regulatory procedure with scrutiny. In both cases the acts in question are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument. However, the similarity of the criteria does not mean that they will be implemented in exactly the same way; in a new institutional context the scope of the delegated acts will not necessarily be identical to that of the regulatory procedure with scrutiny. Any automatic duplication of precedents is therefore to be avoided.

Article 291 states that where **uniform conditions** for implementing legally binding acts of the Union are needed; those acts **shall** confer implementing powers on the Commission (or on the Council in duly justified specific cases). The European Parliament and the Council, acting by means of regulations in accordance with co-decision 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.

In accordance with this provision, the Commission adopted on 9 March 2010 a proposal for a "Comitology Regulation"¹².

The Commission's proposal is currently being discussed in the European Parliament and the Council.

The key elements of the proposal are as follows:

- The proposal maintains the Committee structure foreseen in the Comitology Decision, but rationalises it as outlined below;
- Only two procedures are foreseen: the advisory procedure, which mirrors the existing advisory procedure, and a new "examination" procedure, which would replace the existing management and regulatory procedures;
- The advisory procedure is the general rule and can be applied to all policy domains and for all types of binding implementing measures;

For reasons of clarity, consistency and efficiency, the proposal foresees an automatic alignment of the existing *acquis* to the new procedures. Council Decision 1999/468/EC establishing the old committee procedures would

¹² [COM \(2010\) 83](#)).

therefore be repealed. Where basic acts adopted before the entry into force of the new Regulation provide for an old committee procedure provided in Council Decision 1999/468/EC, the old advisory procedure would follow the new advisory procedure and the management and regulatory procedures would follow the new examination procedure. Only the regulatory procedure with scrutiny introduced in 2006 would be maintained for the purposes of existing basic acts.

All institutions agree that this Regulation cannot draw in abstract the demarcation line between Article 290 and Article 291.

Annex II

Organisational structure of the ESS in the EU framework

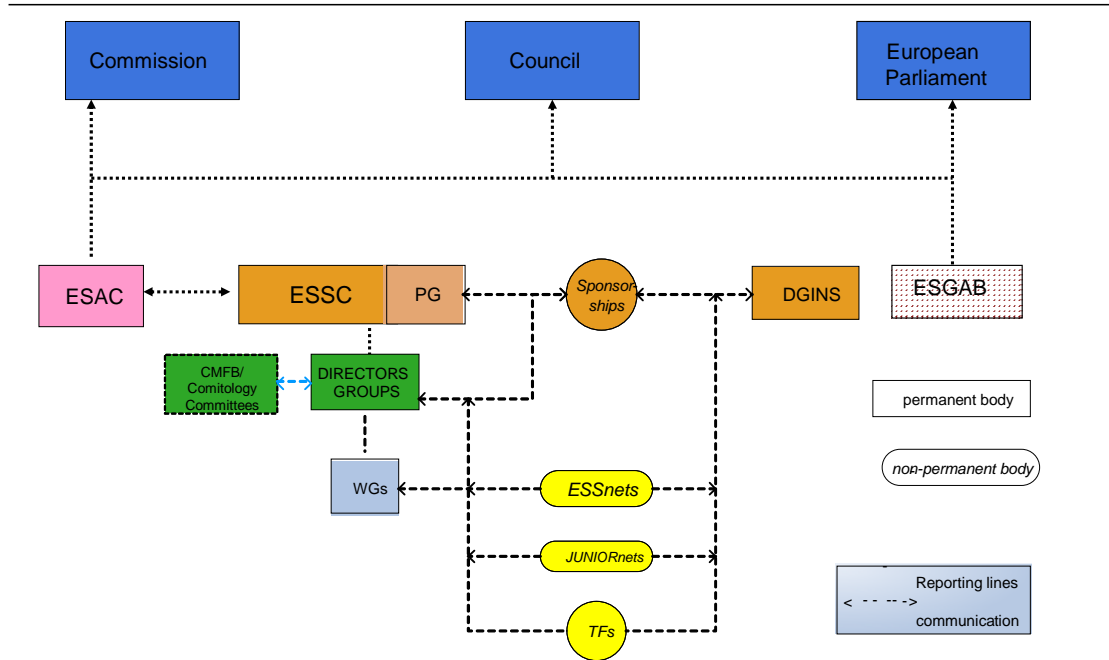


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