

The Law of the EUROPEAN UNION

Teaching Material



J.H.H. Weiler
European Union Jean Monnet Professor
NYU School of Law

AND

Martina Kocjan
Graduate Member of the Faculty of Law
University of Oxford

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TABLE OF CONTENTS

| | |
|---|-----------|
| 1. INTRODUCTION: THE ADMINISTRATIVE PROCESS -- POWERS OF EXECUTION AND IMPLEMENTATION | 3 |
| 1.1 WHAT IS COMITOLOGY? | 3 |
| 1.2 Origins | 3 |
| 1.3 The 1999 Decision | 4 |
| 1.4 Why have comitology? | 5 |
| 2. LEGAL TEXTS AND OFFICIAL DOCUMENTS | 6 |
| 3. EXCERPT FROM J. SHAW: COMITOLOGY AND THE DELEGATION OF POWERS .. | 7 |
| 4. COUNCIL DECISION OF 28 JUNE 1999 LAYING DOWN THE PROCEDURES FOR THE EXERCISE OF IMPLEMENTING POWERS CONFERRED ON THE COMMISSION (1999/468/EC)..... | 10 |
| 5. EXCERPT FROM PETER VAN DER KNAAP: GOVERNMENT BY COMMITTEE: LEGAL TYPOLOGY, QUANTITATIVE ASSESSMENT AND INSTITUTIONAL REPERCUSSIONS OF COMMITTEES IN THE EUROPEAN UNION..... | 16 |
| 6. FROM INTERGOVERNMENTAL BARGAINING TO DELIBERATIVE POLITICAL PROCESSES: THE CONSTITUTIONALISATION OF COMITOLOGY, BY CHRISTIAN JOERGES AND JÜRGEN NEYER..... | 20 |
| Note and Questions | 43 |
| 7. REFORMING COMITOLOGY | 43 |
| 7.1 Proposed Council Decision amending Decision 1999/468/EC..... | 43 |
| 7.2 Comitology at the Convention on the Future of Europe and in the Constitution..... | 45 |
| 8. CASE C-257/01: COMMISSION V COUNCIL | 47 |
| 9. FURTHER READING | 55 |

1. INTRODUCTION: THE ADMINISTRATIVE PROCESS -- POWERS OF EXECUTION AND IMPLEMENTATION

This section deals with some of the legal aspects concerning the implementation of Community law and the power struggle, in this respect between Commission and Council, Community and Member States.

From: <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldcom/135/135.pdf>

1.1 WHAT IS COMITOLOGY?

Comitology is concerned with the control, by the Member States and the European Parliament, of the implementation by the Commission of EU legislation. EU legislation frequently gives the Commission power to make subordinate regulations or take other action, overseen by committees made up of representatives of the Member States. Many important decisions are made in comitology committees, of which there are three types:

1. Advisory committees—here the Commission has most power. They only have to take account of the committee's views.
2. Management committees—here the Council/the Member States can block the Commission.
3. Regulatory committees—here the Council has most power, as the Commission has to secure the support of a qualified majority of Member States.

“Comitology” is established Community shorthand for the work of committees, made up of representatives of Member States and chaired by the Commission, whose function is to implement Community laws and Community policies. The work includes:

- taking decisions on the detail of the implementation of Community laws;
- taking decisions for the furtherance of Community policies (eg how much to spend on what etc.);
- the adaptation or updating of Community legislation in order to take account of technical developments.

1.2 Origins

The origins of the word “comitology” are in dispute (indeed, it cannot be found in any ordinary English dictionary). C. Northcote Parkinson coined the phrase “the science of comitology”, by which he meant the study of committees and how they operate.¹ It has been suggested, however, that “comitology”, in the European Union context, derives more from the word “comity” than from the word “committee”.² Whatever may be its origin, it has become an example, par excellence, of Europeak.

What is not in dispute is the Treaty origin of the Council's power to delegate to the Commission the function of implementing measures. Article 202 TEC (which was modified by the Single European Act in 1986), says that “To ensure that the objectives set out in the Treaty are attained, the Council shall, in

¹ *Parkinson's Law*, 1958, Chapter on “Directors and Councils”, p. 31, first paragraph.

² See the explanation offered by Baroness Park of Monmouth in HL Deb. 11 November 1997, col. 118: “It appears to be a Brussels-created word deriving from the word “comity” in the phrase “comity of nations””.

accordance with the provisions of this Treaty: [...] 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.”

Although the Treaty makes no mention of comitology or committees (indeed, prior to amendments to Article 202 in the Single European Act, the legality of the comitology procedures was challenged before the European Court of Justice³), a Framework Decision establishing the rules and procedures to be followed was adopted by the Council in 1987.⁴ This Decision rationalised what, up until then, was a quite disparate committee structure.

1.3 The 1999 Decision

Following a Declaration attached to the Amsterdam Treaty calling for a new comitology Decision, the 1987 Decision was replaced in 1999.⁵ This streamlined the comitology structure by reducing the types of committee to three: advisory, management and regulatory, each of which is chaired by a Commission representative. The choice of which procedure to use is laid down in the “basic instrument”.⁶

Comitology Procedures under the 1999 Decision

Advisory committee—as its name suggests, this committee is essentially advisory. Member States are often represented by experts in the particular field, who together deliver an opinion on a Commission draft of the proposed implementing measure. Although the Commission is required to “take the utmost account of the opinion delivered by the committee”,⁷ it is under no obligation to abide by it.

Management committee—in management committees Member States are usually represented by civil servants, who again deliver an opinion on the Commission’s draft within an agreed time limit. However, a management committee has the power to block the Commission’s proposal if a qualified majority (as laid down in Article 205(2) of the Treaty) so vote. In such cases the Commission must notify the Council immediately, and may defer the application of the measures for a period authorised by the basic instrument, but which cannot be longer than three months. The Council may, by qualified majority, take a different decision. In practice such “unfavourable opinions” are rare, mainly because the Commission is often willing to adapt its proposals during the course of the committee meeting—with the committee then voting on the adapted proposal. A management committee is frequently used in relation to the application of the common agricultural and common fisheries policies.

Regulatory committee—depending on the importance of the proposals, a regulatory committee is generally composed of a higher grade of civil servant than a management committee. Measures of general scope designed to apply essential provisions should be adopted by a regulatory committee. Given the greater degree of importance of the measures considered by these committees, the Commission has to gain a qualified majority on the committee if the proposal is to be adopted. If it can not

³ Case 25/70, *Koster* [1970] ECR 1161

⁴ Dec. 87/373, [1987] OJ L 197/33.

⁵ Dec. 99/468, [1999] OJ 1184/23.

⁶ In this context, the “basic instrument” refers to the primary EU legislation relating to the particular policy area in question (eg a Regulation on control of fish quotas might specify that the management procedure is to be used).

⁷ See above, fn. 1, Article 3.

muster that majority, the Commission must immediately submit to the Council a proposal relating to the measures to be taken, and must inform the European Parliament. If the European Parliament considers the measure ultra vires (ie it exceeds the implementing powers provided for in the basic instrument), and if the basic instrument was subject to co-decision (as laid down in Article 251 of the Treaty), the Commission must inform the Council of the position. The Council may then act by qualified majority on the proposal, taking account of the view of the European Parliament where appropriate. If the Council rejects the proposal by a qualified majority, the Commission must either submit an amended proposal to the Council, or re-submit its original proposal or present a legislative proposal. In practice, the Commission is very unlikely to re-submit the proposal. If it proposes primary legislation, the European Parliament will then get a voice in the passage of the legislation.

It is this 1999 Decision, setting up the above three procedures, which the Commission is now proposing to amend.

1.4 Why have comitology?

In virtually every country with a legislative system it has been necessary for the legislature (in the case of the EU, the Council of Ministers and the European Parliament) to delegate the detailed implementation of legislation, usually to an executive body (the Commission). In the EU, there are certain areas of Community policy which are highly regulated, and require numerous, detailed regulations, often needing to be passed quickly to cope with changing circumstances. It would be impractical for the Council to have to determine these—the legislative process would grind to a halt. The system of comitology thus eases the work load of the Council.

Comitology allows Member States an input into the implementation of measures at Community level. It is common to think that Member States only disagree on points of general principle. Frequently, however, Member States agree on general strategy, but differ on the detailed application of it. Comitology allows a forum for resolving those differences.

Further, significant decisions are often determined in comitology committees, making the assent of Member States vital. Comitology adds legitimacy to the implementation process. Many decisions which may appear to be nothing more than technical details, in fact have a substantial impact on producers, traders, users and consumers. Without the input of the Member States representing such stakeholders, confidence in the implementation process would undoubtedly suffer.

So the system of comitology acts as a check on the Commission, whilst at the same time allowing national interests to have a say in implementing measures. What is more, the Council (as legislature) has supervision over the execution of legislative measures it has passed.

2. LEGAL TEXTS AND OFFICIAL DOCUMENTS

- **EC Treaty**

Article 202

To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

- ensure coordination of the general economic policies of the Member States;
- have power to take decisions;
- 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.

Article 211

In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

- **First Comitology Decision: Council Decision 1987/373**
- **Second Comitology Decision: Council Decision 1999/468 (see bellow)**
- **Commission List of Comitology Committees; (2000/C 225/02)**
- **Council Regulation (EC) No 806/2003** of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (qualified majority)
- **Council Regulation (EC) No 807/2003** of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity)

3. EXCERPT FROM J. SHAW: COMITOLGY AND THE DELEGATION OF POWERS

The legislative process cannot be examined in isolation from the extensive structures of 'comitology' which determine the manner in which many powers arising under primary legislative instruments are exercised in practice (Joerges and Vos, 1999). It was introduced in 6.7. The term comitology refers to the practice within the Council of delegating in the primary legislation certain implementing powers (typically aspects of secondary rule-making) to the Commission, to be exercised in conjunction with committees ('comités' in French: hence the term) of national representatives chaired by a representative of the Commission. These committees of national representatives – some of whom are civil servants, but many of whom are scientific experts or even representatives of interest groups – wield varying degrees of influence over the executive process. There are over 200 such committees in existence. Whether one regards the practice of comitology as an enhancement of both the effectiveness of the EU's institutional structure and the quality of its decision-making because it can facilitate deliberation at the supranational level and brings expert knowledge into the system, or as a bureaucratic mechanism which rids EU decision-making of its last vestiges of democratic accountability is a moot point. What cannot be doubted is its importance, as well as the inevitability in practice of some sort of delegated powers system to enable effective rule-making and execution of EU policies, as we saw already in 6.7. Most observers agree that comitology is 'possibly one of the most significant organic developments in the EU's institutional structure' (Bradley, 1992: 720). According to Weiler, comitology is central to 'the democratic life of the Union', and thus the task of addressing the challenges it raises in terms of the exercise of power within a 'complex and hazy landscape' is of fundamental importance (Weiler, 1999: 2, 9).

The amendment to what is now Article 202 EC by the Single European Act was introduced to begin the task of matching legal form and practice. Comitology was well established in the system when Article 202 was redrafted in terms which leave much discretion with the Council:

[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.'

More detailed rules were enacted in a framework measure (Council Decision 87/373 OJ 1987 L197/33) which established that comitology could take three basic forms, with a number of variants. The least intrusive Committee is the Advisory Committee (Procedure I), to which the Commission submits a draft of the measures it proposes to adopt. The Commission must take 'the utmost account' of the opinion delivered by the Committee, but is not prevented by a negative opinion from adopting the measure. Under Procedure II, the draft is considered by a Management Committee, which has the power, by a qualified majority, to delay the adoption of the measure by the Commission, during which time the Council itself can adopt a different decision by a qualified majority. The most restrictive type of Committee is the Regulatory Committee (Procedure III), where the support of a qualified majority of the committee is required for the Commission draft.

If there is not sufficient support, the power of decision reverts to the Council, but if this institution does not act within three months, the Commission may adopt the act. The three procedures themselves incorporate a number of variants, and the delegating power granted by the Council will specify which procedure and variant applies in each case.

Comitology in this form is not supported by the Commission, which feels its discretion is excessively limited by Member State interference; this argument derives strength from an argument that the intention of the third indent of Article 202 was to intensify the separation of powers within the EU by consolidating the executive function within the Commission, not to intensify the powers of the Member States. The Parliament likewise has remained implacably opposed since it fears that its prerogatives under the legislative process are restricted by forms of delegation of powers to the Commission under which the Council and the Member States retain control, but which bypass the legislative role of the Parliament. The sidelining of the Parliament had, of course, been enshrined by the Court ever since the Köster case (Case 25/70 Einfuhr- und Vorratstelle v. Köster [1970] ECR 1161) which explicitly acknowledged that the original legislative procedure need not be followed for any implementing measures taken under the original measure. Despite that precedent, the Parliament attempted to challenge the Council's Decision formalising the structures of comitology (Case 302/87 Parliament v. Council (Comitology) [1988] ECR 5615), but its attempt failed on the procedural question of its standing to bring annulment actions under what was then Article 173 EEC before the Court of Justice (a position on standing the Court later reversed), rather than an examination of the merits of its arguments. There matters rested for some time, although to protect the Parliament's interests, the Commission agreed that draft measures going before the Committees will be forwarded to the Parliament for information.

The comitology question returned to the institutional agenda with added force in the wake of the introduction of the co-decision legislative procedure by the Treaty of Maastricht. As a 'co-legislator' the Parliament was able to argue very forcefully that it should not be wholly excluded from the executive process, given that the Council, as the other co-legislator, is intimately involved in it, by virtue of the terms of Article 202. Using what powers it had under the Conciliation Committee process in the context of co-decision to seek improvements in its situation, the Parliament rejected the draft directive on voice telephony precisely over its dissatisfaction with the way the comitology issue was dealt with in the draft; indeed, during the first year of applying co-decision, the Parliament systematically made use of its powers to highlight the comitology question. This drastic action led the Council to the negotiating table to produce a *modus vivendi* agreed in December 1994 between the three institutions on comitology and measures adopted using the co-decision procedure (OJ 1996 C102/1) (a form of 'interinstitutional agreement': see 7.17). This put on a more formal footing the Parliament's 'right' to receive all draft general implementing acts at the same time and under the same conditions as to the relevant committee. The Commission committed itself to take account of the Parliament's comments and to 'keep it informed at every stage of the procedure of the action which it intends to take'. The Council's commitment, in the event of the matter being referred to it, was not to adopt an implementing measure without first consulting the Parliament, and taking due account of its views. It should seek 'a solution in the appropriate framework' with the Parliament.

This was a matter set down for review at the 1996 IGC, both because of interinstitutional conflicts and also because the Council continued to spend an inordinate amount of debating time choosing the committee procedure to include legislative measures, something which the 1987 Decision was supposed to prevent. In the event, the IGC disappointed all expectations, and agreement was not reached. However, a declaration was annexed to the Treaty of Amsterdam calling on the Commission to propose an amendment to the 1987 decision, and it duly did so, with the measure being adopted in June 1999 (Decision 1999/468 OJ 1999 L184/23).

The legislative procedure surrounding the adoption of that act was again marked by significant action on the part of the Parliament, which chose to wait until its final legislative session before the elections of June 1999 and managed to block half of the budgetary appropriations for committees using its budgetary powers, in order to express more firmly its opinion on the matter than its 'simple' consultation under Article 202 would have seemed to warrant. The old framework of committees is essentially preserved. However, the Parliament is given a scrutiny power to alert the Commission if it considers that an implementing measure intrudes into the legislative sphere. The Decision also brings some limited transparency to the field, by applying to comitology the principles and conditions on access to documents

which apply to the Commission. That would have been the position anyway, regardless of the Council's formalisation of the rule, as it was the conclusion reached by the Court of First Instance in a judgment handed down shortly after the Decision was adopted (Case T-188/97 Rothmans v. Commission, October 14 1999). The Court found that comitology committees came, for the purposes of access to documents, under the Commission itself. The Commission could not deny 'authorship' of the documents.

It is perhaps worth noting as a footnote to these comments that the situation is even more opaque in relation to the matter of policy formulation and implementation in the area of Justice and Home Affairs than in, say, the agriculture or internal market fields. Peers charts the complexity of working groups and committees, the conflicts between justice ministries and interior ministries in the Member States, and the interaction between COREPER and a newly created Strategic Committee on Immigration, Frontiers and Asylum, created to cover the five year Title IV transitional period where special rules on decision-making apply (Peers, 2000b).

4. COUNCIL DECISION OF 28 JUNE 1999 LAYING DOWN THE PROCEDURES FOR THE EXERCISE OF IMPLEMENTING POWERS CONFERRED ON THE COMMISSION (1999/468/EC)

Note that the new "Comitology" Decision is not only simplifying the functioning of the Committees but is also trying to make it more predictable. The main purposes of the Decision " is to simplify the main requirements for the exercise of implementing powers conferred on the Commission and improve the involvement of the European Parliament in those cases when the basic instrument conferring implementation powers on the Commission was adopted in accordance with the procedure laid down in article 251 of the ECT". Finally the Decision is aiming at improving information to the EP and to the public concerning committee procedures.

Compare the modified procedures with the previous procedure as described in the article which follows the Decision.

Read the last article of the unit having in mind these changes made by the new Decision and see if all the improvements suggested by the authors regarding the Committees are reflected in the new decision.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the third indent of Article 202 thereof,

Having regard to the proposal from the Commission,
Having regard to the opinion of the European Parliament,

Whereas:

(1) in the instruments which it adopts, the Council has to confer on the Commission 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; it may also reserve to itself the right, in specific and substantiated cases, to exercise directly implementing powers;

(2) the Council adopted Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission(4); that Decision has provided for a limited number of procedures for the exercise of such powers;

(3) declaration No 31 annexed to the Final Act of the Intergovernmental Conference, which adopted the Amsterdam Treaty calls on the Commission to submit to the Council a proposal amending Decision 87/373/EEC;

(4) for reasons of clarity, rather than amending Decision 87/373/EEC, it has been considered more appropriate to replace that Decision by a new Decision and, therefore, to repeal Decision 87/373/EEC;

(5) the first purpose of this Decision is, with a view to achieving greater consistency and predictability in the choice of type of committee, to provide for criteria relating to the choice of committee procedures, it being understood that such criteria are of a non-binding nature;

(6) in this regard, the management procedure should be followed as regards management measures such as those relating to the application of the common agricultural and common fisheries policies or to the implementation of programmes with substantial budgetary implications; such management measures should be taken by the Commission by a procedure ensuring decision-making within suitable periods; however, where non-urgent measures are referred to the Council, the Commission should exercise its discretion to defer application of the measures;

(7) the regulatory procedure should be followed as regards measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, as well as measures designed to adapt or update certain non-essential provisions of a basic instrument; such implementing measures should be adopted by an effective procedure which complies in full with the Commission's right of initiative in legislative matters;

(8) the advisory procedure should be followed in any case in which it is considered to be the most appropriate; the advisory procedure will continue to be used in those cases where it currently applies;

(9) the second purpose of this Decision is to simplify the requirements for the exercise of implementing powers conferred on the Commission as well as to improve the involvement of the European Parliament in those cases where the basic instrument conferring implementation powers on the Commission was adopted in accordance with the procedure laid down in Article 251 of the Treaty; it has been accordingly considered appropriate to reduce the number of procedures as well as to adjust them in line with the respective powers of the institutions involved and notably to give the European Parliament an opportunity to have its views taken into consideration by, respectively, the Commission or the Council in cases where it considers that, respectively, a draft measure submitted to a committee or a proposal submitted to the Council under the regulatory procedure exceeds the implementing powers provided for in the basic instrument;

(10) the third purpose of this Decision is to improve information to the European Parliament by providing that the Commission should inform it on a regular basis of committee proceedings, that the Commission should transmit to it documents related to activities of committees and inform it whenever the Commission transmits to the Council measures or proposals for measures to be taken;

(11) the fourth purpose of this Decision is to improve information to the public concerning committee procedures and therefore to make applicable to committees the principles and conditions on public access to documents applicable to the Commission, to provide for a list of all committees which assist the Commission in the exercise of implementing powers and for an annual report on the working of committees to be published as well as to provide for all references to documents related to committees which have been transmitted to the European Parliament to be made public in a register;

(12) the specific committee procedures created for the implementation of the common commercial policy and the competition rules laid down by the Treaties that are not currently based upon Decision 87/373/EEC are not in any way affected by this Decision,

HAS DECIDED AS FOLLOWS:

Article 1

Other than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself, such powers shall be conferred on the Commission in accordance with the relevant provisions in the basic instrument. These provisions shall stipulate the essential elements of the powers thus conferred.

Where the basic instrument imposes specific procedural requirements for the adoption of implementing measures, such requirements shall be in conformity with the procedures provided for by Articles 3, 4, 5 and 6.

Article 2

The choice of procedural methods for the adoption of implementing measures shall be guided by the following criteria:

(a) management measures, such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications, should be adopted by use of the management procedure;

(b) measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, should be adopted by use of the regulatory procedure; where a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures, such measures should be adopted by use of the regulatory procedure;

(c) without prejudice to points (a) and (b), the advisory procedure shall be used in any case in which it is considered to be the most appropriate.

Article 3

Advisory procedure

1. The Commission shall be assisted by an advisory committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time-limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

3. The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

4. The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which the opinion has been taken into account.

Article 4
Management procedure

1. The Commission shall be assisted by a management committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty, in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article.

The chairman shall not vote.

3. The Commission shall, without prejudice to Article 8, adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided on for a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of such communication.

4. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 3.

Article 5
Regulatory procedure

1. The Commission shall be assisted by a regulatory committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article.

The chairman shall not vote.

3. The Commission shall, without prejudice to Article 8, adopt the measures envisaged if they are in accordance with the opinion of the committee.

4. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken and shall inform the European Parliament.

5. If the European Parliament considers that a proposal submitted by the Commission pursuant to a basic instrument adopted in accordance with the procedure laid down in Article 251 of the Treaty exceeds the implementing powers provided for in that basic instrument, it shall inform the Council of its position.

6. The Council may, where appropriate in view of any such position, act by qualified majority on the proposal, within a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of referral to the Council.

If within that period the Council has indicated by qualified majority that it opposes the proposal, the Commission shall re-examine it. It may submit an amended proposal to the Council, re-submit its proposal or present a legislative proposal on the basis of the Treaty.

If on the expiry of that period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the proposed implementing act shall be adopted by the Commission.

Article 6 *Safeguard procedure*

The following procedure may be applied where the basic instrument confers on the Commission the power to decide on safeguard measures:

(a) the Commission shall notify the Council and the Member States of any decision regarding safeguard measures. It may be stipulated that before adopting its decision, the Commission shall consult the Member States in accordance with procedures to be determined in each case;

(b) Any Member State may refer the Commission's decision to the Council within a time-limit to be determined within the basic instrument in question;

(c) the Council, acting by a qualified majority, may take a different decision within a time-limit to be determined in the basic instrument in question. Alternatively, it may be stipulated in the basic instrument that the Council, acting by qualified majority, may confirm, amend or revoke the decision adopted by the Commission and that, if the Council has not taken a decision within the abovementioned time-limit, the decision of the Commission is deemed to be revoked.

Article 7

1. Each committee shall adopt its own rules of procedure on the proposal of its chairman, on the basis of standard rules of procedure which shall be published in the Official Journal of the European Communities.

Insofar as necessary existing committees shall adapt their rules of procedure to the standard rules of procedure.

2. The principles and conditions on public access to documents applicable to the Commission shall apply to the committees.

3. The European Parliament shall be informed by the Commission of committee proceedings on a regular basis. To that end, it shall receive agendas for committee meetings, draft measures submitted to the committees for the implementation of instruments adopted by the procedure provided for by Article 251 of the Treaty, and the results of voting and summary records of the meetings and lists of the authorities and organisations to which the persons designated by the Member States to represent them belong. The

European Parliament shall also be kept informed whenever the Commission transmits to the Council measures or proposals for measures to be taken.

4. The Commission shall, within six months of the date on which this Decision takes effect, publish in the Official Journal of the European Communities, a list of all committees which assist the Commission in the exercise of implementing powers.

This list shall specify, in relation to each committee, the basic instrument(s) under which the committee is established. From 2000 onwards, the Commission shall also publish an annual report on the working of committees.

5. The references of all documents sent to the European Parliament pursuant to paragraph 3 shall be made public in a register to be set up by the Commission in 2001.

Article 8

If the European Parliament indicates, in a Resolution setting out the grounds on which it is based, that draft implementing measures, the adoption of which is contemplated and which have been submitted to a committee pursuant to a basic instrument adopted under Article 251 of the Treaty, would exceed the implementing powers provided for in the basic instrument, the Commission shall re-examine the draft measures. Taking the Resolution into account and within the time-limits of the procedure under way, the Commission may submit new draft measures to the committee, continue with the procedure or submit a proposal to the European Parliament and the Council on the basis of the Treaty. The Commission shall inform the European Parliament and the committee of the action which it intends to take on the Resolution of the European Parliament and of its reasons for doing so.

Article 9

Decision 87/373/EEC shall be repealed.

Article 10

This Decision shall take effect on the day following that of its publication in the Official Journal of the European Communities.

5. EXCERPT FROM PETER VAN DER KNAAP: GOVERNMENT BY COMMITTEE: LEGAL TYPOLOGY, QUANTITATIVE ASSESSMENT AND INSTITUTIONAL REPERCUSSIONS OF COMMITTEES IN THE EUROPEAN UNION

(From: Shaping European Law and Policy, The Role of Committees and Comitology in the Political Process, Robin H. Pedler and Guenther F. Schaefer, 1996)

[footnotes omitted]

COMITOLGY COMMITTEES

With respect to the EC, many confine the analysis of committees to a special species of committee: comitology committees. The reason for this is that comitology committee procedures in particular involve certain risks to the efficiency and legitimacy of EU policy-making. This is also the area with the most interinstitutional struggles - notably between the Council of Ministers and the European Parliament.

Defined narrowly, comitology committees are those committees that operate under the Council's 1987 Comitology Decision. The essential function of comitology committees is to relieve the Council of Ministers from the burden of having to deal with innumerable technical details during policy implementation. Implementation activities require a large number of administrative measures, more than can be dealt with by the Council. For this reason, responsibility for implementing measures is conferred by the Council on the Commission. In 1987, the Council formally delegated a part of its competence to lay down or apply legislation by introducing a comitology system under which the development of proposals in the sphere of secondary legislation is bestowed upon the Commission. There are four comitology procedures through which the Commission is assisted in the implementation of EC policies. Three of these require the existence of a committee, whilst in one the Council itself may take a decision that replaces the Commission's proposal.

The rules for the adoption of implementing measures are laid down in the 1987 Decision on Comitology. The first article of this decision specifies certain cases in which the Council reserves the right to exercise implementing powers directly.²⁴ The second article regulates the composition and working methods of the committees and describes the three comitology procedures: (1) advisory committees; (2) management committees; and (3) regulatory, committees.²⁵ Advisory committees assist the Commission in the preparation of its proposals for primary, legislation. Management committees help the Commission to develop broader lines of specific policies during the implementation stage, whilst regulatory, committees actually restore far-reaching decision-making to the Member States.

Procedure I: Advisory Committees

In procedure I, the Commission is assisted by an advisory, committee composed of representatives of the Member States. The advisory committee is chaired by a Commission official who submits to the committee a draft proposal of the measures to be taken. Within a certain time limit, the committee delivers its opinion on the draft, if necessary, by taking a vote. The committee's opinion is recorded in the minutes and each Member State also has the right to ask to have its position recorded in the minutes. In general, there are no legal consequences attached to the consultation of the consultative committees. Although

the Commission must take the 'utmost account of the opinion delivered by the committee' it is not obliged to modify its proposal accordingly. Advisory committees are established primarily in policy fields such as external relations, competition, employment, industrial and social affairs, transport, telecommunications, the environment, internal market policy, energy and education [...].

Procedure II: Management Committees

Like advisory committees, management committees assist the Commission by giving their opinion on draft proposals. They too are composed of national representatives and are chaired by a representative of the Commission who abstains from voting. Management committees can adopt opinions by a qualified majority as laid down in Article 148(2) of the EC Treaty. If the committee adopts a favourable opinion or fails to adopt one within a certain time limit set by the Commission, the latter may adopt the measure with immediate effect.²⁹ In the case of an unfavourable opinion, however, the Commission is forced to submit the proposal to the Council. It is here that dividing procedure II into two variants becomes relevant.

Procedure II, Variant A

Under variant IIa, the Commission may - but is not obliged to - defer the immediate implementation of the proposed measures for a period of not more than one month. If the Commission decides not to defer, it will adopt and implement the proposal without further delay. If the Commission does this, it is politically difficult for the Council to revoke the measure. If the Commission in fact does defer the implementation of the measure, the Council, acting by a qualified majority, may take a different decision within the established time period. Comitology variant IIa can be found mainly in external relations, agriculture, environment, nuclear safety, civil protection, fisheries, and customs and indirect taxation.

Procedure II, Variant B

Under the much more restrictive variant IIb, a negative opinion issued by the management committee compels the Commission to defer the application of the measures it has proposed for a period to be laid down in each act adopted by the Council (but which may in no case exceed three months from the date of communication). In this period, the Council, acting by a qualified majority, may take a different decision. This means that there is a clear legal effect attached to variant IIb of the management committee procedure. Despite the fact that the Commission is not obliged to follow the advice of the management committee, the Council can itself, within a certain time period and deciding by qualified majority, take a measure that replaces the one suggested by the Commission if the latter is not in accordance with the management committee's advice. It should be noted that there are not many variant IIb committees.

As Docksey and Williams note, the 'good news' of the second comitology procedure is that a decision will always be taken. In addition, the committee's negative opinion, which is needed to trigger referral back to the Council, can actually prove to be difficult to obtain. Moreover, there is no guarantee that the Council will vote the same way as the management committee. In both instances, the Commission's proposal may be implemented with a maximum delay of only three months (in variant IIb). Management committee variant IIb is rather rare but does apply to implementation regulations concerning the internal market, enterprise policy and, strikingly, the Statistical Office of the KU.

Procedure III: Regulatory Committees

Whereas the management committee procedure is typical of policy in the field of agriculture, the regulatory committee method was developed for policy issues outside agriculture where Member States wished to control the Commission even more closely. As in the advisory and the management committee procedure, the Commission is assisted by a committee composed of the representatives of the Member States which is chaired by the representative of the Commission. Here too, the representative of the Commission submits to the committee a draft of the measures to be taken, after which the committee gives its opinion within a time limit 'which the chairman may lay down according to the urgency of the matter'. As is the case in the management committee procedure, the committee will try to adopt an opinion by a qualified majority, with the chairman abstaining from voting.

However, the Commission can only turn its proposals into regulations if the regulatory committee has issued a favourable opinion by a qualified majority: 'If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is given, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority'. The Council must respond within a period to be specified in each act but which may in no case exceed three months from the date of referral of the Commission's proposal to the Council.

Procedure III, Variant A - The Net or Filet Procedure

If the Council has not acted by the expiry of the agreed time period, variant IIIa of the regulatory committee procedure allows the Commission to adopt the measures it has proposed. As it guarantees that a decision can be taken no matter how the Council acts, variant IIIa is labelled the net or filet procedure: even if no decision can be reached in the Council, the Commission can adopt the proposed legislation and start implementing the policy. Variant IIIa of the comitology committee procedure applies particularly to implementation legislation with regard to the internal market, agriculture, transport, and customs and indirect taxation.

Procedure III, Variant B - The Safety Net or Contrefilet Procedure

Under variant IIIb, if the Council has not acted by the expiry of the period laid down, the Commission is able to adopt its proposed measures, except where the Council has decided against the proposed measures by a simple majority. With this stipulation, variant IIIb of the regulatory committee procedure grants the Council the possibility of obstructing proposals in the sphere of tertiary legislation. For this reason, variant IIIb is also referred to as the safety net or contrefilet procedure. As Kapteyn and VerLoren van Themaat rightly observe, the safety net procedure may actually paralyse the European Union's decision-making capacity. In theory, this risk exists in the policy fields of agriculture and the environment, nuclear safety and civil protection. In practice, things very rarely get to this stage.

Procedure IV: The Safeguard Procedures A and B

Despite considerable opposition from the Commission, the Council inserted another safeguard clause in the 1987 Decision on Comitology.³⁷ When specific interests of individual Member States or the European Union at large are at stake, the Commission may consider itself authorized to take safeguard measures. The Commission is obliged to inform the Council and the Member States and it may be stipulated that, before adopting a protective decision, the Commission must consult the Member States in accordance with procedures to be determined in each case. Any Member State may refer the Commission's decision to the Council within a time limit to be stipulated in the act concerned.

Under variant IVa of the safeguard procedure, the Council, acting by a qualified majority, may take a different decision within a time limit to be stipulated in the act in question. Under variant IVb, the Council may confirm, modify or revoke the decision adopted by the Commission. If the Council has not taken a decision by a fixed deadline, the decision of the Commission is deemed to be revoked. A committee is not appointed in either variant of the safeguard procedure.

Comitology Committees: A Summary

There are important differences between the various comitology procedures. Nugent summarizes them in a very clear manner: 'Advisory committees can only advise; management committees can block a Commission decision by a qualified majority; regulatory committees must give their approval for Commission decisions by a qualified majority'. The Commission may ignore advisory committees without any consequences. Under variant IIb, management committees can stop the Commission by delivering a negative opinion. The regulatory committee procedure requires the Commission to obtain a positive opinion from the committee (by a qualified majority).

6. FROM INTERGOVERNMENTAL BARGAINING TO DELIBERATIVE POLITICAL PROCESSES: THE CONSTITUTIONALISATION OF COMITOLGY, BY CHRISTIAN JOERGES AND JÜRGEN NEYER

Abstract: *This article argues that the irresistible rise of Comitology is an institutional response to the deep-seated tensions between the dual supranational and intergovernmentalist structure of the Community on the one hand, and its problem-solving tasks on the other. Comitology has accordingly provided a forum in which problems are addressed through evolving and novel processes of interest formation and decision-making. However, neither legal nor political science have been able properly to evaluate the workings of the committee system, both disciplines remaining trapped within normative structures and traditional methodologies ill-suited to the analysis of these institutional innovations. As a consequence, this article advocates the trans-disciplinary study of Comitology, and furthermore argues that the two disciplines might be drawn together by the concept of 'deliberative supranationalism': being on the one hand a normative approach which seeks both to preserve the legitimacy of national democracies and to set limits upon the traditional Nation State within a supranational community; and on the other, a theoretical tool which is nonetheless responsive to and accommodating of 'real-world' phenomena.*

I Introduction

Whilst the remarkable recent explosion of legal and political science research on the Community's committees in general, and Comitology in particular,⁸ has uncovered a broad range of practical, legal and theoretical issues, it has yet to lead to any consolidated consensus between the two disciplines. This study attempts to find a path through such complex issues by deploying a dual strategy; choosing a relatively narrow field of enquiry, namely the regulation of risks to health in the foodstuffs sector, and then interpreting it from a variety of perspectives. The field is chosen for two reasons: first, the foodstuffs sector is at a cross-roads with market-building interests now being confronted by the establishment of a Europeanised regulatory machinery; and secondly, the completion of the foodstuffs market ranked so highly on the Community agenda that the legislative framework was completed before other areas were

⁸ Cf, for the relevant literature, citations in C. Joerges, 'Die Beurteilung der Sicherheit technischer Konsumgüter und der Gesundheitsrisiken von Lebensmitteln der Praxis des europäischen Ausschußwesens ('Komitologie'), *ZERP-Diskussionspapier* 1/95, 78-89, and in R. H. Pedler/G. F. Schaefer (eds), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, (European Institute of Public Administration, 1996), 195-198; more recent publications include: Pappi and Schnorpfeil, 'Das Ausschußwesen der Europäischen Kommission: Grundstrukturen und Kommunikationsmöglichkeiten für Verbände', in H. Schmidt/E. Rieger/T. König (eds), *Das europäische Mehrebenensystem*, (Campus, 1996), 135-159; Wessels, 'Capturing Transformation Processes: on the Fusion of Administrations in Europe' (Manuscript, Bonn/Cologne, 1996); Neyer, 'Administrative Supranationalität in der Verwaltung des Binnenmarktes: Zur Legitimität der Komitologie', *Integration*, 1997, 24-37; M. Bach, 'Verwaltungs- und Expertenstäbe im multibürokratischen Entscheidungsprozeß der EU' (Manuscript, Konstanz, 1997); V. Eichener, *Entscheidungsprozesse in der regulativen Politik der Europäischen Union* (Habilitation Bochum, 1997); M. Everson, 'The Oversight of Delegated Legislation Within the European Union: An Administrative Law of Bits and Pieces', (Manuscript, EUI Florence, 1997); S. Schlacke, *Risikoentscheidungen im europäischen Lebensmittelrecht: Eine Untersuchung am Beispiel des europäischen Zusatzstoffrechts unter besonderer Berücksichtigung des europäischen Ausschußwesens ('Komitologie')* (PhD Thesis Bremen, 1997); E. Vos, *Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies* (PhD Thesis EUI Florence, 1997).

tackled. Thus, this framework is now primarily concerned with implementation rather than new legislation. Equally, the committee system works particularly well and with enormous intensity.

Our enquiry into the committee system in section II of this article is related to the theoretical and interdisciplinary objectives pursued in sections III and IV. We seek to identify practices within the decision-making process which challenge the analytical and normative assumptions upon which the majority of integration research rests. The entrenched nature of these assumptions demonstrated by the parallel and independent discussion of Comitology within legal discourse and political science, we are particularly interested in exploring certain deep-rooted schisms between these two disciplines. Lawyers, on the one hand, tend to restrict themselves to normative arguments and expect political scientists simply to provide them with information about the 'real world'; political scientists, on the other, tend to confine themselves to explanatory and analytical arguments - where they do look at legal institutions they tend to perceive of them either as constraints or opportunities. These disciplinary demarcation lines often appear counterproductive. We hope not only to substantiate this claim by documenting a number of serious shortcomings in the two disciplines' analyses of Comitology but also, and perhaps more importantly, we attempt to establish a trans-disciplinary discourse.

The more ambitious section of our contribution (section IV), suggests that Comitology is characterised by an institutional innovation which will necessitate a redefinition of our existing normative understanding of the European polity, and similarly challenges the analytical assumptions of current integration research. Methodologically speaking, we claim that the schisms between and the shortcomings in mono-disciplinary analyses of the European polity can and should be overcome through a constitutionalist interpretation of 'supranationalism'. It is, however, important immediately to emphasise that although the concept of deliberative supranationalism presented here, is a regulative idea, and not an existing legal framework or a factual given, it nonetheless entails far more than a purely normative fantasy. Deliberately conceived as a means to surmount the incoherence and impasse in the current legal debate on European integration, it claims the status of a 'legal theory of the integration process';⁹ but it at the same time also attempts to give concrete form to the normative arguments and institutions envisaged by the constructivist strand in political science. At the theoretical level, deliberative supranationalism seeks to overcome the age-old dichotomy between *Sein* (being) and *Sollen* (ought), but equally has the very practical goal of bridging the gap between legal and political theories of European integration through the application of the model which constitutionalism provides for the disciplining of political processes and the legitimacy of governance within the nation-state.

II A Description of 'Comitology' and Some Queries

The story of the apparently irresistible rise of the general committee system, and Comitology in particular, need be recounted only very briefly here.¹⁰ The intensity of the 'Europeanisation' of agricultural policies in the Sixties, determined that this sector would lead the way in developing the 'archetypal' forms of committee: the 'management' and 'regulatory' committees,¹¹ which were subsequently to be complemented by a richer typology.

⁹ For a description of this term cf, Joerges, *European Economic Law, the Nation-State and the Maastricht Treaty* in R. Dehousse (ed), *Europe After Maastricht. An Ever Closer Union?* (Beck, 1994) 29 at 36-41 and *idem*, 'Rechtswissenschaftliche Integrationstheorien', in B. Kohler-Koch/W. Woyke (eds), *Lexikon der Politik - Band 5. Die Europäische Union* (Beck, 1996) 229-232.

¹⁰ Cf, references in note 1 and the contributions of Bradley and Vos to this volume; cf, for a particularly careful review of available data Falke, 'Comitology and other Committees: A Preliminary Empirical Assessment', in R.H. Pedler and G. F. Schaefer (eds), *op cit* n 1, 117-165.

¹¹ Cf, Bertram, 'Decision-Making in the EEC: The Management Committee Procedure', (1967-68) 5 *CMLR* 346.

The expansion of the committee system and its subsequent refinement, was accelerated by the adoption of the Internal Market Programme in 1985 and the Single European Act (hereafter, SEA) of 1987. The new legislative strategy, announced and agreed upon in these documents, was meant to achieve broad harmonisation objectives through relatively few European legislative acts. Both the Commission and the drafters of the SEA foresaw that this policy would only enhance the existing need for regulatory techniques to ensure that broadly defined legislative objectives and principles could be continually concretised and adapted to new economic and technological developments. Therefore, the amendment to Article 145 by the SEA provided, in the third indent, that 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'.¹²

The formulation of the amendment entailed a political compromise, but it soon became clear that the Council was by no means willing to leave to the Commission the new implementing powers for programmes which so often touched upon economically important interests and politically sensitive issues. In the Comitology Decision of 13 July 1987¹³, the Council, rather than definitely conferring implementing powers in accordance with Article 145 (3), restricted itself to defining the procedural alternatives for such a delegation. The Council's political message was crystal clear: Member States are not willing to loosen their intergovernmental grip on the implementation process in favour of supranational institutions. In more constructive terms, the Comitology decision rejects the idea of a supranational central implementation machinery headed by the Commission, and thus indirectly forces national governments into a co-operative venture.

A *The Comitology System in the Foodstuffs Sector*

The perfecting of the legislative frameworks and the sophistication of the committee system were to occur in tandem. The entire development precisely mirrored the general trends in market integration policies.¹⁴ It was the legendary *Cassis de Dijon* ruling and the subsequent adoption of the new harmonisation policy in 1985, with its switch to a 'horizontal' approach,¹⁵ which triggered the successful growth of European legislation to a 720 page volume.¹⁶

Foodstuffs clearly presented illuminating regulatory challenges. Not only were sophisticated institutional frameworks and more or less stringent regulatory standards to remain intact in the best interest of the functioning of real-world foodstuffs markets; but legislation was also to be informed of the fact that foodstuffs regulation needs to address particularly interesting traditional and modern issues such as: information-related market failure, agency problems in the selection of regulators, conflicting expert opinion on the risks attributable to foodstuffs and/or nutrition habits, the growing importance of new concerns about animal welfare and the environmental dimensions of food production, as well as the impact of cultural traditions on production and consumption. Clearly, problems of this complexity could not be dealt with uniformly and definitely via legislative fiat at European level but instead continue to require

¹² This provision continues: '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.'

¹³ Council Decision 87/373/EEC of 13.07.1987, laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 197/1987, 33.

¹⁴ Cf, Streinz, 'Gesundheitsschutz und Verbraucherinformation im Lebensmittelrecht der Europäischen Gemeinschaften', in R. Damm and D. Hart (eds), *Rechtliche Regulierung von Gesundheitsrisiken* (Nomos, 1993) 151.

¹⁵ COM (85) 603 final.

¹⁶ Cf, European Commission, Foodstuffs. Co-ordinated instruments (1994; ISBN 92-826-8056-8); cf, for a recent overview Hankin, 'The Role of Scientific Advice in the Elaboration and Implementation of the Community's Foodstuffs Legislation', in C. Joerges, K.-H. Ladeur and E. Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations* (Nomos, 1997, forthcoming).

unceasing regulatory activity to ensure that: the costs and benefits of regulatory measures be identified and balanced, and that regulators remain well-versed in the ever-growing knowledge basis for regulatory action, and so are in a position to respond to new public concerns. Indeed, the 'scientification' of foodstuffs' regulation, taken together with its 'politicisation', has exerted such pressure on traditional foodstuffs' law that innovations would have occurred at the national level even without any European market-building and harmonisation efforts.

When the institutions of the EC embarked on their venture of market-building, they had only a limited number of options available. The policy did not depart from the point of *whether* foodstuffs should be regulated at all, but rather from the pragmatic issue of *how* the EC was to overcome the obstacles presented by legal divergence, ossifying regulatory policies and the completion of the project in a short time-span.¹⁷ It is no surprise that the committee system flourished, but its development and internal differentiation are of exemplary importance since they represent the sophisticated model of 'regulation through committees' which, since its very inception, was understood to be the European alternative to centralised regulation through agencies on the one hand, and regulatory competition or mutual recognition on the other.¹⁸

- The Standing Committee on Foodstuffs (StCF) is of paramount importance. This committee was set up in 1969¹⁹ as a regulatory committee (variant IIIb of the Comitology decision).²⁰ Currently, there are some 35 directives and regulations which refer to this committee. Josef Falke identifies 117 different groups of tasks the StCF is expected to cope with.²¹ Functionally speaking, the StCF is the joint political organ of the Member States designed to support and control the Commission.
- The Scientific Committee for Food (SCF) was established back in 1974²² and was reorganised in 1995.²³ This committee draws upon the - by definition transnational and objective - world of science. Accordingly, committee members are supposed not to represent national interests but the state of their disciplines. However, it is worth noting that a scarcity of scientific resources at the European level, is compensated for not only by the committee's ability to form working groups and invite further experts, but also by Directive 93/5 on assistance to the Commission and co-operation by the Member States in the scientific examination of questions relating to food,²⁴ a measure fostering co-operation with the relevant national bodies.
- The Advisory Committee on Foodstuffs (ACF) was established in 1975²⁵. This committee represents the economic and social interests at the European level. The Commission seeks its advice only when preparing new legislation. The ACF is not represented in the implementation process.

B *The Performance of the Comitology System: A Series of Queries and Some Findings*

An empirical assessment of the performance of the Comitology system might draw on a wide range of information including the readily available legal acts and official documents already outlined, as well as

¹⁷ Cf, Hankin, *loc cit*.

¹⁸ Cf, Dehousse *et al*, *Europe After 1992: New Regulatory Strategies*, EUI Working Paper Law 92/31 (1992); Joerges, 'Product Safety in the European Community: Market Integration, Social Regulation and Legal Structures', in F. Snyder (ed), *European Community Law. Vol. II* (Dartmouth, 1993), 297-320. - For much more detailed descriptions of the committees operating in the foodstuffs sector cf, Schlacke, *op cit* n 1 (ch. 1 D and E) and Vos, *op cit* n 1 (ch. IV).

¹⁹ Cf, Council Decision 69/414/EEC of 13 November 1969, OJ L 291/1969, 9.

²⁰ Cf, Council Resolution of 13 November, OJ C 148/1969, 1.

²¹ *Op cit* n 3 at 127.

²² OJ L 136/1974, 1

²³ Commission Decision 95/273/EEC, OJ L 167/1995, 22.

²⁴ OJ L 52/1993, 18.

²⁵ By Commission Decision 75/420/EEC, OJ L 182/1975, 35.

less accessible data such as: the working practices and formal procedures of committees,²⁶ the frequency of their meetings, the establishment of expert groups and the access of interested parties, the role of the Commission and the official status of experts from Member States, the numbers of people participating in committee meetings, and the budgeted cost in ECU for a legislative act.²⁷ In the following, however, we also draw upon our own research into the attitudes and perceptions of committee members, in order to allow for an analysis of committee performance which is sensitive to the very novel forms of interest group formation and political decision-making process which have sprung up under the umbrella of the Comitology system. Ultimately, however, we likewise conclude that any meaningful assessment of such data will depend fully upon the evolution of new normative yardsticks; traditional legal and political science analyses being unable adequately to address such new phenomena.

The 'Nature' of Risk Regulation

Judgments on the social acceptability of risks associated with the consumption of food require a balancing of benefits and costs which cannot be meaningfully performed without the help of experts but which, at the same time, must also pay due regard to normative, political and occasionally ethical considerations. For present purposes, it is sufficient to note that to date²⁸ no constitutional state has delegated risk assessments entirely and exclusively to expert bodies.²⁹ The normative, ethical, cultural and political dimensions of risk calculation will make themselves felt at Community level: not only do they militate against the delegation of risk assessments to bodies of experts; but they also render it highly unlikely that one single body will be able to come up with uniform decisions which are socially acceptable within the entire internal market. The institutional implications of these considerations are far-reaching. If and because risk assessments must also include normative-political considerations, there the committee system needs equally to mediate between 'universal' (European-wide agreed upon) criteria and 'national' concerns. Thus, it must not be replaced by a central authority which would be politically unaccountable for its risk assessments.

Economic Implications: Distributional Concerns and Industrial Policy

The control of risks imposes costs on competent authorities and a high level of protection increases costs to industry and consumers. The economic implications of such decisions are by no means uniform throughout the internal market thereby complicating still further the balancing of the costs and benefits of European decisions. The difficulties inherent in the economic equation remain a further barrier to attaining uniformity. Beyond the costs of risk regulation, further economic consequences need to be envisaged. The raising of standards and the development of sophisticated regulatory schemes which ensure the safety of foodstuffs, inevitably work in favour of those Member States with technically highly-developed industries as they may now more easily penetrate 'foreign' markets. We suggest that both types of economic implications need to be distinguished. The advantages or disadvantages of risk assessments for specific industries will give rise to 'national concerns' which can be classified as industrial policy considerations. Administrative costs and, more importantly, the costs for producers, traders and consumers which higher safety standards may entail are to be classified as 'distributional' because they affect the economic interests of these actors. Contrary to the redistributive objectives of 'traditional'

²⁶ The 'rules of procedure' of the Standing Committee for Foodstuffs as of 11.05.1993, III/3939/93 have been published by DG III.

²⁷ Cf, Falke, *op cit* n 3at 133-138.

²⁸ For recent summaries in sociology and political science on which our argument is based cf, Bechmann, 'Risiko und gesellschaftlicher Umgang mit Unsicherheit', (1994) *19 Österreichische Zeitschrift für Soziologie* 8-33; K. S. Shrader-Frechette, *Risk and Rationality. Philosophical Foundations for Populist Reforms* (University of California Press, 1991).

²⁹ For summary of the underlying considerations cf, Köck; 'Risikovorsorge als Staatsaufgabe', (1966) 121 *Archiv für öffentliches Recht* 1-24; Pildes and Sunstein, 'Reinventing the Regulatory State', (1995) 62 *Chicago L. Rev.* 1 at 46-72.

welfare policies, however, the distributional consequences of stringent safety regulation for products are widely dispersed; consumers are not classes with, either in principle or theory, identical economic interests.

Interest Formation and Decision-making Processes in the European Polity

Both of the above issues indicate deep-seated tensions between the dual supranational and intergovernmentalist structure of the EC on the one hand, and its problem-solving tasks on the other.³⁰ The committee system needs to be understood as an institutional response to that tension. In the gap between the EC structure and its tasks, Comitology has proved a forum for the development of novel and mediating forms of interest formation and decision making. Any attempt to provide for its analytical conceptualisation and normative evaluation, may therefore be confronted with institutional innovations which fit neither into the analytical models of functionalism and intergovernmentalism, nor into the normative concepts of corresponding legal theories. This is why research on Comitology should be prepared to encounter 'under-theorised' phenomena and scrutinise interactions both inside and beyond the formalised institutional structures, decision-making processes and practices of the committee system.

Findings

Within the framework of the above-named project,³¹ 45 expert interviews have already been conducted, some 100 questionnaires³² been sent out and hundreds of documents been studied. The findings, presented in detail in the Table included within this article³³, may be summarised as follows, and to a large degree substantiate what might in any case have been expected:

- the boundaries of the committee system cannot be equated with its formal structures; both the representatives of Member States and the Commission itself exploit many sources of information and are open to receive advice from 'outside'. This may explain why the ACF has never been invited to comment upon implementation issues;
- the agenda of committees is dominated by the Commission. Its room for manoeuvre is by no means substantially constrained by the shadow of majority voting which the Council included in its legislative acts.³⁴ However, the Commission pursues long-term strategies aiming at consensual rather than conflictual decision-making. Points which are bound to arise in the foreseeable future are handled at an early stage and when they can still be quite openly discussed. Where serious objections against proposals are raised, decisions will be postponed. Even delegations of Member States tend to use the StCF as a forum for an exchange of views on new and unsettled issues;
- the Commission's dominating role as an agenda setter appears not to be constrained by the SCF. The Commission feels entitled autonomously to determine the issues in which it seeks scientific advice.³⁵ However, both the Commission and the SCF respect the conditions which contribute to the high reputation of the SCF as an highly experienced body of experts. This may be explained by the institutional interests of both actors. An appeal to the authority and impartiality of science-based

³⁰ Cf, more extensively Joerges, *op cit* n 11 and *idem* 'Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik', in: R. Wildenmann (ed), *Staatswerdung Europas? Optionen einer Europäischen Union* (Nomos, 1991, 225-268 (English translation: 'The Market without a State? States without Markets? Two Essays on the Law of the European Economy', EUI Working Paper Law 1/1996 at 28-42).

³¹ N * *supra*.

³² Only preliminary results are given, further quantitative analysis will be conducted upon completion of all interviews.

³³ *Ibid*, a systematic account will be given by Andreas Bückler, Jürgen Neyer and Sabine Schlacke in our final report which will be ready in autumn 1997.

³⁴ Cf, n 13 *supra*.

³⁵ This attitude, which the Commission's Legal Service shares, is not in accordance with the judgment of the ECJ Case 12/91 *Angelopharm* [1993] ECR I-171 at 210; cf, section II A 3 *infra*.

findings is obviously useful to the Commission where conflicts of interests among relevant parties impede consensus building but it also simultaneously strengthens the position of the SCF. It should already be noted here that institutional interests of this kind may help to ensure compliance with sound decisional criteria.³⁶

'Quality' of Decision-making

Having detailed the workings of committees system, a question now arises of how such a system is best to be evaluated. Here, however, both the law and political science are faced with certain difficulties. When asked about the performance of the committee system, lawyers are tempted to refer simply to their distinction between legal and illegal acts. The Comitology issue, however, forecloses such an easy way out. European law may require an evaluation of decisional outputs;³⁷ more importantly, the state of the law is so uncertain, that any legal discourse specifying potentially applicable rules and principles will have to rely on substantive argument. Political scientists trying to conceptualise decision-making practices may draw on a broad array of theories or approaches. In recent contributions on the EC dichotomies such as argument vs. bargaining,³⁸ instrumental rationality vs. communicative action³⁹ have been tried out; further theorems are on offer.⁴⁰ Although this piece will return to this point later,⁴¹ it is sufficient to mention the two commonalities: both disciplines tend, at least implicitly, to conceptualise the committee system as a non-hierarchical form of governance. Lawyers are ready to accept, or at least feel compelled to ensure, unprovided-for structures for decision-making where these seem to further compliance with European objectives. Similarly, Political scientists tend to acknowledge the 'reality' of argument as a prerequisite to and result of the functioning of the committee system. This shift from 'power to reason' implies that the performance of committees must not simply be assessed in terms of a 'high' or 'low' level of their regulatory output but rather be evaluated in terms of 'procedural' devices designed to ensure the reasonableness of decision-making practices.

The Need for a Normative Meta Theory

The convergent perceptions of the committee system in both disciplines remain troublesome.⁴² Political scientists will ask whether and how one might operationalise dichotomies, such as argument and strategic action, in order to be in a position to assess interactions within the committee system or to identify the impact of rules concerning the presentation of arguments (die 'Darstellung von Entscheidungen') on the decisions actually taken (die 'Herstellung von Entscheidungen'). Lawyers would insist that the style of reasoning alone can never replace formalised legality and legitimacy requirements. Our response to these difficulties relies on a specific, albeit so far unfinished, version of supranational constitutionalism. We argue⁴³ that the committee system must be based upon, and controlled by, constitutional provisions favouring a 'deliberative' style of problem solving. Where these structures can be identified and established, the motives of decision-makers become irrelevant.

³⁶ Cf, section IV *infra*.

³⁷ This is the case in Article 100a (4) and, more generally, where the right of Member States to take unilateral action is at stake.

³⁸ Gehring, 'Regieren im internationalen System. Verhandlungen, Normen und internationale Regime', (1995) 36 *Politische Vierteljahresschrift* 197-219.

³⁹ Risse-Kappen, 'Exploring the nature of the beast: International relations theory and comparative policy analysis meet the European Union', (1996) 34 *JCMS* 53-80.

⁴⁰ For a recent critical summary cf, Zürn and Zangl, 'Argumentatives Verhandeln bei internationalen Verhandlungen. Moderate Anmerkungen zur post-realistischen Debatte', (1996) 3 *Zeitschrift für Internationale Beziehungen*, 341-366.

⁴¹ Section III B *infra*.

⁴² We are especially indebted to Peter A. Hall for confronting us with these problems; this is not to say that we have resolved them.

⁴³ Cf, section IV *infra*.

III The Observation of Comitology by Legal and Political Science

Returning to the question of how Comitology might best be evaluated, legal and political science perceptions of Comitology will now be examined in greater, though by no means comprehensive, detail. It is noteworthy that whilst academic discussion on Comitology has now reached many quarters, legal science continues to hold the usual lead in terms of both the time and the space devoted to the subject. However, such legal debate remains unsatisfactory, since the law would appear to have difficulties in tackling the emergence of institutional structures which are not to be found in either national legal systems or the Treaties. Equally, political scientists have been caught somewhat unaware by developments not predicted either by intergovernmentalist or by functionalist approaches to integration. As becomes apparent in our analysis, the perceptions of the two disciplines thus share to a surprising degree common premises and difficulties.

A *Comitology and the Legal System: Institutional Conflicts and the Search for a European Administrative Law*

When faced with new problems or developments, lawyers are bound to discriminate between legal and illegal events. The yardsticks they use are the legal structures as provided for in the Treaties or developed on that basis in the case law of the ECJ. The legal system should, therefore, not be expected to conceptualise a new phenomenon like Comitology in positive terms. It will rather respond to concrete conflicts as they are brought into legal arenas. The recognition and positive transformation of innovative developments into new legal concepts is likely to happen gradually and indirectly. The 'juridification' of the committee system follows such patterns. Two important arenas can and need to be distinguished.

The most visible legal debates on Comitology have been initiated by the interests and moves of institutional actors, which seem neither willing nor able to consider the whole range of legal issues which any meaningful debate on the committee system would have to address. Thus, the long-term interest expressed by the European Parliament in its initiatives, were not motivated by the search for a comprehensive legal framework for the establishment and working of European committees; nor did the Council ever submit a futuristic concept explaining what it might mean to defend the administrative powers of Member States against centralist tendencies in the management of the Internal Market. Rather, the EP more or less continuously supported the Commission in its drive to strengthen the Community's administrative powers, whereas the Council defended the influence Member States are expected to exert through the committee system. These conflicts clearly concern the institutional frameworks of the European regulatory policies and mirror the well-known conflict between supranationalism and intergovernmentalism. The attention they have attracted seems, nevertheless, disproportional. The institutional debates should be viewed as just one part of the juridification process because its less spectacular, more subtle and probably more important counterpart was the step-by-step development of principles and rules concerning the administrative powers and practices of European bodies. The supranationalism/intergovernmentalism divide can easily be re-detected in this second arena but the kind of issues that have been dealt with here address the problems of establishing a post-national and non-hierarchical system of governance much more directly.

'On the Road to Nowhere'⁴⁴ Commission and EP vs Council and the Meroni Doctrine

Three phases in the institutional conflicts over the committee system can be distinguished. The first phase started decades before the adoption of the SEA: the committee system had become a distinguishing institutional mark especially of the Common Agricultural Policy. Already during that period

⁴⁴ Cf, Bradley's contribution to this volume.

the EP took an intense and critical interest in this development. Parliament, however, had at that time no standing before the ECJ. The first decisions of the ECJ, which endorsed in principle the legality of the management procedures practised by pertinent committees, took hardly any notice of the EP's institutional concerns.⁴⁵ A second phase began with the adoption of the SEA which, although intended to increase the power of the Commission, was in fact undermined by the Council's 'Comitology Decision' of 13 July 1987,⁴⁶ in which the Member States indicated their intention not to loosen their control over the implementation process. Parliament sought relief, but failed to convince the Court to recognise its capacity to bring an action for annulment.⁴⁷

The institutions entered a first phase and the EP was more successful in promoting its position through the institutional agreements. In 1988, Commission (acting through its President Jacques Delors) and Parliament (represented by its President Henry Plumb) agreed that the Commission would provide Parliament with all the essential information about Comitology committees (the Plumb Delors Agreement). After the TEU came into force, the new co-decision procedure under Article 189b provided a new basis for the Parliament's claims. Following a Commission initiative, all the relevant institutional actors signed a Draft Interinstitutional Agreement on Comitology between the EP, the Council and the Commission.⁴⁸ According to this *modus vivendi*,⁴⁹ any draft general implementing act submitted by the Commission would also be sent to the appropriate parliamentary committee.

The institutional conflict is multi-faceted but it is unlikely to generate a sophisticated institutional response to the many queries surrounding the Europeanisation of risk regulation policies. Implicitly, the EP is furthering through its initiatives a centralisation of administrative powers without, however, being able to demonstrate how it might effectively supervise the Commission and hold it politically accountable.⁵⁰ The counterproductive implications of the EP's institutional strategy become more clearly visible when they are read in conjunction with the famous *Meroni* doctrine.

The *Meroni* principle prohibits the delegation of 'discretionary powers' which would amount to a transfer of responsibility replacing the choices of the delegator by those of the delegatee.⁵¹ This doctrine is of such wide-spread recognition that it cannot only be invoked to question the legality of the whole new approach to harmonisation and standards;⁵² but it has also forced Community legislation to camouflage continuously the real functions of standardisation bodies and even the new Medicines Agency.

The *Meroni* doctrine must be read together with the request to respect the 'institutional balance' between Community organs.⁵³ This principle is not very helpful in the search for an adequate legal framework for risk regulation because it does not address the specific problems of this type of regulatory activity. Fortunately, the ECJ refrained from concretising this principle into a rigid doctrine, suggesting instead that the Council should be free to specify the conditions under which the Commission might exercise

⁴⁵ The leading case is *Cs 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Koester, Berodt & Co.* [1970] ECR 1161; cf, also *Cs 5/77 Tedeschi v Denkavit* [1977] ECR 1555.

⁴⁶ See n 6 *supra*.

⁴⁷ *Cs 302/87 European Parliament v Council* [1988] ECR 5615 at 5644.

⁴⁸ SEC (94) 645 final; cf, Falke, *op cit* n 3 at 125-127.

⁴⁹ OJ C 43/1995, 40.

⁵⁰ This is not to say that a constructive role of the EP would be simply inconceivable. The role of the EP in the BSE saga as documented and analysed in the contributions Bücken, Schlacke and Graham to this volume confirms that efficient political supervision can be exercised *ex post*; its constructive effects may depend upon the ability of the EP to go into the depths of an issue and to thus identify problems of exemplary importance.

⁵¹ Cases 9 and 10/56 *Meroni* [1958] ECR 9 and 51 at 43-44.

⁵² The point has first been made by Lauwaars, 'The 'Model Directive' on Technical Harmonization', in R. Bieber, R. Dehousse, J. Pinder and J.H.H. Weiler (eds), *1992: One European Market? A Critical Analysis of the Commission's Internal Market Strategy*, (Nomos, 1988) 151-173.

⁵³ Cf, for more comprehensive analyses S. Schlacke, *op cit* n 1 (ch. G III) and E. Vos, *op cit* n 1 (ch. III.5).

'executive powers' delegated to it.⁵⁴ Its function can be constructively interpreted as safeguarding pluralism in the European implementation process - although the ECJ has never explicitly acknowledged that the participation and co-operation of Member States may be required by this principle.⁵⁵

Administrative Law of Bits and Pieces

The second approach to 'juridifying' Comitology can be understood as a reaction to its 'administrative' functions (as a rule-making executive⁵⁶), by which the legal system undertakes some preliminary steps towards a European administrative law which should eventually lead to the adoption of an act on administrative procedures. It seems normatively highly plausible to insist upon a clarification of the boundaries of the delegation of 'essential' issues to the Comitology complex; to advocate greater transparency in the decision-making processes; and to search for institutional guarantees which would ensure the independence and plurality of scientific committees. It seems equally obvious that those affected by Comitology decisions must have access to judicial protection and that the standing of groups representing social interests needs to be enhanced.⁵⁷ However, equations of the decisional practices of the Comitology system with that of national administrations and/or of American agencies rest upon weak premises.⁵⁸ Advocates of a European act on administrative procedures seem to presuppose that Comitology will transform into one hierarchical system of European governance but they may underestimate the dependence of administrative law models on the organisational structure and the social conditions of nation states or federations.⁵⁹

The difficulties of the analogy can be substantiated with the help of the list of queries presented above.⁶⁰ We argue that risk regulation at European level is more complex than in the more integrated societies of national states for two reasons. First, its normative, ethical and cultural dimensions may be so diverse in Europe that they cannot be delegated to one single body with the competence to adopt uniform rules. Second, the economic costs and benefits of such decisions are felt unevenly across the internal market. Again, it would seem neither practically feasible nor normatively attractive to entrust one single body with the task of weighing the costs and benefits of social regulation in Europe. In other words, the resistance of Member States (and the Council) to participating in the implementation process and the reservation of some regulatory autonomy ('nationale Alleingänge') reflects legitimate concerns which cannot be adequately met by a transformation of the Comitology complex into a type of unified and centralised administrative body.

Bridging the Gap between Intergovernmentalist Bargaining and Centralised Rule-making

Examining the case law of the ECJ with the reservations in mind, which have just been raised against the agenda of the actors in the institutional debates on the one hand, and analogies to the administrative law models of fully fledged federations or nation states on the other, one is inclined to praise the ECJ for its cautious attitude and even detect elements in the judgments which begin to define the legal structures of multi-level governance in a way which mediates between the interests in the establishment of a functioning internal market on the one hand and the concerns of national constituencies and the

⁵⁴ Cf, Case 25/70 (n 39 *supra*).

⁵⁵ Cf, Vos, *loc cit*.

⁵⁶ Cf, for an explanation of this oxymoron Falke and Winter, 'Management and Regulatory Committees in Executive Rule-Making', in G. Winter (ed), *Sources and Categories of European Union Law. A Comparative and Reform Perspective* (Nomos, 1996) 583-599.

⁵⁷ Cf, for a particularly careful recent exploration of these issues S. Schlacke, *Risikoentscheidungen*, *op. cit* n. 1 *supra*, ch. G IV.

⁵⁸ Cf, Joerges, 'The Market Without the State', *op cit* n 23 at 29-31.

⁵⁹ Cf, for a similar argument Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot', (1996) 2 *ELJ* 3-25.

⁶⁰ Section I B *supra*; text accompanying n 20 - n 36.

European public for the social responsibility of the internal market project on the other. Limitations of space prevent an extensive discussion of the legal issues;⁶¹ it is sufficient to point to a number of indicators which support our interpretation.

One legal basis at the disposal of the ECJ to structure the Europeanisation of risk regulation stems from primary law, and, in particular, the use of Article 30.

As the ECJ has consistently held in its review of national legislation, Member States must not simply rely on Article 36 when defending a national regulation; where they are concerned about public health, 'the risk must be measured, not according to the yardstick of general conjecture, but on the basis of relevant scientific research'.⁶² With this requirement, the Court restricts legislative discretion and imposes standards on decision-making processes within the Member States.

Once it had been established that legislation must be backed by relevant *scientific* evidence, it became unavoidable to decide upon the validity of such evidence. The ECJ has wrestled with this problem. Member States were asked to respect 'the findings of international scientific research, and, in particular, the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the Food and Agriculture Organisation of the UN (FAO) and the World Health Organization (WHO)'.⁶³ The expert committees to which the ECJ refers, however, often do not arrive at a uniform and globally applicable conclusion. Disagreements are taken as an indicator of the difficulties and uncertainties of risk assessments which enhance the discretionary power of legitimised decision-makers, without, however, giving them *carte blanche*.⁶⁴

A more extensive body of case law concerns the constraints upon the discretion of decision-makers within European committees and there are a few cases which have considered directly the decision-making procedures:

One important step taken by the ECJ is the judgment concerning the non-consultation of the Scientific Committee on Cosmetology. The Court stated: 'The drafting and adaptation of Community rules governing cosmetic products are founded on scientific and technical assessments which must themselves be based on the results of the latest international research (...)'.⁶⁵ To adopt this requirement amounts to the de-authorisation of two Community institutions: neither the Commission nor the 'Committee on the Adaptation to Technical Progress of the Directives on the Removal of Technical Barriers to Trade in the Cosmetic Products Sector' which consists exclusively of representatives of the Member States, is in a position to carry out the type of assessment which 'in the nature of things and apart from any provision laid down to that effect' requires the assistance of 'experts on scientific and technical issues delegated by the Member States'.⁶⁶ Experts must not take over; but they must be heard!

One thought provoking American observer predicts that the statement-of-reasons requirement of Article 190 will serve as the key to open the door of judicial control over the European regulatory process.⁶⁷ The ECJ seems to remain sceptical and cautious. The Court tends to treat the Council as a normal *legislature*,

⁶¹ Cf, more comprehensively Joerges, 'Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalised Governance Structures', EUI Working Paper RSC 10/1996 (forthcoming in C. Joerges/K.-H. Ladeur/E. Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making* (Nomos, 1997).

⁶² Cf, as a recent example Case 17/93 *Van der Veldt* [1994] ECR I-3537 at 3560.

⁶³ Cf, e.g. Case 178/84 *Reinheitsgebot* [1987] ECR 1227 at 1274.

⁶⁴ Cf, e.g. Case 272/80 *Biologische Producten* [1981] ECR 3277 at 3292, and Cs 2047/84 *Léon Motte* [1985] 3887 at 3904.

⁶⁵ Cs 12/91 *Angelopharm* [1993] ECR I-171 at 210.

⁶⁶ *Ibid*, at 211 (para. 33).

⁶⁷ Shapiro, 'Codification of Administrative Law: The U.S. and the Union', (1996) 2 *ELJ* 26 at 44-45.

enjoying a very wide margin of discretion.⁶⁸ The discretion of the Commission, however, has been controlled more stringently. A further step has been taken in relation to decisions concerning individual rights of direct action. The statement of reasons required by Article 190 'must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority (...) in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction.' This is the Court's only statement of its prior jurisprudence in *Hauptzollamt München-Mitte v Technische Universität München*.⁶⁹ The importance of this ruling results from its concurrent recognition of basic procedural rights: where Community institutions have the power to carry out complex technical appraisals, respect for the rights of individuals is to be ensured by the 'duty of the competent Community institutions to examine carefully and impartially all the relevant aspects of the individual case, the rights of the persons concerned to make their views known and to have an adequately reasoned decision'.⁷⁰

This does not suggest that the authority of the ECJ is backing our vision of a law of transnational governance, which would avoid both the pitfalls of intergovernmentalism and of building up a centralised technocratic governance structure. What we contend, however, is that the case law remains compatible with the normative vision we are trying to elaborate.

B Comitology in the Perspectives of Political Science

Our interest in the analytical and prescriptive potential of political sciences is guided by our own research objectives. It is not our aim to present an analytical model and explain the functioning of Comitology; rather, we hope to demonstrate why both an adequate description and any normative assessment of Comitology needs to cope with the issues we have listed before turning to disciplinary analyses.⁷¹ We suggest that our list can serve as a yardstick to assist the comparison and assessment of the problem-solving capacity of competing approaches. This implies that we look first for the analytical capacity to acknowledge the interaction of supranational and national, governmental and non-governmental actors; secondly, for the sensitivity to capture the economic, political and ethical facets of risk assessments and their social acceptability; and thirdly, for the potential to appreciate both the impact of institutions and of normative commitments of the actors involved.

The overview could only appear comprehensive if we would confine it to studies which focused on the committee system. Our broader interdisciplinary interests in analyses of the normative structures of social action, the effects of law, the social acceptability of, and compliance with, regulatory policies, however, suggest a stronger epistemological orientation along the dividing lines between realism, utilitarianism and constructivism.

Intergovernmentalism and Agency Structures

It is one thing to acknowledge in studies on European integration that institutional patterns and legal actors matter and quite another to come to grips with that impact. The high visibility of the legal frameworks under which actors operate in the EU, well-documented interadministrative co-operative relations, the dense networks among a multiplicity of actors have not led intergovernmentalists and neorealists to abandon their paradigms. These three factors merely require that the general assumptions of international anarchy and interaction patterns among states be relaxed and modified.

⁶⁸ Cf, Cs C-331/88, *Fedesa and Others*, at 4063.

⁶⁹ Cs. C-269/90 [1991] ECR I/5469 at 5499.

⁷⁰ At 5499.

⁷¹ Cf, section I B *supra*, text accompanying n 20 - n 36.

One such modification has recently been put forward by Pollack in his attempt to understand the role of supranational institutions on the basis of an enrichment of rational choice institutionalist theory by general insights into 'principal-agent' relationships.⁷² From the Member States' perspective, the argument is that the delegation of competences by an act of Council to the Commission establishes an interest in policing the agent (the Commission). The ensuing conflicting institutional interests seem obvious; contrary to the Commission, which tends to promote the liberalisation of markets, individual Member States balance the collective aim of deepening the internal market with their specific interests in economic and social protection.

In order to bridge this conflict between the Commission and Member States, the latter have been keen to establish mechanisms ensuring compliance of the Commission with their objectives. The Comitology decision of the Council⁷³ can then be interpreted as representing the Council's concern with its control powers. The different procedures provided in the Comitology decision involve specific mixtures of autonomy of the Commission and control by the Member States which, in turn, have varying effects on the efficiency of the implementation process and influence the relation of group rationality as opposed to the protection of specific interests of one of the principals.

Intergovernmentalists advocate that the unequal distribution of power among Member States is an important variable in the explanation of interaction speaking. Generally, intergovernmentalism seems to assume that the powerful interest of domestic industries to achieve a specific regulatory outcome, with its attendant substantial economic costs or benefits, will induce these industries to provide their national administration with 'objective' arguments such as scientific evidence to defend their position.⁷⁴ Thus, on the one hand those countries with only marginal interests in achieving a specific result find themselves on the 'demand side' of expertise and will be more inclined to accept European suggestions which shape their regulatory preferences; on the other, those countries which host industries with a strong economic interest may rather be on the supply side and therefore more keen to convince, and capable of convincing, other parties of their point of view. The process of framing the way in which problems are defined and being dealt with may, therefore, often be rather asymmetrical.

Asymmetrical power resources do not diminish under the conditions of institutionalised interactions but are well presented in terms of a variety of capacities. In Comitology, power-play among Member States is not exercised through open threats but by setting the terms of discourse in which interaction is to be conducted. By emphasising the need to provide reasons, administrations without the requisite resources for elaborating their reasoning in 'reasonable terms' (terms which are backed by scientific evidence and refer to agreed upon standards), face serious difficulties in giving credence to their position. Because of the function of scientific discourse to serve as a filter for claims, it is very difficult for participants to maintain positions without being backed by generally acceptable arguments. Their arguments are easily delegitimised by the terms of the discourse. The rather high level of consumer protection by which the decision of the StCF is most often characterised, therefore does not only reflect the reasonability of its deliberations but also the 'silencing' of relatively powerless Member States. The silence on distributive concerns therefore mirrors the dominance of powerful Member States and a discourse which strongly works in favour of their interests.

Political scientists have a great record in demystifying the normative world of legal discourse. Nevertheless it is legitimate to ask whether this search for realism is itself realistic. The modelling of the relations between the Member States and the Commission with the help of the principal-agent paradigm

⁷² Pollack, 'Obedient Servant or Runaway Eurocracy? Delegation, Agency, and Agenda Setting in the European Community', (Harvard Working Paper No. 95-10, 1995).

⁷³ N 6 *supra*.

⁷⁴ This argument has been supported by several interviews conducted with representatives from the Bund für Lebensmittelrecht und Lebensmittelkunde (BLL), 14.02.96, the Confederation of the Food and Drink Industries of the EU (CIAA), 26.04.96 and an official from the Bundesministerium für Gesundheit, Bonn, 28.02.96.

seems to add a greater degree of plausibility to the suggestion that the quality of reasoning, the authority of experts and the commitments to legal rules and principles matter in a way rational utilitarianism is unable to conceptualise. If and because the interests of the many principles of the Commission are not uniform but nevertheless remain in favour of establishing a single market, it seems highly likely that the principals can be persuaded to engage in serious deliberations and accept their outcome. Even the advantages that economically strong Member States enjoy in articulating their positions do not necessarily denounce the 'quality' of the interaction within committees; Member States which do not yet have a defined position on specific issues may be well advised to take a free ride on the findings of their stronger neighbours and develop their preferences accordingly.

Functional Supranationalism

Pioneering studies of the committee system have underlined the importance of interadministrative partnership⁷⁵ and the potential of the Commission to shape the transnational flow of information. The Commission can exert this power because it holds due to its superior information that enables it to determine the agenda of the whole system.⁷⁶ From a supranational perspective, it is not the Member States' interests which dominate European politics but rather European institutions which have the capacity to channel and influence Member State interaction in a way that is compatible with European interests.

Important factors strengthen the bargaining power of the Commission; in preparing its proposals the Commission manages to use the authority of the Scientific Committee for Foodstuffs (SCF) which is consulted whenever this seems appropriate to the Commission.⁷⁷ Although the ECJ has now insisted on the consultation of the scientific committees whenever 'the nature of things' so requires,⁷⁸ the Commission remains in a position to decide whether this condition is met.⁷⁹ As far as scientific evidence in Comitology is accepted to be the most valid currency for making convincing arguments, this is an important bargaining-chip which the Commission uses intelligently to support those arguments which suit its own goals. The second most important function of the Commission is to chair the negotiations about the adoption of its proposals and to set the agenda of the committee and the working groups. In combining different topics in one session, the Commission can not only encourage package-deals among the Member States and itself but also place a high demand on the technical expertise of Member States' delegations whose limited resources are not always able to meet the standard. It comes as no surprise to learn that overloaded agendas and the pressure of the Commission to proceed according to tight timetables remain of central concern to the delegations. Member States in the StCF frequently express concern about the Commission's efforts to speed up negotiations. The period of time which is put at the disposal of national delegations to respond to the Commissions' proposals and formulate their own interests and positions is sometimes reduced to a few weeks.⁸⁰ In general, this does not leave enough

⁷⁵ Wessels, *op cit* n 1 and 'Verwaltung im EG-Mehrebenensystem: Auf dem Weg zur Megabürokratie?', in M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration: (Leske und Budrich, 1996)*, 165-192.

⁷⁶ Bach, 'Vom Zweckverband zum technokratischen Regime: Politische Legitimation und institutionelle Verselbständigung in der Europäischen Gemeinschaft' in H.-A. Winkler and H. Kaelble (eds), *Nationalismus - Nationalitäten - Supranationalität* (Stuttgart, 1993).

⁷⁷ Not surprisingly, the Commission explicitly rejects demands for a more autonomous and self-conscious role of the SCF which include the right of the SCF to give opinions without being asked (cf, Interview conducted with Commissions' official at DG III, Brussels 22.02.96). The Commissions' practice of instrumentalising the SCF is a fact which is heavily critiqued by a number of delegates; cf, Interview conducted with official from the Permanent Representation of Germany in Brussels, 26.04.96.

⁷⁸ Cf, n 28 and n 59 *supra*.

⁷⁹ For challenging the opinion of the Commission if the conditions for asking the StCF are met, Member States must apply to the European Court of Justice - a time, energy and money consuming undertaking.

⁸⁰ The rules of procedure of the StCF require that all documents related to the sessions of the committee (e.g. the notice conveying the meeting, the agenda, the draft measures on which the committee's opinion is requested)

room for domestic consultations with all interested parties.⁸¹ The Commission does not hesitate to take a vote on proposals where consensus is unattainable and voting is the only successful option within the tight time-limit. Consequently, a number of respondents to our questionnaire⁸² argued that the whole process of negotiation is not only heavily influenced but even dominated by the Commission. Apart from one respondent, all delegates expressed concerns either about the Commission being too assertive in pushing for results or for using its competences too extensively.

The whole argument turns the insights of the principal-agent thesis on its head. It rests on the assumption that the Commission, and eventually its partners in national administrations, will be able to define and implement a common agenda. If one considers the difficulties of identifying risks, the problems of balancing the costs and benefits of regulatory decisions, the need to explore new issues and deal with the many uncertainties of risk management, the picture drawn of the Commission starts to look so simplistic that it becomes highly implausible. Not only is the Commission dependent upon co-operation; it also needs to bring about a type of consensus that stabilises its own prerogative. Is this possible without a 'sound' basis of decision-making and the reputation of acting as a 'fair' broker between conflicting interests and concerns?

Constructivism

Constructivist approaches conceptualise social norms as an important independent variable for explaining the behaviour of (national) actors.⁸³ Their argument builds upon two principles; first, people act towards objects, including other actors, on the basis of the meanings that the objects have for them, and second, the meanings in terms of which action is organised arise out of interaction.⁸⁴ The identity of actors, therefore, is understood as being 'an inherently social definition of the actor grounded in the theories which actors collectively hold about themselves and one another and which constitute the structure of the social world'.⁸⁵ Consequently, the institutionalisation of interaction is not conceived of as being only a device for overcoming problems of interdependence and co-operation but also as a process of internalising new preferences and even identities. Institutionalisation therefore is not something occurring outside actors and only affecting their behaviour but it is a cognitive process that involves a redefinition of the self and the other.

must reach the offices of the permanent representatives of the Member States not later than 21 days before the date of the meeting (Art. 3). In urgent cases, however, the chairman of the committee may shorten the time to 10 clear working days or even include an item on the agenda for a meeting in the course of that meeting (in cases of 'extreme urgency').

⁸¹ This problem is obviously even more demanding for the German Länder which must consult one another before being able to reach common positions. It also highlights the difficulties Germany's federal structure faces in being compatible with the demands for decision-making under intense time pressure (cf. interviews conducted with officials at the Landesuntersuchungsamt für die amtliche Lebensmittelüberwachung, Bremen, 15.01.96, the Behörde für Arbeit, Gesundheit und Soziales der Freien Hansestadt Hamburg, 29.04.96, the Niedersächsisches Ministerium für Landwirtschaft und Forsten, Hannover, 3.05.96, a representative of the Bundesrat, Wiesbaden, 15.08.96 and the Ministerium für Umwelt, Raumordnung und Landwirtschaft des Landes Nordrhein-Westfalen, 4.06.96).

⁸² One element of our empirical investigations has been to distribute a questionnaire among the delegates in the StCF.

⁸³ For an illuminating critic of rationalism cf. Wendt, 'Anarchy is What States Make of it: the Social Construction of Power Politics', (1993) 46 *International Organization* 391-425, Risse-Kappen, 'Exploring the nature of the beast: International relations theory and comparative politics analysis meets the European Union', (1996) 34 *JCMS* 53-80.

⁸⁴ Wendt, *op cit* at 403.

⁸⁵ *Ibid*, at 398.

It seems important to note that negotiations among delegations may last for years with the same personnel attending. Delegates meet frequently not only during the sessions of the Standing Committee but have very often also met another before in the preparation of draft legislation and the negotiations about its adoption in the Council's working groups.⁸⁶ During the course of working together, delegates approximate not only national legal provisions but also different problem definitions and problem-solving philosophies. They slowly move from representatives of the national interest to representatives of a Europeanised interadministrative discourse in which mutual learning and understanding of each others difficulties surrounding the implementation of standards becomes of central importance. The emergence of shared feelings of interadministrative partnership is crucial to understanding the course of the negotiation because the control which national governments have on delegates is generally rather weak. Sometimes, governments have not defined their preferences and therefore leave delegates a wide margin of discretion. In other instances, delegates use their unique informational status to influence their governments' perception of their own preferences or even simply by-pass them.⁸⁷ It is not by accident that even the intergovernmental Committee of Permanent Representatives (COREPER) is commonly known in the German administration as the 'Committee of Permanent Traitors'.⁸⁸ And it is exactly for this reason that observers of international negotiations have always pointed to the double-edged character of the actions of delegates: they do not only perform strategic bargaining with the aim of maximising particular utilities by trying to externalise costs and internalise benefits but also deliberative problem-solving with a rather problem-oriented approach and the aim of finding solutions which maximise collective utilities.

Law

All three of the approaches outlined above help to identify specifics of the Comitology system including its neglect of economic/distributive concerns. Intergovernmentalism adds to it the bargaining power of the highly-regulated Member States. Supranationalism points to the strength of the Commission in emphasising the goal of deepening the internal market. Constructivism explains the emergence of some sense of Europeanisation on part of the delegates. In our comments we have always rephrased one single observation: although it seems simply realistic to insist on the importance of argument and discursive processes in the decision-making of committees, one should accept that it is impossible to measure the 'real weight' of an argument against the interests it furthers, to detect whether the reasons given for a decision reflect its real motivation. To accept this impossibility is not to devalue the quality of decision-making processes which are based on arguments valid and acceptable in principle for all participants. On the contrary, scepticism as to the force or practical impact of reason in real-world processes is a good reason to establish institutions furthering the respect for good arguments and imposing pertinent constraints; this is why decision-making should become embedded into Law. This then leads to the final step of our argument; it is submitted that the constitutional commitments of the actors involved should 'govern' the operation of committees and ensure a deliberative style of policy-making. This is a complicated suggestion. It requires us to substantiate our normative perspectives on European governance in general and on risk regulation in particular.

IV Deliberative Supranationalism

The disciplinary analyses we have submitted converge in one important respect: they support a *sui generis* characterisation of the European polity. As our overview of the legal debate emphasised, the many unsettled legal problems with Comitology all confirm our observation that the committee system does not fit into the interpretation of the EC-system as either a supra-national legal order or a mere

⁸⁶ On the following cf. the findings of Lewis, 'Constructing Interests: EU Membership, COREPER and the Constitutive Processes of National Preference Formation' (Manuscript Cologne/Madison, WI 1996).

⁸⁷ Interview conducted with official from the Bundesministerium für Gesundheit, Bonn, 28.02.96.

⁸⁸ Interview conducted with official from the Permanent Representation of Germany in Brussels, 26.04.96.

association of nation-states. Comitology, so we have asserted, must rather be interpreted as positively evidencing that transnational markets can be governed by institutions representing 'more than a regime and less than a federation'. Similarly, our search in current integration research for an analytic approach which is compatible with our empirical evidence confirms the emergence of governance structures which can no longer be attributed to either nation-states or a supranational state-like entity. These findings certainly lend support to our hypotheses at the outset of this contribution and they are very much in line with widely shared views on the *sui generis* character of the European Community.⁸⁹

However, the insight that Comitology presents itself as Queen's evidence for the *de facto* emergence and the legal recognition of transnational governance structures should not be read as the conclusion but rather understood as the intellectual challenge of our story. If and because lawyers cannot content themselves with equating the factual with the normative; if and because political scientists are expected to be interested in the 'quality' of the emerging European polity, we have to come to terms with the normative ambivalence of our findings.

These, then, are the issues we need to consider. We will first identify and defend a general normative vision which responds to the normative ambivalence of our findings, this vision we term 'deliberative supranationalism' (*infra A*); second, we will substantiate our general notion for the field under scrutiny, namely the regulation of product risks through the committee system (*infra B*); third, we will concretise our concepts further with a view to developing a legal framework for the Europeanisation of risk policies (*infra C*). Each step of the argument is normative in that it strives to identify criteria which should enable us to address, ensure and improve the 'quality' of non-hierarchical transnational governance. We attribute to our normative ideas the characteristics of regulative principles which are capable of guiding the assessments of decisional problems, the further elaboration of institutional frameworks and legal principles. At each of the three levels of our normative deliberations, and in our efforts to bridge the gap between normative ideas and actual policy-making and decision-taking, a crucial function will be ascribed to the 'law'. In this sense our argument is trans-disciplinary and paraphrases a classical problem in our specific context: how do institutions affect social practices; how might institutions help to discipline politics? It goes without saying that we do not deal with that problem in general because we are exclusively concerned with the potential of legal commitments to structure regulatory practices within the EC.

A Constitutionalism Beyond the Nation-State

In a recent summary of the discussion and her own vision of democratic legitimacy, Benhabib lists three tasks modern democratic societies have to face, namely securing legitimacy, economic welfare and 'a viable sense of collective identity'.⁹⁰ Any resolution of these tasks, so the proponents of the theory claim, depends upon the institutionalisation of a public sphere of opinion formation, and the recognition of basic rights - basically, on the institutional achievements of constitutional states. This is at least the common understanding of those legal theorists and constitutionalists who have transposed the deliberative model of democracy into the legal discourse thereby equating the legitimacy of modern law with its backing by democratic political institutions - and vice versa: no valid law outside democracy, no democracy without law.⁹¹

⁸⁹ Cf, for an elaboration of these perspectives Jachtenfuchs, 'Theoretical Perspectives on European Governance', (1995) 1 *ELJ* 115-133; Jachtenfuchs and Kohler-Koch, 'Regieren im dynamischen Mehrebenensystem', in M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration* (Leske und Budrich, 1996), 15-44.

⁹⁰ Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy', in S. Benhabib (ed), *Democracy and Difference. Contesting the Boundaries of the Political* (Princeton UP, 1994), 67-94; for the impact of these ideas in Europe cf, e.g. E.O. Erikson, *Deliberative Democracy and the Politics of Pluralist Societies*, Arena Working Paper 6/94, Oslo 1994.

⁹¹ Cf, most recently O. Gerstenberg, *Bürgerrechte und deliberative Demokratie* (Suhrkamp, 1997).

The nation-state foundations of such arguments are readily apparent. We therefore do not by any means suggest that the deliberative model of legitimate governance could be simply 'applied' at the EC level. The notion of deliberative supranationalism denotes a long-term project which needs to be elaborated in two dimensions. It should be read as compensating shortcomings ('failures') of constitutional nation-states and thus present a normative basis for supranational constitutional commitments; it should, however, also draw upon deliberative ideals in structuring supranationalism.

The kernel of our argument is⁹² the legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. If and because democracies presuppose and represent collective identities, they have very few mechanisms ensuring that 'foreign' identities and their interests be taken into account within their decision-making processes. The legitimacy of supranational institutions can be designed as a cure to these deficiencies - as a correction of 'nation-state failures' as it were. It seems easy to detect such elements in European law and to base its claim to supranational validity on exactly these normative quality. Thus, the non-discrimination guarantee of Article 6 can be read as aiming at compensating the particularism of national basic rights; similarly, the prohibition of protectionist policies by Article 30 can be read as meaning that European nation-states must not try to resolve their economic and social problems at the cost of their neighbours.⁹³ The constitutionalisation of such principles is in line with the ideals embodied in democratic constitutions and legal supranationalism can thus be understood as complementing common features of national constitutionalist traditions.

We also submit that they entail a normatively attractive response to so many critics of the European project and that they can be elaborated into a supranational version of the deliberative reading of pluralism. Assuming that 'we the peoples' of Europe do not wish to build up a Federal State which would be entrusted with the whole range of tasks which were once assigned to constitutional nation-states; and given that we are nevertheless to live with an opening of the borders of our formerly national economies, we are bound to strive towards an unprecedented polity. We must conceptualise supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but at the same time clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimised states and with the supranational prerogatives that an institutionalisation of this interdependence requires. The legitimacy of supranational constraints imposed upon the sovereignty of constitutional states can in principle be easily understood. Extra-territorial effects of national policies may be intended, indeed they are real and unavoidable in an economically and socially interdependent community. This raises the question of how can a constitutional state legitimise the burden it unilaterally imposes upon its neighbours? 'No taxation without representation' - this principle can claim universal validity; the very idea of democratic constitutionalism requires that constitutional states apply this principle against themselves. A supranational constitutional charter therefore does not need to represent a new 'state'. Nor does supranationalism require that democracies concede a right to vote to non-nationals. What it does require is that the interests and concerns of non-nationals should be considered even within the national polity. In this sense, supranationalism does convey *political* rights and not just economic freedoms to Community citizens. Supranationalism is therefore to be understood as a fundamentally *democratic* concept. 'Supremacy' of European law can and should be read as giving voice to 'foreign' concerns and imposing corresponding constraints upon Member States. What supremacy requires, then, is the identification of rules and principles ensuring the co-existence of different constituencies and the compatibility of these

⁹² Although we may have used a neologism, we believe that it will be possible to identify many parallels to our ideas. Especially international relations scholars seem increasingly aware of the normative problematic of the core concepts of power and interest; what they term a 'domestication' of international politics refers to the sectorial and/or gradual transformation of international anarchy into a more civilised (rule bound) system. Cf. Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?', (1996) 34 *Journal of Common Market Studies* 29-51.

⁹³ Cf. Weiler, 'Fin-de-Siècle Europe', in R. Dehousse (ed), *Europe After Maastricht. An Ever Closer Union?* (Beck, 1994), 203-216.

constituencies' objectives with the common concerns they share. Community law is to lay down a legal framework which structures political deliberation about exactly these issues. It is a constitutional mandate of the ECJ to protect such legal structures and principles and to resolve controversies surrounding their contents.

B Social Regulation, its Insulation in the EC and National Concerns

In the context of our enquiries into the legal framework for European social regulation, it is certainly important to consider those elements of the *acquis communautaire* which function as a stable legal framework for the implementation process. These are two outstanding general problems: the insulation of risk assessment policies from national economic ('industrial policy') concerns⁹⁴ and the need to delineate Community and national powers in the normative/political elements of risk regulation. A closely related issue concerns the transposition of general normative commitments into concrete decisional practices which a juridification of the practices within Comitology is to ensure.

The fields of product regulation belong to those core activities where the EC has been specifically active and successful. Following Majone, the focus of European policies on areas of social regulation and the insulation of regulatory activities from what he calls distributive concerns is not only an empirically and analytically adequate characterisation of the EC's political practice, but also a normatively sound orientation.⁹⁵ Majone's characterisation of the EC's regulatory activities strikes us as capturing perfectly well the EC's policy *agenda* at any rate in the field of *product* regulation. In that sense, we cannot but subscribe to his analysis. The famous rejection of traditional harmonisation strategies back in 1985 and the entirely new approach were indeed a deliberate response to the constant subversion of the Community's market-building objective by the unanimity requirement which prevented the adoption of comprehensive regulatory programmes and protected parochial orientations of each and every Member State towards the furthering of the economic well-being of its national constituency.

However, as we have already pointed out,⁹⁶ we suggest a much more differentiated analysis. First, we would like to distinguish between 'industrial policy' objectives and the more diffuse impact of regulatory policies on the 'distribution of risks' and their costs. The political and normative prerequisites for insulating social regulation from these consequences are as diverse as their economic implications. Second, we believe that the political-normative and ethical dimensions of risk regulation in our fields militate both empirically and normatively in favour of institutional compromises between the strengthening of non-majoritarian institutions and the preservation of co-operative forms of governance allowing for flexibility towards national concerns. 'Double Pluralism' may be an adequate term to denote our normative intuition and its relation to the concept of deliberative supranationalism.

Insulation from Economic Implications

The price for European regulatory policies is to be paid for, at the end of the day, by industry and consumers. This burden, however, is by no means uniform throughout the Community. The economies of high standard countries are privileged by high standards of protection. There can be no doubt that industrial policy concerns connected with the adoption of specific regulatory strategies rank high on the agenda of national political actors and negotiators at European level. Is it practically conceivable, or at least normatively sound, to support a systematic disregard of these implications? Our answer to this

⁹⁴ For the terminology used cf. section II B (2) *supra*.

⁹⁵ Majone, 'The European Community: An "Independent Fourth Branch of Government"?', in G. Brüggemeier (ed), *Verfassungen für ein ziviles Europa* (Nomos, 1994), 23-43; cf. the analyses of Caparaso, *op cit* n 86, 39-44; Everson, 'Independent Agencies: Hierarchy Beaters?' (1995) 1 *ELJ* 180-204; Majone's argument is once more systematically and in full clarity presented in G. Majone, *Regulating Europe*, (Routledge, 1996) at 284-300.

⁹⁶ Section II B *supra*.

question is specific. In order to explain our suggestions, we have to take up once again the distinction between 'industrial policies' and 'risk distribution'.

Contrary to our contention, the whole European single market programme and similarly, the case law of the ECJ on Articles 30 and 36 since the decision in *Cassis de Dijon* can and have been read as supporting and furthering the insulation of social regulation without any further distinction from all 'distributive' concerns. In our view, this jurisprudence requires a more subtle interpretation.⁹⁷ One should first note that the ECJ has never questioned, in principle, the regulatory autonomy of the Member States nor subjected them to some comprehensive deregulatory programme. What the Court did was to impose duties of justification on Member States pursuing regulatory policies which seem incompatible with the economic objective of establishing a single market. The Court took both principles enshrined in the Treaty's provisions seriously: the free trade and anti-protectionism objectives of Article 30 *and* the respect for the regulatory autonomy of constitutional states contained in Article 36. What political scientists rightly perceive as an 'insulation' of social regulation from 'distributive' concerns must at the same time be appreciated as an effort of the legal system to mitigate between two conceptually different concerns and to find rules which the specifically European regulatory pluralism requires. Our reading of the Court's jurisprudence as ensuring the compatibility of the commitments to establishing a common market and respecting the regulatory concerns of constitutional states is first of all a rejection of an interpretation of the ECJ's jurisprudence as a deregulatory agenda. This reading affects, however, the normative evaluation of 'distributional' concerns. It seems logical to infer from the ECJ's case law that no Member State can defend its own low regulatory standards against a higher level of protection realised in a European standard. The regulatory autonomy to expose its own citizens to higher risks than those agreed upon at a European level is indeed lost. Does this imply that the European Community should not care about the implication of its policies for national economies? To demonstrate the normative contents of this issue there is a recent example: the British Government must not claim the regulatory autonomy to expose European citizens to the risks inherent in its management of the disease of BSE. But would it be justified to impose all the costs of BSE on the British economy? To ask the Community to share the economic burden of BSE with the UK is to view BSE as an accident which does not find the UK Government (and its citizens) liable.

Any interpretation of the ECJ's jurisprudence should consider the limitation of the Court's oversight. It is one thing to search for rules ensuring the compatibility of the single market project with national regulatory concerns. It is quite another to impose an economic solidarity on European societies. When asked whether the Community is entitled to treat BSE as an accident and use its resources to compensate British farmers for their losses, would the ECJ interfere? Certainly not. This reluctance is our answer to the insulation issue: the legal rules and principles favouring the insulation of the Comitology committees from economic considerations are justified insofar as they disregard the prerogatives of Member States to determine for themselves the level of risk to which their citizens are exposed. The disregard of 'industrial policy' implications, however, can only be pragmatically justified with respect to the fact, that such implications cannot be adequately dealt with in the implementation process.

Experts, Laymen and Public Concerns

Our second general observation on the nature of risk regulation concerned the political-normative elements of decision-making which cannot be reduced due to aggregated costs and benefits, - an experts' judgment cannot claim a per se higher rationality than those of laymen.⁹⁸ In the EC context, this well-known problem exhibits specific facets which can be exposed by reflecting on the meaning of well-established legal principles.

⁹⁷ On the following cf, more extensively Joerges, 'Scientific Expertise...', *op cit* n 55 and for a similar interpretation M. Poiaras Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedoms and Political Rights' (1997) 3 *ELJ*, 55 at 73-79.

⁹⁸ Cf, the references in n 22 *supra*.

The normative elements of risk assessments form part of the political agenda of constitutional states. They exemplify the importance of a public sphere of continuous deliberation - including the need to rationalise such deliberations through adequate institutional frameworks. Such considerations clearly militate against centralised decisional powers in the EC. On the other hand, once it is acknowledged that constitutional nation-states are not entitled or legitimised to treat their preferences and interests simply as 'given' (just like economic theories tend to treat the preferences of consumers), one must be ready to relativise the decisional autonomy of national societies, to accept supranational intervention even into the normative realm of risk assessment. Furthermore, there must be a continued awareness of the fact that even within constitutional states the risk problem has inspired many institutional innovations. To indicate just one aspect: the elaboration of sound standards is nowhere left to Parliaments instructing administrative bodies and courts. The political arenas of risk regulation are more dispersed and often fragmented. Once the indispensability of delegating regulatory issues to representative but specialised arenas is recognised, Europeanisation processes can be perceived as a chance rather than a threat.⁹⁹ Not only do they enhance the opportunities for the generation of knowledge, they also entail chances for the broadening and deepening of debates among experts and the strengthening of non-professional associations.

The weighing of supranational prerogatives against national competences is a background agenda not only of the jurisprudence on Articles 30 and 36, but also on residual national competences under Article 100a (4), within safeguard procedures and the pre-emptive effects of secondary Community law. These issues are particularly sensitive after the introduction of majority voting; of course, even under the unanimity rule, tension between supranational powers and national concerns was frequently felt and resolved by the ECJ. However, with the growing involvement of the Community into regulatory policies in general and risk regulation in particular, the search for a European-wide co-ordination of risk management becomes ever more important. Both centralisation of decisional powers and European level and the defence of national competences would seem counter-productive. The committee system which couples decision-making across territorial boundaries, which encourages European-wide co-ordination of policies without completely pre-empting national reactions proves to be a sensible compromise -- both politically and normatively. Until 1987, the legitimacy of EC decision-making rested upon the unanimous consent of governments. The reliance on governmental will was at the same time the starting point of intergovernmentalism in political science. To be sure, even before the SEA of 1987, the ECJ's interpretation of EC law had identified (and to some degree cured), the deficiencies of these positions: Governments were to respect rights granted by the Treaty. They must not define their policies unilaterally, but must think about their compatibility with the rights and interests of other EC citizens. In other words: supranationalism not only requires the Community to respect a pluralism of regulatory concerns; it also requires that national regulators are exposed to transnational arenas scrutinising the validity of their arguments.

IV Conclusion: Comitology as a Supranational Political Forum

The establishment of non-hierarchical governance structures turns out to be an indispensable prerequisite of the functioning of the Common Market. This type of governance will depend upon persuasion, argument and discursive processes rather than on command, control and/or strategic action. Positive normative connotations with this assertion can be claimed in theory. Any equation of the legal and administrative practices we have described with a normatively attractive new model of governance

⁹⁹ V. Eichener, in his recent Habilitation Thesis (n.1) as well as in some earlier work, refers to Joshua Cohen's and Joel Rodgers' concept of 'associational democracy' ('Solidarity, Democracy, Association', in W. Streeck (ed) *Staat und Verbände*, (1994) 35 *Politische Vierteljahresschrift (Sonderheft 25)* 136-159 as a legitimising background theory. The equation of national and transnational conditions seems, however, premature; cf, Everson, *op cit* n 1 and Gerstenberg, *op cit* n 84 at 119-126.

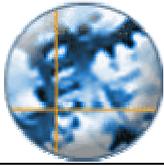
would, however, still be premature. Two kind of issues need to be explored further before we can present affirmative or deconstructive conclusions. First, we have to develop and explain the normative yardsticks against which we want to measure the Comitology system. Second, we will have to operationalise more precisely the categories and concepts on which we rely with a view to assessing the practices we have identified in a more reliable way.

Notwithstanding these challenges, we feel able to assert: that intrusions into national autonomy must be complemented by positive supranational decision-making. The questioning of national autonomy and the (supranational) judicial control of its limits implies that supranational decision-making cannot be left to the state of nature, but requires its own legitimacy. Just as problem-solving within constitutional states is bound to respect individual rights and democratic procedures, supranational interactions aiming at mutually acceptable problem-solving must not be conceived as merely strategic games. It would be the task of the law to further this kind of orientation, for example through: clear commitments represented primarily by the Commission to arrive at a common solution; the establishment of fora where the views of all concerned societies can be included; legal principles and rules civilising the decision-making process and providing an institutional context for practical reasoning; to ensure the potential of the system to manage tensions between output rationality (high standards), procedural transparency and fairness; to control the regulatory bargaining power of individual states; to promote the generation and dissemination of knowledge.

Table: Compilation of questionnaires from 14 delegates of 11 Member States in the Standing Committee for Foodstuffs*

| | | | | | | | | | | | |
|--|--------------------------|-------------------------------------|-------------------------------------|----------------------------|-----------------------------------|--|-------------------------------|-----------------------------|---|--|---|
| MS identified according to voting weight under Art. 148(2) EEC | 10 (I+II) | 10 | 5 | 5 | 5 | 5 | 4 | 3 | 3 (I+II) | 2 | 0 (I+II) |
| Representation in other European food bodies | three | some | some | some | four | some | no | three | some | three | some |
| Delegate to StCF since | 1986; 1992 | 1988 | 1985 | 1996 | 1994 | 1975 | 1994 | 1994 | 1995 | 1972 | 1993; 1995 |
| Size of delegation | 2-4 | 1 | 1-2 | 1-3 | 3 | 2 | 1-2 | 1-2 | 1-4 | 1-2 | 1-3 |
| Do delegates also sit in Council? | yes | yes | yes | yes | yes | yes | no | no data? | no; yes | no data | no |
| Importance of economic considerations | secondary | difficult to answer | secondary | secondary | important but not explicit | important issue | not explicit | secondary | explicit but secondary | secondary | depends on context; not explicit |
| Importance of procedures | low | high | high | medium | low | fairly high | low | low | low | low | low |
| Where is consensus actually reached | WGs | WGs | StCF, sometimes informal | WGs | StCF or WG | WGs | WGs | mainly in WGs | StCF and WGs | WG, informal | During meetings |
| Consultation with other delegations | sometimes | sometimes informal | rarely | yes, often | sometimes | rarely | only for information exchange | rarely | rarely, only with Nordic countries | sometimes | only with Nordic countries |
| Neutrality of the COM in the StCF | own interests | objective | own interests | own interests | neutral broker | looking for majorities | own interest | own interest | neutral, mediating | mediator with own interests | own interests |
| Consultation with own government? | never | if proposals substantially modified | if proposals substantially modified | only if necessary | sometimes | no data | once | if necessary | rarely; never | if necessary | rarely; never |
| Ability to influence agenda | adequate | adequate | mostly present | adequate | adequate | adequate | adequate | adequate | adequate | adequate | adequate |
| Independence and quality of SCF | satisfactory; good | good | intransparent | very good, high reputation | high reputation, and independence | too slow, only limited independence, intransparent | no negative experience | no comment | good work, no bad experience, independent | high reputation, quality, independence | high reputation, quality, independence |
| Should SCF have rights of initiative? | no opinion; no | yes, but careful | no data | yes | no | no | no | yes | no; yes | yes | yes |
| Should Parliament participate in Comitology? | no need | yes | no, inefficient | no | no need | no need | no need | no opinion | no | no need | no need; no experience |
| Miscellaneous remarks | Commission too assertive | General satisfaction | General satisfaction | More access to SCF needed | Low, only IIIb is acceptable | Commission too dominant | Commission too dominant | high, but poor transparency | efficient, translation missing | high | No delegation of further competencies to commission |

* For reasons of confidentiality, we do not identify the responses of individual delegations with reference to nationality. Instead delegations are identified according to voting weight. Furthermore, all answers listed are our own interpretations of the responses given by delegates to a questionnaire which was distributed during the 2nd and 54th sessions of the Standing Committee of Foodstuffs. If two delegates from one country have responded, they are separated in the table (if necessary) with a semi-colon. Abbreviations: StCF denotes Standing Committee for Foodstuffs; SCF denotes Scientific Committee for Foodstuffs; WG denotes Working Group



NOTE AND QUESTIONS

Despite the improvements brought about by Council Decision 1999/468/EC in the comitology procedures, this system is still another manifestation of an overall maintenance of opacity and lack of democratic accountability in the EU decision-making.

The Commission tried to address these problems with a proposal for a new Council Decision, which would amend decision 1999/468/EC. This attempt has been followed by discussions within the Convention on the future of Europe.

7. REFORMING COMITOLOGY

7.1 Proposed Council Decision amending Decision 1999/468/EC

From: Comitology: towards a definitive solution? Available at http://europa.eu.int/futurum/documents/other/oth040503_en.pdf

In line with these orientations, the Commission put forward a proposal in December 2002 to amend the 1999 Council decision. In particular, it proposed to revise the existing regulatory procedure, for implementing measures under co-decision, by introducing two distinct phases. In the initial "executive" phase, the Commission will submit a draft measure to a committee of Member State representatives. If, by a deadline set by the Commission, the committee expresses opposition to the draft measure, an additional period will be allowed for the Commission to find a solution. The Commission's draft measure will thereafter be forwarded, in the second "control" phase, to the European Parliament and the Council. Either institution may, within a set deadline, express opposition to the Commission's draft implementing measure, in which case the Commission may either submit a legislative proposal or proceed to adopt the implementing measure, possibly amended in the light of the positions of Parliament and the Council. This procedure is complemented by an urgency procedure, allowing implementing measures to provisionally enter into force before the legislator's controls take place.

The new procedure fulfils the requirement that Council and Parliament are equal partners in overseeing the way in which the Commission discharges the implementing powers conferred upon it by legislative instruments adopted under co-decision. It takes up the precise formula of the Bourlanges Resolution allowing Council, by a qualified majority, or Parliament, by a majority of its members, to object to an implementing measure within a deadline (of maximum two instead of three) months. It recognises that the Parliament may have a say on the substance of the draft and not just a right to object that the measure exceeds the powers delegated.

It also brings in a distinction between (1) measures of general scope that implement essential aspects of the basic legislation or adapt it, including what could be called delegated legislation, which would be subject to this new procedure, and (2) measures that only have an individual scope or concern procedural or administrative arrangements, which would be subject to call-back by neither Council nor

Parliament and where the committee of national representatives would be purely advisory. The old "management committee procedure" would cease to exist.

This distinction has been accepted by Parliament in the Bourlanges resolution on the typology of acts and seems justified as long as the "procedural arrangements" do not confer rights or impose obligations of general application - something that Parliament, as co-legislator on the basic legislation, should be able to ensure.

The Commission's proposal is therefore highly satisfactory. Yet some aspects need to be clarified before giving it the "green light":

- the Commission, in case of disagreement on an implementing measure, must be obliged to take account of the objections raised by Parliament or Council. However, the Commission's proposal contains the word "possibly", implying that it is free to ignore any objections.
- The special commitments made by the Commission in the context of Financial services legislation, assuring Parliament a more favourable treatment, should, of course, continue to apply. Parliament would continue to have three months to comment on proposals during the committee phase.
- Sometimes the solution to an objection by Parliament or Council may be the simple withdrawal of the draft implementing measure, but the Commission's proposal makes no provision for this.
- Under the urgent procedure, if an objection gives rise to a full legislative procedure, the implementing measure in question might, in some circumstances, need to be maintained pending its review, to maintain legal certainty.

Major changes proposed by the Commission:

1. Advisory committees—the Commission would give itself more power, by taking away the right of the European Parliament to rule on the *vires* of proposals.

2. Management committees—this type of committee would be abolished for matters passed by Codecision of the Council and the European Parliament (which, under the Convention on the Future of Europe's draft Treaty for the EU, would become the norm).

3. Regulatory committees—the European Parliament would be given more power, but the Commission would be able to override the Parliament and the Council/the Member States.

For more information on the possible implications of the proposed Council decision see also:

<http://www.statewatch.org/docbin/evidence/Comitol.htm>. or
http://europa.eu.int/futurum/documents/other/oth040503_en.pdf

7.2 Comitology at the Convention on the Future of Europe and in the Constitution

The Convention on the Future of Europe has, *inter alia*, been examining the issue of comitology. The issue has been touched upon in four separate documents: the report of the Working Group IX on Simplification; the first draft Article 28 on Implementing Powers; in the second draft Constitution, draft Article I-36, which is an amended version of the previous Article 28; and in the final draft of the Constitution.

Working Group IX on Simplification

The Working Group on Simplification recommended a hierarchy of laws,¹⁰⁰ something which was proposed at the time of the Maastricht Treaty, but to which Member States were then hostile. The Group proposed three levels:

- (i) Legislative Acts—“acts adopted on the basis of the Treaty and containing essential elements in a given field”;
- (ii) Delegated Acts—“these acts would flesh out the detail or amend certain elements of a legislative act, under some form of authorisation defined by the legislator”; and
- (iii) Implementing Acts—“acts implementing legislative acts, ‘delegated legislation’ or acts provided for in the Treaty itself.

The third category, implementing acts, is intended to cover those measures which when taken by the Union would normally be taken by the Commission with or without a comitology procedure or exceptionally by the Council. The new category of delegated acts is also intended to cover acts to be taken by the Commission, but subject to some form of control mechanism (such as a right of call back, a period of tacit approval or a ‘sunset clause’¹⁰¹). It would appear that the proposed new category would cover measures which at present would be dealt with under comitology procedures.

What effect a distinction between delegated acts and implementing acts would have on the nature and volume of matters subject to comitology is not clear. It is noteworthy that the Working Group envisaged that the introduction of the new category of delegated acts would lead to a simplification of the comitology procedures (possibly by amendment or abolition of the regulatory committee procedure), but the Group’s report did not delve any deeper into the issue of comitology, and took the view that any analysis of Article 202 was beyond its remit.

Draft Article 28: Implementing Acts

In the Praesidium’s first draft of Article 28,¹⁰² they sought “a clarification of Article 202 TEC, which currently governs implementing powers, exercised at Union level.”¹⁰³ The paragraphs which relate to comitology are 2, 3 and 4:

“2. Where uniform conditions for the implementation of the Union’s binding acts are needed, those acts may confer implementing powers on the Commission or in specific cases and in the cases provided for in Article [CFSP], on the Council.

¹⁰⁰ CONV 424/02.

¹⁰¹ A sunset clause is a clause under which the measure automatically terminates at the end of a fixed period unless it is formally reviewed.

¹⁰² For more analysis of this Article, see our Report *The Future of Europe: Constitutional Treaty—Draft Articles 24-33* (12th Report, Session 2002-03, HL Paper 71), at pp 15-17.

¹⁰³ CONV 571/02, at p. 4.

3. Implementing acts of the Union may be subject to control mechanisms which shall be consonant with principles and rules laid down in advance by the European Parliament and Council in accordance with the legislative procedure.

4. Implementing acts of the Union shall take the form of European implementing regulations or European implementing decisions.”

Whilst paragraph 2 may be essentially the status quo, namely that implementing acts are delegated to the Commission but can exceptionally be effected by the Council, the same cannot be said of paragraph 3. The reference to “control mechanisms” (which presumably relates to comitology committees) says these should be “consonant with principles and rules laid down in advance by the European Parliament and the Council in accordance with the legislative procedure.” This would establish in the Treaty the right of the European Parliament to have a voice in comitology procedures (or at least those adopted under the “legislative procedure”, which refers to co-decision).

Second Draft Article I-36: Implementing Acts

The second draft Article on implementing acts, published following amendments submitted by Convention members on the original, repeated the first draft Article 28, but with one amendment to paragraph 3. That will now read:

“3. The law shall lay down in advance rules and general principles for the mechanisms for control by Member States over implementing acts of the Union.”¹⁰⁴

Two changes are notable here. First, the “mechanisms for control” would be exercised by the Member States. This, the Praesidium explains, is to stipulate that control is exercised in this area by Member States.¹⁰⁵

Presumably, the amendment indicates a continuation of the comitology structure. Second, the rules and principles would be laid down in advance by “the law”. Reference to the European Parliament and the Council has been deleted. We assume “the law” refers to a Decision similar to the 1999 Decision, which will provide for set procedures to be followed in implementing measures.

Final text of the Constitution

Article 37 in the official and final version of the Constitution reads as follows:

2. Where 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 Article I-40, on the Council.

3. For the purposes of paragraph 2, European laws 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.

4. Union implementing acts shall take the form of European implementing regulations or European implementing decisions.

¹⁰⁴ CONV 797/1/03 REV 1, at p. 30.

¹⁰⁵ See above, fn. 6.

8. CASE C-257/01: COMMISSION V COUNCIL

Commission of the European Communities v Council of the European Union

C-257/01

18 January 2005

Court of Justice

2005 [ECR] I -0000

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

The Convention Implementing the Schengen Agreement, signed in 1990, contains rules relating to the crossing of external borders and to visas. The arrangements implementing those rules – detailed normative provisions and practical instructions – were prescribed by the Common Manual (CM) and the Common Consular Instructions (CCI) respectively.

Following the Treaty of Amsterdam's integration of the Schengen acquis into the legal and institutional framework of the European Union, the Council, in 2001, adopted two regulations¹⁰⁶, by which, in reserving the right to exercise implementing powers itself in relation to visa applications and border surveillance, it departed from the ordinary system under which the Commission is responsible for implementing the Council's basic instruments.

Two types of procedure are thereby established for the implementation and updating of the CM and the CCI: First, certain provisions may be amended by the Council acting unanimously; second, Member States may communicate to the Council such amendments as they wish to make to other provisions.

The European Commission sought annulment of those two regulations.

Judgment:

[...]

33 The Commission puts forward two pleas in law in support of its action. The first alleges infringement of Article 202 EC and Article 1 of the second comitology decision in that, in Article 1 of each of the contested regulations, the Council reserved the right to exercise implementing

¹⁰⁶ Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (OJ 2001 L 116, p. 2), and Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (OJ 2001 L 116, p. 5).

powers itself, improperly and without giving adequate reasons for doing so. The second plea alleges infringement of Article 202 EC in that Article 2 of the contested regulations confers power on the Member States to amend, first, certain parts of the CCI and certain Executive Committee decisions supplementing the CCI and, second, parts of the CM.

First plea in law: reservation of powers to the Council

Arguments of the parties

- 34 The first plea in law comprises two parts. By the first part of the plea, the Commission submits that the Council did not establish that the specific nature of the implementing measures provided for by the contested regulations was such as to justify the exercise of implementing powers by the Council. It is clear from recital 8 in Regulation No 789/2001 and from recital 5 in Regulation No 790/2001 that the Council provided a 'generic' statement of reasons which covers an entire area of the CCI or the CM rather than a specific measure.
- 35 Those recitals describe neither the nature nor the content of the implementing powers concerned, which would show why it is necessary for the Council to exercise such powers itself, since the mere reference to visa policy and border surveillance in general terms is not sufficient to establish the specificity of the measures to be taken.
- 36 Likewise, an explanation concerning both 'the enhanced role of the Member States', which, in the Commission's submission, can refer only to the fact that under Title IV of the Treaty the Member States may take legislative initiatives, and the sensitivity, particularly as regards political relations with third countries, of questions concerning border surveillance and the issue of visas, which accounts precisely for the enhanced role of the Member States, could apply to any implementing measure adopted under Title IV of the Treaty.
- 37 Finally, the reference to the transitional period of five years provided for in Article 67(1) EC and the Council's undertaking to review the 'conditions under which such implementing powers would be conferred on the Commission' after the end of that period clearly shows that the reason for the Council's reservation of implementing powers to itself lies not in the nature or content of the basic instruments but in the fact that the latter fall within the scope of Title IV of the Treaty.
- 38 By the second part of its first plea in law, the Commission maintains that, quite apart from whether the implementing measures are specific in nature, the Council failed to comply with the obligation to state reasons laid down in Article 253 EC. Reasoning which is founded, first, on the specific institutional situation in Title IV of the Treaty, and secondly on the sensitive nature of the policies concerned cannot justify the Council's decision to reserve to itself the implementing powers provided for by the contested regulations.
- 39 As regards the specific institutional arrangements of Title IV of the Treaty, the Commission argues that matters such as external borders, asylum, immigration and judicial cooperation in civil matters, which were formerly included in Title VI of the Treaty on European Union, have been brought within the Community framework.
- 40 Admittedly, the Member States have power to take legislative initiatives during a five-year transitional period laid down in Article 67(1) EC, and Article 68 EC contains derogations as regards the procedure laid down in Article 234 EC. However, use of the comitology procedure set up pursuant to Article 202 EC cannot be excluded by the special and derogating provisions of Title IV of the EC Treaty.

- 41 Furthermore, even if areas concerning border surveillance and the issue of visas were to be regarded as sensitive, the Commission submits that it is capable of dealing with such matters and that, in any event, it would not act without involving the Member States in the decision in accordance with the comitology procedure. The Commission draws attention to the institutional role conferred on it by the Treaty in respect of relations with non-member States, in particular at the stage of negotiating international agreements. It also points out that certain aspects of visa policy, in particular the determination of the States whose nationals must be in possession of a visa, already came within the Community framework before the Treaty of Amsterdam was adopted. Finally, the domains concerned are merely a matter of procedures and formalities.
- 42 The Council submits as a preliminary point that the CCI and the CM are hybrid documents in the sense that each of them contains provisions which are legislative, executive and factual in nature. The contested regulations take account of this particular feature by providing for three different procedures for amending the CCI and the CM. According to recital 11 in Regulation No 789/2001 and recital 8 in Regulation No 790/2001, the elements which are legislative in nature may be amended only in accordance with the relevant provisions of the EC Treaty; those which are executive in nature may be amended only in accordance with the procedure laid down in Article 1 of each of the contested regulations and only amendments of those provisions may be regarded as implementing measures; finally, information of a factual nature may be amended only in accordance with the procedure set out in Article 2 of each of the contested regulations.
- 43 The Council also observes, as a preliminary point, that there is a considerable overlap between the CCI and the CM, which results from the fact that the competent consular authorities and the competent border authorities must often consult the same information in the course of their work, which explains the similarity of the procedures established by the contested regulations.
- 44 In respect of the first plea, the Council contends that recital 8 in Regulation No 789/2001 and recital 5 in Regulation No 790/2001 clearly indicate that the reservation of implementing powers relates specifically to the amendment of certain 'detailed provisions and practical procedures' set out in the CCI and the CM. The nature and content of those provisions are described in more detail in the preceding recitals, namely recitals 1, 2 and 5 in Regulation No 789/2001 and recitals 1 and 2 in Regulation No 790/2001. Accordingly, the reasons given are not generic in nature and cannot apply to all measures taken under Title IV of the Treaty. In that regard, the Council states that it has already adopted numerous acts under Title IV, some of which concern visa matters, without having reserved implementing powers to itself.
- 45 The considerations which led the Council to reserve the right, in this instance, to exercise implementing powers itself are the same as those which led the framers of the Amsterdam Treaty to give the Member States power to take initiatives under Title IV of the EC Treaty for an initial five-year period. The same reasons also led the Council to provide that amendments and updates of the measures in question should be agreed unanimously.
- 46 At the time of adoption of the contested regulations, the incorporation of the Schengen acquis into the framework of the European Union and the conferral on the Community of new competences in respect of visa policy and border control had taken place only a short time previously.
- 47 It is precisely because the decision to reserve the right to exercise implementing powers itself is the exception rather than the rule that the Council, despite the sensitivity of the area, indicated that it would review the conditions under which such implementing powers would be conferred on the Commission after the end of the five-year transitional period referred to in Article 67(1) EC. The Council submits that the three-year period still to run before expiry of the transitional period was a reasonable period of time for it to assess whether the considerations which led it initially to reserve implementing powers to itself were still valid.

- 48 The Council denies that it reserved the right to exercise implementing powers itself on the ground that the measures in question fell within Title IV of the Treaty. Since the Treaty of Amsterdam entered into force, it has in fact adopted many measures in the realm of Title IV, which contain comitology provisions.

Findings of the Court

- 49 As a preliminary point, it must be borne in mind that, under the first subparagraph of Article 1 of the second comitology decision, implementing powers are conferred on the Commission other than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself. In that, the provision merely reproduces the requirements set out concurrently in Articles 202 EC, third indent, and 253 EC.
- 50 In that regard, as the Court held in its judgment in Case 16/88 Commission v Council [1989] ECR 3457, paragraph 10, following the amendments made to Article 145 of the EC Treaty (now Article 202 EC) by the Single European Act, the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision.
- 51 That means that the Council must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that, under the system established by the Treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power.
- 52 In this instance, the Council specifically referred, in recital 8 in Regulation No 789/2001 and in recital 5 in Regulation No 790/2001, to the enhanced role of the Member States in respect of visas and border surveillance and to the sensitivity of those areas, in particular as regards political relations with non-member States.
- 53 It cannot be denied that such considerations are both general and laconic. However, assessed in their proper context, they are such as to show clearly the grounds justifying the reservation of powers to the Council and to allow the Court to exercise its power of review.
- 54 It is clear, in the first place, that prior to the entry into force of the Treaty of Amsterdam, which occurred two years before the contested regulations were adopted, visa policy – with the exception of the determination of the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, as provided for in Article 100c(1) of the EC Treaty (repealed by the Treaty of Amsterdam) – and external border policy were excluded in their entirety from the European Community's competence and were among the procedures established under Title VI of the Treaty on European Union.
- 55 In the second place, Title IV of the EC Treaty includes, in Articles 67 EC and 68 EC, progressive special and derogating provisions concerning the procedure for adopting subordinate legislation and the preliminary ruling procedure. Thus, Article 67(1) and (2) EC provides for a transitional period of five years following the entry into force of the Treaty of Amsterdam, during which, as a general rule, the Council acts unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament. After that period, the Council legislates solely on a proposal from the Commission and may, acting unanimously, provide for all or parts of the areas covered by Title IV to be governed by the procedure referred to in Article 251 EC and adapt the provisions relating to the powers of the Court of Justice.

- 56 Provisions of this kind reflect the specific nature of the area covered by the contested regulations. Until 1 May 1999, that area fell, for the main part, within the procedures established under Title VI of the Treaty on European Union, since the framers of the EC Treaty did not wish to confer on the Commission a sole right of initiative in this area at the outset.
- 57 In the third place, the provisions exhaustively listed in Article 1 of the contested regulations concern clearly circumscribed matters. Although the provisions represent a major part of the CCI and the CM, it is none the less the case that they do not deal with all aspects of visas and external border control.
- 58 In the fourth place, it is clear from recital 8 in Regulation No 789/2001 and recital 5 in Regulation No 790/2001 that the Council undertook to review the conditions under which the implementing powers reserved by those regulations could be conferred on the Commission after a three-year transitional period.
- 59 For all those reasons, which are sufficiently clear from the preambles to the contested regulations and from the context in which they occur, it must be held that the Council could reasonably consider itself to be concerned with a specific case and that it duly stated the reasons, in accordance with Article 253 EC, for its decision to reserve to itself, on a transitional basis, power to implement a series of provisions exhaustively listed in the CCI and the CM.
- 60 The fact that recital 8 in Regulation No 789/2001 and recital 5 in Regulation No 790/2001 are worded almost identically is not, on its own, such as to call that finding into question, particularly given the close links which undoubtedly exist between the area of visas and that of border control.
- 61 In those circumstances, the first plea advanced by the Commission in support of its application must be rejected.

Second plea in law: implementing power conferred on the Member States

Arguments of the parties

- 62 By its second plea, the Commission maintains that the procedure for the Member States to amend and update the CCI and the CM, provided for in Article 2 of the contested regulations, is contrary to Article 202 EC. That provision, which allows the Council only to reserve the right to exercise implementing powers itself or to confer them on the Commission, does not authorise such a procedure.
- 63 It adds that, even if the procedure concerns factual information in the possession of the Member States, that information is contained in instruments whose legal basis consists, by virtue of Decision 1999/436, of provisions of the EC Treaty and therefore amendments to those instruments must adhere to the normal institutional rules.
- 64 The Council's response is that the amendments to the CCI and the CM pursuant to Article 2 of the contested regulations cannot be classified as implementing measures but relate to a mechanism for exchanging information. It is evident from recital 10 in Regulation No 789/2001 and recital 7 in Regulation No 790/2001 that what is involved is factual information which can be provided only by each Member State. Accordingly, Article 202 EC is of no relevance.

Findings of the Court

- 65 It is quite clear from Article 2 of the contested regulations that, despite the use of the verb 'wish', each Member State may itself amend, sometimes in agreement with the other Member States, certain provisions of, or annexes to, the CCI and the CM. In the words of recital 10 in Regulation No 789/2001 and recital 7 in Regulation No 790/2001, 'members of the Council and the Commission are informed without delay of all amendments ...', which implies that it is the Member States which have the power to make amendments.
- 66 In that regard, it must be stated that, although Article 202 EC, third indent, governs the issue of uniform implementation of the basic instruments adopted by the Council or by the Council and the Parliament, and hence the division of implementing powers as between the Council and the Commission, the provision does not concern the division of powers as between the Community and the Member States.
- 67 It is necessary to consider whether, for the purposes of the implementation of certain provisions of, or annexes to, the CCI and the CM, the Council was required to use Community procedures or whether power to amend those provisions or annexes could be conferred on the Member States without infringing Community law.
- 68 In this instance, the Council maintains that the provisions which may be amended by the Member States cover only factual information which the Member States alone may effectively supply.
- 69 It is appropriate to bear in mind in that respect that the CCI and the CM were adopted by the Executive Committee at a time when the area concerned was a matter for intergovernmental cooperation. Their integration into the framework of the European Union with effect from the entry into force of the Treaty of Amsterdam did not, of itself, result in the Member States being immediately stripped of the powers which they were entitled to exercise under those instruments in order to ensure their proper implementation.
- 70 In that quite specific and transitional situation, prior to the evolution of the Schengen acquis within the legal and institutional framework of the European Union, no objection can be made to the Council having established a procedure for the transmission by the Member States of amendments which they are authorised to make, unilaterally or in collaboration with the other Member States, to certain provisions of the CCI or the CM, the contents of which depend exclusively on information which they alone possess. Such a complaint could succeed only if it were established that the procedure thereby put into practice was such as to prejudice the effective or correct implementation of the CCI or the CM.
- 71 It must none the less be stated that the Commission, which has not disputed either that the information given in the provisions which may be amended by the Member States is factual or the fact that the information can be provided effectively only by the Member States, has not shown, or even attempted to establish, in respect of each of those provisions, that it was appropriate to use a uniform updating procedure for the CCI and the CM in order to ensure their proper implementation. It merely examined by way of example, in its reply, Annexes 4 and 5 to the CCI.
- 72 In those circumstances, the Court considers that its review must be limited to an assessment of the legality of Article 2 of Regulation No 789/2001 in so far as it applies to Annexes 4 and 5 to the CCI, alone examined by the Commission in its pleadings.

- 73 In that regard, Article 2(2) of Regulation No 789/2001 provides that when a Member State wishes to make an amendment to Annex 4, 5B or 5C to the CCI, in particular, it first submits a proposal for amendment to the other Member States, which may comment on the proposal.
- 74 As regards, first, Annex 4 to the CCI, which includes a list of documents issued by each Member State and entitling the holder to entry without a visa, the Commission submits that, by virtue of Article 21(1) and (2) of the CISA, nationals of third countries who hold valid residence permits or provisional residence permits issued by a Contracting Party may, on the basis of that permit and a valid travel document issued by the same Contracting Party, move freely for up to three months within the Schengen territories.
- 75 Although it is true that amendment of the list in Annex 4 to the CCI has an immediate impact on the conditions under which Article 21(1) and (2) of the CISA applies, it is none the less the case that, under Article 21(3), '[t]he Contracting Parties shall send the Executive Committee [for which the Council has substituted itself, in accordance with Article 2(1) of the Protocol] a list of the documents that they issue as valid travel documents, residence permits or provisional residence permits within the meaning of this Article'.
- 76 There is nothing to suggest, in the wording of that provision and in the absence of any other Community provision amending in that respect the rules in the CISA prior to the adoption of the contested regulations, that, once the list of documents in question has been communicated to the Executive Committee (or to the Council), the Member States are no longer competent to determine the nature of the documents valid as residence permits or provisional residence permits.
- 77 Consequently, the Commission has not established that the amendment of Annex 4 to the CCI required use of a uniform updating procedure.
- 78 As regards, second, Annex 5 to the CCI, concerning the cases referred to in Article 17(2) of the CISA, in which the issue of a visa is subject to consultation with the central authority of the Contracting Party with which the application is lodged and, where appropriate, the central authorities of other Contracting Parties, it must be stated, in the first place, that in accordance with point 2.1 of Part II of the CCI, consultation of the national central authority by the diplomatic mission or consular post examining the application is provided for 'in [the cases], and in accordance with the arrangements and deadlines, laid down by national law and practice'. Annex 5A to the CCI mentions precisely those cases.
- 79 The Commission has not succeeded in showing why the use of a uniform procedure for the updating of Annex 5A to the CCI was necessary for the proper implementation of point 2.1 of Part II of the CCI, account being taken of the reference in that provision to national law and practice.
- 80 In the second place, point 2.2 of Part II of the CCI concerns cases in which the diplomatic mission or consular post with whom a visa application is lodged must seek authorisation from its central authority, which must first consult the competent central authorities of one or more of the other Contracting Parties. Point 2.2 provides that 'until the final list of cases of mutual consultation has been approved by the Executive Committee [for which the Council has substituted itself], the list annexed to these Common Consular Instructions shall apply'. That list is in fact in Annex 5B.
- 81 The Commission, which does not dispute that each Member State is responsible for determining visa applications in respect of which prior consultation of the central authorities of the other Contracting Parties is required, has not established why, until a final list of cases of mutual consultation has been established by the Council, use of a uniform procedure was necessary for

the proper implementation of point 2.2 of Part II of the CCI and, in particular, for the updating of Annex 5B to the CCI.

- 82 In the third place, point 2.3 of Part II of the CCI, which refers to the list in Annex 5C to the CCI, concerns cases in which visa applications are lodged at an embassy or a consular post of a Schengen State, representing another Schengen State.
- 83 The Commission has not demonstrated, or even tried to establish, why use of a uniform procedure was necessary for the proper implementation of point 2.3 of Part II of the CCI, and, in particular, for the updating of Annex 5C to the CCI.
- 84 As a consequence, the second plea put forward by the Commission in support of its application must be rejected.
- 85 Having regard to all of the foregoing considerations, the Commission's application must be dismissed in its entirety.

[...]

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SEC(90) 2589 final; Communication from the Commission to the Council: Conferment of implementing powers to the Commission

COM (1998) 380 final - 98/0219(CNS);16.06.1998; Proposal for a Council decision laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ C 279, pp. 5-7

On-line

<http://www.eipa.nl/Topics/Comitology/comitology.htm>

On this website you can find current EIPA activities on "Committees and Comitology" and in depth information on the topic.