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Governance by Committee, the Role of Committees in European Policy-Making and Policy Impementation

EU-COMMITTEES

FINAL REPORT

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Final report

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Preface

Within the Fifth Community RTD Framework Programme of the European Union (1998–2002), the Key Action 'Improving the Socio-economic Knowledge Base' had broad and ambitious objectives, namely: to improve our understanding of the structural changes taking place in European society, to identify ways of managing these changes and to promote the active involvement of European citizens in shaping their own futures. A further important aim was to mobilise the research communities in the social sciences and humanities at the European level and to provide scientific support to policies at various levels, with particular attention to EU policy fields.

This Key Action had a total budget of EUR 155 million and was implemented through three Calls for proposals. As a result, 185 projects involving more than 1 600 research teams from 38 countries have been selected for funding and have started their research between 1999 and 2002.

Most of these projects are now finalised and results are systematically published in the form of a Final Report.

The calls have addressed different but interrelated research themes which have contributed to the objectives outlined above. These themes can be grouped under a certain number of areas of policy relevance, each of which are addressed by a significant number of projects from a variety of perspectives.

These areas are the following:

- ***Societal trends and structural change***

16 projects, total investment of EUR 14.6 million, 164 teams

- ***Quality of life of European citizens***

5 projects, total investment of EUR 6.4 million, 36 teams

- ***European socio-economic models and challenges***

9 projects, total investment of EUR 9.3 million, 91 teams

- ***Social cohesion, migration and welfare***

30 projects, total investment of EUR 28 million, 249 teams

- ***Employment and changes in work***

18 projects, total investment of EUR 17.5 million, 149 teams

- ***Gender, participation and quality of life***

13 projects, total investment of EUR 12.3 million, 97 teams

- ***Dynamics of knowledge, generation and use***

8 projects, total investment of EUR 6.1 million, 77 teams

- ***Education, training and new forms of learning***

14 projects, total investment of EUR 12.9 million, 105 teams

- ***Economic development and dynamics***

22 projects, total investment of EUR 15.3 million, 134 teams

- ***Governance, democracy and citizenship***

28 projects; total investment of EUR 25.5 million, 233 teams

- ***Challenges from European enlargement***

13 projects, total investment of EUR 12.8 million, 116 teams

- ***Infrastructures to build the European research area***

9 projects, total investment of EUR 15.4 million, 74 teams

This publication contains the final report of the project 'Governance by Committee, the Role of Committees in European Policy-Making and Policy Impementation', whose work has primarily contributed to the area 'European construction and multi-level governance'.

The report contains information about the main scientific findings of EU-COMMITTEES and their policy implications. The research was carried out by six teams over a period of one year, starting in February 2001.

The abstract and executive summary presented in this edition offer the reader an overview of the main scientific and policy conclusions, before the main body of the research provided in the other chapters of this report.

As the results of the projects financed under the Key Action become available to the scientific and policy communities, Priority 7 'Citizens and Governance in a knowledge based society' of the Sixth Framework Programme is building on the progress already made and aims at making a further contribution to the development of a European Research Area in the social sciences and the humanities.

I hope readers find the information in this publication both interesting and useful as well as clear evidence of the importance attached by the European Union to fostering research in the field of social sciences and the humanities.

J.-M. BAER,

Director

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Acknowledgements

Doing empirical social research can be exciting; it can also be full of pitfalls, unexpected difficulties and sometimes seemingly unsolveable problems. Doing this cross-nationally, involving teams from five different countries, intensifies the excitement and the problems.

The European Institute of Public Administration has been concerned with the committee system of the European Community for some time and had developed seminars for civil servants and officials from the European institutions designed to improve their understanding of how committees function and to increase their appreciation of the importance of the committee system for the European system of governance. A small team of political scientists and lawyers dedicated a good proportion of their time to this enterprise. In the spring of 1999, two members of the team, Christine Neuhold and Frank Petiteville, brought me the Commission's call for proposal under the key action of the 5th Framework Programme "Improving the Socio-economic Knowledge Base", suggesting that we should submit a proposal so that we could get answers to many of the questions we were confronted with in our seminars but had no convincing response. We called on friends and friends of friends and put together four teams, three that would look at the way Council working parties, standing committees in Parliament and comitology committees are actually working. The fourth team was to examine the theoretical context for the committee systems in terms of democracy and legitimacy.

We succeeded in submitting a proposal in which Frank Petiteville headed a small team of young researcher from France: Eve Fouilleux from the Université de Rennes and Andy Smith from Bordeaux. Christine Neuhold became a one-woman team to study the standing committees in Parliament and Georg Haibach, also a member of EIPA's comitology team, assumed the leadership of the group studying comitology committees, which also included Alexander Tuerk from King's College London and Guenther F. Schaefer from EIPA. We had many concrete questions and were looking for concrete answers, but we had difficulties to interrelate them and to put them into a general theoretical context. In order to solve that problem, we asked two colleagues, Torbjörn Larsson from EIPA and Andreas Maurer from the University of Cologne, to help in the four subprojects to solve this problems by developing a theoretical guide for our empirical analysis and to make sure that we not only ask the right questions, but that we also did not forget important ones.

When we received the news that the Commission was prepared to financially support our project, the first problems occurred. Frank Petiteville had accepted an offer to join the

faculty of the University of Paris, but was prepared to continue working and leading the team on Council working parties. Hardly had the ink dried on the signatures on the contract with the Commission, Christine Neuhold left EIPA and joined the Institute of Higher Studies in Vienna. Frank Petiteville withdrew from the project in the early summer of 2000, because his workload at University did not allow him to continue.

Andy Smith from Bordeaux took leadership responsibility and Jaques de Maillard joined the team. After a bit more than one year, Georg Haibach joined the Commission service and it was too late to recruit a new team leader, so Guenther F. Schaefer was forced to take the leadership in the subgroup on comitology and Alexander Tuerk took over some of the work of Georg Haibach. Despite this reallocation of tasks, this subproject could not have been completed successfully in time without Natalie Flatz and Margarete Gotthard, joining the team in the summer of 2001.

These large number of personnel changes required a considerable administrative rearrangements and transfers of funds between the participating institutions. We would like to express our great appreciation to Angela Liberatore of DG Research for her understanding support in managing these problems. We owe her a great deal more! She was always ready to help, give us her advice, reminding us of things that need to be done, and most importantly, following our activities and supporting them with constructive advice.

The most exciting aspect of the project were the five workshops, where we discussed our progress, exchanged experiences, co-ordinated our interview schedules and tried to find solutions to theoretical and practical problems.

All three empirical subprojects were based on documentary analysis, literature research and interviews. We greatly appreciate the help of members of the Commission services, the Council General Secretariat and the General Secretariat of the European Parliament in getting access to the information we needed. We particularly want to thank our interview partners, the members of standing committees of Parliament and their staff, Member State representatives in Council working parties and officials of the General Secretariat and last but not least, members of Commission Service in many DGs, who generously shared their time with us to answer our questions.

In the course of the project, several others deserve to be mentioned, because without their help we could not have completed our job. The first is Belinda Vetter, who until January 1, 2002, managed the secretariat of the project competently, patiently and with great dedication. Marion Stulfa, a researcher at EIPA, prepared the short and some of the long descriptions of the 800 implementing measures that we analysed in the comitology

project. Katharina Polster, also a researcher at EIPA, carried out much of the documentary analysis and supported the work of Christine Neuhold in the project on Parliament committees. Putting the final report together, checking the footnotes, assembling the bibliography was the task, among others, of Natalie Flatz and Margarete Gotthard. The whole team wants to thank them specifically for this.

This is my last large research project in my 40-year career as a political scientist. It was a rewarding experience to work with this group of relatively young scholars and colleagues, share my experience with and to help them to find their way on the difficult road in empirical research, watch how they grew and developed new skills in mastering difficult problems.

Finally, the whole team wants to express its appreciation to the Commission for supporting this work. We sometimes despaired of all the administrative details and countless forms and formalities. But without the Commission support, the project would never have been realised. At the end, we are all convinced it was worth all the effort and we hope that the reader will be as excited as we are about our findings and conclusions.

Guenther F. Schaefer

Project Co-ordinator

Abstract

In this research project on EC committees another picture of the European system of governance than the traditional one emerged. Undoubtedly, committees represent the most opaque and even secret aspect of European decision making that are commonly viewed as "Archipel Brussels", an ever growing swamp bringing forth a new political class of "Eurocrats" and "technocrats". Realising that despite the importance of committees in the European system of governance, there have been – at least until recently -very few empirical inquiries about how the system is structured, how it is functioning, what its output is and how it should be evaluated, we decided to explore this relatively uncharted territory.

In order to establish a conceptual framework, the most common theories of European integration and democratic government were studied. Raising the question of legitimacy and democracy we concluded that fusion theory and the concept of 'Europeanisation' by incremental participation proofed to be most useful in describing the committee system and that it could be characterised as a consensual power sharing system. The concept of deliberative supranationalism, however, provided the best frame of reference for the interpretation of our empirical findings.

Using documentary analysis, literature researches and interviewing, we analysed the standing committees of the European Parliament, working parties in Council and comitology committees.

Our empirical conclusions can be summarised as followed:

- Working groups of the Council are arenas, where both technical and political issues are resolved. They are not battlegrounds of intergovernmental conflict, but fora for inter-Member State and inter-institutional mediation and problem solving.

- The standing committees of the European Parliament effectively and efficiently incorporate technical expertise, private and public sector interest and provide arenas for inter-institutional co-ordination, particularly between the Council, the Commission and the Parliament.

- Comitology committees do not overstep their delegated competences and -at the same time – facilitate horizontal and vertical co-ordination of EC implementation policy.

The central focus of committees is a continuous search for consensus and compromise. In that respect the committee system of the EU can be called a deliberative democracy, albeit not a perfect one, that builds its legitimacy on the protection of minorities and delivers results, although procedures and majority decision also play an important role.

List of frequent acronyms

AFCO	Committee on Constitutional Affairs
AFET	Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy
AG	Advocate-General
AGRI	Committee on Agriculture and Rural Development
BST	Bovine Somatrophine
BUDG	Committee on Budgets
CAP	Common Agricultural Policy
CFI	Court of First Instance
CFSP	Common Security and Defence Policy
CONT	Committee on Budgetary Control
COREPER	Committee of Permanent Representatives
CREST	Comité de la recherche scientifique et technique
CULT	Committee on Culture, Youth, Education, Media, Sport
DEVE	Committee on Development and Co-operation
DG INFSO	Directorate-General Information Society
DG MARKT	Directorate-General Internal Market
EC	European Community
ECJ	European Court of Justice
ECON	Committee on Economic and Monetary Affairs
EDD	Group for a Europe of Democracies and Diversities
EEC	European Economic Community
EFA	European Free Alliance
EFA	European Free Alliance
EFC	Economic and Financial Committee
ELDR	Group of European Liberal, Democrat and Reform Party
EMPL	Committee on Employment and Social Affairs
ENVI	Committee on the Environment, Public Health and Consumer Policy
EP	European Parliament
EU	European Union
FEMM	Committee on Women's Rights and Equal Opportunities

GMO	Genetically Modified Organisms
GUE/NGL	Confederal Group of European United Left/Nordic Green Left
INDU	Committee on Industry, External Trade, Research & Energy
JHA	Justice and Home Affairs
JURI	Committee on Legal Affairs and the Internal Market
LIBE	Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (JHA)
MEPs	Member of European Parliament
MRLs	Maximum residue Limits
NGO	Non-Governmental Organisation
NI	Non-attached Members
OJ	Official Journal
OLAF	European Fraud and Prevention Office
ONP	Open Network Programme
PECH	Committee on Fisheries
PETI	Committee on Petitions
PPE-ED	Group of the European People's Party (Christian Democrats) and European Democrats
PSE	Group of the Party of European Socialists
QMV	Qualified Majority Voting
REGI	Committee on Regional Policy, Transport & Tourism
RP	Représentant permanent
SEA	Single European Act
TDI	Technical Group of Independent Members – mixed group
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
UEN	Union for a Europe of Nations Group

I. EXECUTIVE SUMMARY

1. Introduction

The evolving European system of governance, which started in 1950 as an institutionalised form of horizontal, cross-boarder co-operation, has developed into a dynamic, vertical, multilevel system for policy making, policy implementation and application. In this process it had and has to cope with several major challenges:

- the challenge of repeated geographical enlargement;
- the challenge to manage growing heterogeneity in the political, economic, social, cultural and language regimes of its component parts -the challenge to manage ever new tasks and responsibilities;
- the challenge to adapt its institutions and organisational structures and policies to the increasing complexities of contemporary political, economic and social life.

The committee system with its manifold manifestations developed in order to enable the system to cope with these challenges, just as it did in different forms in other modern, multilevel systems of government like the U.S., Germany and Switzerland. More specifically, the EU-committee system was and is the institutional instrument to cope with:

- the need for an ever higher level of technical, scientific, legal and political expertise in policy making which results from the growing complexity of regulating contemporary western society;
- the need for efficient vertical co-ordination between the different levels of governance without recourse to hierarchy with command and control from above;
- the need for horizontal co-ordination between the Member States, not so much perhaps in the first pillar, but decisively so in the second and third pillar – but also;
- the need for transnational communication and deliberation – the rule of the game is consensus and compromise as a result of deliberation.

The public debate about the committee system of the EU is characterised by a latent fear of an "Archipel Brussels", an ever growing swamp bringing forth a new political class of "Eurocrats" and "Technocrats". Committees in the European system of governance probably represent indeed the most opaque and even secret aspect of EC decision

making. They are considered to be of a dubious legal nature or even illegitimate because they are not mentioned in the Treaties, their proliferation in many different forms is seen as a deviation from EC constitutional rules. As their members are not elected on a democratic basis – except the standing committees of Parliament – they are frequently viewed as symbolising the "bureaucratic" and "technocratic" bias of the EU system and a major reason for questioning its political legitimacy.

The research project whose findings and conclusions are summarised in this report has started from a different set of assumptions. Realising that despite the importance of the EU committee system, there have been – at least until very recently – very few empirical inquiries about how the system is structured, how it is functioning, what is its output and how it should be evaluated, we decided to explore this relatively uncharted territory empirically.

When exploring uncharted territory it is advisable to limit ones objectives. We decided to limit ourselves to three types of committees: Two that are primarily involved in rule-making and rule adoption (i.e. legislation) -the standing committees of the European Parliament and the working parties in the Council -and one that is primarily concerned with policy implementation, the so-called comitology committees.

We also decided to limit the scope of the inquiry to a few areas of community activities namely certain aspect of the Internal Market like telecommunications, social policy, research and development policy, health and consumer protection. Being fully aware that there are significant difference in decision-structures and processes in different policy arenas of the EC, covering all would not have been possible with the resources at our disposal. Nonetheless, we feel that the arenas selected represent some of the most important policy sectors of the community.

Furthermore, when exploring uncharted territory it is advisable to agree on a common method and procedure. And it is also advisable to use relatively standard methods of social research. This is precisely what the project did; all the empirical studies used documentary analyses, literature researches and interviewing.

Finally, when exploring uncharted territories if is advisable to use a guide, a theoretical frame of reference. Initially we were primarily concerned about the democratic dimension, that is the role of the committee system in the European system of governance in its effort to find a stable balance between the principles of majority rule and protection of minorities on the one hand and procedural input democracy with its efficient result (output) oriented democracy. On the other hand, this kind of orientation immediately raises the question of legitimacy and we started to look at the contribution

that the committee system can make to the legitimacy of the European system of governance, i.e.. Whether it is

- worthy of recognition and approval in encouraging consensus, communication and integration;

- respectable and trustworthy;

- able to solve problems and to accomplish its task (performance);

- able to develop structures which inspire and secure consensus and which are limited controlled where institutions check and balance and control each other.

There was no ready made theoretical framework available and we decided to have one of the subprojects deal with these questions its main task was to link the empirical work to the central question of the whole project: what is the contribution of the committee system to the democratic character and legitimacy of the European system of governance? Is the committee system indeed symbolising the "democratic deficit" and the "bureaucratic and technocratic bias" of the EC system or can we find evidence that would support the assumptions of deliberate democracy where the interest of minorities are protected, where institutions check and balance each other, where decisions are taken effectively and efficiently and in a open manner which includes the interest of those affected.

2. Research, findings and conclusions

How legitimacy is created and maintained in a democratical system, is one of the classical questions in the social and political sciences. It is also a topic that has attracted considerable attention among those who studied the European system of governance, a system that makes binding decisions, influencing the life of many of it's citizens and constraining their freedom for individual action. It is a rather complex system of interactions between institutions and actors on the European level and actors on the Member States level. It is a system that does not fit easily into one of the familiar categories of democratic governance. Some of the newly created supranational institutions have been modeled according to key organs of liberal democratic states, i.e. an executive, a legislature and a judiciary. But there are also elements with no equivalent on the national level. Committees are active and participate in the development, adoption and implementation of policy in national systems, they play an even more important role in policy initiation, decision making and application on the European level. The evolution of transnational or supranational policy making in the European Community has significant implications for traditional conceptions of

democracy. Although the supranational institutions were constructed or modeled along the lines of modern liberal democratic states, they function quite differently in the European Community: the Council is the legislator, but also has executive functions; the Commission is the initiator of Community policy and at the same time is responsible for policy implementation – yet it is not the EC government; the Parliament is directly elected but it can not elect a government. These ambiguities have been the source of extensive criticism particularly with respect to what has been called the "democratic deficit". The question of the democratic legitimacy of the system has been regularly questioned not only by scholars and the media but by leading politicians as well as the institutions themselves.

In the conclusions of the Laeken summit setting up and defining the mandate for the Convent charged with drafting yet another revision of the Treaties the heads of state and governments expressed their concern over the seeming lack of democracy and asked how it could be remedied. The White Paper on Governance by the Commission addresses the same fundamental issues.

Our research project tried to give at least some tentative answers. Our focus was committees, committees that play a central role in EC policy-making and policy implementation. Our objective was to examine empirically how different committees work and what functions they perform in this complex system of governance and to relate our findings to the question of democracy and legitimacy of the EC system. To do this, it was necessary to develop a conceptual framework that could be operationalised and applied to interpret our findings. To end this we took a double approach:

- we first looked at theoretical explanations of the European system of governance that were developed over last 20 years in political science (ch 1);

- secondly we tried to understand the European system of governance in the general context of what characterizes modern democratic systems (ch 2).

We concluded that the concepts of horizontal and vertical fusion and cooperative administration are most likely capable to explain and characterize the European committee system and committee interactions. The growing numbers of Council working parties and the increasing frequency of their meetings, the growing number of civil servants from the Member States involved, the growing frequency of comitology committee meetings, particularly in the field of agriculture, are all indications of a process of institutional and personal mobilization within a concentric, multilevel, polyarchic instead of hierarchical political system. In this system national administrations are increasingly shifting their attention towards Brussels. National civil servants

participate in an increasing number of meetings and are confronted with different administrative cultures and interaction styles. The fusion concept also emphasizes the mixture of national and EU competences and the distributed responsibility for the use of decision making instruments. It is a process of checks and balances between national and European institutions in preparing, taking, implementing and controlling EC decisions. This process has been asymmetrical; it is primarily the administrative machinery of the Member States that is involved leading to an increasing bureaucratization of the policy making and implementation process.

The general approach to democratic systems of governance focuses attention on two dimensions. First the degree to which the majority rules and the rights of minority are protected and secondly the extent to which basic rules and procedures (input orientation) are emphasized or whether performance and results (outputs) are considered more important. Each political system derives its legitimacy from the balance of these dimensions and this balance differs from one political system to another. The analysis in chapter B. led to the conclusion that perhaps the most interesting and challenging political system is one which has to rely to a large extend on legitimacy derived from achieving results and minority protection, a system which could be called deliberative governance or deliberative democracy. Deliberative systems are characterized by the lack of a stable majority to build its legitimacy on, instead it relies on a process through which different interest negotiate trying to find solutions to serve a common good. This process is focussing on inclusiveness; all those affected by a decision should be allowed to participate in shaping it and do this on an equal basis. At the same time the ambition is not just to find a compromise satisfying all the participants but to arrive at effective solutions which are acceptable to everyone or most that are affected.

We concluded that the European system of governance which has yet to find European a demos to build its legitimacy upon, a task which looks not very promising in the foreseeable future, particularly as crucial building stones such as transnational political parties, a common media, a common language to promote common identity are non existent and – in view of pending enlargement – will be practically impossible to reach. The European system can not rely on a stable majority, decisions have to be reached by ever changing majorities and ever changing constellations. The main source of legitimacy is thus a complex systems of checks and balances making sure that power is not concentrated but dispersed. This is a consensual system where effectiveness and efficiency are essential elements for creating legitimacy because the main objective is finding solutions which pleases large segments of the public. It is also a deliberative system focussing on openness and transparency in finding the common good because

that is the only way of making sure that inclusive discussions have taken place and all have participated on an equal and fair basis.

This type of political system has recently be called deliberative democracy. In chapter C. we explored this concept of deliberative democracy as a possible guide, a conceptual framework for analyzing and interpreting the reality of the European committee system. Applying this theorem to the European committee system we concluded that four key concept of (democratic) deliberative supranationalism are of particular relevance for the interpretation of our empirical findings. The key concepts are: democratic accountability; a system of democratic checks and balances; democratic effectiveness and efficiency; openness and transparency. The findings of our empirical research will be summarized by using these four concepts.

2.1. Democratic accountability

At least theoretically, accountability can be most easily defined in a parliamentary system where there is a simple chain of command. The parliament is elected by the people and responsible to them and the government is elected by parliament and responsible to the latter. In the complex system of decision making that has developed in the European Community, assigning responsibility for specific decision outcomes is rather difficult. Accountability in essence means that decision makers can be held responsible directly or indirectly by the citizenry and that it is possible to dismiss bad or incompetent decision makers. In the European system of governance, all binding decisions are the outcome of a rather extended process of negotiating and bargaining in different institutional settings and between institutions. Assigning accountability and to hold someone responsible for the final outcome is rather difficult, as it is difficult to find out who initiated what, who influenced it and who participated in the final decision. Clearly the Member States play a crucial role not only as masters of the Treaty but also as masters of legislative and executive rule making in the Council and in comitology committees. The increased role of Parliament, particularly after the Amsterdam Treaty, has made it even more difficult to identify those who can be held accountable. Finally and of very special importance, is the role of "experts" and "specialists" who carry out most of the negotiations and who play a significant role in shaping political outcomes. These are not politicians that can be "punished" but unknown, if not faceless, civil servants.

It is not surprising then that the European system of governance and its committee system on first sight will score very low on the accountability scale. Decisions are made by a phletora of individual and group actors in horizontal and vertical, formal and informal coordination and decision meetings. Moreover, Brussels is far away in the mind

of the citizens. What happens there is only recently received some attention by the media and the average citizen has difficulties to understand what is happening and why and who is taking what decisions.

One would expect that the European Parliament and its standing committees can be most easily held accountable for what they decide. Its members are elected directly and there are elections every 5 years where the voters have a chance to through the rascals out. Chapter E. demonstrates, however, that the public is hardly interested in what happens in Parliament. With the exception of controversial debates with high visibility like BSE, fraud or when the Parliament tries to vote the Commission out of office, the media and hence the people take little notice. Even those directly affected, in this case for instance the young people in Europe, will hardly be aware of the fact that Parliament fights a pitch battle with the Council over the money that is spent on the LEONARDO and SOKRATES programs.

Members of Parliament do try to keep contact with their constituencies but the increasing legislative responsibilities make this ever more difficult. Visiting groups to Parliament are one of the links between MEP's and their voters, but it is in fact only a very small proportion, a few 1000 every year, of more than 360 million people that have this opportunity. However, on such occasions MEP's do have to explain and defend the positions they have taken on important decisions. Being accountable also means to explain and to stand up for ones decision.

From a formal perspective, participants in working parties in the Council are directly responsible to their respective government that has sent them there and these governments are in turn accountable to the people who have directly or indirectly elected them. But national electorates have very few means to follow and even less to control what their governments and their representatives do in Brussels. They have even less an opportunity to "punish" them.

Accountability of participants of Council working parties is further obscured by the fact that they are frequently involved in role conflicts, as chapter D. demonstrates. On the one hand, they are representatives of the Member States governments and have the task to argue and defend their governments position. On the other, they frequently become representatives of compromises in the Council to their own government. This is particularly the case of staff members of the permanent representations, the attachés and the sectoral experts, which through their daily interactions with colleagues from other Member States become member of a "club". A *corps d'esprit* develops across national boundaries with shared beliefs and values and with the shared objective to get

"the job done", to reach a compromise. As a negotiation in the Council working groups drag on in the search for a consensus, participants manage a parallel negotiation process with their own government. They are in constant contact via telephone, e-mail or especial telegrams with the ministries in an effort to adapt national positions, to redraw the line of what can be accepted in order to reach compromise. Working parties are not predictable intergovernmental battle grounds but sites for inter-Member State, inter-institutional and ideological mediation.

Comitology committees seem to work in a vacuum of accountability. Except for those who participate or insiders, very few know of their very existence. And very few of the proposed implementing measures ever get any public attention. No one knows who the actors are and very few people understand how the system operates. Representatives of the Member States in comitology committees are accountable to their government just as participants in Council working parties are. They come with instructions which have been negotiated in the national capital and although they may often be rather vague, it is nonetheless difficult to deviate from them.

Characteristic of all three types of committees is the direct or indirect involvement of public and private interest groups and non governmental organizations (NGO). All three empirical chapters demonstrate the degree to which the elements of civil society participate extensively and intensively in committee work. In Parliament particularly, interest groups follow the procedures and provide important input, information and expertise, to the standing committees. To working parties in Council interest groups have no direct access but they do have access indirectly via the national governments. They try to influence and shape, sometimes parallel in several Member States, the positions that governments take in Council deliberations. The same applies to comitology committees where the Commission is in constant contact with affected interests when it prepares its implementing measures and where Member State representatives inform and get information from national interest groups that are affected by the work and the decisions of the committee in their respective Member States.

Concluding, we can say that direct accountability in the European system of governance is difficult to locate. But this is to be expected in consensual decision system where power is shared and dispersed. More important in such a system is the question to what extent civil society is involved and here the evidence is clear, interest groups and NGO's are constantly "present" in the decision process. But how equal and how fair is their access to decision process, how inclusive is their access? It is a question that we were not able pursue in our project.

2.2. Democratic checks and balances

This concept refers to the way by which decisions are made, the way how one set of actors is checked and controlled by another. It refers to the way conflicts are resolved, how coordination and cooperation is arranged and finally how decisions, consensus or compromise, is reached. It means first inter-institutional checking and balancing between the three major actors in policy making: the Council, the Parliament and the Commission. Checks and balances are also important within institutions, particularly within the Council where checks and balances must assure that no Member State is pushed to the wall that even small Member States will have their say and their arguments will have to be listened to. Checks and balances is also about the protection of minorities, a small or a small number of Member States in the Council and in comitology committees and small political groups in the Parliament. Voting is to be considered the last resort, to be used only if one or two Member States cannot be convinced. The name of the game is consensus in the Council and in comitology committees. In the Parliament it is also the question of how conflicts between political parties are resolved and national preferences are balanced.

The system of institutional checks and balances that evolved in the European system of governance is almost a classical case of inter-institutional coordination. This applies, where primarily to the first pillar and its major policy arenas including the internal market, R&D, transport, environment, etc and particularly to those policy areas where co-decision applies. Here it is no longer possible for one of the major actors to impose its will on the others.

Chapter E. demonstrates (compare Annex 1., Part 2) how the European Parliament has become the major arena for inter-institutional debate, where standing committees are occasions where all other institutions can and are participating, where the other institutions are heard, where questions are asked, and where members of the committee have a chance to argue their position. The trialogue develop in the co-decision procedure in the nineties is another instrument of intra-institutional checks and balances, where a small number of representatives from the Commission, the Council and the Parliament meet informally to find a compromise acceptable to all three partners. The study of the EP produced considerable evidence that many legal acts and programs would look very different today if the Council would not have been forced to reach a compromise with the Parliament.

Extensive internal checks and balances exist within all the committees we examined. In Parliament the rules of procedure encourage members of small political groups to play an

important role by assuming chairs, responsibility as rapporteurs or draftsmen. Even more important is the role of the party coordinators in the committees. They frequently meet before and after sessions of standing committees, discussing and negotiating the business of the committee. In the Council working parties, a minority of Member States and particularly small Member States are protected by its working and decision style. Proceeding are characterized by drawn out negotiations, by changing positions and coalitions, and in many instance by reasoned debate. Decision making is characterized by the search for consensus. Different actors try to persuade each other in an effort to find a common solution. Needless to say, this is a time consuming process and probably from the point of time efficiency not very efficient. In cases where unanimity rule applies, one Member State, and be it the smallest one, has the possibility to block a decision until it is acceptable to it.

We found quite similar working methods in comitology committees. Although comitology committees were and are established for the very purpose of checking the Commission's implementing policy, the name of the game is consensus and compromise.

An important issue with respect to democratic checks and balances is the requirement that each institution stays within its boundaries as defined by the Treaties. It was the first major objective of the team studying comitology, focused on the question whether the Commission has stayed within the competency for implementation that have been delegated to it by the legislators or whether it has – with the collusion of the comitology committee – violated the prerogatives of the legislators, Parliament and Council. This was one of the key issues in the long debate between Parliament and Council over the role of comitology committees. Parliament insisted that important and basic decision should not be made through the implementation process involving comitology committees but through a legislative procedure where those who are affected have a much greater possibility to be involved and to participate. Chapter F. concentrates on this problem in great detail. The line between what is an implementing and what a legislative matter is difficult to draw in practice but it can drawn theoretically. We concluded that several criteria should be taken into account, particularly the impact on fundamental rights of individuals, the complexity of the issues and the need for flexibility. Empirically we found that the Commission and comitology committees stay well within the boundaries that the legislator has assigned to them. Out of 800 hundred cases we examined, we found only 10 where the question of crossing the line required close examination and in none of the cases a clear violation of the rights of the legislator could be argued. The empirical evidence presented in chapter G. suggests that the theoretical distinction between the implementation and legislation is not important. Member State representatives trust that

the Commission carefully checks the legal basis of its proposed implementing measure and we found no evidence that this would not be the case.

2.3. Democratic effectiveness and efficiency

In system characterized by checks and balances and the search for compromise and consensus there will always be a trade of between (time) efficiency and legitimacy. In functional terms, efficiency means that decisions have to be made, and made on time. The citizenry expects that the government delivers and solve problems and does so in time. Deliberative governance requires debate and that takes time. Hence effective governance in a supranational democracy means that committees, the standing committees in Parliament, the working parties in the Council and comitology committees, effectively facilitate the decision process. It is important that in the committees, solutions to problems are found which are more efficient and effective than those that could have been achieved on a national level. More importantly, these decision in order to be efficient must be acceptable to all or most concerned, it must be the result of deliberation Thus while decision making may be inefficient in terms of time, the question that needs to be answered is more how effective are they in facilitating compromise and finding solutions.

The complexity of the institutional systems of checks and balances that developed in the European system of governance lead many observers to conclude that this system can hardly be efficient in the sense that its output responds to the needs of those concerned and does so in time. Somewhat surprisingly is the overall quantitative output of the Community in legislation and implementation. But quantity does not say much about quality. Most of the legal acts that are adopted by the Commission using comitology procedures involve routine administrative measures. In those cases, however, where controversial implementation decisions will have to be made, the process takes a long time and is thus not responding very fast to the needs of the citizenry.

The Community system on the other hand is very effective when it comes to reaching compromise and consensus. It is also very effective with respect to incorporating expert advice in the deliberation and the decision process. That applies particularly to the standing committees of Parliament which have developed a variety of avenues for acquiring expert advice through hearings, the participation of civil society, their own professional staff and the research department of the General Secretariats.

Comitology committees and - perhaps to a lesser extent - Council working parties are rather efficient when it comes to routine measures, particularly in the area of agriculture where many committees meet in a weekly or biweekly rhythm passing many legal acts.

When it comes to important and controversial decisions, time efficiency is not very high in both types of committees. It is a widely held view that working parties in the Council should only solve "technical" issues and leave "political" decisions to COREPER and preferably even the Minister. The evidence presented in chapter D. supports the argument that this distinction is at best a theoretical one, accepted equally by those involved and by outside observers. In reality working parties get intensively involved in questions of policy and political direction.

Both Council working parties and perhaps to an even larger degree comitology committees can be described as institutionalised expertise. The role of the "expert" is dominant, although in Council working parties attachés introduce frequently more political arguments. In comitology committees the expertise of the Commission staff often supported from the outside through interest groups and consultancies is merged with the expert know how of the Member State representatives.

Finally comitology committees effectively contribute to improving the efficient implementation and application of EC law in and through the Member States. They provide opportunities for horizontal and vertical coordination which significantly increases the effectiveness and the efficiency of the implementation process on the Member State level. This does not suggest that there are no implementation deficits in the Member States, there are, but they would presumably be much worse without the comitology system in place. In our interviews, it were particularly the Member State representatives on the committees who stressed the importance of the opportunities for horizontal and vertical coordination which committee meetings provide.

2.4. Democratic openness and transparency

Openness means first of all that those who are affected by decisions have the opportunity to participate in shaping them. It requires that their preferences are taken into consideration and that they are to be included on a fair and equal basis, that they are inclusive in nature. In the EU governance system, openness refers to the question whether and to what extend representatives of civil society can participate in the decision process. Are they heard, are they taking seriously and is this done on a fair and equal basis? Transparency means that the process of arriving at conclusions and decision should be open or at least that information should be accessible about how decisions were reached, who took what decisions and who used what arguments, i.e. the decision should be "reconstructable".

Much of the debate on transparency in the EU focuses on opening up proceedings in Council and in other decision arenas to the public, the media and interested parties. This

is the wrong emphasis and particularly with respect to committees in Council and comitology committees. Instead the key issues are legibility, tracability, visibility and understandability, the possibility to reconstruct the decision, the ability of the public to find out who took the decision, who took what position in the debate and in the end voted for or against it. If working party meetings in Council, particularly COREPER and even at the ministerial level and comitology committee would be open to the public, the debate would move to the coffee breaks and the hall ways, away from the arena where reasoned debate can take place. In Parliament this is naturally different, its plenary session and standing committees are open to the public. More precisely, the European Parliament invites interest groups and even request other institutional actors to participate in its meetings thus providing a general forum for a wide debate. This is well demonstrated in chapter E. where the input of civil society, interest groups and NGO's is not only accepted but often actively asked for by members of Parliament. Organised interest in Brussels follow closely what Parliament does, try to influence the procedures, have often closed working and consulting relationships with MEP's, with rapporteurs and group coordinators in the committees.

Access to and influencing working parties or comitology committees is a different matter. It is only possible by influencing the negotiation position of a Member State in its national capital. Direct influence on working parties is impossible, given its structure and working style. It is somewhat different in comitology committees where the Commission, as reported in chapter G., sometimes directly seeks the advice of those affected when drafting its implementing measures. Lobby groups are fully aware what is happening in the implementation process and make an effort to have an impact on shaping decisions. This applies equally to commission officials drafting specific implementing measures and to individual representatives from the Member States, who in the end have to vote on it.

We found that transparency is a much more problematic issue. Except for the standing committees of Parliament, the other committees examined are not open to the public. In the Parliament, interest groups are present, media and visitor groups have a chance to find out what is happening and Parliament has had a long tradition of open access to its documents. Interested parties can read and follow the debates in plenary, have access to documents of the standing committees. The Legislative Observatory established by the Parliament is a remarkable instrument for interested parties to check at any time the status of a specific decision. Council working parties and comitology committees are not open. They would become very inefficient and ineffective if they would be. They are arenas for intensive debate and argument, efforts of persuasion and of reaching compromise. This cannot be done in front of open microphones and rolling cameras.

Important, however, is the possibility to reconstruct the decision to find out who made it who took what decision and who in the end voted for or against it.

Until recently this was indeed a problem. However, the increasing concern about the question of transparency, particularly since the Maastricht Treaty, has contributed significantly to making the EU process more open and accessible. Today conclusions and summaries of debates of the ministers can be found on the internet a day or two after the event. This of course does not apply the COREPER and certainly not to working parties and there is considerable space for improvements in the future.

The rules on transparency of the comitology decision of 1999 requires that at least the most important parts of comitology committee proceedings become accessible. The Commission has to inform Parliament of all proposed measures and of the decisions that were reached. Recent Court decisions further strengthened the rights of affected parties to find out more about what happened in the committee and who took which position. Increasingly chairs of comitology committees put the results of meetings in the form of short protocols in the internet, a practice that was started some time ago in the area of agriculture but now has spread. Again, there is room for much improvement. Participants in the comitology process have a rather ambivalent attitude towards the question of transparency. If too much "reconstruction" was possible it may negatively affect the possibility of reaching compromise and endanger the effectiveness of the system to facilitate deliberation. Nonetheless, the new rules on transparency has removed some of opaque and secret nature of the comitology process.

2.5. Conclusion

We have argued and presented empirical evidence that the EU is a democratic system which builds its legitimacy largely on protecting minorities and its ability to deliver results (output), although procedures and majority decisions also play an important role.

The study showed that there is more accountability, effectiveness and efficiency in the committee system than what one is lead to believe by media reports and public debates. The system of checks and balances between institutions and within institutions functions well –at least in the first pillar – in preventing one institution from gaining a predominant position. Openness and transparency is more problematic; tracability is possible but not necessarily encouraged by the way the system operates on a day to day basis.

Committees are effective fora for debate, for negotiating and for reaching consensus or compromise -all essential elements of a deliberative democracy. Is the EC then a perfect deliberative system? -Certainly not, but is seems well on the way in this direction.

3. Policy Implications

Both, the Laeken declaration on the future of the European Union of December 2001, and the Commission's White Paper on Governance of July 2001, address a number of issues and problems which were the central focus of our study of the committee system i.e. the questions of accountability, of checks and balances between the institutions, of efficiency and effectiveness and of openness and transparency.

What kind of contributions can our findings make to the debate that is currently going on, both in the Convent and in the discussion of the Governance White Paper. We would like to summarize these under the following topics:

- the committee system as an instrument of coordination, cooperation and deliberation;
- the committee system as instruments for effectively managing inter-institutional checks and balances;
- the committee system and the problem of transparency and openness;
- the role of the committee system in achieving efficiency and effectiveness;
- the separation of legislation and implementation;
- democracy, legitimacy and accountability.

3.1. The committee system as an instrument of coordination, cooperation and deliberation

We described above how the committee system as a whole provides arenas for inter-institutional cooperation and coordination and how particularly the standing committees of Parliament provide an arena for open debate, not only between the institutions but also with representatives of civil society. Particularly working parties in Council and comitology committees provide in addition a forum for vertical cooperation, and coordination and deliberation in solving different problems.

The committee system has been criticised for its opaque nature, its bureaucratic tendencies and its lack of transparency and openness and suggestions have been made to initiate fundamental reforms to redress these problems.

Our findings suggest a word of caution. The committee system has developed not by design but by responding to a need. Small changes can easily endanger its effectiveness

in finding solutions to common problems. Particularly comitology committees are frequently the target of reform proposals (see the White Paper on Governance, page 25). These reforms should be approached with great care. Our evidence suggests that comitology committees are very effective in reaching consensus in difficult questions of implementation and in managing routine applications of EC Law. More important are their contributions to the efficient and effective implementation and application of EC policy in and through the Member States. Abolishing them altogether or reducing the frequency of their meetings would seriously endanger efficient policy application and implementation. Abolishing the management and/or regulatory procedure could negatively affect the delicate balance between Commission and Council in policy execution.

3.2. The committee system as instruments for effectively managing inter-institutional checks and balances

We found that inter-institutional control is very effectively handled by committees. The standing committees of Parliament involve the other institutions. The presidencies of Council, particularly in co-decision, effectively and efficiently work with Parliament and Commission in reaching consensus and compromise. Comitology committees, set up for controlling the Commission implementing policy are indeed effective in solving difficult problems but also in managing the routine matters of policy administration.

This conclusion only applies to those areas of European policy that are decided by co-decision, particularly with respect to cooperation between Parliament and Council. Here we found the system of checks and counterchecks to be very effective. The suggestion that co-decision should be extended to most policy areas that today still fall under consultation, deserves support from this perspective.

3.3. The committee system and the problem of transparency and openness

Although transparency has improved significantly over the last decade, there is still room for further improvement. The opaqueness and intransparent nature of committee activities can be best improved by increasing the ability of citizens and civil society to reconstruct how decisions where arrived, who took what position, and who voted in the end for or against it. The requirements on transparency of the comitology decision of 1999 is a big step forward. Making committee decision including COREPER and working parties of Council available on the internet would constitute another step forward. Opening meetings to the public, on the other hand could easily endanger the function of committees as effective fora for deliberation and negotiation.

3.4. The role of committee system in achieving effectiveness and efficiency

Committees are not very time efficient, but then deliberation takes time. On the other hand committees are very effective in fostering deliberation and incorporating expertise, including the expertise of representatives of civil society. They are also effective in reaching consensus and compromise. Reforms that are being discussed for Council working parties should be carefully scrutinised to make sure that they do not undermine these capabilities. The presidency in Council provides important leadership and is faced with the constant challenge to reach results. Replacing rotating chairs, with permanent ones or a chair that is elected for a longer period of time may endanger the key role of the chair as mediator and broker of consensus and problems solutions. Enlargement will further increase the efficiency problem and reforms will be necessary – but they should be taken in small steps, perhaps after more thorough empirical studies than ours have been carried out.

3.5. The separation of legislation and implementation

In the implementation practice the problem of separating implementation from legislation is not an issue. The fear of Parliament that the Commission with the help of comitology committees encroaches on the rights of the legislators is not justified. The suggestion that clearer provisions should be added to the Treaty has some merits, but it is not likely to resolve the problem. More useful would be the development of guidelines about what should be delegated and what not in the basic act along the lines suggested in chapter F. A very useful Treaty revision, our study strongly supports, would be to improve the standing or the recourse to the European Court of individuals that are directly affected by implementing decisions.

3.6. Democracy, legitimacy and accountability

The European system of governance is a system in evolution. It has not reached its final status. There are many questions on democracy and legitimacy that have been raised in the Laeken conclusions and in the Governance White Paper. Our findings support the conclusion that the committee system in the sense of deliberative democracy makes a significant contribution to establishing the legitimacy of the European system of governance. But we confront two problems: First, democratic legitimacy is generated by democratic practice and procedure. That this also applies to the EU may be evident to those involved, and those who carefully study this system of governance, but not to the citizen at large. What is required is that people get to understand it better. Perhaps what is necessary is a programme to explain to citizens how the representatives of their

governments participate through committees in shaping the rules that govern their lives. The targets for such a programme would naturally be the students of secondary schools, universities and the media. Television documentaries might demonstrate to the citizens of an individual Member State how their government representatives in working parties in Council and in comitology committees try to find a common solution and how they fight for their very interests. Similarly, interest in European parliamentary elections could be increased if committee meetings would be documented and made available to the public to illustrate how European institutional actors and representatives of civil society influence and participate in shaping European policy outcomes.

Secondly, the power sharing and deliberative image of the EU focussing on implementation and minority protection that we described in this project does not seem to be the picture leading politicians have of the EU system when they describe or criticize the Union or when they put forward suggestions how to change it. Paradoxically, it looks like leading politicians talk about the Union one way but step aside and let it develop in another. After all, the Member States are the masters of the Treaty, but they also molded and shaped the institutions and practices that have evolved. When making proposals for reform leading politicians orient themselves on what they are familiar with at home, systems based on majoritarian rule, procedures and direct accountability and not on what they and their predecessors have created or let develop on the European level. Improving the legitimacy of the EU by making them more like national parliamentary democracy could easily jeopardize the delicate system of checks, balances and deliberation that has evolved over time and is in the last analysis the basis for its legitimacy. What is needed is understanding, appreciation and identification of what has been accomplished. Leading politicians can make the most effective contribution by spreading this to the citizens of the Union.

4. Final Progress Report

4.1. Final progress report for Subproject 1 -Council Working Groups

The objectives set for this subproject were essentially threefold:

- discover what goes on in working groups and analyse their contribution to the functioning of the Council of Ministers as a whole;
- investigate the linkages between working groups, the European Commission and the European Parliament in order to update information about inter-institutional relationships;

- reflect upon the causes and consequences of differences in working group practices from one policy sector to another.

By tracing the legislative process involved in producing fifteen directives or decisions taken from a representative sample of five policy sectors (telecommunications, research, environment, culture, social affairs), these objectives have been met and the time frame of the project respected. On the basis of 50 interviews with working group members (officials from the permanent representations, from national ministries, from the Commission, from the Council Secretariat), as well as documentary and media analysis, two documents have been produced. The first, prepared in cooperation with subproject 2 on the EP, is a series of monographic descriptions of each legislative process studied (compare Annex 1., Part 2). The second document is the subproject's chapter four in the final report. This document has been discussed and revised with the aid of academics within and without the project as a whole.

If our initial objectives have been met, two objectives that emerged during the research have only been partly dealt with for reasons of access to information. The first objective was to produce sociological data on members of working groups. To this end 100 questionnaires were distributed within the permanent representations in the summer of 2001. Unfortunately we only received 10 replies to this request for information. The second question that emerged during our study concerned the fact that Member States usually send two delegates to working group meetings: a member of its permanent representation and a 'national expert' who comes to Brussels specifically for such meetings. Towards the end of the project, we set out to try and interview a number of these national experts. Again, however, this objective was thwarted by the unavailability of many national officials. For this reason, the travel budgets of subproject 1 have been underspent.

Nonetheless, in terms of the value added of this sub-project, we remain extremely positive. In our view, our research is original and breaks new ground for three reasons:

- because we have conducted careful case-studies based analysis of what working groups do (rather than general questionnaire-based surveys);

- because we have delved deep into the relationship between working groups, the Commission and the European Parliament. By analysing the interfaces between these institutions, we have gone beyond habitual notions of "inter-institutional" conflict;

- because our theoretical grounding in the science of public-policymaking has pushed us to go beyond accepting the common discourse on a technical-political divide where working groups only treat "technical" issues. Instead, we have shown that ambiguity over what is "technical" and what is "political" is a key dimension of EU decision-making and institutional development.

4.2. Final progress report for Subproject 2 – Parliamentary Committees

The objectives and research questions formulated in the proposal were the following:

1) To document how EP committees incorporate expert advice in their committees and contribute to the shaping of EC law;

2) To assess the impact of outside influence such as national political parties, national governments, lobby-groups, etc.;

3) To analyse the manner and effectiveness of the control EP committees exercise on other EU institutions (Commission and Council);

4) To examine the possibility of scrutiny and control over the implementation process with the view to establishing realistic procedures for controlling the implementation process.

All the objectives were accomplished within the time-frame of the project as documented in chapter F. The last round of interviews were completed in September 2001.

We have conducted 30 interviews. The interview partners were not chosen only from the committees selected for analysis (as foreseen in the proposal), but according to their direct involvement in the case studies under examination. Where possible, we tried to interview the respective rapporteur and/or members of committees that had to give an opinion. The comparative aspect of our study was strengthened for the following reasons: although we tried to conduct our interviews with MEPs working in the sectors selected for analysis, it was sometimes necessary to interview also members of committees not covered in our study (due to the fact that a number of them changed portfolios after the elections) but who had previous experience in this sector. This broadening of the analysis was further increased by the fact that draftsmen for opinion were in selected cases delegated by committees falling outside the five sectors selected for examination. To complement the picture and to obtain more background information, representatives of the EP's General Secretariat and the political group secretariats were also interviewed. They were selected on the basis of their involvement with the cases

selected for analysis or because they deal with specific procedural issues such as the conciliation procedure.

The added value of the subproject is to contribute to a better understanding of the role of EP committees. In our documentary analysis we found that EP committees have rarely been the subject of empirical inquiries. In our research we -at least partially – tried to fill this "gap" by providing substantial empirical evidence on the functioning of EP committees. We also made a contribution to the debate on the "democratic deficit" by addressing the question whether the EP committees help to increase the EP's accountability to EU citizens.

4.3. Final progress report for Subproject 3 – Comitology Committees

Subproject 3 consisted of two parts:

- A theoretical part, which examined the distinction between legislation and implementation from a legal, political and administrative perspective. This part also discussed the question of effective control of implementation.

- A second, empirical part, in which a sample of 800 implementing measures were examined with the objective to determine whether the Commission had exceeded its delegated powers and to look at possible critical cases where this might have occurred in considerable detail and clarify how and why this may have occurred through interviews with the chairs and committee members.

During the project's life-time, the theoretical part was always well on schedule. We were able to present preliminary conclusions both at the workshop in Brussels and the ECSA conference in Madison, USA.

However, the empirical part of the project was considerably hampered by several not foreseeable problems, which put the team under considerable time pressure: First, despite the support of the General Secretariat of the Commission, it was impossible to get access to the 800 proposed implementing measures. An alternative strategy, using the CELEX data base had to be developed and applied which caused considerable delays. Secondly, the departure of the subproject leader, Georg Haibach, on 1 May 2001 required a restructuring of the project and lead to additional delays. Guenther F. Schaefer assumed the leadership of this subproject and Alexander Tuerk took over most of the remaining empirical work. Third, to our surprise, we found very few critical cases; only 10 out of the 800 cases examined could be classified as critical. Therefore, we

decided to shift the focus of the interviews from a detailed analysis of the critical cases to a general examination of how comitology committees actually work.

We planned to conclude the interviews by the end of September 2001. However, due to the fact that in August most of the chairs and Member State representatives were on vacation, we were able to conclude the 18 interviews with chairs of comitology committees and the 21 Member State representatives by the end of November of 2001.

The delay in the completion of the interviews in conjunction with the difficulties lead to a delay in the drafting and writing of the final report. It was the major reason for postponing the final drafting workshop from December 2001 to February 2002.

4.4. Final progress report for Subproject 4 – The Committee System, legitimacy, citizen's perceptions and acceptance of the EU-System of governance

In the final project period, the members of subproject 4 focused on the answering of the following questions, which they were only able to start when the empirical research was finished:

1) To what extent do the Committees promote the participation of a plurality of interest (especially non-national interests) and the protection of minorities? Are certain interests excluded – what constitutes a legitimate interest or how are interests constructed as being legitimate?

2) What characterises the discussion in the Committees – bargaining on aggregated interests and preferences or deliberative arguing in order to find an acceptable solution? Is power symmetrically or asymmetrically allocated to the members of a Committee?

3) Is the effectiveness (impact) of different solutions discussed?

4) In what way is the work of Committees co-ordinated into a broader setting?

During the workshop in September 2001, it was decided not to have the conclusions of this subgroup in one chapter, but in two. The period from September 2001 until the end of the project in January 2002 was characterised by the work on the analysis of the concept of deliberative democracy and its usefulness in interpreting the empirical findings and the drafting of the papers for the final report.

II. BACKGROUND AND OBJECTIVES OF THE PROJECT

The European Union as a project has grown substantially over time and its organisation and functions can best be explained as the results of this long historical process. At the beginning there were the Treaties which set the basic framework for how the system should operate, but also defined the goals this innovative system of cross national co-operation wanted to achieve. But problems arose and piecemeal decisions addressing different types of questions have often led to the creation of new structures, shaping a union that can be described as innovative governance in progress. New ideas were tested, often without much thought being given to how they might fit into the broader picture of a supra-national, federal and democratic system of governance. Some of the innovations have proved to be remarkable constructive and have quickly been integrated into the formal structures of the Union. Others, less successful, have quickly been abandoned again.

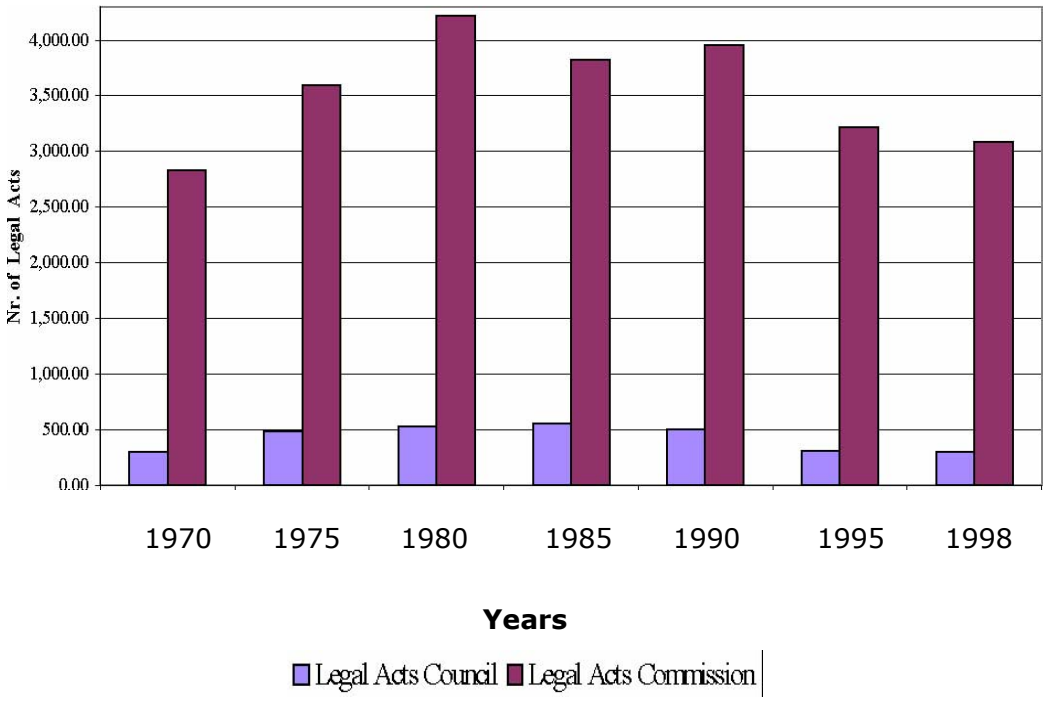
There are many innovative features of this unique system of governance. Among the most important are the mechanisms and processes that were developed for adopting binding rules and regulations for all its constituent Members. The adoption of these rules is a complex process of interaction, of co-operation between the component parts, the Member States, and the newly created European institutions. At first, primarily two institutions were involved, the Council of Ministers and the Commission. They were later joined by the European Parliament as a third partner in policy development and policy adoption. The European Court of Justice should not be forgotten, it has played a significant role in developing and improving European Law as well as adjudicating conflicts over the binding rules that the other three institutions had adopted.

Not unexpectedly the result of this process has been a rather complex network of institutions, actors and decision-makers, very difficult for the outsider to comprehend, much less to explain. Nonetheless it has been quite productive despite its complexity and despite the necessity to reach decisions often under the rule of unanimity and often after long negotiations between key-players, as graph 1 demonstrates[1].

This new structure for authoritative decision-making goes far beyond the scope of national governments that have set them up. Member State governments are still major actors but they do intrude on each others sovereignty. They are not any longer fully in control of their own affairs and not infrequently, they have to submit to or accept rules and decisions even if they have opposed them or do not like them.

[1] Legal Acts: summary of regulations, directive and decisions.

Figure 1. Legal Acts adopted by the Council and the Commission



Source: Joerges/Falke (2000), p. 44.

The evolving European system of governance, which started in 1950 as an institutionalised form of horizontal cross-boarder co-operation, has developed into a dynamic, vertical, multilevel system for policy making, policy implementation and application. In this process it had and has to cope with several major challenges:

- the challenge of repeated geographical enlargement;

- the challenge to manage growing heterogenity in the political, economic, social, cultural and language regimes of its component parts;

- the challenge to manage ever new tasks and responsibilities;

- the challenge to adapt its institutions and organisational structures and policies to the increasing complexities of contemporary political, economic and social life.

The committee system with its manifold manifestations developed in order to enable the system to cope with these challenges, just as it did in different forms in other modern, multilevel systems of government like the U.S., Germany and Switzerland. More specifically, the EU-committee system was and is the institutional instrument to cope with:

- the need for an ever higher level of technical, scientific, legal and political expertise in policy making which results from the growing complexity of regulating contemporary western society;

- the need for efficient vertical co-ordination between the different levels of governance without recourse to hierarchy with command and control from above;

- the need for horizontal co-ordination between the Member States, not so much perhaps in the first pillar, but decisively so in the second and third pillar – but also

- the need for transnational communication and deliberation – the rule of the game is consensus and compromise as a result of deliberation.

The different types of committees functioning in their distinct institutional contexts have served and are still serving the EU in facing the challenges and respond to the needs sketched out above. EU committees shape policy and play a significant role in contributing to the formulation and adoption of binding rules. They act as institutionalised groups of specialised and representative people, they have agenda-setting, rule-setting, rule-interpreting and fund-approving functions. Committees act as decision-makers as well as channels of communication through which the actors exchange their views about goals and alternative solutions to problems.

The public debate about the committee system of the EU is characterised by a latent fear of an "Archipel Brussels", an ever growing swamp bringing forth a new political class of "Eurocrats" and "Technocrats". Committees in the European system of governance probably represent indeed the most opaque and even secret aspect of EC decision making. They are considered to be of a dubious legal nature or even illegitimate because they are not mentioned in the Treaties, their proliferation in many different forms is seen as a deviation from EC constitutional rules[2] [3]. As their members are not elected on a democratic basis – except the Standing Committees of Parliament – they are frequently viewed as symbolising the bureaucratic and technocratic bias of the EU system and a major reason for questioning its political legitimacy.

The research project whose findings and conclusions are presented here has started from a different set of assumptions. Realising that despite the importance of the EU committee system, there have been – at least until very recently – very few empirical enquiries

[2] see chapter C and chapter F.
[3] see deBurca (1999), pp. 55-81.

about how the system is structured, how it is functioning, what is its output and how it should be evaluated, we decided to explore this relatively uncharted territory empirically.

When exploring uncharted territory it is advisable to limit ones objectives. We decided to limit ourselves to three types of committees: Two that are primarily involved in rule-making and rule adoption (i.e. primary legislation) - the Standing Committees of the European Parliament and the working parties in the Council - and one that is primarily concerned with policy implementation, the so-called comitology committees.

This choice excluded one of the major types of committees involved in the EC policy process: consultative or expert committees that assist the Commission in the preparation of its proposals for legal acts or programmes. It was not an entirely voluntary choice, since we were unable to find a team that was prepared to take on that extremely difficult task. These consultative or expert committees have been the least examined and researched aspect of community decision-making[4]. It was also a choice that we regretted as an important link in the committee system was missing[5].

We also decided to limit the scope of the inquiry to a few areas of community activities namely certain aspect of the internal market (especially telecommunications), social policy, research and development policy, health and consumer protection. Being fully aware that there are significant difference in decision-structures and processes in different policy arenas of the EC, covering all would not have been possible with the resources at our disposal. Nonetheless, we feel that the arenas selected represent some of the most important policy sectors of the community. Perhaps the most important area lacking is agriculture where we decided that this very complex system that developed since the 60s is almost a system of its own and would deserve special attention in a research project at least the size of the present one.

Furthermore, when exploring uncharted territory it is advisable to agree on a common method and procedure. And it is also advisable to use relatively standard methods of social research. This is precisely what the project did; the empirical inquiries carried out used documentary analyses, literature researches and interviewing.

Finally when exploring uncharted territories it is advisable to use whatever guide is available, a theoretical frame of reference. This proved to be rather difficult. Initially we were primarily concerned about the democratic dimension, that is the role of the

[4] A rare exception is Schaefer/Haider (2001).
[5] One member of our team, Torbjörn Larsson, has started an empirical examination of expert committees with the financial support of the Swedish Ministry of Finance.

committee system in the European system of governance in its effort to find a stable balance between the principles of majority rule and protection of minorities on the one hand and procedural input democracy with its efficient result (output) oriented democracy. On the other hand, this kind of positioning immediately raises the question of legitimacy and we primarily started to look at the contribution that the committee system can make to establishing the legitimacy of the European system of governance, i.e. whether it is

- worthy of recognition and approval in encouraging consensus, communication and integration;

- respectable and trustworthy;

- able to solve problems and to accomplish its task (performance);

- able to develop structures which inspire and secure consensus and which are limited and controlled, where institutions check and balance and control each other[6].

There was no ready made theoretical framework available and we decided to have one of the subprojects deal with these questions in two ways:

- first by evaluating existing explanatory theories of European integration with the view to assess their explanatory power with respect to committees; and

- secondly, to use a more traditional governmental systems approach and see how committees could be fitted into this framework.

From these choices the following structure of the research project and hence the final report emerged. In a first theoretical part, Andreas Maurer in chapter A. looks at alternative theoretical explanations of European Integration and comes to the conclusion that fusion theory is probably the most useful. In chapter B., Torbjörn Larsson examines how a governmental political systems approach can explain European Integration and concludes that the European system of governance is possibly the rather rare form of consensual government which is characterised by putting strong emphasis on getting results, outputs through compromise and negotiations, results which not necessarily please everyone but at least most can live with.

Based on these theoretical examinations, Andreas Maurer and Torbjörn Larsson jointly explore in chapter C. this type of deliberative supranational governance which stresses

[6] Habermas (1976), pp. 39-61; Hennis (1976), pp. 9-38.

efficiency, effectiveness, compromise, combined with deliberative elements focussing on expert knowledge, reasoned argument and inclusiveness.

In the second part we present the empirical findings. In chapter D. Eve Fouilleux, Andy Smith and Jacques De Maillard examine working parties in the Council as fora where draft legislation and compromise solutions begin to take shape. They are not the intergovernmental battle grounds often assumed, but arenas for inter-Member State, interinstitutional and ideological mediation. In chapter E., Christine Neuhold describes the Standing Committees of Parliament that have succeeded in economising their operation to cope effectively with their increasing legislative role, but which also provide a forum for interinstitutional and open debate including the public, at least members of the civil society.

Chapter F. and G. deal with comitology. In chapter F., Alexander Tuerk and Guenther F. Schaefer explore the question of how to define the concept of legislation in the EC legal system and how to assess its relevance for the implementation process and secondly, to examine empirically whether the Commission in collusion with comitology committees exceeded its implementing powers, as Parliament had often suspected.

Finally chapter G. presents the results of interviews of how comitology actually work. Guenther F. Schaefer, Alexander Tuerk, Margarete Gotthard and Natalie Flatz come to the conclusion that here, as well as in other committees, search for consensus are the rules of the game and that the committees play both an important vertical and horizontal coordination function.

Finally in the conclusion Guenther F. Schaefer and Torbjörn Larsson try to place these findings in the theoretical context developed in chapter C. concluding that the evidence strongly supports the assumptions made by the representatives of the concept of deliberate supra-nationalism.

III. SCIENTIFIC DESCRIPTION OF PROJECT RESULTS AND METHODOLOGY

A. Committees in the EU system: alternative approaches for understanding a multi-level, multi-actor system

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1. Introduction

From the original EEC Treaty to the Treaty of Nice many core issues of public policy have become subject to supranational decision making and intergovernmental co-ordination. Like policy fields and decision making norms, institutions have been further developed or been newly introduced in order to cope with the functional scope of the EU. Like the Parliament, the Council and the Commission, the subordinated committees are the result of both functionalist -day-to-day -institution-building and intergovernmental - IGC-like - bargaining. They are part of the EU's institutional structure and do not purely and simply constitute a neutral arena, but structure the policy processes according to a variety of norms, rules and procedures. Thus, analysing committees in an unsettled but moving environment means to scrutinise the various interactions between European and national governmental as well as bureaucratic actors, companies, non-profit and private interest representatives. If any dominant factor is to be made responsible for the popular fears of the 'bureaucratisation' in and around Brussels, it is the specific constellation of a de-nationalised public authority and the impact of the various multi-level arenas acting therein.

Consequently, the patterns of committee interaction can not only be analysed as a search for consensus between a limited and stable number of actors. Not only the well-known kinds of formal bargaining or other asymmetric dependency situations should be examined minutely, but the exchange of resources on the basis of equality and mutuality as well. Due to their particular character, committee interactions have to be investigated beyond the formal structures of the EU policy-cycle.

In this chapter an effort will be made to review some of the most important theoretical approaches to European integration with respect to how they can help us to understand the role of committees in the European system of governance.

2. Integration Theories and committees: An Overview

2.1 Realism, Functional Co-operation and Intergovernmental Monitoring

Realists conceive the sovereign nation-state as the authoritative actor in cross-border interactions[7]. Although various inner state actors participate in the making of political decisions, the nation-state is identified as a unified protagonist of clearly defined interests and preferences[8]. Following neo-realist assumptions the EU and its institutional set-up are products of a general strategy of national governments to gain and to keep influence vis-à-vis other countries[9]. „The fundamental goal of states in any relationship is to prevent others from achieving advances in their relative capabilities"[10]. Within the framework of the EU, the principal task of Member States is to retain their supremacy as 'masters of the Treaty'.[11] National actors defend and shape an institutional balance favouring the Council and -to a growing extent -the European Council: The Council's infrastructure is then considered as an addition to national institutions sharing the control of the Commission's activities and thus preventing an evolution towards an unrestrained supranational bureaucracy: „The influence of supranational actors is generally marginal, limited to situations where they have strong domestic allies."[12] The style of European law making is characterised by conflict between Member States in which zero sum games predominate. Accordingly, the behavioural pattern of actors in the Council of Ministers and its administrative substructure of COREPER and working groups would be characterised by unanimous decision-making and distributive -'quid-pro-quo' -or "integrative balancing".[13] National administrations would be regarded as essential in sheltering the 'institutional balance'. The interaction style between the two levels of 'co-operation-governance' would follow a model of diplomatic administration: Civil servants −regularly hailing from foreign ministries and prime minister departments −would prevent any attempts from supranational actors to gain influence.

Unlike classic realism, the liberal intergovernmentalist variant of neo-realism focuses on the construction of national preference building.

> „National interests are […] neither invariant nor unimportant, but emerge through domestic political conflict as societal groups compete

[7] Waltz (1979); Evans/Rüschemeyer/Skocpol (1986); Volgy./Imwalle/Schwarz (1999), pp. 246-262.
[8] Grieco (1988), p. 494.
[9] Grieco (1988), pp. 485-587; Link (1998); Moravcsik (1999).
[10] Grieco (1988), p. 498.
[11] Bundesverfassungsgericht 1993.
[12] Moravcsik (1995) , pp. 611-628.
[13] Link (1998).

> for political influence, national and transnational coalitions form, and new political influence, national and transnational coalitions form, and new policy alternatives are recognised by governments."[14]

The analysis of the configuration of national interests, therefore, includes looking at how actor groups beyond the core of governments and administrations steer the definition or – with respect to public opinion -the background of interests and preferences: „Groups articulate preferences; governments aggregate them."[15] Liberal intergovernmentalism therefore shares the (neo-)realist assumption on the centrality of Member States' actors within the EU and it explicitly "denies the historical and path dependent quality of integration"[16], which both neo-functionalism and neo-institutionalism stress as the rationale to explain the very process of "supranational governance"[17] in the European Union.

According to this concept, the committees surrounding the EU's organisational set-up are identified as products and instruments of a general strategy of national governments and administrations to pave the way to more influence in the Brussels sphere.[18] The principal task of the respective committees is to restrain the supremacy of the Member States as 'masters of the treaty'.[19] Particularly the Council's infrastructure (COREPER, working groups) and the comitology committees would be considered as an addition to national administrations sharing with them the supervision of the Commission's activities, thus preventing an evolution towards an unrestrained supranational bureaucracy. Considering the various forms and procedures of comitology committees, this approach would anticipate a constant trend towards a typology which would guarantee national civil servants an extremely large influence. Relating to the question of legitimacy, committees would have a high rating on the scale since they are representatives of the holders of national sovereignty. Accordingly, realists would suggest neglecting the relevance or opposing the reality of supranational administrations. Instead, national administrators would be expected to try to emphasise the supremacy over national politicians and to keep the frequency of political cross-border meetings restricted.

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[14] Moravcsik (1993), p. 481.
[15] Moravcsik (1993), p. 483: „The most fundamental influences on foreign policy are, therefore, the identity of important societal groups, the nature of their interests, and their relative influence on domestic policy."
[16] Moravcsik (1995), pp. 612-613.
[17] Stone Sweet/Sandholtz (1998), p. 5, who view "intergovernmental bargaining and decision-making as embedded in processes that are provoked and sustained by the expansion of transnational society, the pro-integrative activities of supranational organisations, and the growing density of supranational rules". Consequently, they argue, "these processes gradually, but inevitably, reduce the capacity of the Member States to control outcomes".
[18] Wessels (1990), pp. 229-241.
[19] Bundesverfassungsgericht 1993, in: Oppenheimer (1994), p. 190.

A different model of European administration which would fit into the realist conceptualisation of the integration process would be a specific kind of intergovernmental monitoring: Referring to this model, national governments would dominate the European arena of institutions and procedures and their administrative bodies. The sovereign nationstates would co-ordinate their policies, as it is typical for inter-state relations under traditional international law. Cross-border interactions would be shaped by national politicians, particularly by ministers of foreign affairs. The very few exterior contacts would take place in intergovernmental conferences or Councils at the level of national ministers allowing governmental actors to remain sovereign both to external and internal political decisions. Finally, a model of functional co-operation might also be interpreted with the theoretic tools offered by realism. The European policy output would be shaped by national government-administration interactions, where co-operation between civil servants and government depends on the subject of European negotiations. Consequently, the Brussels based administration would serve as a 'collective sherpa' in the interests of the Member States. The functional and technical requirements would determine the number and depth of administrative interactions. Information inflow would depend on the performance of national administrations and governments.

Realism largely ignores the European Parliament and its committee substructure as an independent actor of EU policy-making. If considered, the focus would be on the members of the EP acting as defenders and aggregators of national interests. Although they sit as transnational political groups, realism would score national whipping. As to the overall interaction mechanisms between the institutions, the EP would be seen as an added value for the Council and its constituent units of Member State delegates. Clearly, Realism would then need to simply disregard the co-decision procedure and its empirically evident effects on the relative power of the EP.

2.2. Federalism and the Parliamentary Administration

According to the federalist paradigm, the struggle of national actors for access, influence and veto powers e.g. for an effective control of the Brussels arena has not been, is not and will not become successful.[20] Instead, Member States' actors will be more and more marginalised and substituted by EU bodies and institutions, which are being transformed from dependent Member States' arenas into independent actors. Each step of treaty building would increase the role of supra-national institutions and decrease veto powers of Member States. The behavioural pattern of the Council of Ministers would be dominated by referring to and using Treaty provisions of qualified majority voting. Those

[20] Mayne/Pinder (1990), pp. 214-215.

EU-related bodies which bring the national actors together -Council, COREPER and its related working groups would be seen as primarily serving the national interest and thus constituting a major obstacle to a proper federal system which alone could guarantee efficient, effective and legitimate European policies. Concomitantly, the attempts of national administrations to lock into the EU system of supranational governance and government are rejected as a strategy against the real will of the 'European people' and its path to a federal union.[21]

In this view, and contrary to the school of realism, the European Parliament is a key institution of the constitutional set-up of "a future EU government". Parliament would be expected to (s)elect, to control and to legislate with government. Federalism would assume a legitimate supranational order, which formulates far-reaching policy agendas, articulates ideals and brokers strategies for the deepening of the integration process. The national actors -governments, administrations and their EU-related agencies -would wither away. Moreover, inter-administrative bargaining within committees would be considered as an obstacle to solve the problems of the European Union and its citizenry.

In this view the traditional opposition of the European Parliament to comitology committees goes beyond its quest for more power; it is a key issue, in fact, of the constitutional set-up of the EU's de-facto government structures. Consequently, federalist theories on European governance would suggest to abolish both the management and the regulatory committees. Following this school of thought, the model of a 'truly' European administration would be a European bureaucracy which clearly dominates the national administrative bodies in each relevant field of European public policy, but which itself is dominated by a supranational government based on parliamentary elections and parliamentary government. Thus, the model of a supranational bureaucracy is -compatible with realist views -considered as a kind of antagonist. Since federalism suggests a division of competences between the different levels of policy making (European -National -Regional -Local), co-operation between administrations would be modelled according to the principle of subsidiarity. Moreover, federalism would assume a European bureaucracy acting as a 'political promoter' which formulates far-reaching policy agendas, articulates ideals and brokers strategies for the deepening of the integration process.

[21] Schneider (1996), pp. 21-50.

2.3. Neo-Functionalism and the Supranational Technocracy

From neo-functional points of view the very nature of integration is considered as the process whereby

> "political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones."[22]

The main feature of integration would be the concept of functional, institutional and procedural spillover -a process that refers

> "to a situation in which a given action, related to a specific goal, creates a situation which the original goal can be assured only by taking further actions, which in turn create a further condition and need for more action, and so forth."[23]

Consequently, spill-over gradually involves

> "more and more people, call(s) for more and more inter-bureaucratic contact and consultation, thereby creating their own logic in favour of later decisions, meeting, in a pro-community direction, the new problems which grow out of the earlier compromises."[24]

Neo-functionalism would thus expect that the actors tend to expand the scope of mutual commitment and to intensify their commitment to the original policy sector(s).[25] In view of this approach, Treaty revisions are the legally sanctioned products of spillover processes, which provide the EU institutions with more exclusive powers for shaping binding outputs for its Member States. The latter would accept their roles as parts of a process without a fixed picture of its final outcome. Neo-functional spill over within policy fields and from one policy area into another would lead to a widening of the functional scope of EU law i.e. to an increasing number of Treaty provisions for a growing number of policy fields. The EU related structures and procedures of Member States would be

[22] Haas (1964), p. 16.
[23] Lindberg (1963), p. 10.
[24] Haas (1964), p. 372.
[25] Schmitter (1969), p. 162.

oriented to an emerging supranational bureaucracy. The European bureaucracy would be expected to act as a 'political promoter' who formulates far-reaching policy agendas, articulates ideals and brokers strategies for the deepening of the integration process.

From this perspective, comitology committees would be considered as functional necessities, tackling technical problems together without the need for further reflection on their democratic legitimisation. In this perspective, one would expect comitology committees to be arenas where functional „problem-solving" rather than political „bargaining"[26] would dominate the interaction style. Committees – both the Council's working groups and the comitology committees -would be conceived as bodies of experts, where people with highly specialised technical knowledge in a certain area come together in order to shape European secondary and implementation legislation. The participants would not be interested in the exact legal form of their committee, but in reaching agreements on the basis of a joint analysis of the problems at stake. Distributive effects, vertically among the two levels, or horizontally between Member States, would be clearly subordinated to the best technical solution in the interest of the common good. Neo-functionalism generally explains the growth in number of committees and in the frequency of their meetings as product of spillover processes.[27] Given this basic orientation, the neo-functionalist model of European administration would be characterised by the existence of relevant administrative interactions depending in its number and characteristics primarily on the functional scope of the Union. Cross-border contacts would be considered a necessary addition to the interstate adjusted bureaucracy. These interactions strengthen the proficiency of national administrations in finding adequate task-orientated solutions without lessening the conventional relationship to other interstate actors or constraining their political leadership. The impact of supranational actor's remains to some extent restricted, domestic political concerns dominate the convenience of national actors for supranational co-operation. Whereas the model of functional co-operation would suggest a dominance of the national level in European policy making, the model of a supranational technocracy would tend to argue, that the European level, i.e. the European Commission and its Directorates General, would dominate the game of policy field oriented administration. Similar to the model of functional co-operation, this kind of bureaucracy would not depend on a particular constitutional basis or on certain institutional arrangements, which organise joint decision-making. The co-operation of national and European civil servants would not be undertaken for its own merits, but seen as a chance to find problem-orientated solutions on the European level. The technical requirements determine the number and depth of

[26] Scharpf (1988), p. 2.
[27] Schmitter (1996), pp. 211-244.

administrative interactions. However, unlike functional co-operation, information inflow and the specific demands for implementing European secondary legislation would depend on the services of the Commission and only to a lesser extent on those of national administrations.

2.4. The erosion of democratic government and the model of an European mega-bureaucracy

In the view of an erosion school of thought,[28] bureaucratic expansion is the consequence of national and European administration's intense interactions, shaping together a multi-level mega-bureaucracy.[29] By pursuing a highly regulated multi-level game, bureaucrats from both the European and the national level would emphasise their autonomy against the political class by using their administrative experience.[30] As experts in complex administrative procedures, they replace democratic policy-makers, thus constructing a conglomerate that can not be subjected to parliamentary or judicial control -controls to which national administrations are normally subjected. The "logic of bureaucratic" membership and the influence which the involved actors may execute would produce a strong „logic of committees".[31] The participating civil servants betray their governments and populations alike. The individual citizen would be confronted with a multi-layer functional set-up which is not willing to create loyalty or to establish any kind of solidarity with the public. By excluding others from their activities, mega-bureaucracies create an independent political space, which is different from norms established by legislatures or elected governments. In this perspective, the model of mega-bureaucracy is not only the result of "Eurocrats", but also of national administrations, leading both to enlarge their areas of influence which are uncontrollable by others. The characteristic indicators of the megabureaucracy are largely explicable in terms of an unlimited coincidence of national and supranational administrative structures. Using their special bureaucratic abilities both civil servants of the Commission and national civil servants would use administrative interactions to prevent any serious control. The disappearance of other actors leads to a "government by expertocrats" which may be highly efficient, but is beyond any political control.

[28] For this term see Delbrück (1987), pp. 386-403, and Scharpf (1991), pp. 621-634.
[29] For this term see Wessels (1996) or for the comitology committees, as a "comitocratie", Fabien (1995), p. 17.
[30] Weber (1950), p. 17. Weber distinguishes between academic knowledge and office knowledge, only the latter can be amassed inside bureaucracy.
[31] For the terms in this context see Schendelen (1996), p. 31.

2.5. Governance, Fusion theory and the Models of Horizontal and Vertical Fusion

In view of major approaches within the post-1989 school of governance the institutional and procedural changes in the EU treaties need to be analysed as one particular element of rather minor relevance within the complex multi-level game of the EU.[32] The EU polity is seen as a "post-sovereign, polycentric, incongruent" arrangement of authority, which supersedes the limits of the nation-state.[33] Assuming a non-hierarchical decision-making process, the EU does matter but as one realm for collective decision-making and implementation. In other terms, "policy-making in the Community is at its heart a multilateral inter-bureaucratic negotiation marathon".[34] As formalised and informal networks[35] among a large number of different groups of actors in various arenas for decision-making, formal rules generally tend to become irrelevant. The 'governance-inspired' pendulum thesis then assumes some kind of cyclical up and down between "fusion and diffusion".[36]

This

> "pattern of the pendulum varies over time and across issues, responding to little endogenous and exogenous factors, and including shifts between dynamics and static periods or arenas of co-operation"[37].

With Maastricht as a more permanent fixture of European integration[38] these push-and-pull dynamics between different levels of governance lead to an "unstable equilibrium"[39] where 'Europeanisation'-and 're-nationalisation'-trends come into a close co mpetition.

In clear contrast to neo-realism and intergovernmentalism some proponents of multi-level governance would conceive the European Parliament as an active co-player: "Irrespective of whether the EP provides legitimacy of European executive decisions, it certainly interferes with the negotiating process."[40] It can, and sometimes does, overturn the results of negotiation in and around the Commission and the Council. 'Maastricht' did however not constitute major structural changes for the daily governance practices of the

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[32] Note the classic school of European governance refers rather exclusively to the European institutions. See: Smit/Herzog (eds.) (1976).
[33] Schmitter (1996), p. 136.
[34] Kohler-Koch (1996), p. 367.
[35] Héritier (1996), pp. 149-167.
[36] Wallace (1996), p. 13.
[37] Wallace (1996), p. 14.
[38] Jachtenfuchs/Kohler-Koch (1996), pp. 15-46.
[39] Wallace, W. (1996), p. 439.
[40] Wallace, H. (1996), p. 33.

EU. Even if the European Parliament is seen as „perhaps the largest net beneficiary of the institutional changes in the TEU"[41], multi-level governance would not expect the Parliament as a key player in the EU's arenas. From the perspective of this school of thought, Member State structures do not merely perform as unified actors. They rather matter as arenas of collective decision preparation and implementation, thus indicating a new stage for both administrations and for the state. European governance thus contributes to a „decrease in the unilateral steering by government, and hence an increase in the self-governance of networks".[42] Accordingly, changes in the style of EU-related interaction mechanisms could be taken as a significant indicator for this phenomenon.

In view of this school of thought, committee interaction might be regarded as one particular element within the complex multi-level game of the EU. Assuming a non-hierarchical decision-making process overarching the geographical limits of the EU and its Member States -multi-level governance also appears as a characteristic in other systems such as NATO, the OECD or the UN -, committees do not (intend to) move the EU into a certain direction or transform its basic character and organisation. Instead, they perform as defenders of the status quo. Committees do matter as arenas for deliberation and collective problem solving. If „good governance" contributes to a „decrease in the unilateral steering by government, and hence an increase in the self-governance of networks", committees could be taken as a significant indicator for this phenomenon.[43]

Fusion theory[44] goes beyond the analysis of the integration process at a given time and offers tools to understand the very process of interaction and joint problem solving beyond the state. It regards EU institutions and committees as core channels and instruments as interested actors -national governments and administrations, MEP, other public and private actors -increasingly pool and share public resources from several levels to argue on commonly identified problems and to attain commonly identified goals. Institutional and procedural growth and differentiation -starting from the ECSC onwards - signal and reflect a growing participation of several actors from different levels, which is sometimes overshadowed by cyclical ups and downs in a political conjuncture. However, each 'up' leads to a ratchet effect by which the level of activities in the valley of day-to-day politics will have moved to a higher plateau. The major feature of this process is a 'fusion' of public instruments from several state levels linked with the respective

[41] Wallace, H. (1996), p. 63; Maurer (1999).
[42] Kohler-Koch (1996), p. 371.
[43] Kohler-Koch (1996), pp. 359-380, p. 371.
[44] Wessels (1996); Wessels (2000).

'Europeanisation' of supranational, national, regional and de-nationalised actors and institutions. The result is a new grade of institutional and procedural complexity.

On the national level the fusion thesis suggests a significant trend towards Europeanisation.[45] Europeanisation is defined as a process by which governmental, parliamentary and non-governmental actors shift their attention to the Brussels arena, involve their resources and invest 'time' to participate.[46] With this definition, a change in relative terms of using limited and scarce resources is indicated. The location from where actors involve themselves might be national, European, or regional. EU policy making thus triggers constant institutional adaptation in the Member States alters the domestic rules and the inter-institutional distribution of means for complying with the requirements for an effective participation in European governance. National and regional actors orient their capacities towards the EU legislative process. Europeanisation then means "the incremental process of reorienting the shape of politics to the degree that EC/EU political and economic dynamics become integral parts of the organisational logic of national politics and policy-making".[47] In the extreme, Europeanisation by orientation and integration could lead to the full synchronisation of national politics with self-made EC/EU ‚imperatives', or -on the other side of the spectrum -the successful instalment of policy-making structures and constitutional norms, which bring the Member States in clear and structural opposition to the EC/EU system. Recent analysis on the participation of Member States in the EU[48] indicate that those elite's involved in the policy cycle seem to develop specific – non-accidental - and original attitudes which lead to a general acceptance and support of the system; in any case they are ready to spend considerable amount of energy and hope to achieve substance out of it.

Fusion theory[49] thus regards committees as indicators of this permanent process of combining and sharing resources from several institutional and instrumental levels; committees are the manifestation of a growing Europeanisation of national administrations.

In this view, committees in general and comitology committees in particular are significant in the way the European Court of Justice has put it: if powers

[45] Rometsch/Wessels (1996); Goetz (1995), pp. 91-116; Carter/Scott (1998), pp. 429-445; Knill/Lehmkuhl (1999).
[46] Wessels (1997), p. 36; Maurer (2001b), pp. 36-37.
[47] Ladrech (1995), p. 68.
[48] Wessels/Maurer/Mittag (2001); Maurer/Wessels (2001b).
[49] Especially Wessels (1992), pp. 36-61.

> „fall partly into the competences of the Community and in part within that of the Member States it is essential to ensure close co-operation between the Member States and the Community institutions".[50]

Thus, committees with national and European civil servants are examples for and a main driving force behind the merging of public instruments. They are to some extent a product of the increasing competition for access and influence in the EU policy cycle.

We could distinguish between the model of horizontal and vertical fusion and the model of co-operative administration, which mainly differ with regard to the level of influence of administrative bodies against governments. The model of vertical and horizontal fusion would help us to design interrelated processes of Europeanisation on the level between the Member States and EU institutions on the one hand and on the level between national and European administrative bodies on the other. Like in the case of the new Economic and Financial Committee (EFC), both Europeanised levels of interaction i.e. Commission and European Central Bank (ECB) on the EC level and Member States representatives on the national level, meet in a special committee which co-ordinates views and opinions of Member State and EU administrations on a given set of issues[51]. The fusion theory would expect that committees like the EFC would neither act as the »guard dogs« of national governments charged with controlling the ECB or the European Commission nor as forums for more intergovernmental negotiations; it would rather behave as a specialised body for joint action. Consequently specific interaction styles within committees -horizontally between its members and other committees [e.g. between the EFC and the ECOFIN working groups or the EC Employment Committee] and vertically between its members and other specialised Member States institutions/committees -are to be expected to be characterised by: "a constructive team spirit, a confidential club atmosphere, an effective collegiality will dominate over strict interpretation of legal texts and formal rules".[52] Unlike horizontal/vertical fusion, co-operative administration would be more oriented towards and more dependent on the Member States' governments level. A good example could be the new CFSP planning and early warning unit established by the Treaty of Amsterdam, where the members (from the Member States and the Commission) will act under the auspices of the Council's Secretary General and in the interest of the »joint strategic decisions« to be formulated by the European Council.

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[50] European Court of Justice 1994: C/94 (World Trade Organisation) Summary in: Proceedings of the Court of Justice and the Court of First Instance of the European Communities 30 (1994), pp. 7-14.
[51] Article 114 [ex-Article 109c] EU-Treaty.
[52] Hanny/Wessels (1998), p. 111.

3. A brief look at the empirical reality

Comparing the explanative power of the different theories of European integration to the phenomena of the committee system and submit them to empirical validity we are confronted, by a not entirely surprising confusing picture. Certainly committees in the EU system are not artificial creations, nor a typical development by pure accidental factors, nor merely a bureaucratic plot to keep, or even extend, their influence. Whereas the Member States acting in the Council dominate the creation of comitology committees -as neo-realism would suggest -, the concrete business of policy implementation through comitology is clearly shaped by the European Commission[53] -an argument fitting more into a federalist conceptualisation of a federal administration. However, the EU's committee system is not characterised by a tendency whereby the different bodies are being replaced by pure Community institutions. The realist concept of diplomatic administration hardly corresponds to reality: committee members in the Council's sub-units or acting in the European Commission's committee network may feel a certain type of »togetherness«. But given the Commission's power to dominate the game of implementing measures on the one hand, and the powers of the Council in establishing committees, as well as the power of the Member States to nominate their representatives and the power of the European Parliament to scrutinise the comitology decisions at least to a certain extent on the other hand, the image of independent diplomats shaping the preparation and implementation of EU law without the Commission is rather misleading. Of course, if we focus attention exclusively on the committee networks in the field of justice and home affairs established prior to the Maastricht Treaty (within the Schengen and the TREVI regime), we would have to acknowledge a certain trend of intergovernmental monitoring combined with some kind of governmentally monitored diplomatic administration between the early 1980s and the post-Maastricht era. However, since Maastricht came into effect, the TREVI committee structure of the third pillar has shifted towards functional co-operation with a pre-dominance of the national level at all stages of the policy process.[54]

Some of the indicators may suggest neo-functionalism as the most appropriate tool for investigating the committee network in the field of EC legislation. Especially the evolution of the Council's and the Commission's legislative output in comparison to the increase of

[53] See Commission report on the working of the committees during 2000, OJ C 37/2002 of 9 February 2002 pp. 2-16; Ciavarini-Azzi (1996).

[54] Ex-Article 100d ECT in combination with ex-Article K.4 TEU established the so-called 'K.4 committee' bringing together Senior Officials from the Member States in order to assist the Council and COREPER in the preparatory phase of measures in the field of justice and home affairs. The TREVI-system is thus being replaced by the K.4 committee structure with 3 steering groups and 19 working groups. Unlike in the TREVI system, the European Commission is now fully associated in the work of the K.4 committee.

comitology committees suggests to conceptualise committee interaction as a supranational technocracy in process[55]. However, qualitative studies on national administrations and their interaction within the EU do not indicate subsequent shifts of loyalty from the nation-state towards the EU committee systems, as neo-functionalism would suggest. The concept of a multi-level mega-bureaucracy would expect growing complexity and a lack of transparency, hence committee interaction networks that are impossible to control either by the European Parliament or by the national parliaments of the Member States. However, this concept ignores that the control capacities of the European Parliament, especially with regard to the comitology system, have been improved. This is not to say that Parliament's demands regarding the accountability of the comitology network have been fulfilled by the new comitology decision of 1999. But especially in those cases of post-Maastricht secondary legislation, where the co-decision procedure applies, the European Parliament is able to influence the choice of the comitology procedures to be established.[56]

Our interpretation leads to a characterization of both the committee system and the committee interactions according to the concepts of horizontal and vertical fusion and co-operative administration. The growth rates of the meetings of Council working groups, of the number of civil servants involved, of the frequency of comitology meetings particularly in the field of agriculture and of the expenditure for comitology meetings, indicate a process of institutional and personal mobilization within a concentric - polyarchical instead of hierarchical -political system, in which national administrations are shifting their attention towards Brussels. The challenges of a Commission providing the operational rules of comitology, the claims of a Parliament pressing COREPER into 'pre-conciliation' meetings for co-decision and the demands of interest groups offering advice and bringing in 'transnational' expertise spill back into national administrative systems. Moreover, national civil servants are increasingly confronted with different administrative cultures and interaction styles. Consequently, mobilization leads to Europeanisation of institutions and staff, which share common belief systems about their contribution to the establishment of a functioning democracy in the EU system. The fusion attempt stresses the 'checks and balances' between the national and the European institutions in preparing, making, taking, implementing and controlling EC/EU binding decisions. The fusion thesis also emphasizes the frequently observed mixture of national and EU competences and also the distributed responsibility for the use of decision making instruments. One element of our short view on the empirical reality is clear: The fusion thesis has been asymmetrical. Not the complete setup of the Member States has moved

[55] Compare Wessels (2000).
[56] See Bradley (1997), pp. 230-254.

but mainly the administrative machinery. The trend towards bureaucratization and administrative segmentation keeps on going -although some of the dramatic loops of this development have decreased.

During the last fifty years of European co-operation and integration Member States' governments as well as the EC/EU institutions have created, reformed and used a variety of instruments and procedures within a triangle between market, state and non-governmental networks as an arena for "the mediation of the interests of governments, administrations, supranational institutions and interest groups."[57] New and/or revised sets of provisions offer European and national actors additional incentives and opportunity structures to solve their most serious socio-economic problems. The question to be addressed is in how far these differentiated opportunity structures help the institutions to create a legitimate polity beyond the nation-state? Does institutional variety constructs or obstructs a democratic order?

[57] Peterson (1995); Ayral (1975), pp. 330-342.

B. The European system of governance and committees – a legitimacy and democracy problem

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1. Introduction

A classical discussions in the field of political science is the issue of political legitimacy – that is, what gives the rulers the right (power) to impose their will on the people or, slightly rephrased, why should the public follow the decisions taken by the rulers, especially when a decision goes against their private interest? The break through of democracy in the beginning of the 20th century and later the triumph over both fascism and communism did not in any way reduce the actuality of this discussion, on the contrary. A low turn out in general elections, a steady decline in political party membership and the general public's scepticism towards the elected politicians have rekindled the debate and warnings have been issued of a growing legitimacy gap in today's democracies[58].

The creation of the European Union has played an important role in this discussion and it has been seen both as a possible solution to the problem and as a problem in itself. To some extent the EU is regarded as an instrument by which Member States can solve some of the problems the welfare state is facing and thus restore the general public's confidence. On the other hand, the organisation and the functioning of the EU have raised serious doubts about the legitimacy of the whole project as such and the question has been asked whether the net effect of the ambition to increase legitimacy through further integration has not in fact been the opposite. A favourite target for criticism in this area has been the informal structures of the EU and since the EU is filled with committees and committee work this debate has come to focus on the use and abuse of these committees. In this chapter the ambition is to lay the theoretical foundation for how the issue of democratic legitimacy and EU committees can be studied.

2. Political legitimacy and its historical background

The discussion of political legitimacy has roots far back in history, long before the democratic regimes of today had emerged. Even the philosophers of ancient Greece found this topic to be of great importance. Plato, for example, stressed the importance of rule by law in a good government while the rule of men lead to bad governments, and

[58] Olsen (1983), p. 14.

Aristotle questioned whether it was 'more convenient to be governed by the best men or by the best laws'.[59] Thus, a concern for these early philosophers as well as for later ones was the distinction between legitimate power and power which was not legitimate, because if the power emanated exclusively from brute force, what then distinguished a state from a band of bandits? Or, as the question was formulated by St Augustine: 'Without justice, what would in reality kingdoms be but bands of robbers'?[60]

Later, in the 19th century, Mosca saw two basic sources for authority either top down from God, or bottom up from the people. To him, legitimacy was a question of authority, not reason -the realisation of either God's will or the will of the people gave legitimacy to the decisions of the rulers.[61] The problem here, of course, was to find a method that made it plausible to the public that the decisions made or the laws passed could be deduced from the will of God or the will of the people. It is also worth mentioning that the will of the people in those days was not necessarily manifested in general elections. Monarchs, for example, often saw themselves as the supreme interpreters of the general opinion -ruling in the name of the people but without consulting them or their representatives. Additionaly, relying on God almost always entails giving a lot of influence to the clergy – which is not always a reliable source for the King's intentions.[62]

In the 'pre-democratic' days, at least two more types of arguments were provided to give legitimacy to the political power of the rulers -one based on history and one based on natural law. In order to find principles and reasons justifying the use of power by the rulers some would turn to the system that many believed to exist 'by natural order' which had been in place since the beginning of mankind. Even today some people will argue that certain natural rights (principles) are given to an individual the moment he or she is born, principles which must respected by the rulers and which can not be set aside.

When using historical arguments to justify public power one can follow one of two different roads -the conservative (static) or the more radical (change). From the conservative point of view, and in the spirit of Burke, some laws are more basic than others and derive legitimacy simply from the fact that they are very old, just like some institutions and regulations.[63] When applying this perspective, the rulers had to build their legitimacy on the previous order and any change to society had to be carried out gradually. In stark contrast to Burke and the conservative ideas are those with a more

[59] Bobbio (1989), p. 91.
[60] Ibid. (1989), p. 82.
[61] See Mosca (1939) 'The ruling class'.
[62] See Thomas of Aquino (1948) 'De Regimine Principum'.
[63] See Burke (1790) 'Reflextions on the Revolution in France'

radical approach, which also use historical arguments in their legitimacy strategy, but here the future was the focal point. According to the radicals, what gave legitimacy to a revolutionary change of the state was a deterministic historical process, going through a development of predetermined changes affecting society. Thus the state had to change drastically in order to cope with the changes in society if it were to survive at all.

Max Weber had a somewhat different approach to the question of legitimacy. To him the question was not so much from what general principle the rulers could deduce their right to rule the people but rather what made people follow certain leaders. He identified three types of justifications -charismatic, traditional and rational. People will often follow leaders just by habit or tradition, they have been more or less indoctrinated since birth to follow those who hold higher offices. In this case, the legitimacy is largely linked to the office, not the person.[64] The charismatic leader on the other hand gets his/her legitimacy from his/her personality. What Weber had noticed was that certain leaders got what they wanted just because their personality inspired confidence. The third type of legitimacy is based on rationality, i.e. people follow leaders who make suggestions and decisions that are rational (logical), because they think this will solve the problem and it is presented in such a way that they can understand it. Weber believed this to be the modern form of leadership, suitable for a democracy. People would increasingly follow leaders who could give rational and logical arguments to support their decisions. This type of leadership would also imply the rule of law since rationality is the foundation for laws.[65]

What is especially interesting with Weber in terms of legitimacy is his emphasising of the output side of the political system. The relationship between the services provided by government and the citizens is of vital importance for whether the government would be perceived to be legitimate by the general public or not.[66] However, stressing the results or the output of government activities as a way of legitimating power is nothing new, already Hobbes who in the Leviathan argued that individuals should obey the ruler or the rulers as long as they protected their interests legitimacy could not be deduced from the will of good.[67]

This brief overview demonstrated that the issue of legitimacy is something that concerns all types of regimes, but when applied in western democracies the concept of legitimacy becomes closely related to the concept of democracy and the questions of where and

[64] Weber (1978).
[65] Weber (1977), p. 42.
[66] Rothstein (1992), p. 47.
[67] Ball/Dagger (1999), p. 55.

why legitimacy is to be found are sometimes contested.[68] But since there are different types of democratic government, modern day discussions of democracy have produced a number of answers to these questions. In order to come to grip with the arguments regarding the legitimacy of today's democracy, a closer look needs to be taken at some of the more basic forms of democratic regimes.

3. Common organisational features of democratic regimes

The responsibility of a government is basically twofold: the authoritative allocation of resources and legitimacy building (support).[69] Or, to rephrase it, a government tries to regulate basic conflicts in society by solving different types of what is regarded as the current societal problems, e.g. unemployment or healthcare. Legitimacy-building and problem-solving are interrelated and there is input (procedures) and output (results) in both cases. Government input is when the government in its decision-making capacity follows certain procedures which are well known in advance and accepted by the public, allowing the public to participate in and have an influence on the government's decisions. Government output is when it receives support from the public because it has produced certain results in its problem-solving capacity.[70] The legitimacy of a political system is made clear by the fact that the public is willing to participate in the decision-making procedure and that the people will respect and adhere to the decisions, even when they go against their personal interests.[71]

However, producing results is not only the rational technical way of finding the best solution to a specific problem; it is also about who gets what, when and how.[72] In other words, problem-solving (the regulation of conflicts) is all about whose preferences should be allowed to take precedence. In a democracy the simple answer to this question is usually: those of the majority.[73] But democracy is not only about the right of the majority to rule (which some people see as the tyranny of the majority): minorities also have rights in a genuine democracy.[74] Furthermore we will always find people claiming that democracy is not only instrumental but a goal as such -a way for human beings to develop.[75]

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[68] Laffan (1999), pp. 331-332.
[69] See Easton (1957) p. 383.
[70] Scharpf (1999), p. 7.
[71] Weiler (1993), p. 253.
[72] Lasswell (1936).
[73] Arblaster (1991), p. 68.
[74] Majone (1996), p. 286.
[75] Räftegård (1998), p. 69; Held (1997) p. 149.

Democratic regimes can be organised in many different ways but there are generally some common features. These common features originate to a large extent from the traditional distinction of three different powers: legislative (decision-making), executive and judicial, which in turn correspond to three different types of institutions: an elected assembly (parliament), an executive (government) and a judiciary (courts).[76]

The assembly, elected by the public in free and open elections, often comprises two chambers. All, or some, of the members of the upper (first) chamber are often indirectly elected, or (not so common) appointed, or inherited. In an assembly with two chambers where only one chamber is directly elected, the directly elected second chamber is the more powerful one. The main object for the assembly is legislation, but it also has functions like supervising and scrutinising the executive and the judiciary. The parliament usually get its legitimacy, its mandate to exercise power, from the fact that it is elected by the people and in that sense is believed to represent the people.

The executive can either be of a monolithic or a dualistic type. In many cases the government includes both a president and a prime minister, or a monarch and a prime minister (who is figuratively the first minister of the monarch).

The normal function of the executive is to implement the decisions taken by the assembly and to put forward suggestions to the assembly on how to change the present legislation in different areas and how resources should be allocated in the annual budget. The executive often also has an important role to play in suggesting or appointing people to higher offices such as the head or members of the board of the central bank or judges in the supreme or high courts. How the executive gets its legitimacy differs from one political system to another; sometimes by being appointed by and accountable to the assembly, in other cases by being directly elected by the people.

The judiciary is of course mainly responsible for the correct application of the laws, but it is also involved in the functions of the executive and the assembly either through a constitutional court or through judicial review exercised by the regular courts. The right of the individuals to appeal government decision can also affect the execution of government policies. As opposed to the assembly and the executive, the courts do not build their legitimacy primarily on being elected (although judges are directly elected in some countries) or by being appointed by an elected body. The real legitimacy of the courts is derived from their independence vis-à-vis all other interests and their ability not to succumb to outside pressure. The objective and unbiased interpretation and

[76] See Montesquieu (1990).

application of the law is the key to their authority, which sometimes is also true for other governmental institutions like the central bank and the auditing office.

Finally, it is important to remember that these entities do not function independent of each other, they are part of a common political system. The role of each one of them and the balance between all of them may differ from one democratic political system to another, but if changes are made in the functions of one, they will also affect the other two. Therefore, should the rules and regulations guiding the work of an assembly be changed this will most certainly also affect the operation of the executive and/or the judiciary. However, to predict what is going to happen in other parts of the political system can be difficult. In fact, what is sometimes seen as minor changes to one part of the political system can have rather drastic effects as the consequences are sifted throughout the whole system.[77] Consequently, the political legitimacy of a government does not stem from one source only but from a number of interrelated institutions, together forming a political system of a specific type.[78]

4. Different types of democratic governments and their political legitimacy

To begin with, one can discern two main types of democratic government (a third type will be discussed later), based on two different principles attributing importance in varying degrees to the four values: procedures for problem-solving, producing results, majority rule and minority protection.

Fundamental to a democratic regime is, of course, the right of the majority to rule, but this right does not go so far as to threaten the life and existence of minorities. Therefore, in a democratic society, there has to be some kind of protection for the individual (the smallest minority there is). The problem we are faced with here is how to design this protection while not making it so far reaching as to circumscribe the basic principle of majority rule. What is needed is a balance between the two principles. And here you will find the demarcation line between governments based on power sharing (presidential or pluralist governments) and governments based on the parliamentary idea.[79]

[77] Pierson (1996), p. 127.
[78] Olsen (1983), p. 37.
[79] Dahl (1989); Coultrap (1999) p. 107.

4.1. Parliamentary systems

Political systems based on the parliamentary principle are usually designed to promote majority rule. In a parliamentary system this is done by giving more or less supreme power to the parliament. The idea behind a parliamentary government is that it is a system of successive delegation. To begin with the people delegate power to the parliament in the election process, and the parliament in turn delegates power to the executive to implement the will and wishes of the people. That way it can be said that the people in a parliamentary system rule themselves, i.e. what is expressed is the will of the majority of the people who control the rulers by means of a chain of accountability.

But even if the principle of majority rule is clearly expressed in a parliamentary system one usually finds mechanisms for protecting minorities.[80] For example, decisions such as amendments to the constitution may need a qualified majority in the parliament to be accepted. In other cases, certain delaying techniques can be activated or are compulsory when a parliament is about to take a decision that might restrict a basic right for minorities. It is worth noting here that the demand for qualified majority voting means that we are talking about a ruling minority not a majority -i.e. a minority can block (veto) a proposal from the majority side, although it cannot impose a new decision. The power of veto is a choice between saying yes or no, or maintaining the status quo or not.

However, it is important to stress that the concept 'the will of the people' in a parliamentary democracy means the right for a stable majority to rule for a certain amount of time, i.e. until the next general election or when a new government is formed.

4.2. Power sharing systems

A power-sharing system provides better protection for minorities as it is more explicitly based on the idea of checks and balances. In a power-sharing system we do not find that one of the central parts of the government (executive, legislative and judiciary) has supreme power over the other two. In certain areas one may have the upper hand but there will always be areas where the power is shared and public power is diffused rather than centralised**.** There are two kinds of power-sharing techniques, one emphasising "input" and the other "output" of government activity. Input has to do with procedures which have to be observed when decisions are taken, while output has to do with the content of certain decisions (legal or not). To be more precise, on the input side it is quite common to find rules prescribing that new laws must be adopted by a common

[80] Olsen (1990), p. 83; Nino (1996), p. 3.

accord between the executive and the parliament -i. e. both must come to the same conclusion on the phrasing of a new law.[81]

An example of how the output technique works is when courts by their mandate of judicial review nullify laws they find to be in conflict with the constitution. Today it is in fact quite common when talking about a power-sharing system to refer to the courts as guardians of the constitution against potentially conflicting legislation, be it parliamentary laws or decisions by the executive. Power-sharing systems can be classified in different ways. It is, for example, possible to distinguish between vertical and horizontal power sharing. Power sharing can be based on the public institutions getting their legitimacy from the same sources, for example a parliament and an executive both directly elected by the people. Here, we have a situation where one majority is controlling another. In other words, should these majorities be of the same type, there would be no clear protection of minorities.

The vertical principle of power sharing -a federal system -is characterised by a division of power on different levels, where limited power is given to a federal level while the rest remains at the level of the states or is shared between the federal and state level. It is, of course, debatable whether the states should be regarded as being below, above or on equal footing with the federal level, especially where the states are the foundation for the federal level, i.e. where it all began. In reality a power-sharing system is often a mixture of different kinds of power-sharing principles -vertical and horizontal -as well as of input and output principles.[82]

The different systems -power sharing and parliamentary -build their legitimacy in two different ways. A parliamentary system gets its legitimacy from the fact that all power is entrusted to a parliament which is elected by the people and is superior to the other central governmental entities – an essential element of this system is the parliament's accountability to the people. Since the parliament is operating in the name of the people it has more or less unlimited power; it can for example dismiss the executive.

A high turnout on election day is therefore more critical in a parliamentary system than in a power-sharing one, since this creates the impression that the parliament speaks in the name of the people, and a low turnout could be taken as an indication of a loss of legitimacy. In this way a parliamentary system is a simpler construction and easier to understand and explain to the general public, but it is more vulnerable to a change of opinion of the general public.

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[81] Riggs (1997), p. 256.
[82] Coultrap (1999) p. 107.

In contrast, a power-sharing system is more complicated and to a large extent will get its legitimacy from the fact that the power of the executive is controlled (limited) by checks and balances. In short, the power is both allocated and overlapping, but the question of accountability is less clear.

In reality no government fits the model of either a power-sharing or parliamentary system perfectly and in real life one often finds elements of both. However, there is a third democratic model, but in order to understand that type of government more 'informal' institutions (actors) – such as political parties -have to be included in the concept of government.

4.3. Consensual governments

So far we have only discussed the formal (constitutional) part of government in today's democracies. It is now time to take a closer look at a third type of government. However, in order to fully understand this type of government one also has to take into account the more informal structures and organisations of a political system, with an especial emphasis on political parties.

What has previously been attributed to the different types of constitutional governments take on a different aspect when one considers the informal parts of the political system.

In parliamentary systems, e.g. with an institutionalised division between the executive and the parliament, the gap between them is allegedly bridged by well-disciplined political parties. The main feature of modern democracies in the 20th century is not the leading role of the parliaments but of the political parties.[83] By means of general elections it is decided which party or parties will be in government and which will be in opposition. Thus it is more accurate to say that in parliamentary systems today, the parliament is often an arena for competition between political parties rather than individual actors in their own right. In fact, when suggestions are made to extend the influence of parliament, the suggestions are in reality normally either in favour of increasing the power of the opposition or of the parliamentary delegation(s) of the ruling side. Today, parliaments do not control the governments, the controlling is done by the political opposition with the assistance of interest groups, the public and, increasingly, by the media.[84]

[83] Bobbio (1989), pp. 105.
[84] von Beyme (1993), p. 278.

The party structure may vary from basically a two-party structure to a multi-party one, and from a culture of strongly disciplined political parties to one with more fragmented parties. Furthermore, the party structure can, from an ideological point of view, be either predominately one-dimensional or multi-dimensional. In a country where the party system tends to be one-dimensional we often find left-wing parties in coalition against right-wing parties or *vice versa.* On the other hand, should the party structure be of a multi-dimensional type it is more difficult to predict which parties are going to join forces and form a government.

Party governments can therefore belong to different categories. A distinction is usually made between minority and majority governments and between one-party governments and coalition governments. A one-party government that has gained a majority of the seats in parliament is often described as a strong government (majoritarian government), and a coalition government where no single party commands a majority of its own is seen as a weak government.[85] The development of the party system thus affects the balance between minority and majority rule, as well as the problem-solving capacity and legitimacy of the state.

In a predominately two-party system the government will of course be of the majority type. This will further reinforce the already strong tendency in a parliamentary system for majority rule. On the other hand, the structure of a multi-party government can be a counter force to the basic constitutional character of the system. This means that in such a parliamentary system more protection is given to minorities. In some countries, parliamentary (coalition) governments are not formed on the basis of the principle of the minimum number of parties necessary to rule; instead they opt for large coalitions. In countries like Finland, Belgium and the Netherlands the formation of a government is more about which party or parties should be excluded from government than which parties to include. In other countries the government would in advance negotiate with the opposition before they take a decision in order to ensure a broad support for its proposals. According to Lijphart majoritarian government is more an exception than the rule with respect to how parliamentary governments are formed and function.[86]

Multi-party systems in general provide better protection of minorities especially if small parties are included in the government. Large coalition governments or government actually involving the opposition in its decision-making procedures, called consensual (consociational) democracy by Lijphart, not only provide better protection of minorities in

[85] Lijphart (1984), p. 107.
[86] Lijphart (1999), p. 65.

parliamentary systems but also maintain some capacity for majority rule in combination with results (output). In fact Lijphart has argued that consensual democracies are better in producing results than majoritarian governments.[87] There is, of course, a limit as to how small a minority can be in order to be protected by the political party system and very small groups as a rule never make it to the parliament. The rights of an individual against the state in such a system can only be protected by recourse to the legal system.[88]

Should, on the other hand, the same party or parties constitute a majority in several elected bodies of a power-sharing system the checks and balances between the different government bodies can become less effective. But since elections to the different bodies are seldom held on the same date, elections lead quite often to different majorities in different bodies. However, in a power-sharing system the basic character of the system is not only defined by the relationship between the elected bodies, several other types of checks and balances operate which limit the development of a truly strong government.

The role of the parliament differs according to the structure of the party system. In a power-sharing system the parliament is more likely to be a policy-making arena, while in a parliamentary system it is more likely to be one of competition between the party or parties in power and the opposition. But we also find differences in different parliamentary regimes. In some countries with a predominantly two-party system (majoritarian system), like in the United Kingdom, we have a 'talking' parliament. The chances of the opposition directly influencing the proposals for new laws made by the government are slim to non-existent. About all it can do is to try and make abundantly clear to the general public the major drawbacks with the government's proposals (from their point of view) and hope that public opinion will force the government to change its mind. In countries where the government is often of a minority type, the situation is somewhat different. Here the opposition at least gets a chance to directly influence new policy presented by the government. However, influencing public opinion may not be the best way to maximise potential influence. As a result, in these countries we find a parliament less skilled in brilliant rhetoric but more focused on negotiating behind closed doors with the government -a 'working' parliament as opposed to a talking one.

The different political systems are also more or less well suited to different types of societies. A society characterised by strong conflicts in the fields of language, religion, ethnic and regional identity and possibly even ideology would probably be better off with

[87] Ibid, p.275.
[88] Nugent (1999), p. 498; Weiler (1997), p. 282.

some kind of power-sharing system, whereas a parliamentary government is better suited to fill the needs of a more homogeneous society.[89] It should therefore come as no surprise that the Belgian government, which is trying to control a society characterised by strong tension between three groups separated by language, region and religion, has moved in its organisational design from a consensual, parliamentary type of government towards a power-sharing system of a federal type. The opposite seems to be happening in Finland, where the tension between ethnic groups and social classes is decreasing. The Finnish government has developed towards a more genuine parliamentary system -less power to the president and qualified majority voting is usually no longer needed in the parliament to pass laws.

To summarise, the pre-coded tendency in the constitutional structures of different types of government to favour the principle of majority rule or the protection of minorities can, in terms of legitimacy building and problem-solving capacity, be reinforced or balanced out by the structure of the "informal" government, i.e. the respective party system. How strong this effect is will to some extent depend on how well-disciplined the political parties are. In certain democratic countries the 'informal' type of government generates consensual governments – the legitimacy of which is not based on the constitution. Thus, we seem to have three basic principles for organising a democratic regime – the parliamentary (majoritarian), the power sharing and the consensual principle.

5. Other forms of legitimacy structures in democratic governments

Interestingly enough, democratic governments do not only achieve legitimacy by ruling in the name of the people and fulfilling the people's needs; legitimacy can also be generated through institutions which have not been publicly elected, so called non majoritarian organisations like courts or regulatory agencies. In fact a number of measures taken lately by democratic governments to improve their legitimacy have had the character of increasing and strengthening the role of non majoritarian organisations. Increased judicalisation of Western styled democracies has been noticed by Neal Tate and Torbjörn Vallinder,

> 'either (1) the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts or, at least, (2) the spread of judicial decisionmaking methods outside the judicial province proper. In

[89] Dahl (1998), p. 149.

> summing up we might say that judicialisation essentially involves turning something into a form of judicial process.'[90]

Legitimacy is not gained simply through the good name and the tradition of courts and judges but also through the legal process as such, which can be imitated by organisations other than courts.

Borrowing (i.e. copying) concepts and terminology from the private management sector has also been used by governments in an effort to improve their legitimacy, one example of which is 'New Public Management'. A number of measures and items have been labelled "New Public Management", from the point of legitimacy, two aspects are of special interest; the introduction of a market or similar techniques in the production and distribution of public services, and the creation of administrative units, so called agencies, with a high degree of autonomy vis-à-vis the government -thereby breaking up the classical chain of command created by ministerial responsibility linking the public administration to the government in parliamentary democracies. Consequently, the public administrations of today are supposed to achieve legitimacy through efficiency and service to the public, not just by being the extended arm of and fulfilling the dreams and hopes of the politicians.[91]

Another example of the same technique is when experts or scientists are asked to take decisions instead of politicians or representatives of interest organisations. Transforming social and political conflicts into technical or scientific problems is a well established method in all modern democratic societies.[92]

What a closer look at democratic governments reveals is, therefore, that their legitimacy is not only derived from ideas of a self ruling and a self controlling people, other processes and techniques are also involved. Which, finally, brings us to the European Union where, at least in the beginning, these 'non majoritarin' forms of legitimacy building were thought to play a major role in generating support for the concept of a Union.

[90] Vallinder (1995), p. 13.
[91] Pierre/Peters (2000), p. 64.
[92] Radaelli (1999), p. 43.

6. The European Union and its legitimacy

When making a comparison between the European Union and other existing forms of democratic governments, majoritarian, consensual or power sharing ones, we find similarities but also great differences. To begin with, there is nothing in the European Union which even remotely resembles that particular chain which is linking the electorate to the rulers that we find in a parliamentary system. It is true that we have a directly elected parliament but the formation and the composition of the executive is not dependent on the political majority in that parliament. On the other hand, the European parliament can with a vote of no confidence force the Commission to resign, something we would perhaps not expect to find in a power sharing system.

Furthermore, there are political parties in the European Parliament which compete over power and influence but none of them constitute a clear ruling side or an opposition to the executive. Clearly, in its composition the European Union is much closer to the model of a power sharing system than a parliamentary democracy but even so there are elements in how the powers are allocated within the system that makes it unique compared to other political systems of this type. In power sharing systems the power is divided between the different public institutions and it overlaps in such a way that the different institutions balance each other -no one is supposed to be able to dominate the others or to be a dominating player in the system. This is obviously not the case in the European Union where the Council with its strong executive and law making powers easily outrank the other institutions. In many ways the European Union, therefore, can be described as an unbalanced power sharing system. And this becomes even more confusing when one takes into account how legitimacy is created in the European Union.

Already in the beginning the legitimacy of the European integration was founded more on output, to generate certain results, than on input. The Union's mission was -right from the start -to secure peace in Europe and improve welfare through the internal market and, later on, to improve the Member States' competitiveness in the world market economy. The Union was not primarily created with the intent to try and improve or to secure democracy in the Member States. However, in later years the European project has expanded and new ideas and ambitions have been added, and now the focus is as much on combating poverty, extending and improving democracy as on securing peace and the internal market.

Originally, therefore, European legitimacy was to a large extent built on indirect means through the control by the Member States national parliaments.[93] Secondly, it was built on non majoritarian institutions and processes, relying on expertise and trying to enhance impartiality.[94] Later on arrangements were made to promote more direct legitimacy, which was considered to be 'stronger' than indirect legitimacy, by the creation of an elected parliament. But when scrutinising how this power sharing system has tried to build its legitimacy, a somewhat unexpected picture emerges, because the strongest part of the system, the Council, bases its legitimacy on an indirect link to the people while the weaker link, the Parliament, has a direct one. Could it be the case that the Council has more power than legitimacy, while the Parliament has a legitimacy surplus (sic)? A tempting conclusion although many would argue that it is the other way around - the legitimacy of the European Union is primarily derived from the Member States' governmental representatives taking decisions in the Council. In the case of the Commission the legitimacy rests on its organisation of expertise and its ability to run a policy-making process characterised by impartiality and fairness. Finally, the European Court of Justice builds its legitimacy much like the courts in the national states – i.e. on procedures and taking on the expected images of a court including wigs and robes – supplemented by the recognition of judges in higher or supreme courts of the Member States, as a being supreme. From a legitimacy point of view the European Court of Justice has probably been the most successful EU institution if success is defined as making its authority known and recognised. However, what is often regarded as the big, and perhaps most difficult, problem for the European Union is the absence of an image of a united people that we find in nation states.[95]-on which authority and legitimacy can be built, as stated by the famous Maastricht decision of the constitutional court of Germany.

But how serious are these objections to the idea of a Union as a political system of its own with its own legitimacy? In order to fully understand this problem a comparison with other governmental systems might be helpful. Let us therefore once again return to the discussion of what types of democratic government we find today and how the European Union can be related to -or included in one of the different categories.

[93] Obradovic (1996), p. 201.
[94] Radaelli (1999), p. 30.
[95] Laffan (1999), p. 346.

7. Democratic legitimacy beyond the nation state

Democratic structures are rather complex creations and legitimacy is therefore generated in different ways, as shown earlier. However, testing the ideas along two dimensions seems to be of vital importance – firstly, majority rule vs. protection of minorities and secondly, procedural (input) democracy vs. results (output) democracy. To begin with, we have the question of how to balance the right of the majority to rule against the protection of civil rights for minorities. In a democracy it is usually taken for granted that the majority principle is applied, i.e. the majority rules over the minority. Those arguing that the majority principle implies tyranny of the majority are usually met with three counter arguments. First, should we reject the majority principle we end up by being ruled by the minority. On the assumption that all men are equal and have equal rights to fight for the implementation of their preferences when values clash, it seems only fair that the majority's preferences are satisfied on behalf of the minority's, not the other way around. Or, as expressed by Shapiro: 'Tyranny of the majority is something that the people should rationally fear, but not as much as they should fear tyranny of the minority'.[96]

A second way of defending the majority principle is to stress that the rule of the majority is not a problem as long as the influence is not asymmetrical. Individuals rarely have identical preferences which means that in a democracy you sometimes will find yourself on the winning side -the majority -and at other times on the loosing side. Thus, in a democracy an individual will not always have all his personal preferences satisfied when government decision are taken, but they will be satisfied often enough. Finally, a third line of argument in defence of the majority principle can be found among those who point to the role of compromise in a democracy. It is rather common that compromise is being stressed as an (the) essential element in a democracy. Individuals in a democracy are supposed to be able and willing to compromise with their own values and to accept or at least tolerate -to some degree -the values of other people. In other words, although the majority rules in a democracy, it should never impose its will unconditionally on the minority. Instead it is always supposed to, at least marginally, make some concessions to minorities by way of compromise. A similar way of reasoning is put forward by those who claim that the ruling majority should not always seek the smallest winning majority -

[96] I. Shapiro, Democratic Justice, Yale U.P., 1999 p. 33 (Quoted in Den starka demokratin, Premfors, Atlas, Stockholm 2000).

meaning fifty-one percent versus forty-nine. This should be a rare exception, not the norm.[97]

However, even when all the arguments for the majority principle have been taken into account, strong arguments still remain in favour of protecting minorities in a democracy. It can not be right that there could be no way of preventing a majority from taking decision severely hampering the life and existence of minorities. This is of course unacceptable for most people who believe in democratic theory -it can never be accepted e.g. that a majority, no matter how large, can abolish the democratic procedure as such. This is the reason why we find in most democratic governments different types of mechanisms with the objective of protecting the rights of minorities as the foundation for the democratic procedure. They can be of a procedural type, where the object is to delay certain types of decisions for some time or demanding qualified majority for decisions of a more fundamental nature. Alternatively they can be more substantial like constitutional definitions of which types of governmental decisions that are unlawful. One problem here of course is how far one can go in protecting minorities without infringing on the fundamental democratic principle of majority rule – the balance between the two principles has always been delicate. When looking at how different types of democratic regimes are handling this balancing act it is clear that, although all of them basically accept the majority principle, some underline the importance of protecting minorities more than others.

The second vital dimension in a democratic system is the balance between procedures and results. Some would even argue that democracy is all about procedures (input) -i.e. how to make authoritative decisions in areas where public interests are at stake.[98] However, two different opinions can be identified with respect to the question of participation. One stresses the importance of the citizens' active participation, while the other is focusing more on the possibility for citizens to participate when it is in their interests but most of the time letting the elite go on with the ruling. The elitist approach even stresses how too much participation can be harmful for the efficiency of the government and participation should therefore be restricted.

Others would go even further by stressing that democracy is also about the government's ability to take (the right) decisions (output), i.e. to solve societal problems and regulate conflicts between different types of interests correctly. Expressed in another way, democracy is not just about the machinery of government but also about results. When a

[97] Ross (1967), p. 114.
[98] Held (1997), p. 223.

government looses its ability to take decisions and to solve the problems in society it will soon loose its legitimacy. The importance of as well as the limits of efficiency (output) related legitimacy in a democracy has been further stressed by Scharpf, who links the problem solving capacity of a government to different types of policy areas. According to him, output efficiency primarily generates legitimacy when dealing with regulatory policy, as opposed to distributive policy which has to be based on a system of procedural democracy.[99]

To complicate the picture further, results and procedures are interrelated and some times it is not clear whether something is to be regarded as input or as output. What is clear though, is that a government can not base its legitimacy on output or efficiency alone, if it wants to call itself a democracy.

Thus, just as all democratic governments adhere to the principle of majority ruling but differ in their protection of minorities, all democratic systems are based on the idea of democracy as a procedure. But the systems are organised differently when it comes to emphasising the result of the government decision-making (output legitimacy). The two dimensions are interrelated, as illustrated in the figure below, suggesting four ideal types of democratic governments.

Table 1. Ideal types of democratic governments

	Democratic focus of the system	
	High degree of:	
Source of ligitimacy	Majority rule	Minority protection
Procedures (input)	Majoritarian	Power sharing
Results (output)	Consensual	Deliberative

What should be highlighted here is that each democratic regimes get their legitimacy from different types of arrangements -through majority rule and the protection of minorities as well as through procedures and results arrangements. But the balance between the components will differ from one system to the other. Some systems put the emphasis on generating legitimacy through input arrangements focusing on fulfilling the needs of the majority (a majoritarian type of government) -which also happens to be a description of a 'pure' parliamentary system similar the one we find in the UK. Other

[99] Scharpf (1999), p. 109.

countries have a power sharing type of government and are consequently more focused on procedures for protecting the basic rights of minorities, not only by pandering to the majority. This type of government closely resembles the one we find in the United States. The so called consensual government could, on the other hand, perhaps best be described as system which normally generates legitimacy through output arrangements (results) but also has the ambition to satisfy the needs or the preferences of a large majority.

Probably the most interesting and challenging political systems are those having to rely to a large extent on legitimacy derived from achieving results and minority protection -a system which could be called deliberative government or deliberative democracy. Deliberative democracies are characterised by a system that lacks a stable majority to build its legitimacy on and instead it relies on a process where the different participants through reasoning and negotiating try to find solutions to serve a common good. This process is focusing on inclusiveness -all those affected by a decision should be allowed to participate on an equal basis -but at the same time the ambitions is not just to find a compromise satisfying all the participants but effective solutions to certain problems at hand which are acceptable to everyone concerned.

Some would say that this is, in a nutshell, the situation the European Union is facing. We have yet to find a European 'demos' and the chances of creating one in the near future look bleak since instruments such as transnational parties, the media, a common language to promote a common identity are non-existent or insignificant in terms of real influence. Thus, the European Union can not rely on a stable majority from which it can derive its legitimacy -majority decisions will be taken but the majority will consist of constantly changing constellations of groups, particularly Member States.

For the EU this means a different situation compared to the one in national governments, making it imperative to focus on other elements of the democratic theory. However, this does not necessarily imply a contradiction to classical democratic theory, nor does it entail a classification of the EU as a *'sui generis'* system, because the EU can in fact be said to conform to the basic requirements of a democratic regime.

To summarise: all the ideal governments described above put special emphasis on certain democratic values -but not the same values. In majoritarian systems accountability is the essential element since the strong concentration of power to a ruling majority entails getting legitimacy by being linked to the people. The main source of legitimacy for power sharing systems is checks and balances, making sure that the power is not concentrated but dispersed. In consensual systems efficiency and effectiveness are

essential elements for creating legitimacy because the main objective is finding solutions to problems in society which pleases large segments of the public. Finally, deliberative systems focus on openness and transparency in finding the common good, because that is the only way of making sure that an inclusive discussion has taken place where all interests concerned have participated on an equal and fair base. Since all democratic government is a mixture of all four ideal models described in figure 2.1, all governments also include the democratic values mentioned above – accountability, checks and balances, effectiveness and efficiency, openness and transparency – but every democratic system comes up with a unique answer to the question: How these four values should be prioritised and combined.

In this chapter the question was raised whether the EU could be classified as a deliberative government. In order to find an answers to that questions we have to take a closer look on democratic theory and deliberative governments in a supranational context, which is what the next chapter will do.

C. Democratic legitimacy in EU politics — no way out for committees

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1. Is the EU system undemocratic? -A snapshot from the Belgian countryside in December 2001

The Laeken European Council of December 2001 formulated a set of questions with regard to the future design of the EU's institutions and their democratic legitimacy. According to the Laeken declaration on the future of the European Union,

> "the European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses [and...] from democratic, transparent and efficient institutions."

Although this statement suggests a broad normative consensus about the state of democracy and legitimacy in the EU, the heads of state and government mandated the Convention they had established to deliberate on some the most traditional questions to be answered when establishing any political system: The first set of questions concerns improvement with regard to the "input-legitimacy" of European integration:

> "How we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions. How can the authority and efficiency of the European Commission be enhanced? [...] Should the role of the European Parliament be strengthened? [...] Should the role of the Council be strengthened? Should the Council act in the same manner in its legislative and its executive capacities? With a view to greater transparency, should the meetings of the Council, at least in its legislative capacity, be public? Should citizens have more access to Council documents? How, finally, should the balance and reciprocal control between the institutions be ensured?"

Evidently, citizens are primarily interested in how an institutional system works to secure that multi-level and multi-actor decision-making is based on a specific and abstract balance of power. The Laeken mandate then moves on to define questions with respect to improving the output-legitimacy of the EU's political system:

> "How can we improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States. How could the Union set its objectives and priorities more effectively and ensure better implementation?"

Overall, the Laeken mandate mirrors an unequivocal picture of a political system in evolution. Although it is based on some of the most traditional concepts of representative democracy, the system requires improvement. However, the very nature of the mandate and its context – the failure of the Treaty of Nice, the perspective of an enlarged Union of 25 and more Member States, and the effects of a globalised economy and trans-national risk production – show that these concepts are not fully implemented. In other words: The European Union faces some serious problems with regard to the relationship between its governing bodies and its citizens. Does, and if yes, how does the EU provide opportunity structures for establishing a democratic system? To what extend do EU institutions – more specifically the highly aggregated system of committees and working groups – provide an obstacle for democracy? Are there any means to reconstruct a concept of democracy, which allows the Union to further build on its differentiated set of institutions, and to gain positive feedback from its citizens? In the first part of this chapter, we shall explore these questions and survey the answers, that we could find in the literature, particularly with respect to the major institutions and the committees associated with them.

2. The democratic design of the EU's system

The EU system takes binding decisions, which influence the citizens' ways of living and constrains their individual freedom. More specifically, the European Community and -at least with regard to the third pillar -the European Union are entitled to limit national sovereignty. Not only the Member States, but the European Parliament, the Council, the Commission and the Court are enabled to take decisions directly binding the residents of its constituent Member States without the prior and individual assent of each national government. EU policies are not only translation devices of ongoing deliberation marathons. For the day-to-day addressee, EU policies are decisions to implement. Once a piece of legislation is published in the Official Journal of the European Communities (OJEC), it affects and induces behaviour -directly, in a given time period, and in most of the cases without any distinction between different parts of the EU's citizenry.

The cumulative process of functional, special-purpose or single-policy oriented integration affects the institutional design and the decision-making process between institutions on both European and national (and to a growing extent even sub-national

and sub-regional) levels of governance. In this regard, the EU's institutional design faces a multitude of questions as to how representative this system of multi-level governance is, in which way its quasi-executive branches -the Council and the Commission -and their surrounding net of committees, working groups, informal meetings etc. are accountable to the citizens and how democratic the decision making procedures in and between the Union's legislative authorities are.

Overall, the proliferation of transnational policy making has crucial implications for traditional conceptions of democracy. Despite the construction of supranational institutions modelled on key organs of liberal democratic states (executive, legislature, judiciary etc.) since its inception the European Union has been criticised for being at the source of the democratic deficit:[100] More recently with the expansion of the EU's competence into areas of greater overtly political sensitivity for states and citizens (including Justice and Home Affairs and monetary union, as well as foreign, security and defence policy) and a growing Euro-scepticism among the EU's citizenry, the democratic deficit has developed further as the leitmotif for the future of European integration.[101]

The issue of democratic legitimacy plays a significant role in western political systems; interestingly, it reveals special importance if related to the European Union, arousing heated debates among scholars studying European integration.

Democracy, is often defined as the "institutionalisation of a set of procedures for the control of governance which guarantees the participation of those who are governed in the adoption of collectively binding decisions".[102] This definition does not automatically imply democracy to be synonymous with parliamentary majority vs. minority government. As shown in the previous chapter, there are many ways to secure the participation of the citizenry in governing a given polity. But if we turn to the evolution of the EU over the last decades, we observe a clear trend: The search for establishing some kind of representative governance structures, in which institutions aggregate participation needs and try to fulfil their general function as arenas and rules for making binding decisions, and for structuring the relationship between individuals in various units of the polity and economy.[103] In this sense, the lack of control over government-like institutions firstly on the national and secondly on the European level -the Council of the EU -generates a "double democratic deficit".[104]

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[100] Reich (1991); Williams (1991); Pliakos (1995); Follesdal (1998).
[101] Laprat (1991); Lodge (1995); Reich (1991).
[102] Jachtenfuchs (1998), p. 47.
[103] Hall/Taylor (1986), p. 19.
[104] Lodge (1996), pp. 190-191.

Of course, those stressing that national sovereignty resists European integration would argue that decision-making in the EU rests primarily upon the Member States and the Council of Ministers and, since Maastricht and Amsterdam, upon the European Council. Accordingly they would ascribe only a minor role to the European Parliament and parliamentary institutions in general.[105] However, since the entry into force of the Single European Act (SEA) and the introduction of the co-operation as well as the assent procedure, the real distribution of powers between the institutions goes far beyond this conceptualisation of the Union. Within the sphere of the European Communities, the Treaty revisions from 1986 onwards reveal a tendency towards a multi-level polity where competences are not only shared between the Members of the Council but also between the Council and the European Parliament.

3. Missing Links: The institutions, their democratic bias, and the role of committees

The European Union is not based on a European 'demos' and the chance of creating one in the near future seem bleak. However, the missing 'demos' is not a prerequisite for democratic governance in the EU system, but an ideal product of successful integration and institutional design. In this respect, we refer to Habermas' analysis.

He argues that

> "the ethical-political self-understanding of citizens in a democratic community must not be taken as a historical-cultural *a priori* that makes democratic willformation possible, but rather as the flowing contents of a circulatory process that is generated through the legal institutionalisation of citizens' communication. This is precisely how national identities were formed in modern Europe. Therefore it is to be expected that the political institutions to be created by a European constitution would have an inducing effect."[106]

In other terms, the "*demos* is constructed via democratic 'praxis'. [...] Instead of 'no EU democracy without a European *demos*', we have 'no European *demos* without EU democracy'."[107]

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[105] In this regard, the IGC blueprint of the old British Government is highly illustrative: "A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996", Presented to Parliament, March 1996.
[106] Habermas (1995), pp. 306-307.
[107] Hix (1998), p. 65.

But are the institutions able to build the European demos via institutional reform? The democratic deficit does not seem to have vanished with establishing gradually and extending the compentences of the European Parliament. There remains a gap between the citizens of Europe and the European institutions both for mental and for geographical reasons. It appears there are limitations as to what can be achieved through new or improved arrangements for the Europeans' participation in the democratic process. Moreover, although the extension of the powers of the European Parliament may have addressed some of the legitimacy problems of the Union it also created new ones due to the low and diminishing turn out on election day. In fact, it looks like the more formal power the Parliament is given by Treaty revisions the less support it gets from the general public in the following elections. Focusing on the parliamentary input structures of the Union is only one of several ways in which governance "beyond the state"[108] might gain legitimacy. And the process of European integration does not feature clear and unequivocal trends towards the establishment of nation-state like government structures. In the contrary, the main idea of integration is the continuous search for problem-solving capacities in specific policy areas without explicitly considering the mode of appropriate government structures.

This is why an important part of the legitimacy building of the EU is based on its ability to effectively solve policy problems with an emphasis on safeguarding minority preferences. In many cases this means finding solutions that satisfy minorities, but these solutions have to be constructed in such a way that they are not opposed by a majority. For the EU this creates a different situation, compared to the one in national governments, making it imperative to focus on other elements of the democratic theory. However, this does not necessarily imply a contradiction to classical democratic theory as the minority aspect of the democratic discussion has received new attention in national government. Over the past years, increasing emphasis has been put on so called deliberative elements of democratic theory, elements that did not use to attract quite so much attention. In a democratic society it is of course of utmost importance that members discuss the issues that effect them and that they through a constant dialogue participate in and influence the society they live in. Lately, this deliberative element of the democratic theory has even been made into a democratic school of its own.

EU committees deserve to be analysed in this context. Although the three major functions of committees in the EU political process -mastering technical expertise, multi-level co-ordination and providing rooms of communication and deliberation on claims and

[108] Jachtenfuchs/Kohler-Koch (1996).

preferences -are uncontroversial and generally viewed as legitimate, the EU committee system is frequently criticised from two different points of view:

Committees are seen as embodying the most opaque and even secret part of EU decision making. They are considered to be the most intransparent aspect of the EU system of governance. The committee system also raises serious questions about the democratic legitimacy of the EU policy process. Apart from COREPER and some specific committees (Economic and Financial committee, Employment committee, Political committee for CFSP, Military Staff in CESDP etc.), the vast majority of committees is not mentioned and/or legally sanctioned in the Treaties and their proliferation is often seen as a deviation from EU "constitutional" rules. Since their members are not elected on a democratic basis (except for those of the EP committees), committees are frequently seen as symbolising the democratic deficit and the 'bureaucratic and technocratic bias' of the EU system. Accordingly the EU committee system challenges traditional perceptions of democracy which value the transparency of decisions that should, in addition, only to be taken by elected and politically accountable representatives of the people.

On the other hand, it can be argued that the growing complexity of economic and social regulation in European societies, combined with the increasing range of Community policy responsibilities, has lead to a situation where many of the decisions taken at Community level are both highly technical in nature and involve intricate processes of multi-level negotiations and co-ordination.

4. Regulation theory and output oriented democracy

Recent developments in democratic theory, informed by regulation theory, have sought to 'update' classical democratic concerns (in terms of legitimacy, transparency and accountability) by confronting them with the growing need for an autonomous regulatory competence with technical expertise.[109] Classical democratic requirements can be met by different means, for example through the "technical" delegation of powers from democratically elected authorities to "expert bodies", or through a "cross-control" system whereby one set of experts control another.[110]

From a functional or technocratic point of view it could be argued that legitimacy is delivered by the success of problem-solving and does not need further justification: In this perspective, the EU may be seen as some kind of a 'regulatory regime'[111] or a

[109] For example Majone (1996).
[110] Hesse (1962).
[111] Majone (1994); Majone (1996).

"special purpose organisation"[112], which is less dependant on its parliamentary democracy than on efficiently-oriented policies. The "output-legitimacy" of the Union then "depends on its capacity to achieve the citizen's goals and solve their problems effectively and efficiently: The higher this capacity, the more legitimate the system".[113] This concept does not go far enough, because it ignores the fact that legitimacy is not purely built on the substantive outcome of politics -dictatorial regimes are also able to produce positive output. Working groups and comitology committees, for example, can be deemed legitimate from this point of view because they act in the name of the democratically elected Member State governments in order to produce 'positive output'. The standing committees of the EP derive their legitimacy from the fact that their members are democratically elected and that the vast majority of their meetings are -unlike in most of the national parliaments! -open to the public and the media. Their expertise function -supported through a relatively large professional staff -may also be seen as providing a means of ensuring there are "checks and balances" on the technical expertise of the Council's working groups.

5. Committees and their legitimacy

The definition of a political order as being legitimate when it is worthy of recognition and approval (Anerkennungswürdigkeit) and thus encourages social integration, communication and consensus, stems from Habermas.[114] There can be distinguished three elements that are required in order to establish the legitimacy of a constitutional order:[115]

- *"auctoritas"* -the respectability and trustworthiness of the political actors of a system of governance -otherwise the system must be treated with contempt (Verachtung);

- *problem solving capability* and the ability to accomplish tasks ("finale Legitimation") — otherwise the system is meaningless (sinnlos);

- a *structure, which inspires and secures consensus*, and which is limited and controlled, otherwise the system would be despotic (despotisch).

Similar concepts of legitimacy -all further developments of Max Weber's typology (legal, traditional, charismatic) -can be found in social and political theories of the 20th century

[112] Dehousse (1998).
[113] Schimmelpfennig (1996), p. 19.
[114] Habermas (1976), pp. 39-61.
[115] Hennis (1976). pp. 9-38.

such as Parsons AGIL scheme.[116] In this context, democratic legitimacy is based on the notion that governing and regulating complex contemporary systems requires delegating the solution of technical problems to competent bodies of "experts" that are controlled by democratically elected institutions and which (in a multi-level system) mutually provide a means of "checks and balances".[117]

Legitimacy, can be understood as a generalised degree of trust of the addressees of the EU's institutional and policy outcomes towards the emerging political system. A political system which is entitled to limit national sovereignty and which is enabled to take decisions directly binding the residents of its constituent Members without the prior and individual assent of each national government requires more than the formal approval of founding Treaties and their subsequent amendments.[118] In Weiler's terms, a political system like the European Union needs social legitimacy: The willingness of minorities to accept the decisions of the majority within the boundaries of the EU's polity. Social legitimacy supposes that decisions which are not taken by unanimity or consensus at all levels of and at every stage in the policy cycle have to be based on a broad acceptance of the system. Even if the citizenry of the EU polity is not fully aware of or interested in the way binding decisions about their way of life are taken, the system and the institutions which deliver the law must be aware of the risk that the public attitude towards it can shift from some kind of a "permissive consensus" or "benevolent indifference" to fundamental scepticism.

If we now turn to the European Commission, we observe two schools, which try to capture the 'institutionalised mirror of supranationality': From the "Haute Autorité" of Monnet to the Commission of Prodi the chorus of negative voices repeats arguments from quite different schools of thought: The "aréopague technocratique, apatride et irresponsible"[119] is matched by assessments of the "Eurocrats"[120] or the "supranational bureaucracy".[121] From an opposite angle, the Commission gains its legitimacy as an "expertocracy".[122] By establishing and shaping „epistemic communities"[123], the Commission constructs the modern version of an „administrative state";[124] it reconstructs its reputation and credibility by mastering the "Sachlogik"[125] of European integration in

[116] Münch (1982).
[117] Majone (1994); Hesse (1962).
[118] Weiler (1993).
[119] De Gaulle (1965); similarly Thatcher (1993), p. 776.
[120] Spinelli (1966).
[121] Wessels (2000b), pp. 120-121.
[122] Scharpf (1998), p. 91.
[123] Haas,P.M.(1992),p.35.
[124] Aberbach/Rockman (1985).
[125] Hallstein (1979).

functional terms. Its technocratic and de-nationalised character is then not a structural deficit, but the adequate institutional solution to the open-ended processes of Europeanization and globalisation. In applying Weber's dimension for legitimate authority the Commission then draws its support from a 'rational-legal' foundation. One particular element of the Commissions's committee infrastructure has found special attention in the last few years: Committees, which act on the basis of the comitology decision of the Council, have become a matter of discussion.[126] The main controversy centres around the question to what extent these comitology committees affect the process of implementing Community legislation, how and through whom are they supervised and controlled and how they exercise influence through some kind of a 'government by committee'.[127]

As to the Council and the European Council, both institutions obtain their strong position in the EU's system from the fact that they are the direct representation of the ultimate authority of the Member States as "masters of the Treaty".[128] In Weber's terminology the members of these bodies base their authority on the traditions of their nations as documented in their constitutional role. Additionally charismatic sources of national leaders might be mobilised for the European cause. By linking national and European identities[129] the heads of governments and states invest their nationally acquired mandates as constitutional architects, decision makers of the last resort and final arbitrators in the Union. They are the symbols of the derived intergovernmental legitimacy of the Union and bridge the gap between the national and European legitimacy by their very person. The administrative networks below and around these political bodies are characterised "as deliberative politics"[130] or as "'good governance' through comitology".[131]The opposite view characterises these bodies and especially the respective administrative infrastructure of bureaucratic committees as outdated symbols of national sovereignty. In this view, they document the final though vain effort of nation states to keep some kind of access and influence. As a result of their intergovernmental nature they are inefficient and ineffective bodies which create sub-optimal outcomes and block any major progress towards a transparent and accountable political system.

The debate on the performance of the European Parliament is based on different and opposite assessments. Is there 'one' European people which need to be represented by

[126] Generally Bach (1992), pp. 16-30; Schendelen (1996), pp. 25-37; Neyer (1997), pp. 24-37; Wessels (1998a), pp. 209-234.
[127] Wheare (1955); Schaefer (1996), pp. 3-24.
[128] Ipsen (1994); Bundesverfassungsgericht (1993).
[129] Banchoff (1999), p. 196.
[130] Joerges/Neyer (1997); Joerges (1999), p. 311.
[131] Joerges (1999), pp. 311-338; Weiler (1999), p. 347.

the EP [132]or are there just different "European peoples"[133] which must be represented exclusively or at least mainly by national parliaments? Does the Brussels arena produce or encourage a "shared public realm",[134] or a "community of shared experiences, memories and communications",[135] or are sufficient opportunities for non-ethnicity based deliberations created within this arena? Whereas in the first decades the lack of real competences and meaningful functions of the EP was stressed, critics now turn to the fundamentals: is there any basic support for the Parliament's legislative and elective acts which would justify the use of the term "parliament"? Although research on the European Parliament addresses an increasing scope of its activities, specific examination on the working mechanisms of the EP's committee is rare. The EP features a committee-based style of internal and inter-institutional decision-making. These fine-tuned styles induce segmentation of MEP's and their interaction structures over time. It is therefore logical to ask whether the ongoing specialisation and segmentation of the EP induces elements for encouraging democracy in EU politics or whether EP is becoming another major generator of the democratic deficit.

6. The concept of supranational deliberative democracy -the key to understanding legitimate governance?

The first part of this and the previous chapters showed just how difficult it is to put the European Union in any one of the specific categories normally used for national governments and international organisations. The EU seems to be existing in a unique compartment situated somewhere between intergovernmentalism and supranationalism on the one hand, and on the other hand somewhere between a parliamentary and a power sharing system. Yet, the EU system does not differ fundamentally from the classic examples known from international and democratic theory, the problem in this specific instance is to find a theoretical approach managing to combine intergovernmentalism and supranationalism with democratic theory in order to provide an understanding of how legitimacy is or could be built in the EU. Some think they have found a solution -focusing on the deliberative elements in the democratic theory -if it really is the solution remains to be seen.

As has been mentioned before, understanding democracy as a system which generates legitimacy primarily by means of majority ruling can be problematic, and many of those adhering to this principle will postulate that the majority principle should only be used in

[132] Spinelli (1958).
[133] Art. 1 TEU; Weiler (1997), pp. 255-258.
[134] Laffan (1996), p. 93.
[135] Kielsmansegg (1996), p. 55.

cases of emergency when other techniques can not be used to solve fundamental conflicts in society. Essential elements of the democratic ideal is discussion, persuasion and compromise, the majority ought not to push unilaterally for its own preferences since it has an obligation to discuss everything with the minority and should be ever ready to compromise -even when a simple majority is easily obtained. The basic principle is to continue the discussions until there is no other way forward or alternative than to take a vote. The discussions should also be fair and equal, the participants must believe they are all equal and be prepared to hear all the arguments. Thus the democratic dialogue is believed to have an intrinsic value, creating democratic individuals who will allow and respect a different opinion, consequently reducing the tension between the different interests in society.[136]

Other types of more pragmatic arguments have been made in favour of more consensual decision-making in a democratic society, especially by those underlining the importance of the links between the decision-making process and the implementation process. Because of the fact that a minority can put up strong resistance to an unpopular decision during the implementation phase if it has been kept out of the process or if it feels that it has been neglected during the decision-making phase, this is not to be taken lightly.

To conclude: when advocating a more consensual democracy common arguments point out that not only is the degree of democracy lower in a majoritarian democracy, it is also less commonly used and not as successful when it comes to creating a prosperous and kind society with more 'gentle' qualities.[137]

This is the traditional interpretation of the concept of democratic dialogue where compromise is seen as the ultimate -but there are many different types of compromise. Most of the time a compromise can only be reached when all the participants have given up some of their original preferences and there is consensus on a common solution -in other words, everybody has to be prepared to give a little in order to get a little but the end result is perhaps not too bad. Sometimes, however, the compromise reached can be characterised as negative, i.e. the parties end up agreeing to a solution they all dislike, because no better alternative was found. A third type of compromise, which is somewhat special, is the result of "horse trading", sometimes claimed to characterise the political process in the EC where unrelated issues are often solved in a package deal. This usually means that one of the contending parties will be allowed to "win" some of the issues provided it backs down on the other issues and vice versa. We can see how the

[136] Ross (1967), p. 112
[137] Lijphart (1999), p. 293; Stenelo (1990), p. 274; Olsen (1990), p. 83.

traditional way of bargaining, compromise and discussion may lead to solutions which do not really solve the problems at hand and a negative compromise may in fact end up satisfying none of the participants. But a democratic dialogue may also take on a deeper meaning, it doesn't have to be just a question of compromise.

7. The idea of deliberative democracy and its problems

Over the past years, increasing emphasis has been put on the so called deliberative elements of democratic theory. In a democratic society it is of course of utmost importance that the members discuss the issues that effect them and that they, through a constant dialogue, are allowed to participate in and influence the society they live in. This is by no means news to anyone. Nevertheless, this deliberative element of the democratic theory has lately been made into a democratic school of its own, which -when applied to the EU -has some interesting implications.

However, what is to be understood by deliberative democracy is not always quite clear. Some see it as a special form of communication between the people and the rulers while others stress the communicative aspect as such. Or, as expressed more elaborately by Eriksen and Fossum concerning the difference between a deliberative procedure and a traditional bargaining process:

> "The problem of bargaining and voting procedures is that they encourage a process of give-and-take, pork barrelling, log-rolling etc. that does not change opinions, necessitates learning or enlargement or refinements of perspectives -there is moulding of a common rational will. In a way it signals that the discussion has come to a standstill -a deadlock. It also indicates that the parties have accepted an outcome, but not because it is an optimal outcome. They accepted it because of the resources and power relations involved. Each participant would ideally like another and better outcome for themselves, but can live with the agreement that has been obtained."[138]

However, when it comes to arguing and deliberative processes, ultimately someone has to change position or at least change his view during the discussion if agreement is to be reached. And if there is a common problem which needs to be solved, it is of vital importance that the actors agree on what action to take, i.e. a moulding of the common will is required.[139]

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[138] Eriksen (2000), p. 60.
[139] Ibid.

Rawls and Habermas are often seen as the founding fathers of this kind of thought and two of their followers, Seyla Benhabid and Joshua Cohen, have been rather explicit about what characterises a deliberative process. Briefly, according to Cohen, there are four key concepts of such a process:

- First of all the participants are free, they are only bound by the results of the deliberation and they supposedly can act on the results.

- Secondly, the deliberation is reasoned, no force is exercised except that of the better argument.

- Thirdly, parties are both formally and substantively equal -each person or party with deliberative capacities has equal standing at every stage of the deliberative process.

- Finally, deliberation aims to arrive at a rational, motivated consensus – "to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals".[140]

What makes this theory so interesting is the close link it creates between the procedure and the result of the deliberation. Legitimacy is established by means of free and open discussions, but it is not the discussion as such which constitutes the essential element from which legitimacy is derived -the outcome of the discussion must also be accepted by the participants and the nature of it must belong to a particular category – it has to be rational and solve the problem.[141]

This kind of reasoning regarding process and legitimacy would fit the democratic structure of the European Union well, since the EU system lacks

- an independent decision-making structure, which is based on central and hierarchical authority and the rule of law;

- a collective identity derived from a common history, tradition or fate;

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[140] Cohen (1999), p. 74.

[141] Or, in more detail by Benhabib: "The features of such a discourse are the following: 1) participation in such deliberation is governed by the norms of equality and symmetry; all have the same chances to initiate speech acts, to question, to interrogate, and to open debate; (2) all have the right to question the assigned topics of the conversation; and (3) all have the right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied and carried out. There are no prima facie rules limiting the agenda of the conversation, or the identity of the participants, as long as any excluded person or group can justifiably show that they are relevantly affected by the proposed norm under question." See Mouffe (2000), p. 86.

- a sovereign community based on fixed, contiguous and clearly delimited territory; and

-a set of explicit principles established and sanctioned by international law.[142]

Effective and accepted integration in such a system is then rooted in the power sharing system of the EU as such and the role played by its committees, particularly comitology committees, -which naturally could contribute to the blurring of "an already unclear constitutional distinction between legislative and executive powers, but does contribute to deliberative supranationality".[143]

But there are also discernible differences between those who see the deliberative element as an essential part of a democratic society and those who want to stress that it is merely a supplement; for example Saward:

> "Advocates often contrast deliberative and merely 'aggregative' traditional democratic theory (Miller 1993); in the former, citizen preferences are forged through a process of structured debate focused on the need to realise the common good, while in the latter, unrefined and perhaps uninformed preferences are merely counted up to produce public policy."[144]

However, the concerns of the 'deliberationist' are in fact rather narrow. No matter how much deliberation takes place, heads have to be counted – 'aggregrative' – at some point if a democratic decision is to be reached. No adequate model of democracy can fail to be aggregative in the end. There is no such thing as a deliberative model of democracy, despite efforts like Cohen's to construct one. What we have is an effort to increase public deliberation on policies within a larger 'aggregative' framework of constitutional democratic provisions.'[145]

Some critics will go even further, viewing deliberative ideas as a potential threat to democracy as such.

> "The kind of pluralism they celebrate implies the possibility of a plurality without antagonism, of a friend without an enemy, an agonism without antagonism. As if once we had been able to take responsibility for the

[142] Eriksen/Fossum (2000), p. 256.
[143] Ibid p. 261.
[144] Saward (1998), p. 64.
[145] Ibid.

> other and to engage with its difference, violence and exclusion could disappear".[146]

Viewed from the perspective of 'agnostic pluralism', the aim of democratic politics is to construct the 'them' in such a way that it is no longer perceived as an enemy to be destroyed, but as an 'adversary', that is, somebody whose ideas we combat but whose right to defend those ideas we do not put into question.[147]

What we find here is a critique based on the concept of democracy as conflict between the ruling side and the opposition, in short the question raised is what happens to the political opposition in a deliberative democracy? All kinds of discussions, deliberations or bargains starts with some kind of conflict or at least uncertainty about what two or more different interests want to achieve when faced with a new problem or situation -in order to have a discussion there must be, at least in the beginning, disagreement. Nevertheless even if one can criticise deliberative democracy of stressing too much the possibility of different interests reaching an agreement through discussions, democracy can not tolerate a total disagreement between a majority and a minority; there must be some kind of common believe in shared values on how fundamental disagreement should be solved. Democracy is about solving conflicts as well as about how conflicts and what type of conflicts are created.

How one understands deliberative democracy naturally affects the application of the theory to the EU. For those who see deliberative democracy as a means for smaller units (groups, segments of society) of the people to rule themselves, the EU presents a problem since so many decisions are taken on a supranational level where participation on a regular basis for the common citizen is difficult if not impossible. On the other hand, if the emphasis is put on group communication, the deliberative theory includes interesting ideas on how an output oriented democratic system based on catering for the minority could operate. In fact, some studies have already shown that the deliberative elements of EU are crucial in promoting the creation of deliberative networks by means of "comitology"[148].

[146] Mouffe (200), p. 134.
[147] Ibid p. 101.
[148] See Joerges/Falke (2000).

8. Deliberation and legitimacy through committees? The Parliament, the Council, and Comitology

Legitimacy on the one hand originates from how a democratic system as such is composed and on the other, how each institutional part is constructed: "What kind of institutional policy would facilitate the development of democratic governance beyond the nation state? The answer is a policy comprising a mixture of different democratic components."[149] Hence, the EU has to rely more on getting its legitimacy through output efficiency and by satisfying and protecting the needs of minorities than a typical national government. But we must not forget that it also relies on the legitimacy generated by -in the perspective of a national government -traditional institutions such a directly elected parliament, an indirectly elected body (the Council) which is a cross between an upper chamber and a government, and an implementation structure (comitology) a merger between an executive and a law-making body. And in all the three arenas committees are created to promote discussion and deliberation.

The European Parliament, like any parliament, gets its legitimacy by being elected by the people and by acting for the people. Two conditions have to be fulfilled if a parliament is going to be able to claim that it acts in the name of the public. First of all, parliament must demonstrate that it represents the preferences of society, i.e. its constituents. Secondly, parliament and its members need to be able to have an influence on the public decision-making process, both as controllers and as law-makers. Important instruments by which a parliament can fulfil these two missions are openness and transparency. Usually, parliament is the most open and transparent institution in a governmental system (a window to the public) and when governmental bills and other propositions are being debated in parliament it is the first time they really get the attention of the public. Parliamentary debates should clarify the weakness and the advantage of every proposal and action taken by the government.

The openness and the transparency of parliamentary debate also make it possible for different interests to check whether their arguments have been taken into account. This is a way of controlling that all interests affected by a certain decision taken by the government have had equal opportunity to make themselves heard. It is also through the deliberation in parliament that the citizens are given an opportunity to see whether the elected politicians really represent all their different opinions and whether they accept the compromises and solutions that have been reached by their elected representatives. Although some part of the deliberation in a parliament is taking place behind closed

[149] Zürn (2000).

doors, the arguments used and the deals made must sooner or later be explained to the public. Here it is finally demonstrated who are the winners and the losers -if there are any. It is then up to the public to react if they can not accept the reasoning leading up to or decisions taken by parliament.

For an indirectly elected body the situation is different from that of a directly elected one. Questions like representation and influence are just as or even more important for the legitimacy of indirectly elected bodies as control and accountability. In the case of the Council, its legitimacy is primarily based on power delegated to it indirectly by national parliaments. The situation and the deliberations in the Council, in contrast to the European Parliament, is more about deliberations and bargains that do not produces losers, they all have to look like winners.

Finally the institutions for implementation, i.e. public administration, which supposedly get their legitimacy by being law-abiding, neutral and objective. Public administrations are meant to be controlled by its "master" but there are limits to this control, since an administration is supposed to be more loyal to rules and regulations if there is a conflict of interest with their masters. Secondly, implementation structures are basically put in place to implement laws, not to create new ones. Consequently, any unit or body which is part of one of these structures is also affected by how they generate its legitimacy. On the other hand legitimacy in the implementation phase is also about getting acceptance of the pursued policy from those who are affected by authoritative decisions. In other words, implementation is as much about arguments and deliberation as is decision-making and it is quite common to talk about a bottom-up perspective on how public policy is made. In fact, the legitimacy generated by the acceptance of those who are affected by government policy can be used to legitimise the whole decision-making procedure. There are many ways in which output legitimacy can be achieved, as has been mentioned before, but all of them involve some kind of deliberation process or negotiations with those affected (clients) or directly responsible for implementation of a certain policy (street level bureaucrats). But the deliberations in the implementation phase must never give the impression that they exceed the authority given to it by the decision-making phase -efficiency and acceptance by the public is the key to its legitimacy.

9. Governance through networking arenas

The functioning of a committee is a part of the larger structure within which it is set up and it is also affected by that same structure. But in terms of democracy and legitimacy, committees can create problems of their own, as expressed by Heidrun Abromeit:

> "The dilemma 'democracy versus efficiency' is nowhere as trenchant and tangible as in the case of networks and bargaining systems, for here it seem obvious that an increase in the one directly and inevitably leads to decline in the other. Networks have evolved, even been invented, expressly in order to improve efficiency."[150]

Committees are often set up to handle different types of efficiency, deficit and uncertainty problems, either inside the organisation itself or between the organisation and its environment. In many cases the setting up of a committee is actually the answer to some kind of power vacuum which is the result of overlapping or power sharing systems. And it is worth mentioning that not only the European Union grows committees. We frequently find committees also in national governments -permanent as well as ad hoc ones. It is, for example, not unusual for cabinets to divide its work into cabinet committees in order to be able to handle the workload better and to establish an internal power structure. Likewise, it is rather common for national governments to set up committees (commissions) to prepare governmental proposals or to supervise the implementation of government policy.

Thus, committees can be seen as arenas around which policy-networks are created, networks which can be very efficient in terms of decision-making and problem solving. The problem, however, from the democratic point of view, is that policy-networks can easily lead to a situation where what is gained by efficiency is lost by secrecy, fragmentation, lack of co-ordination and elitism. Consequently, it is important not only to monitor if the networks fulfil their mission as an efficient policy-making and problem solving institution but also whether a reasonable level of democratic values can be maintained at the same time.

[150] Abromeit (1998), p. 86.

10. Towards a set of guiding questions

This project is focusing on the policy-making procedures in the European Union viewed through the grid of different types of EU committees and the consequences for the legitimacy of the European Union. In this chapter the postulation has been made that the general structure of a political system affects its policy-making process – the policy-making process is not the same in a parliamentary system as it is in a power sharing system. But of what consequence is this for the European Union -postulating that this system is unique compared to the others? In other words, how are the fundamental research questions to be formulated?

To put is simply, this project focus on two related issues. On the one hand it is an attempt to make some empirical observations of a policy-making process in a supranational system, finding out how legitimacy is being built in practice. On the other hand, the question is also to what extent this system can be seen as some kind of deliberative democracy where legitimacy can be generated from the process as such - provided it is living up to certain conditions such as: freedom for all to participate on an equal and fair basis provided they are affected by the decision to be taken, aiming at achieving consensus and rational solutions. Or, what happens to the balancing of power between public institutions, while maintaining the perception of a real and active opposition controlling the rulers, when there is a strong drive for consensus throughout the policy-making process? Concluding, four key concepts appear frequently in the previous chapters – accountability, openness and transparency, efficiency and effectiveness and finally checks and balances. In this framework accountability is the answer to the question: Where is the people? Or more precisely, to what extent is the power of the rulers linked to the will of their people? Secondly, the discussion of openness and transparency is about to what extent the ordinary citizen and the organised interests can understand how the system operates and consequently take part in the decision-making process in order to influence the outcome. However, legitimacy in a democratic system is not only about influence in the decisionmaking process, it also has to do with results, both from an objective point of view as well as a subjective one. It is about efficiency and effectiveness, i.e. is the government capable of taking decisions and can it resolve the problems which society is facing by in a way that pleases the majority? Finally, democratic government is about to what extent the ruling of the majority is controllable -what mechanisms prevent the government from exceeding its mandate, preventing it from turning into the tyranny of the majority instead of the protection of the minority?

Thus, we have the four key concepts which have been the basic theoretical concerns of this research project. The empirical chapters differ in the way they deal with these concepts and the emphasis they put on anyone of them. We shall return in the final chapter to a more detailed analysis of the empirical findings and link them to these key concepts.

D. Council working groups: their role in the production of European problems and policies

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1. Introduction

As part of the wider project on the role of committees in the governance of the European Union (EU), our principal focus is the working groups of the Council of Ministers. More precisely, by examining through interviews and documentary analysis how recent legislation has been processed via such groups in five different sectors[151], this sub-project has set out to shed light on the role played by Council working groups in EU decision-making.

In beginning our project, we were immediately struck by the lack of attention paid by analysts of the EU to the role of Council working groups. Apart from some specific case studies[152], isolated references in readers on the Council[153] and one unpublished PhD. thesis[154], working groups are somewhat of a " black box " for political science, let alone the general public[155]. A recent book analysing the influence of committees in the EU even excluded the case of Council working groups[156]. Despite this lack of research, the two schools of thought that dominate thinking about the EU make implicit assumptions about working groups[157]:

- For intergovernmentalist authors who see EU governance as dominated by Member State governments[158], working groups always matter because the Council matters.

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[151] The sectors chosen are telecommunications, research, culture, social affairs, environment. In each of these, we have studied up to four directives or Council decisions. In addition to examining documents and articles relating to these cases, we conducted 45 interviews with actors involved in the relevant working groups (Commission officials, permanent representatives, civil servants based in national capitals). Although we have amassed a considerable amount of detail in order to process trace what happened in each instance, this processes tracing is undertaken directly in the monographs which accompany this report (see Annex). Instead, this chapter synthesises the overall conclusions taken from our case studies in order to propose answers to the questions announced in this introduction.

[152] Beyers/Dierickx (1997, 1998); Flynn (2000).

[153] Hayes-Renshaw/Wallace (1997); Westlake (1999); Sherrington (2000).

[154] Trondal (2001a).

[155] Academics regularly appear to know little even about the number of working groups. For example, Bomberg and Peterson talk of 150 (1999, p. 36) whereas Quermonne mentions 307 (2001, p. 54). According to the Council's own figures, in July 2001 175 working groups existed (Council document 10279/1/01 rev 1).

[156] Van Schendlen (1998).

[157] For a more detailed discussion of these assumptions, see our preparatory "state of the art" report.

[158] Moravscik (1998a & b).

- For public policy analysts and neo-institutionalists who see the EU as a supranational arena where the European Commission has a major decision-making role[159], working groups do not always matter because decisions are often shaped before Council-level negotiations take place.

In contrast to both these generalisations, our position is that working groups do indeed always matter but not because the Council is all powerful. At a time where the balance between the EU's institutions appears to have shifted considerably, we consider instead that working groups are vital parts of the EU legislative process because they are the arenas where draft legislation begins to firm up and moves to compromise solutions take place[160]. This said, working groups are not predictable intergovernmental battlegrounds but sites for inter-Member State, inter-institutional and ideological mediation. It is in this respect that the development of 'Europeanised' decision-making arenas and processes can, at least to a certain degree, be said to have produced a European space of public action.

In developing this central hypothesis, this report successively sets out the responses generated by our research to three questions: First, in answering the question "how do working groups function?", we describe in general terms their definition, their composition and their formal ways of working (section 2). This part of the chapter also introduces the importance of more informal forms of consultation and negotiation.

Secondly, consultation and negotiation are dealt with more specifically in the part of the paper devoted to "how working groups relate to other components of EU governance?", namely the COREPER, Council meetings themselves, the European Commission and the European Parliament (section 3). Indeed, we argue that it is through adopting a relational, as opposed to a procedural, approach to working groups, that one is able to grasp the importance of what goes on in and around working groups.

The third and final question examined in this report is: do working groups differ and, if so, is this for recurrent (and legitimate) reasons? (section 4). More particularly, is difference due to Treaty provisions, to the nature of policy instruments or to the impact of the brokering of compromise deals?

[159] Cram (1993); Petersen/Bomberg (1999); Pierson (1996); Majone (1996).
[160] Bomberg and Peterson also consider that Council working groups are 'policy shapers' in EU decision-making (1999).

From an analytical point of view, empirically grounded answers to these questions are important because they help us to characterise EU decision-making and determine the *loci* of power.

From a practitioner's point of view, our findings have considerable relevance for an ongoing debate on how to legitimise the EU and its institutions. Officials from the Council itself have been active in raising the question of how the substructure of the Council should best be arranged[161]. More recently still, the meeting of the European Council held in Laeken in December 2001 specifically mentioned the need to make the Council of ministers both more efficient and more open[162].

From a more purely normative perspective, our research also seeks to shed light on the question of whether working groups intensify or attenuate the opacity of EU governance and its " democratic deficit ". Our general response to this question is that working groups can create or accentuate problems of this order but not because they are fundamentally obscure and secretive. Rather, the normative issue concerning the role of such committees in EU governance is more one of their heterogeneity and how this contributes to perceptions of decision-making at the European level as processes that are arbitrary or random.

2. What do working groups do?

> "Working parties are nowhere mentioned in the Treaties. In the Council's own publication, the Council of the European Community (1990), they are tersely described as 'carrying out preparatory work', their principal role being 'to prepare reports for COREPER'. Article 19.2 of the Council's rules of procedure provides that: 'Committees or working parties may be set up by, or with the approval of COREPER with a view to carrying out certain preparatory work or studies defined in advance'. In fact, working parties are the Council's lifeblood "[163].

Written by a practitioner, these lines give some idea of what the 178 working groups that operate within the Council are supposed to do and of an insider's view of their

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[161] A former Director General of the Council Secretariat, G. Trumpf, made his views known in a paper that circulated widely at the end of the 1990s. More recently, the head of the Secretariat's legal service, M. Pires, has also published a paper on this topic, Trumpf/Pires-Report, Press Release Brussels 10.03.1999, N. 2139/99.

[162] This declaration claims in particular that European citizens "feel that deals are all too often cut out of their sight and they want better democratic scrutiny" (Press release: The Laeken declaration, "The Future of the European Union", 15th December, 2001, p. 2).

[163] Westlake (1999), p. 303.

importance. In general terms, the process of negotiations within a working group is as follows: the group is composed of one or two representatives from each Member State, a member of the Council's general secretariat and a member of the Commission staff. Chaired by an official from the Member State that holds the EU Presidency, each group meets to debate a proposal for legislation made by the Commission. Members of the group discuss it, article by article, seeking to reach a common position. However, in analysing the way several working groups function we have noticed some striking differences between their status and rules (2.1), how its members form and convey national negotiating positions (2.2) and the dynamics of each group (2.3).

2.1. What is a working group?

An initial potential source of confusion for the outsider to EU governance concerns the names given to these entities. Some groups are called "working parties", some of which are *ad hoc* (e.g. for the cultural-educative programme LEONARDO), others are called "committees" (e.g. The Committee for Education), whereas other committees exist that do not have the same role and powers as working groups. In reality insiders to the EU decision-making system know the difference between these bodies because for them a working group is defined as an arena which:

- is embedded in the institutional structure of the Council;
- is composed of attachés from the Permanent Representatives of each Member State (RPs) and 'experts' from national capitals;
- whose presidency changes every 6 months;
- deals with several pieces of draft legislation at a time;
- exists for a number of year;
- prepares COREPER and ministerial-level meetings.

In contrast, practitioners underline that working groups are not consultative committees (as the Employment Committee and *Comité de la recherche scientifique et technique* – CREST unmistakably are) because the latter:

- are not directly linked to the decision-making structure;
- not every Member State is always represented;
- the president can remain the same for many years;

- non-civil servants, and even junior ministers, can sit on these committees[164].

To sum up this essentially descriptive viewpoint on what working groups are, the key criteria are their permanency and their place within the machinery of the Council of Ministers. From this baseline, two further points will be developed later in this report.

First, most of the practitioners interviewed spontaneously define working groups very formally as the arenas where Council decisions are "prepared". For them it follows that working groups deal with "technical" issues whereas COREPER and ministerial-level meetings are arenas where "political" decisions are made. Our research shows, however, that the technical-political divide is in reality both more complex and more revealing of the dynamics of EU governance.

Second, the heterogenity of working groups is in no way explained by their formal name Indeed, this heterogeneity means it is analytically unhelpful to pursue the abstract question of what a working group *is* but provides all the more reason for looking closely at what they do.

[164] In some cases, interactions can take place between a working group and a consultative committee in order to shape a policy problem and seek a solution to it. A good example of such interaction is found in the research sector where the research working group interacts closely with the CREST, an organ incidentally chaired jointly by representatives of the Commission and the Council (see section 3.1). Indeed, many working group members are particularly mistrustful of the Commission when it seeks to transform working groups into committees. *" As the people on these committees are highly specialised and sometimes don't really know the rules and the Treaties, Commission officials often take advantage of them. This is a major reason why we always try to use Council procedures rather than consultative committees. The usual scenario is that the Commission makes its propositions in order to allow itself room for manoeuvre so that , in the future, it can do what it wants. The consultative committees are one way of achieving this goal because they are based on a delegation of powers from the Council to the Commission. On this point, the French, the British and the Spanish are always in agreement when we say to the Commission, 'be careful, on this or that point you must go through the Council procedures'. So we always make sure that important things are not decided in consultative committees"* (Interview with RP, January 2001). The same RP later expressed this tension in a different way: *"Generally speaking, committees all have the same problem: the dominant position of the Commission. Indeed, a general remark can be made about Commission officials when they are in working groups or in consultative committees: they are docile and nice in working group meetings and transform themselves into tyrants in consultative committees".*

Table 2. The working groups studied

Policy Sector/directive	Working group
Telecommunications (e-commerce)	The Information Society working group
Telecommunications (ONP framework, UMTS)	The Telecommunications working group
Research	The Research working group
Social Affairs	The 'Questions sociales' working group
Environment	The Environment working group
Culture (MEDIA +)	The Audio-visual working group
Culture (LEONARDO)	Ad hoc Education working group
Culture (SOCRATES)	The Education working group

2.2. Following instructions or seeking deals?

In order to understand what working groups do, one has to tackle the basic tension that all members of these entities (bar those from the Commission and the Council Secretariat) have to grapple with: will they blindly follow the instructions given them to by their respective government or can they develop sufficient leeway with which to bargain for the best (or least-worst) compromise solutions? Put another way, are working groups merely diplomatic venues for the clash of nationally-set priorities? Or are they arenas within which members of the group concerned negotiate not only over the compatibility of national positions but over the EU's definition of a public problem and of appropriate policy solutions?

Again, a variety of answers must be made to this question. One reason for this is that traditions of concerted preparation *differ from country to country*. Territorially, some are highly centralised (like France), others more decentralised (like Spain and Germany, where the regions are consulted). Some include national parliaments in this process (Germany, Denmark), others do not. Some practice widespread social consultation (Austria, Sweden, Germany, Denmark or Belgium), while others tend to limit consultation to national ministries and funnel this through highly structured inter-ministerial procedures (France, the UK)[165].

[165] These differences in co-ordination have been amply studied by other researchers. For recent and comprehensive treatment of this subject see Maurer/Mittag/Wessels (2001). Just to give one example of their findings, during negotiations marked by urgency, countries that have a strong tradition of social consensus have often been destabilised by the demands of taking part in EU decision-making.

Indeed, this point brings us to a second key variable for understanding whether working group members act under binding instructions or seek deals through negotiation: the mechanisms through which *intersectoral agreement* is reached. For the racial discrimination directive, for example, one of the main difficulties facing negotiators was the perceived need to combine a quick negotiation (due to the political context: the participation of the extreme right in the Austrian government 'needed' a response from the EU's institutions) and the need for intersectoral agreements (because this directive concerned justice, employment, home affairs…). The e-commerce directive illustrates a similar case:

> "it was so complicated and so horizontal, that the delegations from each country were very large: 3 or 4 people, each from a different ministry. Sometimes it was obvious they had not agreed on national positions beforehand"[166].

Whatever the intra-national processes which go on beforehand, the positions of most national representatives in working groups are in formal terms highly defined by their national administrations: they have to negotiate in order to preserve national interests by following the "instructions" they receive at the beginning of the negotiations. During the working group's negotiating process, national authorities are continuously informed of developments by several means (e-mail, phone calls, official telegrams).

Underlying 'structural' pressures seriously reduce the room for actors in the softening of instructions received. In particular, negotiations in each working group are marked by recurrent cleavages that express national positions (and oppositions). For example:

- on cultural programmes: opposition between free-market, low expenditure approaches (mainly the Netherlands and the UK) and interventionist ones (southern countries including France);

- on telecommunications: opposition between governments in favour of liberalisation (northern ones), state-led governments (southern ones) and governments positioned in the middle of the road ("*but looking south*") such as France or Belgium;

[166] Interview with permanent representative, 2001. As another interviewee put it, weak or ineffectual intersectoral co-ordination in national capitals show up in working groups *"when it becomes obvious that certain group members are simply giving their own personal opinions"* (November, 2000).

- on budget redistribution (culture, education, and research): cleavages which are often presented as dividing big and small countries (although in fact more detailed points are often the underlying source of cleavage)[167].

In the reality of working group negotiations, all these examples tend to demonstrate that working groups are arenas around which national positions themselves continue to be negotiated as the EU-level discussions take place. Such analysis gives some credence to the intergovernmental hypothesis that working group members are prisoners of decisions taken in their respective national capitals[168]. However, the notion that national positions expressed within working groups are entirely determined outside Brussels must be qualified. In practice, the instructions received by a RP are not always followed to the letter[169].

The case of a French attaché we interviewed is particularly interesting. Before coming to Brussels she had been working in the *cabinet* of the minister responsible for the draft directive under study:

> "The change of place helped me realise the real issues at stake in a text which I thought that I already knew very well! But one really needs to be in Brussels in order to understand these issues. When I was in the minister's cabinet, I was one of the officials who set out general policy and gave instructions; in this capacity, I only came to Brussels for Council meetings. But it is in Brussels that the technical translation of texts and political objectives takes place; in situations where urgency is vital, one simply has to find a way of translating technical and legalistic instructions"[170].

Three reasons explain this 'gap' between national and EU-level decision-making arenas. First, the instructions from capitals only determine positions on major issues. One attaché told us for instance, *"We don't telephone them [national authorities] just for a comma"*. It follows that working group members can thus sometimes increase their autonomy by taking it upon themselves to define what is 'major' or 'minor'.

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[167] A cleavage which also raises conflict between big member states and the Commission over comitology procedures and/or on issues such as how will decentralised and centralised budgets be carved up.
[168] Beyers/Dierickx (1998).
[169] In a recent questionnaire-based study of national officials involved in EU committees, only 35% of those involved in Council working groups considered that they " had clear instructions about the 'position' I should take ". In contrast 72% claimed to " take the 'position' I think is in the best interest of my country". Schaefer et al. (2000), p. 13.
[170] Interview, January 2001.

Second, the longer the negotiation goes on, the more the attaché who sits in working group meetings becomes a specialist of the issues involved. Another French RP emphasised the role of time: *"The longer the debate over a draft text goes on, the more we become specialists of the issue in hand, and thus the more autonomy we create for ourselves"*[171].A Spanish colleague gave us virtually the same opinion:

> "Sometimes the RP must decide very quickly. But usually it's not so difficult to convince Madrid because they are far away. I just need to pick up the phone. In fact we do the political work that goes into a decision right here"[172].

In getting to know the piece of legislation under discussion, this gives him or her more autonomy. In some cases, the attaché can even change the initial national position by convincing ministries and ministers that it is un-negotiable. An example here is the drinking water directive where the French RP managed to convince its colleagues in Paris that a reduction to 10 mg per litre of lead in water was inevitable. Instead this civil servant argued that 'Paris' should concentrate its energies upon obtaining a delay for implementation of the directive.

Finally, in order to facilitate negotiation, attachés are often well-placed to make intra-sectoral trade-offs between different pieces of draft legislation simultaneously going through the Council (and therefore the same working group) ("*I lose on this one, but you help me on that one*"). Such agreements can more readily take place during informal discussions or closed meetings (where only attachés are present). Needless to say, national authorities are very suspicious of this form of deal-making.

In summary, rather than simply being the spokesperson of their national government or administration, staff members of the permanent representation are best described as intermediaries between a transnational process and national interests[173].As Hayes-Renshaw, Lequesne and Mayor Lopez noted some years ago, their attitude "gradually

[171] Interview, January 2001.
[172] Interview, January 2001.
[173] Apart from perpetuating a binary distinction between supranationalism and intergovernmentalism, in our view, Beyers and Dierickx' research design (1997 and 1998) suffers from a number of other flaws. First, it concentrates on " communication networks " between working group members rather than on the decision-making process itself. Second, it concentrates on staff in the permanent representations rather than on this population and national civil servants from the capitals. Finally, by choosing quantitative analysis rather than detailed case studies, this research tells us little about the effects of working group deliberations.

becomes ambivalent, the necessity to defend position is accompanied by a constant desire to see the debate reach a successful conclusion"[174].

2.3. The dynamics of each working group

In this respect it is particularly necessary to fully understand the impact of the characteristics of each working group upon the negotiation process. In analytical terms, here working groups need to be examined more from the perspective of social groups in general in order to ascertain how each has developed its respective rules and processes. It is necessary to explore the sociological hypothesis that through working together over time, members of working groups often begin to think alike and may even become 'distanced' from colleagues in their respective national administrations[175]. Our study has looked at two dimensions of working group dynamics as possible explanations of differences between such groups: the institutional origins of its members and whether they are sectoral specialists or policy generalists.

With respect to institutional origins, the key variable concerns the balance within each working group between attachés from the RPs and 'experts' who come from the capitals specifically to negotiate one piece of legislation. Some groups are mainly made up of attachés (Telecommunications, Research, 'Questions Sociales', Culture) whereas others have different equilibria, often involving national experts more directly (Information Society, Education)[176].

Table 3. Composition and dynamics

Working group	Composition	Dynamics	Council
Telecommunications	Young, RPs	More familiar, more stable	Telecoms
Information Society	Experts and RP's	Less 'family-like'	Internal Market
Data Protection	Senior officials, coming from capitals	Less 'family-like'	Internal Market

[174] Hayes-Renshaw/Lequesne/Mayor Lopez (1989), p. 136. Christiansen and Kirchner speak of a 'two-way process of cultural learning: on the one hand committees provide the central institutions with an ability to observe at first hand (…) cultural diversity in European public administration ; on the other hand, committees permit national officials to familiarise themselves with the nature of the EU's administrative system' (2001) p. 9.
[175] Trondal (2001a).
[176] To sum up, as one interviewee put it, " *The composition of each group is obviously very important. The "x" group, for example, is dynamic -members are younger and are often from the RPs. But "y" matters are dealt with by older, often more senior, officials* "Interview Council secretariat official, October 2000.

In the case of the Social Affairs working group, for example, it is clear that attachés know each other better and together also deal with several dossiers at the same time. Many of them have been in Brussels for several years –their average stay is five years-, use a specific vocabulary and many interviewees spoke of the 'club-like' atmosphere of their encounters. In the directives studied, important roles were played by experts in two case studies: vibrations (making an occasional appearance in the Social Affairs group) and e-commerce (the relatively new Information Society group composed mainly of civil servants coming from capitals). One ex-RP turned Commission official underlined the potential impact of these differences:

> "RPs are more willing to compromise than officials from ministries. The pressure to agree is much greater here than in London or Bonn, etc. As an RP, you are not an expert – you can be more 'objective' (the RPs term) or more 'cavalier'(what the ministries say)"[177].

Such difference between groups led by attachés and others led by national experts can be illustrated with the contrast between the Education Committee and the Social Affairs working group. Composed of national experts, the first was only consultative until the Maastricht Treaty, whereas the second has always been a more classical working group. According to many interviewees, there is a radical difference between the two bodies: in the Education Committee there is no real discussion during the meetings but there are unofficial negotiations beforehand; in the Social Affairs group, there are many more open discussions between attachés. Put in a slightly different way, an attaché told us: *"For me it's clear. If the Education Committee failed to reach agreement, it was because it was chaired by a civil servant who was not a member of a RP"*[178].

This basic difference between attachés and experts, sometimes euphemised as 'negotiation technique' so crucial to the " methods of community " (Lewis, 1998), also appears to influence the flexibility over the working language used in working groups. For example, if Jacques Chirac announced at the beginning of the last French presidency that French should be used by all meetings within the Council, in practice this order was frequently overridden in the name of " efficiency " within working groups[179].

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[177] Interview, January 2001. As Lewis (2000), p. 274, concludes, this socialisation is important but this is not a matter of "wholesale change of identities and interests".
[178] Interview, March 2001.
[179] More generally, Schaefer et al.'s questionnaire-based study of national officials involved in EU committees reveals that 45% of respondents use English most frequently in committee meetings, while 15% most often use French, 23% Spanish and 17% other languages. The trend here is accentuated for the language most frequently used in informal discussions where 70% of officials questioned use English, 19% French, 7% Spanish and only 4% other languages. Schaefer et al. (2000) p. 8.

This hypothesis of attaché-expert difference can also be developed around four other characteristics identified in our research. First, there is the question of who actually speaks 'for their country' in working group meetings. The British tend to funnel everything through the RP, whereas Greek and Finnish attachés often prefer their national experts to speak. Second, many officials coming from capitals find working group procedures unfamiliar and thus become nervous. This obviously puts attachés in a more advantageous position. Third, one needs to remember that some 'experts' from national capitals may not be civil servants at all. This is the case of representatives of regulatory bodies who now attend the telecommunications working group meetings as part of national delegations. Finally, many attachés often describe their opposite numbers from other permanent representatives as 'colleagues'. Indeed, this term is used to highlight professional complicity. An attaché summed up the main contrasts between two "styles" of negotiation, opposing "experts and "attachés":

> "When national experts are present, I never let them have the microphone. If I let the experts take the microphone, they would just say what we want from the negotiation and the meeting would be over. Instead our job is to persuade…"[180].

The second variable we have looked at stems from the observation that even amongst attachés some differences appear. If some working groups are mainly composed of sectoral specialists, others are made up of generalist career diplomats (although this is unusual in first pillar working groups). According to some interviewees, such differences can have an impact on negotiations because where specialists will attempt to preserve the technical coherence of a text, diplomats often try to reach a compromise between various positions as rapidly as possible. A clear example here concerns the Environment group where very few diplomats are involved (one participant estimated that only 4 out of 15 delegations sent nonenvironment specialists to this group).

One effect of this trend seems to be that the working group tends to accumulate reserves and leaves more to COREPER and to ministers to decide. This can be explained in part by the fact that officials from environment ministries, or seconded from such bodies to the RP, restrict the concessions they are prepared to make in the working group because they, unlike career diplomats, intend to finish their careers within the same administration. In contrast, the Culture working group is essentially made up of diplomats who's objective is to avoid COREPER and ministers by taking decisions at this level. Similarly, the Research working group is also dominated by generalist diplomats.

[180] Interview, March 2001.

More generally, many of our interviewees themselves tend to see career diplomats as officials who, in contrast to themselves, have been trained to be particularly secretive and to participate in negotiations that are essentially bilateral. Both these traits are seen by other officials to be not adapted to the demands of working group rules and practices.

Each working group thus has a number of recurrent features which vary for reasons we will investigate further below (section 4). For the time being, we simply underline that members of working groups clearly contribute more to EU negotiations than either they or academic specialists claim. In order to push this observation further, it is necessary to show how this set of actors participate in managing the interface between their respective groups and other EU institutions.

3. How working groups relate to other EU bodies

In terms of producing distinct pieces of EC legislation, what goes on in Council working groups is clearly important. But these entities matter also because they are a structural part of the EU's institutional order as a whole. Rather than approach this question from a formalistic and static point of view, the second part of this section is structured around the following claim: our research has shown that (contrary to what many actors interviewed themselves conclude) working groups do not matter because they resolve " technical " issues thereby leaving more " political " questions to COREPER, ministers and the European Parliament (3.2). Instead, the distinction between the technical and the political is constantly blurred both within and around Council working groups. Indeed, the blurring of the technical and the political generally begins some time before a working group sits down to look at a piece of draft legislation (3.1). Both these hypotheses are important because they concern not only the role of working groups in EU decision-making, but also their influence upon the equilibrium between EU institutions.

3.1. What goes on before Council working groups meet?

Our case studies provide very different answers to the question of what precedes working group meetings, suggesting that this part of EU agenda-setting has no standard pattern. Indeed, the word " consultation " is used by our interviewees to summarise at least four different channels of access to a working group agenda.

The least common interpretation of consultation is that this actually starts in the working group. Held by some actors from the RPs, this vision seems to mean either that national governments have not formally been consulted at all or that the RP in question had no prior knowledge of the file in question.

A second quite different scenario occurs when prior to the submission of a proposal to the Council extensive and intensive consultations between organised interests or scientific experts results in an agreement that the Council can do little to change. This was the case, for example, in the working time directives studied where the social partners reached an accord that was relayed to the *Questions Sociales* working group by the Commission. In such instances, consultation in fact means negotiation because the representatives of the Member States can do little more than validate what has been agreed without their involvement. To some extent, this model of consultation also fits with the setting of norms for the regulation of the telecommunications sector[181].

However, two other contrasting approaches to consultation managed by the Commission (often involving expert groups) are much more common. The first of these is characterised by widespread and open consultation orchestrated by the Commission services. Research and the regulation of the telecommunication sectors are particularly clear-cut examples[182]. In both instances, oral and written submissions of ideas for policy are solicited from all interested parties. Moreover, both sectors feature a committee which formalises consultation of national governments: *le Comité de la recherche scientifique et technique* (CREST) and the Open Network Provision Committee (ONP). The former is a committee of both the Commission and the Council and meets in parallel to the research working group. The ONP committee began life as a comitology body and subsequently widened its role and its membership, even including for some time national telecommunications regulators and European consumer representatives until the Parliament raised objections to this practice.

Beyond the need for Commission officials to seek and test new ideas for policy before sending draft legislation to Council, this approach to consultation must be understood in the context of the often intense differences of view which mark " inter-service " consultation within the Commission and debates in its College of Commissioners. In the telecommunications sector, for example, widespread consultation over the current

[181] As the UMTS case study highlights, the European Telecommunications Standards Institute (ETSI) is a particularly important source of such norms.

[182] We note with interest that consultation processes in the telecommunications sector have been highlighted by the Commission as an example of 'best practices' (*The White Paper on Democratic Governance*, 2001, p. 16). In the research sector the Commission has always consulted widely (researchers, firms, etc.) before defining its proposals for the Framework programme. Some Commission-run " Joint research centres " are devoted to the preparation of priorities and strategies (e.g. The Institute for Prospective Technological Studies in Seville). Furthermore, co-operation seems to be intensifying between the Commission and a number of external institutes and foundations such as the European Science Foundation, OECD, the European Molecular and Biological Organisation, the CERN. This form of information exchange often puts norms and criteria on the EU policy agenda.

revision of the ONP directive enabled DG INFSO to produce a number of publicly available working papers before any draft legislation was put to other DGs and the College.

Anticipating intra-Commission disputes can, however, lead to a quite different approach to consultation. Officials from this institution who prepared the e-commerce and end of vehicle life directives claim to have very deliberately kept official consultation to a minimum in order to avoid inter-service and college "interference" and dilution of their proposals. In the case of the e-commerce legislation, an intersectoral 'framework' directive that would demand a particularly high-level of inter-service co-ordination, the approach adopted by DG MARKET officials was *" to shoot first and discuss later "*[183].More precisely, these officials ensured that the College committed the Commission to legislation on e-commerce in the form of statements made in a Communication before submitting a draft directive to inter-service scrutiny. In addition, although different interested parties had been contacted beforehand for their views in an informal fashion, more formalised exchanges, particularly with national government officials, had been avoided *"because they are always against our attempts to make law "*[184].

In the case of the directive on the end of vehicle life, formalised consultation was also ruled out for similar reasons. Resistance from other DGs, in particular DG ENTERPRISE, is often anticipated by DG ENVIRONMENT officials because of their relative weakness within the Commission*: " our DG is the illegitimate child of parents who only got married after its birth"*[185]. If such officials also fear that Member States will water down Commission proposals in this field, there is an even greater fear that consulting industry prior to the production of draft legislation excessively favours producers at the expense of environmentalist and consumer representatives:

> "There is a problem with this type of consultation. For NGOs, it is very expensive to participate. There is thus always the risk that producers will dominate proceedings. The representativity of a consultative committee can thus very quickly become dubious"[186].

Given that our project is not specifically targeted on agenda-setting, we will not expand more extensively on this point here[187]. The typology presented above simply serves as a

[183] Interview with DG MARKT official, November 2000.
[184] Interview with DG MARKT official, November 2000.
[185] Interview with DG ENVIRONMENT official, November 2000.
[186] Interview with DG ENVIRONMENT official, November 2000.
[187] In particular, research on this question would have to address the policy alternatives that, for different reasons, were not even considered by the consultation and pre-negotiation process. One of the logical

reminder that different issue " streams " tend to lead to different ways of beginning work in a working group. It also shows the fuzziness of the dividing line between consultation, prenegotiation and negotiation, a line which often tends to be crossed well before working groups start their work.

3.2. Beyond the technical vs. political dichotomy: Working groups at the heart of Council-Parliament-Commission interaction

If the line between consultation and negotiation is repeatedly crossed before a working group even begins to look at a piece of draft legislation, this is also because the drawing of a clear-cut line between its technical and political aspects is virtually impossible. Instead the words technical and political are most often labels for issues that are used in the context of debates and conflicts which go on within and between the Council, the Parliament and the Commission. Here we will show that the working group is nonetheless very often the fulcrum around which this interaction occurs and where much EU level mediation takes place.

3.2.1. Working groups, COREPER and ministers

Formally, working groups report to COREPER[188] and thence to ministers. Virtually all our interviewees considered that a separation between technical (secondary) and political (central) issues determines which of these bodies does what. If technical issues are left to the working group, political ones are treated at the level of the COREPER or ministers: *"In the working group, we treat only the technical issues. When there are important points of controversy, it goes to the COREPER "*[189]; *" The working group is a good arena to prepare the debate at the COREPER and Council level "*[190].Itisnoaccidentifthisviewof a world where the technical and the political are clearly identified is reproduced constantly by legal scholars and traditional forms of political science[191].

If one looks more closely, however, the distinction between technical and political issues is rarely clear-cut. What actually often happens is that if an agreement cannot be

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consequences of this research is to recommend the funding of a specific study into the operation of consultative groups or committees set-up and chaired by the Commission.

[188] In our case studies, only COREPER I is concerned as it deals with internal market, industry, telecommunications, energy, environment, research, transport, social affairs, health, education, culture: i.e. exclusively first pillar legislation.

[189] Interview with a permanent representative, December 2000.

[190] Interview with a Council secretariat official, January 2001. Indeed, when draft legislation reaches COREPER, it is divided into two parts: priority issues (usually 4 or 5) that need to be dealt at this level and secondary issues. It is clear that only the first ones are decisive. Sometimes, after 'major issues' have been solved by the COREPER, national delegations choose to drop their reserves on secondary points.

[191] To give just one example, a recent edited book on the COREPER provides many illustrations of this trend, Constantinesco/Simon (2001).

reached at the level of the working group, the text goes to COREPER. Therefore, on some occasions, working groups do deal with issues originally labelled 'political' by working group members. For example, for the racial discrimination directive, there was intense conflict between the UK but also the Netherlands on the one hand, and France, Spain and Sweden on the other, about how a "discrimination" case should be defined. If the first group of representatives considered discrimination could be proven by statistics, representatives from the other countries considered that this was a " dangerous " way of demonstrating "racial discrimination". A solution was eventually found by putting the offending article in the directive's recital and thereby sidelining for the time being an EU-definition of discrimination[192]. What is of interest to us is that when discussing this issue with an attaché, he began by telling us: "*It was political… so it must have been solved in COREPER*", before recognising (having reread his notes) that a solution had in fact been reached within the group.

A second example concerns the landfill of waste directive. One of the blocking points was the percentage of reduction in landfill for non-biodegradable waste. Generally, working group members expect this sort of item to be left to ministers. In practice, this did not occur on this occasion (in contrast to an air pollution directive where figures like this were debated directly by ministers)[193]. Under the Luxembourg presidency in particular, it was argued that these figures for landfill were still quite technical and that therefore it was necessary to continue the negotiation round in the working group. During this round, RPs could try things out with their national capitals, and then restrict the range of figures to be discussed by ministers. For some directives, the Council itself (or the COREPER) just ratifies solutions worked out in the working group. In the case of the drinking water directive that will be looked at further below, the Ministers essentially had only a symbolic function.

The latter example also shows that the frontier between technical and political issues also varies from one presidency to another. Some prefer to use COREPER regularly, whereas others spend more time on issues in the working groups. The latter strategy appears more common:

> "We try to solve all technical problems at expert and attaché level so as to try to avoid COREPER. This is a level where you waste a lot of time as many new documents need to be produced"[194].

[192] In this recital it was stated that statistical evidence could be one means among many others to define discrimination.
[193] Interview with Council secretariat official, November 2000.
[194] Interview, Council secretariat official, October 2000.

In contrast, some presidencies have chosen to use COREPER systemically in order to speed up negotiations. During the last French presidency for example (July-December, 2000), a great deal of legislation was dealt with in this way. The relationship between working groups and COREPER is thus a complex but vital one for understanding the making of EU legislation. As Lewis has underlined[195], there is often considerable rivalry between those who sit in COREPER and in working groups. Such rivalry is played out around the draft legislation which repeatedly circulates back and forwards between COREPER and the working groups. Senior officials in COREPER clearly have more power than the more junior civil servants who sit alongside them in meetings at this level and who go to working group meetings with officials sent specifically for that purpose from the national capitals. However, one should not underestimate the willingness of working group members in general to minimise the number of issues left for COREPER to decide upon. Interviewees from small Member States tend to be particularly anti-COREPER because they consider that its proximity to the relative voting capacity of ministers always returns power to the big Member States[196]. More generally, working group members who have often spent weeks if not months mastering the complexities of an issue and piecing together a compromise live in fear that underinformed ambassadors in COREPER will make hasty decisions that unravel all the work done previously.

Beyond these points on working group-COREPER relations, our research has also sought to answer the related question of what is left for ministers to decide? If most of our interviewees continue to state that political decisions are not taken in working groups but by the ministers, what do they mean in more precise terms? Judging by what we have been told, some issues like budgets are never really discussed in working groups. The role of the working group here is just to generate an initial idea about the different positions taken by each national delegation. In addition, deal-making involving inter-sectoral trade-offs seem to be left for ministers to handle, a good example being the clash between environmental and industrial policy priorities during negotiation of the end of vehicle life directive.

However, other cases of decision-making suggest that less is left for ministers to decide on than one might have thought. This point can be illustrated by the case of the MEDIA negotiation where the actors interviewed underlined the 'efficiency' of the working group:

[195] Lewis (1998).
[196] To cite a Belgian RP, '*COREPER is where the big countries can come to the fore (…) we are small. In the working group we are more equal*''; Interview, June 2001.

> *"documents were pretty clean before COREPER and Council, which is not always the case"*[197]. In a case where there were many " technical " issues to deal with, interviewees attribute this to the fact that some members of the group were " good " professionals from this field[198].

Similarly, for the drinking water directive a French attaché involved told us:

> "The directive was already tied up when I arrived in Brussels. It was already being processed by the working group and most of the problems had been settled. Just a few points of friction remained "[199].

Indeed, the drinking water directive offers a good illustration of the difficulty to build a clear frontier between what ministers and the working groups do and of the continuous nature of interactions between these two levels. In this case, the French delegation in particular had a major problem with the maximum levels of lead that this legislation would set[200]. Finally a solution to this conflict with the French delegation was found by the introduction of a higher maximum level for 15 years and the inclusion in the directive of an additional derogation amounting to nine further years of grace.

However, this solution was only achieved in the last minutes of the Council meeting by reactivating the working group under the form of a so-called 'groupe en marge du Conseil' (an informal, *ad hoc* group) created for the sole purpose of solving this technical-political problem. Labelled a 'quasi working group' by one of our interviewees, the usual group was widened to include some technical specialists from the national capitals and several senior officials from ministerial entourages. Those who had negotiated the legislation through from the beginning were thus directly present at the end![201] Ultimately, the ministerial meeting " dramatised " the issue and injected urgency into the proceedings but the working group was very much involved in the final decisions.

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[197] Interview, with permanent representative, January 2001.

[198] The participation of a Portuguese delegate who had worked in the film industry was mentioned in this sense. This point was underlined in more general fashion by an interview at the Secretariat General of the Council: " *There is a necessity for the Secretariat General to have specialists intervene because, as you know, we are generalists"* (interview, January 2001).

[199] Interview, with permanent representative, January 2001.

[200] As our case study accounts in detail, following WHO guidelines, the Commission's initial proposal on maximum levels of lead in water was 10 mg/l. This level was politically inescapable so the challenge for negotiators was to set a norm of 10 mg/l. but not to render it obligatory. The French government was particularly reticent to accept a strict norm which might oblige it to pay compensation to French private property holders who in future would have to rapidly replace lead piping (of which there are still vast quantities in this Member State).

[201] According to our interviewees, the creation of such a group does not occur very frequently, largely because national ministries dislike such a practice which tends to cut them off from the negotiation. Nevertheless, our interviews also highlight that informal contact between RPs is a constant feature of deal-making within the Council.

3.2.2. A new role for the European Parliament202

The introduction of co-decision by the Maastricht Treaty[203] has considerably changed the nature of interinstitutional negotiations within the European Union. Agreements between the Council, the Commission and the EP have become necessary for many important pieces of legislation (38 domains of European legislation are concerned)[204]. Indeed, it has become an increasingly common objective for working groups to avoid the conciliation procedure by involving representatives of the EP (and/or their viewpoints) in negotiations much earlier than they previously had been. As many of the actors interviewed mentioned, the codecision procedure has greatly increased the complexity of the negotiation phase. In nearly every case[205], this Treaty change has induced a second negotiation phase which takes place in the Council (and in particular within its working groups) after the EP's first reading. This often means that national delegations try to reach a compromise among themselves on the basis of the Commission proposal which can then be presented to the EP as THE Council's position. A second negotiation follows with the European Parliament, where from a Council perspective, the main difficulty is to reach a second compromise without destroying the unity that helped produce the first one.

With respect to the directives and decisions we have analysed, co-decision has been a key issue (e.g. Socrates, Working time and Culture 2000 were all adopted through the conciliation procedure). A growing part of the Council's (and the working groups') activity is thus concerned with dealing with the EP. The presidency especially is increasingly involved in negotiations with EP committees[206]. On this relationship, two comments can be made. First, working group members and European parliamentarians represent competing legitimacies: "*the problem is that RPs have a technical legitimacy, but no*

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[202] On this question see chapter 5 of this report which is specifically dedicated to analysing parliamentary committees.

[203] Art. 251 of The Treaty on European Union (previously art. 189 b).

[204] Concerning the sectors we have studied, most of these now apply the co-decision procedure, even if it affects each of these sectors differently. For example, in social affairs, the working time and health and safety directives were dealt with under co-decision, this was not the case for legislation on discrimination (art. 13 Amsterdam Treaty did not allow codecision).

[205] The exceptions to this rule concern directives accepted in their first reading by the European Parliament. If such a method may appear efficient, it can also pose a number of problems. For example, one Commission official working in the telecommunications field told us: *"The problem is that this procedure is a little too quick and not transparent enough. When we reach agreement on the first reading, the essential work is done between the President of COREPER and the EP's rapporteur. It is up to the rapporteur to consult the other members of Parliament (…) So MEPs are often confronted with a choice between 'yes' and 'no' -there is no deliberation"* (Interview, January 2002).

[206] Indeed, a senior Commission official gave the following opinion on this matter : "The new role of the European Parliament does not change the way one works in working groups. However, it certainly does change the way the chair of each group works" (Interview, January 2002).

democratic one, and it is the opposite for parliamentarians"[207]. As a consequence, the Parliament is often criticised not only for its inability to understand the constraints of the legislative procedure but more seriously for being uninformed or subjectively informed about the issues involved[208]. The second point, partly a consequence of the first, is that most working group members regret the time " wasted" by the new procedures.

The impact of co-decision on working group activity must however be qualified. Firstly, and despite a lack of clear rules on consultation over draft directives that undergo a secondreading in the EP[209], in an increasing number of issues, negotiations take place between the Parliament's committees and members of a working group and particularly the chairs to reach an agreement before the conciliation procedure. This trend shows that European-level actors have sought to adapt their respective institutional logistics to new procedures. For example, in preparing the vibration and scaffolding (*Travail en hauteur*) directives, lengthy negotiations took place between members of the Social Affairs working group and Parliamentary committees in order to avoid conciliation. In the case of scaffolding, members of these bodies even sought an agreement that would get the legislation accepted in the EP's first reading.

In the field of telecommunications, members of the French presidency team began their work by meeting representatives of the Parliament in order to set a common agenda (and to get agreements in first reading). In short, the growing importance of interinstitutional negotiations to avoid conciliation thus underlines first the role played by actors in position to speak *"in the name of"* institutions (working group and EP committee chairs, rapporteurs...) and their ability to make agreements. This is particularly difficult for EP committee chairs to do as their authority and that of their committee can constantly be undermined by the Parliament's plenary sessions. It also highlights the lengthening of the time it takes to negotiate an EU directive.

However, new decision-making procedures only partly explain the changing relations between working groups and EP committees. The timing of negotiations and institutional

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[207] Interview, Council Secretariat official, January 2001.

[208] The sources of information of European parliamentarians are often challenged by actors operating in working groups who consider they have better, i.e. 'more objective', information than parliamentarians do. The latter are often stigmatised for supposedly relying upon information from self-interested lobbies and private companies. See chapter 5 of this report (section 1.5) on the importance of outside influences on MEPs.

[209] A Commission official sums this position up in the following way: '"*Conciliation is a form of third reading where the rules of the game are very precise. But the second reading is only structured by the know-how of the chair of the working group and of the Commission's director general (…) so there is no safety net. You just need one person to be in a bad temper to make the whole negotiation break down*" (Interview, January 2002). More precisely, as another Commission official mentioned with reference to the UMTS Decision, the EP's rapporteur but also members of its secretariat can often play a pivotal role which can speed up or block the passage of a directive under co-decision (Interview, January 2002).

strategies are also important factors. Two examples may be given to illustrate this point. For the adoption of LEONARDO, the objectives of the German presidency (and also of the Commission and the EP) were to reach an agreement before the European elections of 1999. For this reason, and in spite of major cleavages (concerning the budget and the selection of projects), the representatives of the different institutions were under pressure to reach a common position quickly. Contrary to the Socrates Programme which was only accepted after a highly controversial conciliation procedure, this time constraint meant that for LEONARDO long negotiations were avoided.

The second example concerns the antidiscrimination directives for which the EP formally only had a consultative role because its amendments would have no binding effect upon the Council. However, as one interviewee emphasised, "*the EP hasn't accepted the fact that the Amsterdam Treaty excluded discrimination issues from co-decision*"[210]. Consequently, even if it was not legally permitted, the EP tried to play a major role in processing this legislation. The Council and the Commission wanted to push this draft legislation through rapidly, but in order to do so they needed the Parliament's opinion as early as possible, an opinion which representatives of this institution sought to trade off for the retention of some of its amendments. Even if, at the end of the day, only a few amendments proposed by the EP were put into the final version of the directive, this example illustrates the activist strategy followed by the parliamentarians involved. This said, other examples also suggest that there can be a backlash amongst Member State representatives against what they see as the encroaching influence of the EP. This appears to have been the position of Dutch representatives when the budget for Culture 2000 was negotiated (an example we develop more fully below).

These empirical examples show that changes in institutional rules have made a difference to the way EU problems and policies are shaped. We shall see however in section 4.1 that they do not tell the whole story.

To summarise this section devoted to the inter-institutional " partners " of working groups, the latter have influence over EU decision-making because they must now function in a context where neither " the Council " nor " the Commission " dominates the production of EU legislation. As an alternative to the often-heard opinion that the Commission " is a shadow of its former self ", it seems more accurate to depict the governance of Europe as conducted in a highly competitive inter-institutional environment where each player national governments, the Commission and the European Parliament -is obliged to focus intense attention upon what happens in Council working

[210] Interview, Council Secretariat official, January 2001.

groups[211]. In this context, if the technical-political divide is omnipresent in the discourse of practitioners, this is perhaps because the imprecision of this distinction is in fact a powerful facilitator for reaching intersectorial and intergovernmental compromise at the EU level[212]. If such forms of "depolitisation" may enhance the efficiency of EU decision-making, it also seems to have wider implications for institutional legitimacy.

4. Why working groups are different (and so what?)

One way of grasping such effects is to make our research respond to the question, why do working groups operate in different ways? Three responses to this question are explicitly or implicitly made in the literature on EU governance:

- *the legal positivist interpretation*: working groups differ because EU law in general, and its Treaties in particular, determine the formal and informal rules governing the practices of the Council and its relationship to the Commission and the Parliament;

- *the policy instrument interpretation*: different policy instruments place different requirements upon working groups;

- *the brokering interpretation*: working groups function and vary because different policy brokers, in particular the presidency, determine how compromises are reached;

As elaborate below, our research shows that each of these interpretations is partially valid, a finding that provides food for reflection on the normative consequences of variation in working group procedures and practices.

4.1. The force of EU Treaties

Most lawyers would expect working group behaviour to vary for two reasons:

- because there is co-decision or co-operation with the Parliament;

- because of the voting arrangements in Council (QMV or unanimity).

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[211] This point is corroborated by Flynn (2000), p. 95, in his analysis of the role of committees in Environment policymaking: " For too long, perhaps, we have settled for relatively simplistic accounts of institutions in environmental policymaking: a green Parliament battling against a reactionary Council, while a divided Commission stands by. In practice, the political alliances are complex and may differ from issue to issue (...). What is certain though, is that somewhere at the heart of an environment policy dispute a committee will be playing a central part".

[212] As Christiansen/Kirchner (2000), p. 20 underline: " Committees are regularly regarded as technocratic, concerned with the minute details of policy proposals. This may well be true (...) but this does not remove politics from the process. The proceedings of committee governance are highly political, whether or not the issue at stake is regarded as high or low politics ".

The previous sub-section has dealt with the first point and underlined that the EP is now very much a constraint upon working group behaviour even in cases where co-decision does not apply (cf. 3.2.2). With respect to the impact of voting arrangements within the Council itself, in general terms the expectations generated by the Treaties do indeed influence the conduct of negotiations in working groups, but not always as directly as one might have thought.

With the exception of Culture 2000 and the 5th R & D Framework Programme, most of our cases involved procedures which allowed the Council to reach decisions by QMV. Some interviewees, however, immediately downplay the role of voting because there is a tradition of consensual decision making within the European Union. "*A presidency*", one attaché told us, "*will never isolate a Member-State… It will always try to find a minimal consensus*"[213]. A number of other interviewees said that "*we never vote in a working group*". If pertinent in some cases, such discourse is partly misleading. If representatives of the Member States do not vote in the working group itself, this is mainly because alliances and splits are anticipated and a vote would simply confirm and render them more difficult to modify.

However, the bulk of our evidence suggests that if a Member State is isolated by its own negotiating position, it will not always be " saved" by the presidency. Such intervention depends upon the size of that country, the strategy of the presidency and of the intricacies of voting rules. For example, for an educational programme (like Socrates), a Member State with specific demands (Spain for example on languages issues) will not necessarily find support from other Member States. In addition, the rule of unanimity for Cultural programs certainly leads to endless discussions, especially on the budget.

The case of Culture 2000 is an even better illustration of the strength of the constraints of voting rules upon decision-making, how some actors attempt to get around these constraints and the consequences this may have on the negotiation process as a whole. During their presidency of the EU, the government of the Netherlands – a traditional opponent of European intervention in the field of culture -in the name of economy suddenly, and to the astonishment of many other negotiators, proposed the creation of a single cultural programme to replace the three pre-existing, sectoral ones. The Commission had been in favour of such an idea for years but had thus far restrained itself from proposing it because of Dutch, German and British resistance. Its officials thus made an initial proposal for what would become 'Culture 2000' with an overall budget of

[213] Interview, permanent representative, January 2001.

167 million Euro. During the Council negotiation that followed, the Austrian presidency managed to get the Member States to agree to a budget of 156 million Euro.

However, the Dutch delegation refused to go higher than 90 million and then proceeded to block the negotiation for six months by invoking the unanimity rule in force in this sector. After considerable pressure from other Member State governments they ultimately lined up with the majority view. But this change of position was only achieved after the Dutch had simultaneously built what one interviewee called *'a kind of particularly scandalous blackmail which resulted in totally denying the role of the European Parliament'*[214]. More precisely, the Dutch government agreed to the figure of 167 million Euro but only if the other delegations committed themselves not to pay a single Euro more, whatever the position of the European Parliament after consultation. In the event, the EP asked for 250 million for Culture 2000, a figure totally unacceptable to the Council and therefore rendering conciliation inevitable. At the end of this process the amount of 167 million Euro was retained.

In short, the Treaties can undoubtedly explain some aspects of working group difference. However, the impact of unanimity voting or co-decision is not as automatic as one is often led to think: even in the case of culture, unanimity is not always the key problem to getting agreement and the absence of co-decision does not totally explain the sidelining of Parliament.

4.2. The nature of policy instruments

Legal provisions may, however, have more or less impact according to the type of policy instruments that a European directive seeks to set up. In this respect, the EU legislation we have looked at in this study varies in at least three ways: in terms of its newness, whether it is " horizontal " or sectoral and whether it is regulatory or allocatory[215].

First, although often important in explaining legislative outcomes, from the point of view of working group behaviour, the 'newness' of EU legislation is best tackled from the perspective of group dynamics (see 2.3). When a proposal for a directive is discussed which is totally new, the dynamic may be less consensual than with a proposal for a directive which is built on, or amends, an older one. For SOCRATES and LEONARDO, for instance, compromises that had been reached during the negotiation of the first phase of

[214] Interview, Council Secretariat official, January 2001.
[215] The classical distinction in political science is between regulatory and redistributive policies. In the case of the EU, the latter category can lead to confusion. For this reason we introduce the term allocatory to denote policies which allocate a percentage of the EU budget back to specifically identified member states.

each programme, structured discussion on the second by ruling out some policy options. As mentioned by an official interviewed regarding MEDIA +:

> "The whole negotiation was coloured by the fact that it was an old field that was more or less consensual. There was not much pressure in fact. Except regarding the money aspect of course, but again, this was not discussed in the working group but at the Council level"[216].

Second, the horizontal-sectoral distinction refers directly to differences in working group practices caused by the nature of policy instruments. " Framework " legislation, such as the ONP or e-commerce directives, tend to involve actors from different parts of the Commission, different EP committees and ministries within each national government. As such, the negotiation process is frequently a longer one and likely to depend upon inter-sectoral mediation at intra-government, inter-Council and inter-institutional levels which involve a higher number of mostly senior politicians and officials in the EU. Diplomatic style negotiation, partly divorced from the detail discussed in working groups, may be used in order to reach decisions. Although often highly controversial, purely sectoral directives (e.g. research, the UMTS decision) tend to feature negotiations in which the technicalpolitical dichotomy is used in a straight fight between attempts to increase the powers of the Commission in a given sector and attempts made by national ministries to prevent such a result.

Finally, the third way through which the nature of policy instruments may determine working group practices is whether the draft legislation is of a regulatory or an allocatory type. Although excessively dichotomous, this distinction does enable one to reflect about how the likely consequences of new EU legislation impact upon the negotiating stances of working group participants. Although our case studies were not set up to deal directly with this hypothesis, they nevertheless lead us to conclude that:

- Allocation-type policy instruments (ex. the Research Framework Programme, Culture 2000) tend strongly to lead to negotiations centred upon budgets. As such they activate the involvement of politicians in the Council itself or anticipation of this in the COREPER.

- Regulatory-type instruments tend to 'hide' the question of who will pay and who will gain by transferring costs to actors external to the negotiation such as the private

[216] Interview, Council secretariat official, January 2001. Similarly, sectoral proximity (SOCRATES and LEONARDO, for example) can create " personnel spillover ": the specialists in this field tend to work in the capitals but many know each other because they had already met during previous negotiations (LEONARDO I and SOCRATES I).

sector and local authorities (fn: compare: Héritier, 1996; Majone, 1996). For this reason these issues are often labelled 'technical' despite the fact that they provoke varying effects and costs throughout the EU. From the point of the working group, this seems to generate more autonomy and thus a greater role in shaping problems and finding legal and policy 'solutions'. The drinking water directive is one such example. A political issue (avoiding the WHO standard) was hidden behind a technical problem and solution (implementation delays). As we saw earlier, this is why the final solution was found in a working group during the meeting of the Council.

4.3. The intervention of policy brokers

A third explanation for why working groups matter in EC decision-making (and implicitly how they vary) is that of intermediation or brokering. This interpretation suggests that three sets of actors -the Council Presidency, the Council Secretariat and the European Commission -are often well-positioned to encourage national delegations to accept the compromises that are deemed necessary to produce EC law. If our case studies often substantiate this assertion, and contrary to what many participants believe, this is not simply due to the " personality " of the negotiators involved. By looking more closely at the resources necessary to succeed in brokering deals at the EC level, institutional logic's provide a more convincing response which can encompass, but not overstate, " the human element " of decision-making. More precisely, we consider that brokering occurs at two levels that can be labelled inter-institutional and tactical.

4.3.1. Inter-institutional brokering

The inter-institutional level of brokering essentially concerns the manner through which officials within the Commission and each presidency set their priorities and try to get them shared by the relevant sectoral Council of ministers[217]. As is well known, each Member State government organises itself differently in order to take on the task of presiding the Council as a whole[218]. Although a considerable amount of legislation is already being processed when the presidency changes hands, our research suggests that this list of tasks can be and often is reentered in the hierarchical system at that time. As space and time for meetings is limited by physical, temporal and budgetary factors[219],

[217] The problematical nature of this relationship is specifically mentioned in the Commission's *White paper on Democratic Governance* (2001), p. 29.
[218] Compare Wurzel (1996).
[219] The Council building has only fifteen committee rooms. In addition each presidency has a fixed budget with which to compensate national delegations for the expenses of getting delegates to meetings, providing them with accommodation, food etc.

each presidency quite simply has to choose which draft legislation it really wants to push for. A number of our interviewees, for example, cite the last French presidency as one which injected urgency into the system in a number of sectors (particularly social and cultural affairs), one RP even going so far as to jokingly call this " *presidential harassment* "[220]!

Although outright bias on the basis of national interest is difficult to sustain, draft directives that pose problems to the national government holding the presidency can relatively easily be slowed down by simply allocating them insufficient time in working groups and COREPER. Conversely, a presidency can attempt to accelerate this process by negotiating its overall agenda with the European Parliament[221].

In some respects, Commission officials can also be seen to have an inter-institutional brokering role because they often claim to anticipate when a Member State sympathetic to their policy objectives will next hold the Council presidency. Indeed, in order to get legislation through that may provoke inter-governmental blockages, Commission officials sometimes try to identify successive favourable presidencies. In the case of the ONP telecommunications directive (98/10), for example, three presidencies in a row (Italy, the Netherlands and the UK) were very much in favour of liberalisation and thus facilitated the adoption of a piece of legislation that had initially sparked considerable resistance over the definition of " universal service " requirements. Conversely, as another interviewee put it,

"two or three negative presidencies in a row can end up killing a draft directive. In our sector, such a situation has produced a fair number of 'corpses'' "[222]. This said, one needs to stretch the concept of brokering in order to apply it to the action of Commission officials at this level. In most cases they appear to produce draft proposals for legislation in a more or less constant stream which means they cannot always be on the lookout for " windows of opportunity " in the Council. Moreover, as proposers for policy change, at an interinstitutional level they are rarely sufficiently neutral to play the role of a genuine intermediary.

[220] Interview with permanent representative, January 2001
[221] The Council presidency appears to have more direct influence over draft legislation that "arrives" during it's mandate, in particular because it may need to decide which Council of Ministers, and which working group, should negotiate it.
[222] Interview with DG ENVIRONMENT official, November 2000.

4.3.2. Tactical brokering

However, getting legislation onto the EU statute books is not only about 'inter-institutional agenda' brokering. This process also entails a form of tactical brokering which, in involving individual working groups, provides room for more actors to get involved in encouraging compromise definitions of issues and solutions. Such processes tend to crystallise around three issues: the chairing of meetings, the preparation of texts and recourse to COREPER.

According to a number of our interviewees, over recent years the most common tempo of working group meetings has become relatively slow. As always, each article and annex of a draft text are looked at in great detail, but in many instances national delegations are also now allowed to speak at length about any issues that are of even minor concern to them. Used to more directive methods of chairing before joining the Council secretariat, one British official put it to us that *" Chairmen of working groups are in a weak position and we as a secretariat cannot do anything. Meetings just roll on... "*.[223]

Chairing such meetings is an art that some individuals do more efficiently than others. If some of these skills can be traced to the " personality " of the chairperson[224],their effectiveness also depends upon their knowledge of the sector being dealt with and the leeway they are given to negotiate compromise by their own government. In some instances, such as the e-commerce directive, a presidency specifically looks for and appoints an official within its civil service that has the necessary expertise. Indeed, it is no coincidence that in many policy domains working group chairs are not RPs but are " experts " brought in from national capitals[225]. In short, the expertise of a chairperson can not only enhance their capacity to broker deals with their own government, this credibility also improves their chances of convincing other national delegations, Commission officials and perhaps even Parliamentarians of the need to compromise[226]. In other cases (e.g. the vibrations directive), however, over-technically minded chairs can

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[223] Interview, July 2000. Successive enlargements have accentuated this trend, a point stressed in particular by an interviewee (December 2000) from the French permanent representation who compared unfavourably the current way of operating with that which she had known at the beginning of the 1970s when there were only 9 Member States.

[224] According to one council secretariat official: "it's all about avoiding other delegations slowing things down; talking and talking and saying nothing " (interview, November 2000).

[225] In the case of the e-commerce directive, the Finnish RP involved in this negotiation stressed to us that " the chairman of the working group came from our Ministry of Justice. He was nominated because he was a specialist in international private law. We had anticipated work on this directive and made sure he was available to work as an expert rather than as a diplomat " (interview, January 2001).

[226] In this respect our analysis largely concurs with that of Flynn of EU " expert committees ": " one has to raise doubts about a true politics of expertise here more generally, insofar as in many cases the national participants of such committees are not just competent scientists or experts, but are usually national civil servants or otherwise open to political control and selection ". Flynn (2000), p. 89.

lead to a negotiation getting bogged down in detail. In this instance, Council Secretariat officials urged the group of the need to deal with the legislation as a whole and as law that must fit with other EU directives and regulations.

Of course, compromises need to be prepared, a point which brings us to the second aspect of brokering: the use of written texts. Many of our interviewees highlighted that in working groups *" the text is our tool "*. As we saw in part 2, after the first reading of a draft piece of legislation has flushed out a range of national reserves, negotiations begin in order to change wording and thereby remove as many of these reserves as possible before directly involving COREPER and ministers[227]. Here the Council presidency works closely with officials from the Council Secretariat and the Commission, with each set of actors bringing to bear particular resources for brokering compromises. In the case of the presidency, this essentially means using a combination of specific expertise and generalist diplomatic skills, whilst invoking the " neutrality " of its role and its legitimacy to " steer " meetings. More precisely, this work involves building coalitions within the working group and isolating recalcitrant national delegations. Here a vital tool is often the " presidency paper " (sometimes called a non-paper) which seeks to set out a draft common position for the Council.

In the case of Commission officials, "neutrality" means something rather different: not taking sides with any national delegation. This posture, however, is not always possible or even applied by representatives of this institution given that the Commission " has the right to amend its proposal at any stage " and that formally the Council needs unanimity to amend a Commission proposal without its agreement[228]. Instead, the key resource of Commission officials is a capacity to accept or refuse changes to a text that they themselves initiated[229]. Indeed, a number of examples from our study, suggest that the conciliatory behaviour of Commission officials is often crucial to the passage of a directive.

In some policy areas at least, the most effective brokers of texts are in fact officials from the Council Secretariat. A number of these actors modestly downplay their own role, one

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[227] Which is where the difference between recitals and articles, as well as other subtitles of wording, can be very important. To use Westlake's evocative metaphor, the overall process can be described as " boiling off " reserves from national delegations (1999), p. 307.
[228] Westlake (1999), p. 307.
[229] A capacity that depends in turn upon the resources of the Commission official attending working group meetings. Some experienced Principal Administrators can no doubt have considerable influence here, but in many instances the direct involvement of a Head of Unit was seen by several interviewees as providing optimal input for the Commission (Directors being too distant from the detail of the negotiation). This question can also be influenced by the fact that it is not unusual for an ex-RP to actually join the Commission and thus know how a working group functions " from both sides of the fence ".

going so far as to tell us *" we are just the sausage machine that processes the raw material that comes from the Commission and the presidencies "*[230]. In reality, it is often clear that experience of setting and adopting legislation in a specific-sector, more general judicial skills and the impartiality of Secretariat officials can be key elements in brokering working group level compromises. Experience in issue areas comes from the length of time most officials stay in the same job[231]. Knowledge of Community law and judicial-linguistic skills are other assets developed by each official over time and which can be particularly useful when the presidency is held by a new Member State. Indeed, Council Secretariat officials can use their knowledge of the EU's procedures to their advantage when working groups are dominated by national experts new to this level of decision-making. This is also the case because officials often consider that they have responsibility for the " legal coherence " of a draft directive[232].

As the " institutional memory of the Council ", they are thus well placed to identify likely blockages and " non-flyers "[233]. Finally, although Council Secretariat officials are often seen as 'partners' of the presidency, they generally seek to make their neutrality credible by underlining that they are *" the Secretariat of the Council, not the Secretariat of the presidency "*[234] (a posture that may lead them into conflict with interventionist presidencies!). For all these reasons, Secretariat officials insist upon preparing the explanatory note which accompanies any draft legislation going from a working group to COREPER rather than leaving this to officials from the presidency. It may be true that in general, presidencies held by the smaller Member States have more recourse to the Council Secretariat[235] and vice versa. Nevertheless, even in these circumstances, the capacity of officials from this institution to broker compromises seems unlikely to disappear.

The final aspect of brokering that interests us here involves the transmission of draft texts to COREPER and to Ministers. As we saw earlier (part 3.2), both these levels can, and are often, used to unlock working group negotiations. In addition to brokering specific compromising in a single piece of legislation, it is important to add that COREPER

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[230] Interview, July 2000.
[231] Some secretariat officials even develop an activist approach to their sector: " Our job is to serve the general interest and my personal position is that we have the possibility to work in this direction so why not do it rather than just be passive. I work in xxx and I believe in it so... ". Interview, November 2000. Another case from another sector, a Council secretariat official deliberately was leaking documents to the press.
[232] This appears to have been the case in the vibrations directive, Council secretariat official, interview January 2001.
[233] Council secretariat official, interview July 2000.
[234] Council secretariat official, interview January 2001.
[235] For example, one Council secretariat official expressed the opinion that "*the Austrian presidency worked well, largely because of the active support given by the Council Secretariat. We helped them out enormously. Inevitably it was a weak presidency, very inexperienced: it was their first time*" (Interview, January 2001).

in particular is often the arena for obtaining intra-and inter-sectoral deals. Two illustrations underline how " success " at this level of negotiation can hinge upon identifying and agreeing to trade-offs within the same policy area. In the field of EU subsidies to culture, the negotiation of the MEDIA programme was blocked at working group level because three delegations (Germany, Netherlands, UK) refused any increase in its overall budget whereas the French wanted to increase it and needed a big country as an ally. At the same time there was also a blockage over whether a new " European school " should be allocated to Alicante or to Frankfurt. After much informal and bilateral consultation, the French delegation abstained on the school issue thus enabling the Germans to win that vote in exchange for lifting their reserve on MEDIA's budget.

A second example, involving both intra-and inter-sectoral brokering, concerns the 5th Research Framework Programme. In this case, an initial blockage in the negotiations emanated from the need to allocate a budget to nuclear energy research and to alternative energies. The French and Spanish delegations were in favour of the former, whereas their Swedish and Austrian colleagues were advocates of the latter. However, this issue became embroiled in the larger question of the total budget for research in relation to other " internal policies " of the EU (chapter 3 of its budget). The Spanish government in particular resisted the setting of a budget for research that would consume 60% of this budget, thus leaving little money for other internal policies such as culture, transport, the environment and health. Ultimately, an agreement was reached only after the Research Council agreed to reconfirm the budget whilst awaiting the setting by ECOFIN of the financial perspectives used to calculate the EU's overall budget.

This final example highlights the need not to systematically overestimate the importance of brokering within working groups. At this level, brokers do often play a considerable role in transforming draft legislation into documents that the COREPER and ministers can turn into directives and regulations[236]. However, given the importance of external actors and influences, their intervention is not always what determines the final content of legislative output. In order to analyse when genuine brokers emerge, what they do and why it has an effect, a sociological and contextual approach to institutions, institutionalisation and interinstitutional exchange is essential.

[236] As English is the dominant language of EU brokering, some officials worry that this results in unfair advantages for some delegations. This is particularly problematical, they argue, in the case of national experts who, unlike most RPs, do not necessarily have strong linguistic skills.

5. Conclusion

After first restating the key empirical findings of our research on Council working groups, two general conclusions will be drawn.

The four key research results are:

1) Working groups are a vital part of the way the Council reaches decisions. They not only participate fully in reaching intergovernmental compromises, but are also strongly linked into wider processes of intra-and inter-sectoral bargaining. Working group members do receive instructions from their respective national administrations, but these are not always binding. Instead, working group members are called upon to interpret the interests of their Member State in a context where they must constantly take into account the state of the negotiation as a whole and the "need" to reach compromises.

2) What goes on in working groups cannot be understood by treating the distinction between "technical" and "political" issues as a literal truth. Sometimes working groups take decisions that many consider "political", just as sometimes ministers take decisions that would often be considered "technical". Instead, it is vitally important to understand that ambiguity over the technical/political divide is actually an essential part of EC decision-making. Without the flexibility that this ambiguity allows, much less legislation would ever reach the EU statue books. However, as we develop below, this flexibility is also a source of serious criticisms of the legitimacy of the Council and the way it operates.

3) The way Council working groups operate depends heavily upon their "sixteenth" and "seventeenth" members: officials from the European Commission and the Council Secretariat. As the authors of initial draft texts, the way the Commission officials accept or reject changes to their propositions is an essential part of shaping policy problems and finding policy solutions. Although Council Secretariat officials are always discreet in actual working group meetings, under certain circumstances they can play a key role in brokering deals during the informal contacts which surround these set-piece events.

4) Committees of the European Parliament are now in constant contact with Council working groups. Often intensified in order to speed-up decision-making, this contact can sometimes produce impressive instances of inter-institutional co-operation. More often, however, the respective institutional logics and

legitimacies of each institution lead to conflict and delay. This situation is not helped by the lack of clarity which surrounds the co-decision procedures which necessitate a second reading by the Parliament.

The first general conclusion drawn from these findings is essentially analytical, the second more normative.

From a purely analytical perspective regarding what our project has to say about the dominant theories of European integration and decision-making, three points can briefly be restated. First, it is important not to see working groups just as sites for intergovernmental rational choice-type bargaining on the basis of fixed positions where the key resource for any national delegation is information on other Member State positions. Instead, working group members most often have to deal with negotiating situations marked by uncertainties that have as much to do with defining the problem the EU is to address as with the strategies and tactics of their colleagues from other national delegations.

Second, supranationalist interpretations of how working groups operate are not convincing either. Irrespective of voting arrangements in the Council, the perceptions and preferences of national actors clearly do still matter a great deal in decision-making. Although the dynamics of each working group have an important influence, there is little evidence of the emergence of an all-powerful European identity that trumps national affiliations. Similarly, although Commission and, to a lesser extent, Council Secretariat, officials play key roles in working groups, they never dominate them. Nevertheless, differences in the mind sets and behaviour of officials in the RPs and those who come to working group meetings from national ministries, does appear to confirm Christiansen's hypothesis that a process of 'Brusselisation' is an important part of European decision-making[237]. Indeed, our research tends strongly to suggest that permanent representations are often closer to Commission and Council Secretariat officials in their approach to public action than they are to their colleagues in the national ministries.

Third and finally, working groups are not just arenas for dealing with technical or functional problems. Instead, our research has highlighted that as often as not, national representatives in working groups begin work on a piece of draft legislation with some general goals but no clear route map to guide them to a desired outcome. Defined as an iterative process of discussion and exchange engendering shared meanings of issues and

[237] Christiansen (2001).

policy solutions, the term " mediation "[238] better captures what goes on in working groups and, therefore, enables us to grasp how they matter and why this is analytically and normatively important.

Our second and final conclusion summarises the normative points that may be drawn particularly from the analysis set out in part above. The explanations of working group difference made in that section can be revisited as follows:

- if difference between working groups is entirely due to Treaty provisions or the nature of policy instruments, then this difference is predictable and fits perfectly with " the rule of law " (i.e. a strict application of the Treaties). However, we have shown there are many other reasons for difference and that these are not limited to the characteristics of a policy sector.

- if difference is due to brokering, this means the process of negotiating EU legislation is unpredictable. One can either see this as inevitable and desirable, or as undesirable and a

- good reason for changing the EU's Treaties and institutional balance.

Instead of adopting one of these stances, and in order to respond to some of the concerns expressed by the European Council in its Laeken declaration, we prefer to reformulate them in the form of a more general comment on how working groups are important to EU decision-making and whether this constitutes a normative problem: contrary to many criticisms of committees in EU governance, our general argument is that, measured in terms of the availability of information, the "openness" and " transparency " of working groups is not the fundamental question that needs addressing. In negotiations of this type, some secrecy is inevitable and it is surely preferable that most matters be dealt with on the floor of the working groups than in the corridors of the Council building or over the telephone[239].

Instead, the key problem is " legibility " measured in terms of the capacity of outsiders (press, politicians, institutions which represent the general interest such as national parliaments) to interpret the information that insiders have no difficulty in dealing with. However, the source of this problem is less the working groups themselves, or even the variable geometry of community law. After all, what national political system is entirely homogenous and consistent? What is ultimately at issue here is the intense competition

[238] Muller (1995); Rochefort/Cobb (1994).
[239] Curtin (1995), p. 85; Lord (1998), p. 88.

between the Council, the Commission and the Parliament. By labelling a multitude of issues as 'technical' in order to steer them through the EU's decision-making machinery, a range of actors involved provide themselves with a short-term solution that exacerbates the medium and long-term problem of the public perception of the EU as a bureaucratic, nonpolitical process.

By defining politics more widely and accepting that a wider range of national actors, and in particular the press and interested citizens, have a right to participate in debates over controversial choices and compromises, this perception may begin to change.

E. The role of European Parliament committees in the eu policy-making process: the "legislative backbone" keeping the institution upright?

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1. Introduction

The fact that the European Parliament (EP) is now commonly seen as a co-legislator with the Council is a relatively new development. For more than three decades it did not enjoy any effective rights of participation in the legislative process. It started out as an assembly with only two major powers: the power to pass a motion of censure against the High Authority[241] and the right to be consulted by the Council on selected legislative proposals. The opinions given in this classical consultation procedure were non-binding.

The 1987 Single European Act (SEA) represented a major step forward for the EP. It marked the beginning of a new triangular relationship between the Council, the Commission and the EP by introducing the co-operation procedure, which improved inter-institutional dialogue significantly, giving the EP the first opportunity to flex its legislative muscles and to make use of its agenda-setting powers.

Building on the positive experiences of the co-operation procedure, the EP's legislative competences were extended by the Treaty on European Union (TEU, commonly known as the Maastricht Treaty (1993). Through the introduction of the co-decision procedure the Members of the European Parliament (MEPs) were, for the first time, granted the power of veto in several policy areas.[242]

The Treaty of Amsterdam (1999 further) strengthened the EP's role, especially its involvement in the legislative process. The co-decision procedure has been extended from 15 to 38 Treaty areas or types of Community action and now applies to new areas within the fields of transport, environment, energy, development co-operation and certain aspects of social affairs. A significant new element in the Amsterdam Treaty is the streamlining of the co-decision procedure. Most importantly, a legislative act can now be adopted in first reading if either the EP fails to suggest amendments to the Commission proposal or the Council agrees to all the amendments suggested by the EP.

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[240] I would like to thank Katharina Polster for all her assistance and support in organising, conducting and writing up the interviews. I would also like to thank the entire Research team working on this project, San Bilal and two anonymous referees for their very helpful comments on an earlier version of this chapter.

[241] The forerunner of the European Commission.

[242] Initially only 15 Treaty items were covered by the procedure: comprising articles in the policy fields of the internal market, consumer protection, Trans-European networks, cultural policy, public health and education.

The increase in the EP's powers was accompanied by a revaluation of the EP standing committees. They have become a key element in the EU policy-making process and can be seen as a vital contribution to the shaping of legislation.

2. Scope of the analysis

It might come as a surprise that, although these committees play such a major role within the EP, they have rarely been the focus of empirical studies. This chapter aims to contribute to filling this gap by examining the functioning of these committees and the role they play within the EC policy-making process. The arguments are based on empirical evidence from specific case studies within selected policy areas.[243]

The findings represented here are based on interviews with both MEPs and members of the EP General Secretariat and documentary analysis of how such committees have processed legislative acts.[244] The inquiry was designed to answer the following questions:

1) How do EP committees operate?

   - how have they developed?

   - what are the committees' (formal) powers?

   - who are the key players in committees?

   - what is the significance of political groups within committees?

   - where do MEPs obtain their expertise?

   - how is consensus reached?

   - of what significance is the fact that committees are generally open to the public?

[243] The policy areas selected for study are telecommunications, research, culture, social affairs and environment. In each sector we have examined up to 4 directives or Council decisions.

[244] (Preliminary) findings of this paper have been presented at the ECSA Conference, Workshop 10d: "Governance by Committee, the Role of Committees in European Policy-Making and Policy Implementation", Madison, Wisconsin, June 2001 and have been published in the European Integration online Papers (EIoP) Vol. 5 (2001) N° 10; http://eiop.or.at/eiop/texte/2001-010a.htm

2) How do they interact with other institutions within the EU system of governance?

   - how do EP committees interact with other institutions (particularly with Council and Commission) throughout the legislative process?

   - how has the relationship between the Council, Commission and EP changed in the codecision process?

   - what role do committees play in the implementing process of EU legislation, especially in relation to other institutions (for example in comitology)?

3) Do committees affect the "link" to the EU citizen, is accountability increased, and if so, how?

   - do EP committees contribute to increased accountability of the EP to EU citizens?

   - does the increasingly heavy workloads of committees "weaken the bond with the voter", as less time is available for contacts with constituents in the Member State?

   - what means do MEPs have for maintaining contact with EU citizens?

3. The EP Standing Committees: development and mode of operating

The EP Standing Committees have been described as the "legislative backbone" of the EP.[245] Everything that could conceivably be dealt with by the EP falls within the sphere of competence of these committees, which officially examine only questions referred to them by the Bureau.[246] In the practical process, incoming legislative proposals go directly to the responsible committee or committees.

[245] Westlake (1994), p. 191.
[246] The Bureau is composed of the president of the EP, 14 vice-presidents and five quaestors.

3.1. Development of EP committees

Committees have played a central role within the EP from its inception: the Common Assembly had already installed seven committees by 1953. After the direct elections in 1979, 16 standing committees were established. Their number gradually increased to 20 by 1999. At the end of the 1990s there was a growing feeling, however, that the number of committees should be reviewed, in order to distribute the new legislative obligations resulting from the Amsterdam Treaty more evenly.[247] Proposals were put forward in 1998, putting an emphasis on the legislative function of the EP and the need to cope with the increasing parliamentary involvement in co-decision. It is interesting to note that proposals were put forward to dissolve the Women's Committee and to distribute its functions to other committees. Due to the fact that the committee had built up such strong external links and in response to the intense protest of women's organisations the mandate of the committee was however extended to the next parliamentary term.[248]

In the quest to streamline its committees, the number of EP Standing Committees was reduced from 20 to 17 after the June 1999 elections. They cover a particular area or policy of the EC's activities and have been reshuffled for the purpose of:

- merging issue clusters (external economic relations has been merged with industry and research and the Committee on Regional Policy now deals with policies concerning transport and tourism);
- emphasising new priorities (e.g. equal opportunities now has a more prominent role in the Committee on Women's Rights and the same is true for human rights in the Committee on Foreign Affairs);
- ensuring greater committee oversight.

[247] Corbett/Jacobs/Shackleton (2000), p. 105.
[248] Lambert/Hoskyns (2000), p. 111.

Table 4. The 17 Standing Committees of the European Parliament (1999 -2004)

1. Foreign Affairs, Human Rights, CFSP (AFET)	10. Agriculture & Rural Development (AGRI)
2. Budgets (BUDG)	11. Fisheries (PECH)
3. Budgetary Control (CONT)	12. Regional Policy, Transport & Tourism (RETT)
4. Citizens' Freedoms & Rights, JHA (LIBE)	13. Culture, Youth, Education, Media, Sport (CULT)
5. Economic & Monetary Affairs (ECON)	14. Development & Co-operation (DEVE)
6. Legal Affairs & the Internal Market (JURI)	15. Constitutional Affairs (AFCO)
7. Industry, External Trade, Research & Energy	16. Women's Rights & Equal Opportunities (FEMM)
8. Employment & Social Affairs (EMPL)	17. Petitions (PETI)
9. Environment, Public Health % Consumer Policy (ENVI)	

The number, portfolios and size of committees are initially laid down in the first session of a newly elected Parliament and then again after 2 ½ years. In 1999 the largest committee set up was the Committee on Foreign Affairs (65 members), closely followed by the Industry and Environment Committee (both with 60 members). The Fisheries and the Budgetary Control Committees are the "smallest" committees with 20 and 21 members respectively.

The EP's committee structure does not correspond to any particular model. The Foreign Affairs, Human Rights, CFSP Committee is, according to Westlake, clearly modelled on its equivalent in the United States Senate, but has far fewer powers.[249] Its Committee on Economic and Monetary Affairs corresponds much more closely to the German *Arbeitsparlament* model. Due the fact that the EP is -as the only directly elected trans-national parliament -a "sui generis institution", the EP committees have their own distinctive characters and styles, determined by their functions, active members and chairs.

[249] Westlake (1994), p. 135.

3.2. Formal powers of committees

When they meet in the two weeks following the plenary session, the committees prepare the work of the EP. Combining practical and theoretical expertise they have the following formal powers:

- posing oral questions to the Council and the Commission; -posing questions to external experts;[250]

- proposing resolutions following statements made by the other Community institutions;

- proposing amendments to the Parliament's plenary agenda.

The most important political powers of the EP committees are connected to the role in the legislative process, in which:

- the EP can put requests to the Commission for legislative proposals[251] which must be based on reports initiated by an EP committee;

- all legislative proposals and other legislative documents must be considered in committee. The Council and the Commission are required, to provide information to the EP about their proposals and intentions once a month. The major task of the committees then consists of drawing up reports and opinions on proposals for legislation, which build upon formal consultations of the EP with the Commission and the Council (or on the EP's own initiative).

The formal powers and responsibilities of each of the EP's 17 Standing Committees are laid down in an annex of the EP Rules of Procedure.[252] These stipulations are extremely vague, giving rise to competence disputes, i.e. conflicts over which committee should be declared responsible. Committees involved in such disputes are for primarily the Committee on the Environment, Public Health and Consumer Policy and the Committee for Agriculture and Rural Development, a striking example being the dispute over the

[250] Any of the standing committees or subcommittees of the European Parliament may organise a hearing of experts if it considers this essential to the effective conduct of its work on a particular subject (Rule 151 of the Rules of Procedure). Such hearings may be held in public or in camera.
[251] Art. 192 TEC.
[252] Annex VI of the EP Rules of Procedure.

allocation of responsibility for matters relating to food safety or consumer and health protection.[253]

Individual committees are not necessarily equal in prestige or strength. Though committees such as the Foreign Affairs Committee might not possess strong formal powers, their seats are highly sought after by Members of the EP (MEPs). It must be added, however, that the current responsibilities of the Foreign Affairs Committee include EU enlargement, where the EP does have formal powers and plays an increasingly important role.[254] The Budget Committee, which deals with an area where the EP has been allocated formal powers since the 1970s, enjoys a similarly high prestige.[255] The committees' size and importance also depends increasingly on the powers the EP possesses in particular policy areas. For instance, the co-decision procedure has made certain committees such as the Environment Committee and the Transport Committee important actors in the adoption of EU legislation.[256]

3.3. Key players in committees

Committee proceedings are to a great extent shaped by key players in the committee: committee chairs, vice-chairs[257] and rapporteurs, whose role is generally well known, but also draftsmen of opinion, shadow rapporteurs and political group (party) co-ordinators.

The formal officeholders within each committee are its chair and three vice-chairs. The chair presides over the meetings of the committee, speaks for it in discussions preceding sensitive votes in plenary and can contribute considerably to shaping legislation. The role of the vice-chair is mainly to stand in for the chair when he/she is not available. Once a committee has decided to draw up a report or an opinion it nominates a rapporteur (when the committee bears primary responsibility) or a draftsman (when it has to give an opinion for another committee).[258]

Apart from the official officeholders the group co-ordinators play an important role. Each political group selects a co-ordinator who is responsible for allocating tasks to the group

[253] If no solution is found, the issue is passed to the Conference of committee chairs, where its chair would try to mediate, then it would be passed on to the Conference of Presidents (which is composed of the President of Parliament and the chairs of the Political Groups). This of course slows down the legislative process considerably, an argument that has also been put forward by the environment committee (interview with Member of General Secretariat, November 2000).
[254] Art. 49 TEU.
[255] Corbett/Jacobs/Shackleton (2000), pp. 106, 113.
[256] See also point 2.1.
[257] Each committee has three vice-chairs.
[258] Cornet/Jacobs/Shackleton 2000, pp. 106, 113.

members and acts as its main spokesperson. The so-called shadow rapporteurs are appointed by opposed political group(s), mainly to monitor the work of the rapporteur.

EP committees are composed on a cross-party basis and the composition process is organised in various ways: by political groups, through procedural rules and by way of bargaining. Assigning leadership positions within committees is formally based on the d'Hondt procedure, whereby political groups have the choice of which committee they want to chair in an order determined by the size of the group.[259] The individual assignment of positions -such as chair and vice-chair -is then part of a bargaining process, which is somewhat "*mysterious*" [260]. The chairs and vice-chairs' terms of office are two and a half years. The allocation of positions is re-examined halfway through the five-year term of the EP. The individual (both full and substitute) members are chosen by the political groups with the aim of ensuring that each committee reflects the overall political balance among the groups in the EP.

The pivotal role of the committee chair, a position that has been described as a "prized office for MEPs"[261], can be illustrated by contrasting examples of two different directives. Although the committee chairs were heavily lobbied in both cases, especially by industry, the outcome was highly different. In the first the committee chair was unable to present a coherent case due to the external influence and the committee "*rocked back and forth*".[262] In the second case the chair was also the target of intense lobbying, but did not allow herself to be swayed and was able to achieve a cohesive position within the committee. The role of the vice-chairs clearly seems to be of lesser importance: "*He/she is just someone who sits in when the chair leaves the room*".[263]

The selection of rapporteurs and draftsmen is normally decided by the committee itself following a system, which is more or less the same in all committees. Each political group has, according to its size, a quota of points. The group co-ordinators then discuss reports and opinions to be distributed, decide how many points each subject is worth and make bids on behalf of their group. The bids are based in theory (but not always in practice) on the relationship between the number of points already "used" by the group and the original quota[264]. This means that small political groups can "save up points" for a dossier to improve their chances of being assigned a prestigious topic[265].

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[259] For an overview how the d'Hondt system works, see: Bainbridge (1998), p. 125.
[260] Interview with Member of EP General Secretariat, November 2000.
[261] Hix (1999), p. 79.
[262] Interview with MEP, November 2000.
[263] Interview with MEP, November 2000.
[264] Corbett/Jacobs/Shackleton (2000), p. 117.
[265] Interview with official of EP General Secretariat, November 2000.

Once a committee has been declared responsible to draw up a report or give an opinion it has to nominate a rapporteur or a draftsman. The appointment of rapporteurs seems to be based on two equally important factors: expertise and political prestige. In a majority of the cases studied, MEPs in question had been working in the respective policy sector in-and outside the EP for a number of years, gaining profound specialised knowledge, to contribute effectively and efficiently to (legislative) problem-solving ("output legitimacy").[266] The increased familiarity of rapporteurs with particular policy areas and issues increases the amount of specialisation, which in turn can lead to an increase in the confidence of noncommittee members.[267]

The system of rapporteurship is not free from weaknesses. Some MEPs become more and more knowledgeable about certain topics by obtaining a wide range of information and interacting with a plethora of other actors, for example with members of other institutions, particularly, the Commission and the Council. This often leads to a somewhat one-sided view with little exchange of information among the different committees.[268]

The position of draftsman seems not to be as sought after as that of rapporteur as it is considered to be more of a secondary activity and "*not so important in horse trading*". At the same time, it is seen as a way to mark out one's territory when the opinion can be attached to or even be integrated into the report[269]. One way to maximise one's influence as a draftsman is to combine posts, i.e. to be a member of the committee which provides the opinion, the responsible committee and the conciliation committee with Council.[270] This combination provides MEPs with an opportunity to obtain comprehensive insight into all the debates concerning the legislative proposal.

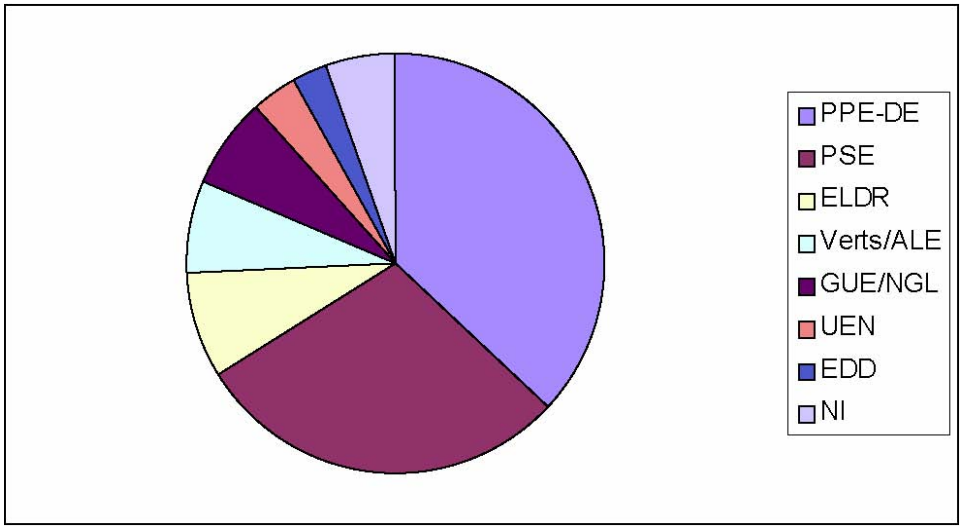
3.4. Significance of political groups within committees

If committees are the "legislative backbone" of the EP, the political parties (or groups) are its "lifeblood" or the "institutional cement pasting together the different units of the Parliament"[271].Each party group in the EP represents a very "heterogeneous collection of established groups and temporary alliances" [272]. Seven political groups are represented in the EP (and a number of non-aligned members) for the legislative period of 1999-2004. In the elections of June 1999 the PSE lost more than 30 seats while the EPP-ED gained

[266] Scharpf (1998).
[267] MacCárthaigh (2001).
[268] Interview with MEP, February 2001.
[269] Interview with MEP, November 2000.
[270] Art 251 TEC.
[271] Williams (1995), p. 395.
[272] Raunio (2000), p. 242.

52 and now holds (with 232 seats) a 51-seat majority over the PSE. It must be pointed out, however, that these two large political groups together hold 66 % of all EP seats. In comparison the European Liberal Democratic and Reformist Group (ELDR), which is the third strongest party within the EP, has only 52 members, i.e. around 8 % of the seats.[273]

Figure 2. Political groups in the EP (1999-2004) -situation as of 9 January 2001



Source: http://wwwdb.europarl.eu.int/ep5/

Political groups play a pivotal role within the EP in general and particularly in committees.[274] As mentioned above, the political groups have created positions such as shadow rapporteur and group co-ordinator through which they gain a firm grip on committee proceedings. The position of shadow rapporteur, which is not defined in the EP Rules of Procedure, is crucial at least for the two larger political groups if they did not succeed in getting the position of rapporteur on a specific proposal or issue. The main task of the shadow rapporteur is to monitor and control the work of the rapporteur and inform other members of their political group of the progress of deliberations/negotiations, developing recommendations and drawing up amendments. The emergence of this position reflects the fact that dossiers have become so highly technical that MEPs not dealing with the proposal directly are unfamiliar with the details of the issue at stake. It also reflects the increasing legislative function of the EP and the growing importance of "partisan" politics in shaping legislation.

In selected cases involving highly political issues such as the 2000 Intergovernmental Conference (IGC) on institutional reform it is also interesting to note that two rapporteurs

[273] http://wwwdb.europarl.eu.int/ep5/.
[274] For an insight into the role of political groups within the EP see: Raunio (2000).

(so called co-rapporteurs) (usually) from two different political groups are appointed.[275] Corapporteurs are thus faced with the challenge of finding a consensus that is supported by a majority of the members of the political groups and that will be carried through in plenary.

The political function of the group co-ordinator can be described as the "*porte parole*" or "*watchdog*" for their party in the committee, ensuring that the members of a political group adopt a cohesive position.[276] Each political group chooses its own co-ordinator as its main spokesperson, who are in most cases formally elected. Once a report has been allocated to a group, it is often the co-ordinator that plays a decisive role in choosing the rapporteur from among the group members. The co-ordinators also aim at maximising the influence of their political group by keeping track of the voting behaviour and attendance of their members. They can also play a central role in communicating the interests of the political group to the other institutions, notably during conciliation in co-decision.

The co-ordinators of each group meet (normally after a committee meeting) to distribute rapporteurships and discuss the committee's future agenda and political problems before they are discussed in committee. Co-ordinator meetings can also take place in Strasbourg at the plenary sessions to discuss issues such as upcoming votes affecting the committee. The co-ordinators have been described as "whips", convening meetings of group members before the committee meeting begins, and attempting to maximise their group's presence and influence during important votes. In practice this can also involve a certain amount of influence on the work of the rapporteur in order to obtain a majority in plenary:

> "We have to ensure that the political group is moving along the same track,so that we get a majority in plenary, because some rapporteurs just write a report the way they like. Of course as a co-ordinator one also has to step back, but we have the responsibility for the group's behaviour and always have to be readyto step in."[277]

[275] In the case of the IGC 2000 the co-rapporteurs were delegated by the PPE-ED and the PSE. Another example of co-rapporteurship would be the rather unusual appointment of two rapporteurs from the same political group on the broadcasting directive.
[276] Interview with MEP, November 2000.
[277] Interview with MEP, November 2000.

Co-ordinators also play a key role in laying down the group's voting line and the list of speakers for plenary sessions. Co-ordinator meetings are not open to the public, but only to the co-ordinators themselves.[278]

Political groups have their own staff, whose total number is linked to the group's size and based on the number of languages used in the group. Within the larger groups between two to three administrators observe and follow the work done by each committee, whereas one official might be responsible for following the work of three or four committees in smaller groups.[279]. The political group staff performs a variety of functions within the groups. Two are particularly important:

- to monitor and to prepare committee proceedings and;

- to support the rapporteur or the shadow rapporteur when managing their political tasks.

The concrete steps this might involve varies from committee to committee. In the Committee on Agriculture and Rural Development the respective administrator is for example responsible for drawing up voting lists, whereas in the Environment Committee he/she would only bring the voting lists into a "readable" form. When trying to co-ordinate their positions or exchanging views the rapporteur might in some cases not negotiate directly with the shadow rapporteur but instead with the responsible administrator. It is the administrators who *inter alia* try to identify conflictual issues between the political groups or national delegations and try to come up with positions that will find a majority in committee and/or in plenary. In this quest they also interact closely with the group co-ordinators.[280]

It is evident that political groups within the EP have found ways of maximising their influence within the committees. The extent to which this influence is exerted differs according to the size of the groups, based on differing (personal-and material) resources. By way of the appointment of positions such as that of shadow rapporteur at least the larger political groups have found a way of monitoring the work of the party group responsible for the dossier. This helps them to improve their stance on a particular issue.

[278] Corbett/Jacobs/Shackleton (2000), p. 111 and interview with MEP, November 2000.
[279] Raunio (2000), p. 235.
[280] Interview with Member of Political Group Secretariat, June 2001.

3.5. Significance of expertise and openness of committee debates

EP committees can draw on a growing pool of expertise. The EP Committee Secretariat is attributed great importance when it comes to supporting the rapporteur or draftsman in the performance of their tasks. By assisting the individual MEPs and the committees, the officials can contribute to increase the functional capacity of the EP. The committee staff not only provides scientific and technical information, but also gives advice on "political" issues. The extent to which the political actors themselves rely on the Secretariat's input is at their discretion.

All of our interview partners stressed the importance of the Committee Secretariat when it comes to drafting a report or an opinion, but stressed the responsibility of the individual MEP:

> "As draftsman of an opinion, for example, of course its me who is responsible for the raw version of the draft and the political impetus but it is the Committee Secretariat who is responsible for the legal formulations etc. I do let them know, however, where the journey should go."[281]

Another MEP supported this view, by pointing out that:

> "The MEPs try to map out their political ideas and mandate the Committee Secretariat to draft a report in accordance with their political guidelines. The General Secretariat shall assist but the responsibility is to be taken bythe MEP himself."[282]

Yet another MEPs views this issue very pragmatically:

> "When having to give an opinion I check with the Committee Secretariat if there is a civil servant who is able to do this and has time to draft it."[283]

The evidence collected highlights the importance of the EP Secretariat in assisting MEPs in their daily work, but MEPs increasingly also turn to interest groups as another valuable source of information. Their input does not have to be requested:

[281] Interview with MEP, November 2000.
[282] Interview with MEP, November 2000.
[283] Interview with MEP, November 2000.

> "They stand on your doormat all the time anyhow; you can not imagine the amount of paper sent by the lobbyists, it makes you want to hide".[284]

Lobbyists increasingly see the EP as an important arena for the representation of interests. MEPs have to integrate interests with relevance to Europe as a whole and are therefore contacted by actors working within the myriad of networks to be found in the EU system of multi-level governance[285]. As Bernhard Wessels reports, average MEPs have roughly 109 contacts with interest groups from the national and supranational level each year. In total this amounts to some 67,000 contacts between the EP and interest groups annually.[286]

Our case studies support the view that contact with lobbyists has become part of the daily business of committee members. In all matters studied -such as the directive on open network provisions to voice telephony, the SOCRATES Programme, the directive on broadcasting activities or the directive on equal treatment without discrimination and the drinking water directive to name just a few -we found lobbying to be a pertinent feature.

The role of interest groups varied from sector to sector, with industry associations being very active in areas such as the directive on landfills, the broadcasting directive and the Fifth Framework Programme. Non-governmental Organisations (NGOs) played an important role in areas such as the prevention of racial discrimination and the drinking water directive.

All interview partners saw lobbyism as a two-way street with the lobbyists trying to influence parliamentarians and the MEPs viewing the lobbyists as *"unintentional support"* by providing an analysis of the Commission's ideas and by highlighting key points and possible areas of controversy.[287] Some MEPs have developed their own network of experts, for example in the telecommunications sector or the field of health and safety at work.

National governments and (in some cases regional governments)[288] contact "their" MEPs and provide them with position papers intended to influence the identification of

[284] Interview with member of EP Committee Secretariat and MEP, November 2000.
[285] Benz (2001), p. 7.
[286] Wessels (1999), p. 109.
[287] Interview with MEP, February 2001.
[288] See on this issue for example: Benz (2001), p. 7.

preferences. Here again the extent to which each opinion is taken into account is at the discretion of the individual parliamentary representative.

Another vital source of information are other EU-institutions, particularly the Commission, and especially those officials who have been involved in drafting the proposal. A majority of our interviewees saw the process of interaction as a "two way street", providing support and information. One exception was, however, the LEONARDO DA VINCI Programme on vocational training, where we got a very different picture. In this case the Commission was characterised as not being an expert on vocational training and having out-sourced her expertise[289].

A striking development in the EP's activities is the great increase in the organisation of public hearings by committees. These hearings can serve a number of purposes: they can facilitate the identification of or familiarisation with a particular issue, assist a committee in the scrutiny of draft legislation and facilitate identification of preferences. A notable example is the drinking water directive (June 1995), where a public hearing, involving a wide range of experts and interested parties, was conducted as regards to the revision of this directive.[290] Within this hearing specific deficits and problems with the existing directives and decisions on (drinking) water quality were identified and requirements for reform proposed.

In contrast to other institutions, notably the Council and Commission, EP committee meetings are open to both representatives of other institutions and the general public. There is, however, an exception to this rule: committees may decide to divide the agenda for a particular meeting into items which are open and those which are closed to the public.[291] Committees represent an opportunity for contact between various institutions. The EP insists that representatives of the Commission attend committee meetings to present their institution's view. The Council presidency is also invited. Seats in the EP committees are reserved for Council representatives. Officials of the Council Secretariat are present at committee sessions, taking notes and recording votes for a report to the Council. This tactic can contribute to shaping the Council's negotiating position with the EP. The EP has tried to induce Council representatives to voice their opinions at committee meetings, but the latter refuse to do so at the early stage of procedural deliberations. The EP is not admitted to Council meetings, not even to those of Council working parties, nor does it participate in the Commission's deliberation

[289] Interview with official of EP General Secretariat, November 2000.
[290] Revision of directive 80/778/EEC.
[291] Rule 171 of the EP Rules of Procedure.

process.[292] By providing a venue for the institutions to interact during the legislative process, the EP has an opportunity to integrate the views of the other actors, especially that of the Commission, to a greater extent than is the case with the other institutions.

The differentiated structures within the EP and particularly the committees encourage the input of interests, they provide an opportunity for a large number of actors to forward proposals. Our study thus supports the (academic) observations that the process of policyformation within the EP is open to a plurality of interests.[293]

According to several interviewees the "usual suspects" attending committee meetings a are members of interest groups and NGOs, especially those who are based in Brussels and have a special interest in a certain topic. Their interest is mainly of a professional nature. Members of the media are also present but normally only at highly publicised hearings on controversial topics such as the release of Genetically Modified Organisms (GMOs).[294] National issues still dominate the media coverage within the Member States:

> "The media is nationally orientated, extremely interesting things are happening in this parliament, but they go completely unreported."[295]

The presence of "normal citizens" is a rather accidental affair, for example in the form of visitor groups. Committee documents are also rather freely available, and even draft reports can be obtained. The Rules of Procedure provide that unless a committee decides "otherwise its documents shall be made public."[296]

3.6. Searching for consensus[297]

Obviously, due to the national and political heterogeneity of the EP, the parliamentary committees are in some cases divided on certain issues. Majorities in the EP are usually negotiated for the topic in question, disagreements are very issue-specific. We could, however, make out two main factors causing conflict in committee:

- differing national interests or traditions;

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[292] Interview with official of EP General Secretariat, November 2000.
[293] Benz (2001), p. 2.
[294] [5] Should journalists, film crews or visitors wish to take photographs or film committee proceedings, they must seek prior authorisation via the Head of Division of the committee secretariat who refers the request to the chair (European Parliament, DG II 2001).
[295] Interview with MEP, June 2001.
[296] Rule 172.2.
[297] The role of MEPs as "representatives" of the "European people" and the challenges they are currently facing are described in point 3 of this chapter.

- conflicting opinions of the political parties.

We also found that conflict is often not caused in the committee itself, but is based on interinstitutional cleavages as illustrated in Table 3.

As we have only studied a limited number of case studies we can only draw tentative conclusions about the factors causing conflict within committee. Inter-institutional conflict played a major role in the cases under examination. This can be explained by the fact that EP is under the procedural constraint of having to muster absolute majorities in co-decision and co-operation procedures. It thus has to try to build a more or less united front against the Council, especially if important political issues are at stake.

We found that especially re-distributive questions were major issues for conflict with the Council. As the EP is eager to strengthen the link with the European public it aims to increase the budget for education and training programmes in the cultural sector for example and thus tries to uphold the image of an institution eager to fulfil some of the citizen's demands. One can only speculate if the stance of the EP were different had it to bring up the resources itself, i.e. to impose taxes.

The fact that the EP is one player in the institutional "triangle" with the Commission, Council (in co-decision) creates a very different environment for MEPs compared to that of national parliaments. MEPs thus face the challenge to find a consensus across party lines if they want to strengthen the position of the EP in the institutional setting. In the cases we studied we found that conflict between political parties played a less important role than inter-institutional conflicts. One notable example was the dossier on racial and ethnic discrimination: the committee was divided due to the divergent opinions of the political groups, notably with respect to the question of shifting the burden of proof to the defendant. Although rapporteur and shadow rapporteur reached an agreement, this consensus was not supported by all the members of one of the larger political groups within the EP. The EP's opinion was nevertheless formed *inter alia* with the support of members of smaller party groups.[298] This directive is a good example of how committee membership provides a real opportunity for smaller political groups to have a say in the formation of legislation (the rapporteur was appointed by the Greens/EFA).

[298] Interview with MEP, February 2001.

Table 5. Main source of conflicts in committees

Directive	Partisan conflict/differences	National conflict/differences	Inter-institutional conflict
ONP (1994)			
ONP (1998)			
Third generation mobile communication systems[299]			
E-commerce[300]			
Landfill			
Drinking water			
End of life vehicles			
5th Framework Programme			
Broadcasting			
LEONARDO			
SOCRATES			
MEDIA Plus			
Culture 2000			
Working time for seafarers			
Working time for mobile workers			
Safety and health at work			
Equal treatment without racial discrimination[301]			

In the field of environment we identified main lines of conflict based on differing national standards, requirements and methods. This can be highlighted by the directive on the landfill of waste or the drinking water directive where very different standards and

[299] This case is an example for a very smooth and efficient decision making process, as the EP backed the Council. See Annex 1 of this paper.
[300] In this case the EP sided very much with the Commission. See Annex 1 of this paper.
[301] In this case the conflict was between the GREENS-EFA and the PEE-ED, in all the other cases the main lines of conflict were identified between the PPE-Ed and the PSE.

traditions prevail within the Member States. Another example of disagreement in committee -caused at least in part by differing national traditions, but not in the environmental sector would be the broadcasting directive, where the committee was apparently split along two lines: whereas some MEPs adhered to the view that the broadcasting industry needs subsidies, other parliamentary representatives held the opinion that regulation of broadcasting must be loosened. These differences were influenced by differing national perspectives and traditions.

We have found some clear evidence about to how these conflicts were resolved. Often it is the committee chair that plays a very integrative role in achieving a consensual atmosphere within a committee. In cases where the role of the chair was described as rather weak we found that conflicts were aggravated and in certain cases not resolved. Group co-ordinators have been identified by all interview partners as the main force in the quest to establish unity within the respective political group, by finding a balance between interests of the political groups and those of the national delegations. Interaction between the different group co-ordinators is very intense, going far beyond the formal co-ordinator meetings. Informal meetings take place at least once a week and the exchange of e-mails also play increasingly a role. However in some exceptional cases it is the national delegations that dominate the agenda within committee and plenary.[302] In these cases where national divisions and interests are very pronounced the role of the co-ordinator is circumcised and comparatively weak.

In several other cases we found very little controversy within the committee. One example is the Community action programme in the field of education, SOCRATES. The committee seems to have been more or less united due to the basic conviction that the EP must stand united in this area if its policy goals are to be achieved:

> "It was based on common sense, everyone wants to support students. There were no divergent opinions, no one wanted to allocate less money to the programme or even scrap it."[303]

Another example where consensus was reached with ease would be the directive on open network provisions on voice telephony in 1994, when the decision to block this directive was not only supported within the committee, but found an overwhelming majority in plenary. A series of factors led to this veto: the post-Maastricht procedures were new and

[302] A good example in this context is the directive on mobile workers.
[303] Interview with MEP, November 2000 and official of General Secretariat, June 2001

untried, there was no inter-institutional agreement on comitology, and the EP was not to be involved in the implementation of the directive as demanded.[304]

Overall, we can conclude that committees are microcosms of the larger assembly, where conflicts can be resolved with less difficulty. One must consider the fact that the desire for consensus runs very deep and is entrenched in the Treaties.[305] It has to also be underlined that the achievement of consensus within the EP is fostered by the way this particular institution works: MEPs have common experiences independent from political affiliation:

> "They have to wait at the airport together and drink a coffee while waiting for the planes when they are delayed, which they always are. On top of that comes the particular lunacy of Strasbourg, where MEPs [of different political groups or nationalities] sometimes have to stay in the same hotel. There is a certain anthropology of getting along within the EP".[306]

By offering an arena for deliberation, not available in plenary sessions, EP committees contribute to sustaining the EU multi-level system of governance. In addition to their scrutiny function within the legislative process, committees serve as unique fora where certain types of transnational politics are played out.[307]

Compared to committee meetings, plenary debates are extremely structured. Debates in plenary have several common features with respect to the way they are organised, whatever their origin (legislative or non-legislative reports, oral questions etc.). According to rule 119 of the Parliament's Rule of Procedure no Member may speak unless called upon to do so by the President, if a speaker departs from the subject the President may call him to order. If a speaker has been already called to order twice in the same debate, the President may, on the third occasion, forbid him to speak for the remainder of the debate on the same subject. Speaking time is allocated to Commission and Council, rapporteurs and draftsmen of opinion, authors of motions, and political groups.[308] A typical debate on a committee report sets off with a short statement (about five minutes) by the rapporteur, draftsmen of committees may also want to speak, albeit for a shorter time-period. As one draftsman of opinion put it:

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[304] On the question of implementation, see point 2.2. of this chapter.
[305] This refers to the fact (mentioned above) that the EP has to muster absolute majorities in the co-operation, co-decision and certain assent procedures for example.
[306] Interview with Member of EP Committee Secretariat, November 2000.
[307] Lambert/Hoskyns (2000), p. 110.
[308] Rule 120 of the EPs Rule of Procedure lays down the modi of allocating speaking time between members.

> "The draftsman of opinion has only 2 minutes in order to present his views in plenary. It is of course attractive for those who want to collect speaking time, but you often ask yourself: is it worth to make such an effort?."[309]

4. Interaction of EP committees with other EU institutions

The relationship between the EP and other institutions on the European level has changed fundamentally first with the introduction of the co-operation and later the co-decision procedure. Co-operation marked an end to the old bipolar relationship between Council and Commission and the beginning of a "triangular" relationship in which the EP's legislative input was limited at the outset, but increased gradually over time.[310]

The role of EP committees in co-operation shall not be examined here, as this procedure has been limited by the Amsterdam Treaty to provisions linked to Economic and Monetary Union (EMU). Instead the focus will be on co-decision after Amsterdam. The Treaty of Amsterdam not only brought a large quantitative extension of the applicability of codecision but also significant procedural innovations with important implications for the interaction between the EP and the Council.

4.1. Interaction with other institutions throughout the legislative process

The introduction of the co-decision procedure by the Treaty of Maastricht has been regarded as a major step forward for the EP and "the cause for parliamentary democracy" at the EU level.[311] The new Treaty provision[312] has established the principle of direct negotiation between the Council of Ministers and the EP committees.

When the Amsterdam Treaty took effect these contacts were intensified, particularly as a result of the possibility of concluding the procedure in first reading. Both institutions have paid close attention to the "joint declaration on the practical arrangements for the new codecision procedure" of May 1999, which encourages appropriate contacts with the aim of "bringing the legislative procedure to a conclusion as quickly as possible".[313]

Every Council presidency is in contact with the responsible EP committee, and the respective Minister presents to the committee the priorities of the Presidency's programme at the beginning of the presidency and its achievements at its end. Prior to

[309] Interview with MEP, November 2000.
[310] Westlake (1994), p. 137.
[311] Shackleton (1999), p. 325.
[312] Ex-art. 189b TEC; i.e. art. 251 TEC.
[313] OJ C 148/1999 of 28 May 1999, p. 1.

the Treaty of Amsterdam, the relationship between the Council and the EP was rather uncoordinated during first reading, as seen from the perspective of some of our respondents. Council had in several cases reached a political agreement before the EP gave its opinion and waited "*basically out of courtesy*" for the EP's comments before it put forward the common position without taking the EP's view into account.[314]

Intensive contact between the EP and the Commission are the rule even at the very early stages of the procedure. Except in cases of particular urgency, a certain amount of time is reserved for discussion in a committee before a draft report is drawn up. As part of this process of exchanging views in a committee, Commission representatives will attend committee meetings, clarifying issues and outlining the Commission's position. Normally the Commission is represented by the desk officer who drafted the proposal; in important cases the desk officer is accompanied by his/her head of division, Director-General or even Commissioner. For a committee with a very heavy agenda up to 15 Commission officials may be present.

Even after Amsterdam there are no clear procedural guidelines for first reading (beyond the joint declaration). The most controversial question is how to mandate the representatives of the EP for negotiating with the Council. Another open question is which members of the Council and EP hierarchy should meet with whom. The EP sees the possibility of reaching an agreement at the first reading as a means of speeding up the procedure, but not something that should be accepted at any cost.

Some of our respondents viewed the lack of formal guidelines for the first reading as giving the EP:

> "a strong hand, as you can create your own conventions. It is all very informal, very voluntary, when I might meet Council representatives in my office for example.It isassuredthat what yousaidis intrust".[315]

Given that the negotiations are based on trust between the institutions, substantial progress can be made, especially in the resolution of technical issues. There are no time limits during first reading, as all those involved view it as a period for discussion, for gathering expertise, laying down their respective positions, and clarifying (mainly) technical questions. From May 1999 until September 1999, four legal acts were concluded at the first reading. These acts covered the approximation and adaptation of

[314] Interview with MEP, February 2001.
[315] Interview with MEP, February 2001.

laws on technical issues within the fields of: measurement;[316] the Trans-European Networks (TENs);[317] animal health protection;[318] and the CAP[319].

In that period there was one notable exception to the "rule" that only "technical" issues are resolved at the first reading stage: the establishment of a European fraud prevention office (OLAF) in May 1999. It was of high political significance after the European Commission resigned in March 1999 due to allegations of fraud, mismanagement and nepotism. This legal act was concluded under extreme time pressure to convey the impression that the Community institutions were undertaking all possible measures within their means to combat fraud and corruption. The Commission put forward its (modified) proposal in March 1999 and the legal act was adopted just two months later. [320]

16 acts were adopted from September 2000 to September 2001 at first reading, some of which were more technical such as the directive on summer time-arrangements[321] or directive on uniform procedures for checks on the transport of dangerous substances[322].A more controversial issue was the regulation on public access to European Parliament, Council and Commission documents[323], where the EP and Council had reached a deadlock in first reading, with the EP postponing its final vote in November 2000. A series of talks were held later with the rapporteur, the chair of the committee responsible, the shadow rapporteur, the three draftsmen of opinion on the proposal and the Swedish presidency and the Commission. As a result of these talks a compromise agreement was reached at the end of April 2001. This was adopted in the plenary session of 3 May 2001. As the Council also approved the agreement, the proposal could be adopted in first reading[324]. Another good example for the progress which can be made in first reading would be the directive on work equipment, where Council and EP had resolved conflictual issues inter alia within a series of informal meetings between the rapporteur and representatives of

[316] See: 1999/0014/COD.
[317] Decision 1741/1999/EC.
[318] Directive 1999/72/EC.
[319] Directive 1999/87/EC.
[320] Regulation 1073/1999/EC of the European Parliament and the Council of Ministers concerning investigations conducted by the European Anti-Fraud Office (OLAF). The new act on the Fraud Prevention Office provides, *inter alia*, that the Office has its own right of initiative to carry out investigations, will be totally independent from instructions from Member States and that investigations can be carried out in the Member States as well as in all bodies, institutions and offices in the Community, http://wwwdb.europarl.eu.int/oeil/oeil.
[321] Directive 2000/84/EC.
[322] Directive 2001/34/EC.
[323] Regulation 1049/2001/EC. See: European Parliament, Delegations to the Conciliation Committee 2001, Annex 6.
[324] 388 in favour to 87 against and 12 abstentions. For more details on this case see: Jacobs (2001).

the Council. This laid the foundation for the EP adopting the Council's common position without amendment.[325]

Given the lack of guidelines (beyond the joint declaration) for first reading, the three Vice-Presidents delegated to the conciliation committee have recently stressed the importance of committees as "*representative bodies*" that best preserve the political make up of Parliament during first (and also second reading). Informal contacts can therefore not be regarded as "*constituting procedures that guarantee the same level of debate and transparency*". Council and EP representatives are urged not to meet behind closed doors, if at all possible. Ordinary meetings of Parliament's committees should thus be the main framework for exchanges between the EP and Council during first and second readings. The Council should be urged to take advantage of its own Rules of Procedure and the provisions of Rules 70 and 76 of EP's Rules of Procedure, which enable Council to appear before EP committees to outline it's position.[326]

If no solution could be found in first reading the Council adopts a common position, which is forwarded to the EP for second reading.[327] At this stage the EP may adopt the Council's common position as it is, it may choose not to act, reject it outright or adopt amendments with an absolute majority.[328] In the latter cases, particularly when discussing amendments, the pivotal role of the rapporteur and the committee chair becomes again apparent; it is up to them to try to find the necessary majorities and defend the position of the committee in plenary.

Given that the EP has difficulties to find the necessary absolute majority in plenary to push through amendments or to reject the common position altogether this inevitably weakens the position of the EP vis-à-vis the Council as the Council's common position may stand unchanged, although a majority, albeit not an absolute majority in Parliament would have wanted to make even significant changes.[329]

On the other hand, if the EP successfully adopts amendments to the common position these will be forwarded to Council and Commission. The Commission will voice its opinion on these amendments.[330] In the best case scenario the Council will accept all EP

[325] See Annex 1 of this report.
[326] European Parliament, Delegations to the Conciliation Committee (2001), p. 28
[327] Within the deadline of three months, after the Council's Common position is made public in plenary. This deadline can be extended to four months (Art. 251, para 2. TEC. The extension of the three-month deadline is stipulated in para 7).
[328] Art. 251, para 2, lit. a, b, c. TEC.
[329] For a detailed analysis of the voting behaviour of the European Parliament, see: Hix (2001).
[330] Within the time-span of three months plus one.

amendments and the act is adopted as thus amended.[331] Failing that, the matter is automatically referred to the conciliation committee.

The Council and the EP delegate an even number of members to this committee (15 each and15deputies).[332] The Commission is also represented and usually led by the relevant Commissioner. Given the fact that one or two civil servants normally accompany each Council representative and several advisors support each member on the EP's side, more than 100 people can be present when the committee meets.

During conciliation a process of exchange has developed where both sides are open to make concessions, but at a price that differs according to each set of negotiations.[333] The procedure has evolved significantly since its introduction by the Maastricht Treaty, "*where a lot was not written down*" and even the basic procedural issues were not always clear: "*no one was even sure when EP and Council should meet*".[334] The Commission's role also was not clear and has evolved constantly in the deliberation process. It has been described as facilitating agreement between the institutions, a function it has performed rather efficiently but "*not gloriously*".[335]

An example for how the relationship between the Council and the EP in conciliation has changed since the mid-1990s is the SOCRATES programme: in 1994 the Council held the view that the EP should have no say with respect to the budget – five years later it was perceived by all concerned as standard procedure.[336]

Another example of the kind of changes that can be pushed through by the EP in conciliation is the Fifth Framework Programme for Research and Technology. At the outset, this seemed to be a rather unpromising case for influence of the EP, as it was an area where the Council had to agree unanimously. To complicate things, the Spanish government insisted that the common position contain a clause, which became known as the "guillotine clause", whereby any budgetary allocation agreed upon for the new programme would be subject to a review linked to the results of the negotiations on the Agenda 2000 revision of EU funding. This also made other Member State delegations rather reluctant to contemplate a significant increase beyond the common position, which allocated 14 billion Euro to the programme. At second reading, the EP voted for a figure

[331] The Council has to decide with unanimity on amendments where the Commission has given a negative opinion. Otherwise it decides with qualified majority.
[332] Art. 251, para 4 TEC.
[333] Shackleton (1999), p. 331.
[334] Interview with MEP, February 2001.
[335] nterviews with MEPs and official of EP General Secretariat, November 2000; February 2001.
[336] Interview with MEP, November 2000.

of 16.3 billion Euro and thus the institutions goals were more than 2 billion Euro apart when negotiations started. Remarkably an agreement was reached in conciliation in November 1998 with the institutions agreeing on a figure just short of 15 billion Euro.[337]

The negotiators that are delegated by the EP to the conciliation committee face a particular challenge: they have to ensure that the compromise achieved in conciliation will be supported in plenary. In this respect the EP delegation can look back on a series of successful negotiations in conciliation, as only two proposals failed in plenary; the directive on biotechnology patents[338] and the directive on company law relating to take-over bids.[339]

Considering the difficulties of conciliation (a large number of people (about 100) participating in the meeting, mandatory presence of at least one minister, etc.), the so-called trialogue meetings play a crucial role in reaching a compromise. These sessions, which are neither mentioned in the Treaty nor in the EP Rules of Procedure, have been created according to the motto "necessity is the mother of invention".

The Treaty[340] does not stipulate what, if anything, should happen after the Council has given its view on the EP's second-reading amendments and before the delegations meet in the conciliation committee. During the first year and a half after the Maastricht Treaty came into effect, there were occasional bilateral contacts between Council and EP, but no structured dialogue. As a result both institutions (with the support of the Commission) attempted to find compromises in a room with over 100 persons present. Only in the second half year after the Treaty was enforced, the concerned actors came to the conclusion that this was not an efficient forum for institutional dialogue and that conciliation needed to be prepared by a smaller group.[341] The first formal trialogue dates back to the negotiations on SOCRATES and "Youth for Europe" under the German presidency in the second half of 1994. It did not become the usual practice, however, until the Spanish presidency one year later. Trialogue meetings have now become a standard feature of the conciliation process, with each side being able to negotiate more freely and openly than is possible in the conciliation committee.

[337] Corbett/Jacobs/Shackleton (2000), p. 197.
[338] OJ C 213/1998 of 30 June 1998, p. 13.
[339] This case is discussed in much detail in the activity report of the delegations to the conciliation committee. See: European Parliament, Delegations to the Conciliation Committee (2001), pp. 13-19.
[340] Art. 251 TEC.
[341] Shackleton (1999), p. 333.

The main actors are:

- On the side of the EP:
  - the vice-president of the EP responsible for the respective conciliation procedure;
  - the chairman of the responsible EP committee;
  - the rapporteur and
  - members of the EPs conciliation Secretariat;
- On the side of the Council, the Member State that holds the Presidency:
  - the permanent representative or deputy permanent representative;
  - the Antici or Mertens
  - members of the Council Secretariat.
- On the side of the Commission:
  - the director or head of unit of the respective DG:
  - the official responsible for drafting the proposal;
  - members of the general secretariat.

As Council, EP and Commission delegate at the most 30 persons[342] to this fora, arranging for this kind of meeting normally poses fewer problems at lower costs when compared to the meetings of the conciliation committee. The trialogue is normally held in English without interpreters.

The inclusion of three EP vice-presidents[343] in the EP trialogue negotiating team is a new development. This possibility was introduced in 1999 with the objectives of improving effectiveness, securing continuity, and improving confidence with the Council.

[342] The three vice-presidents of the EP involved in conciliation have asked all three parties (Commission, Council and EP) to limit their delegation to 10 persons (European Parliament, Delegations to the Conciliation Committee 2000).
[343] Three vice-presidents take turns in attending the meetings: Imbeni, Renzo; Provan, James; Ingo, Friedrich.

A large proportion of controversial issues are solved at the level of the trialogue and only have to be "rubber-stamped" in conciliation committee. The positive role of the trialogue is illustrated by the directive on end of vehicle life. The EP adopted a total of 32 amendments at second reading. In a series of trialogue meetings, compromises were reached regarding a considerable number of amendments (such as exemption of vintage cars from the scope of the directive, official registration of collection points, and stricter safety and environmental requirements for re-used spare parts).

The bulk of the workload (almost 80 %) of co-decision procedures is carried out by only three out of 20 (after 1999 -17) Permanent Committees. The three committees, which dealt with the majority of the draft legal acts submitted under co-decision were:

- Committee on the Environment (36.7 %);[344]

- Committee on Economic and Monetary Affairs and Industrial Policy (25.9 %);

- Committee on Legal Affairs (16.9 %).

Inevitably this proved to be very time-consuming for members of these committees. The concentration is primarily due to the use of the legal bases concerned (Art 95 TEC).[345]

An analysis of the co-decision procedure and its impact on parliamentary committees for the time-period of May 1999 to July 2001 shows a continuation of this trend. Three committees still account for more than 70 % of the procedures concluded in co-decision. The Environment Committee is still the main "user" of co-decision and also the Committee on Legal Affairs is heavily involved. The Committee on Regional Policy and Transport has, however, been witnessing an increase of its share of co-decision procedures.[346]

[344] N = 166 concluded acts up to June 1999.
[345] Maurer (1999), p. 29.
[346] European Parliament, Delegations to the Conciliation Committee (2001), p. 8.

Table 6. Co-decision procedures broken down by parliamentary committee: May 1999 - July 2001[347]

Committee	Number of cases	Percentage
Environment	26 (15)	40 % (23 %)
Regional and Transport	11 (5)	17 % (8 %)
Legal Affairs	9 (12)	14 % (18 %)

Source: European Parliament, Delegations to the Conciliation Committee 2001

The amount of time needed to conclude a co-decision procedure varies: the Committee on the Environment – with the heaviest co-decision burden of all committees – stabilised the amount of time required for adoption. The Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Legal Affairs have even reduced the time needed for the adoption of legislative acts considerably since co-decision was introduced in 1993.[348]

In co-decision the possibilities of the EP to shape legislation is far greater than in the co-operation procedure. The EP has tried at times to go beyond procedural stipulations and to extend its role beyond that foreseen by the legal basis of the respective dossier. One example is the LEONARDO DA VINCI PROGRAMME (2000-2004). This dossier still fell under the co-operation procedure when programme negotiations started in 1998. The Social Affairs Committee argued that LEONARDO should be decided according to co-decision, though even the legal service of the EP gave a clear opinion that it was indeed to be dealt with according to co-operation. The Social Affairs Committee then resorted to linking (vocational) training issues to the SOCRATES-and the Youth for Europe programme, not only to ensure consistency between the three dossiers but in order to maximise its demands, as both latter programmes fell under co-decision. A main factor working in favour of the EP in this context was the fact that the coming into force of the Amsterdam Treaty at the 1st of May 1999 *"loomed over the negotiations like a Damocles' sword"* and the Council was eager to conclude the negotiations as quickly as possible in order to avoid co-decision. In return the EP was able to obtain concessions, such as

[347] The figures without brackets refer to the time-period August 2000-July 2001, whereas the figures in brackets are for the period May 1999-July 2000.
[348] Maurer (1999), p. 29.

changes concerning the duration of the programme, where both EP and Council[349] pressed for seven years, to correspond to the next financial perspective of the EC (instead of 5 years as foreseen in the Commission proposal). It is interesting that the Council and the EP formed somewhat of a united front against the Commission. Another issue where Council and EP were of the same opinion concerned the complementarity of the LEONARDO programme and the European Social Fund. Both Council and EP shared the position that the Commission should devote much of its efforts to ensure the transfer and dissemination of innovative practices with the help of the European Social Fund.

The presidency of the Council -at this point Austria, which was described as being very open and eager to achieve consensus -played a key role in solving this somewhat exceptional case by intensifying co-operation between the Council and the EP. The chair of the Council working party came to EP committee to outline the progress of negotiations in Council and highlighted the main issues of contention. The subsequent German presidency noted these co-operative conditions between both institutions with some degree of surprise: *"they were trapped in this close co-operation between Council and EP."* Germany adopted a more cautious stance in the negotiations. But the coming into force of the Amsterdam Treaty on 1st May 1999 contributed to the willingness of the Council to make concessions such as extending the duration of the programme.[350]

In the case of the MEDIA-PLUS Programme the EP committee only was to be consulted (as no direct links existed to the training aspect of the programme) but also tried to maximise its influence. Not only did the Committee on Culture, Youth, Education, Media and Sport contest the legal basis of the programme, but also tried to have a say over the budget.[351] The EP linked its demands to the MEDIA-TRAINING Programme (co-decision) "threatening" that it would delay the implementation of this programme to the beginning of January 2000 if the budget for MEDIA PLUS were not increased. The Council ignored this, however, and the financial reference for the programme was fixed at 350 Mio. Euro and not at 480 Mio. Euro as demanded by the EP. This example illustrates the difference of the role of the EP in consultation and co-decision: "*the way the Council behaved towards us was worlds apart, there was a great difference between co-decision and mere consultation*."[352]

[349] The Council enshrined this demand in its Common Position of 21.12.1998 See: The Legislative Observatory of the EP (OIEL), http://wwwdb.europarl.eu.int/oiel.
[350] Interview with official of EP General Secretariat, September 2001.
[351] In the area of Media training, co-decision applied.
[352] Interview with MEP, September 2001.

4.2. Role of EP committees in the implementation process

In the process of implementing legislation and particularly in comitology, EP committees play only a marginal role. Comitology refers to the process by which powers of implementation are delegated to the Commission by the Council and in co-decision by Council and EP. The comitology committees are composed of representatives of Member State governments and are as such not democratically elected.[353]

Ever since the installation of the first comitology committees, the EP has put forward far-reaching demands for its involvement in the comitology system. Translating them into political science terms, they could be summarised in the following manner[354]:

- a clear definition of legislative and executive matters so that the executive authority would be strictly responsible for implementing measures;
- in case of legal acts that have been adopted according to the co-decision procedure, the EP should be put on an equal footing with the governments of the Member States when implementing measures are decided;
- the right of the EP to examine all draft implementing acts before they are adopted;
- the right of the EP to veto implementing measures before they are applied.

In reality the EP enjoys only the following limited rights according to the comitology decision of 1999[355] and an interinstitutional agreement concluded with the Commission[356]:

- It is to be informed by the Commission on a regular basis about comitology procedures. This includes receiving draft agendas, draft measures and their legal basis, the result of voting and summaries of the meetings as well as the list of authorities to which members of the committees belong.[357]

[353] Bradley (1997).
[354] Hix (2000), pp. 74 et sub.
[355] The Council had laid down the procedures in Council Decision 1987/373/EC of 13 July (OJ L 197, 18.7.1987, p. 33. These have been reformed by way of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23-26).
[356] OJ L 256/2000, of 10 May 2000, pp. 19-20 and European Parliament, Committee on Constitutional Affairs (2000).
[357] Council Decision 1999/468/EC of 28 June 1999, Art. 7.

- It may indicate, in a resolution, that proposed measures exceed the competences delegated by the legislators (in co-decision) to the commission in the basic act.[358] The resolutions must be adopted by plenary within a period of one month.

Several respondents stated that the topic of implementation is still much discussed in committees. The topic is increasingly on the EPs agenda: "*It (...) is increasingly an issue*. The problematic goes beyond the question of what type of comitology committee should be installed, it concerns increasingly the question of monitoring and even intervening in the implementation process. The new comitology decision and the resulting inter-institutional agreement seem to have settled the dispute of Council and EP of which type of comitology committee should be set up to implement decisions. The EP is demanding enhanced scrutiny rights in the process of implementing programmes. An example is the Community action programme on social exclusion[359], where the EP wanted to be associated in the implementation of the programme, pressing for the direct involvement of the target group into the programme, i.e. those groups having difficulties to integrate into society.

An aspect underlined by several interview partners is that the EP is pressing for comprehensive information rights, i.e. the proper implementation of Art. 7 of the 1999 Comitology decision. The documents are to be sent to the EP in a readable form, so "*that we can see immediately what is the basic legal act setting up the committee* ".[360] Since about one year the Commission sends the documents it has to forward to the EP by email to DG I (Sessional Services) of the EP General Secretariat, which then refers the document in question to the responsible committee. At the same time the documents are also put on an internal EP server known as CIRCA, which is accessible to all parliamentary staff.

The practical implementation of Art. 7 is complicated by the fact, however, that it distinguishes between documents which are forwarded to the EP:

- for information purposes, where the EP has no influence and those;

- where the EP has scrutiny rights, can exercise a "droit de regard".

The EP has only in the latter a right to intervene, but only has a month to do so. This is a very short period given that the document in some cases needs to be translated and

[358] Ibid, Art. 8.
[359] Community action programme to encourage co-operation between Member States, COD/2000/0157.
[360] Interview with official of General Secretariat, June 2001.

committee meeting(s) must precede the adoption of the EP resolution in plenary. For the practical political process this means that EP committees are under pressure to spot almost immediately, after having received the draft measures, that these exceed the implementation powers provided for in the basic instrument.

In order to avoid that the EP be flooded with documentation, the Commission has recently agreed with the EP only to send by email those documents where the EP has scrutiny rights, can exercise a "droit de regard". The EP can, however, put a request to the Commission to receive any other surplus information additional to Art. 7 of the Comitology decision:

> "This is a problem of principle, we are flooded with paper, so want to be able to keep an eye on what is happening, but it should not become an obsession."[361]

In order to maximise the EP's scrutiny powers, members of the Committee Secretariat also pay close attention to whether the implementation powers have been exceeded. The issue is also discussed at co-ordinator meetings and at committee meetings as the EP has to find a common position very quickly, once it deems that the implementation powers have indeed been exceeded.

Despite these efforts, it is not entirely surprising that since the entry into force of the 1999 Comitology decision, the EP has exercised its "droit de regard" only once. In order to facilitate the scrutinising of implementing acts the EP plans to put the documents it has been forwarded by the Commission on a web-site, to be also accessible by a selected public such as interest groups, which could then alert the respective committee.[362]

Three committees are currently very concerned about the correct application of the Comitology Decision of 1999: the Environment Committee, the Culture Committee and the Committee on Employment and Social Affairs. In the field of culture the committee currently follows the strategy previously introduced by the Environment Committee of drawing up implementation reports ("rapports de suivi") concerning *inter alia* the implementation of the YOUTH 2000, SOCRATES and CULTURE 2000 programmes.

These programmes have a considerable impact on the lives of individuals who (could) hold MEPs accountable for their smooth and efficient implementation. The Commission must inform the EP committees how it applies the budget of these programmes, where

[361] Interview with official of General Secretariat, June 2001.
[362] On this issue see: Chapter G: How do comitology committees work: An insider's perspective

monthly and quarterly figures have to be reported. All committees studied try to supervise the transmission of documents that have to be submitted to the EP according to the new comitology decision. An example where the implementation of a programme in the cultural sector seems to work very smoothly is the MEDIA-PLUS Programme 2001-2005, where the EP does obtain all the documents, which it should receive according to the 1999 comitology decision from the respective management committee via the Commission. The rapporteur recognises that this could be regarded as being exceptional:

> "I have heard that the implementation does not always work well, but in this case it does, so one has to point this out."[363]

5. Link to EU citizens: the problem of accountability and responsibility

In addition to institutional and procedural aspects of EP committees, our project also examined the questions of accountability and responsibility. The concept of accountability is defined in two ways: First, to be accountable means to be in a position of stewardship and thus to be called to answer questions about one's actions and decisions. A precondition for this is a certain degree of openness and transparency within the decision making process. Choices and debates have to be broken down in such a way that citizens are able to understand and can evaluate and judge the decisions taken. Second, to be accountable also means to be "censurable" or "dismissible"(Bealey1999, p. 2; Lord 1998).

As they are directly elected, the members of the EP are directly accountable to their electorate. However, the electoral procedures and the allocation of seats to Member States violates the EP the principle of equality.[364] Moreover, it is also doubtful whether voters are adequately informed about the EP activities, and they seem to have insufficient motivation to hold the EP accountable by participating in elections: the average turnout of 49 % in the 1999 EP elections speaks for itself.[365]

The process by which majorities are reached and the complex EU decision-making procedures are not transparent and rather difficult to describe and understand. European parties fail to organise reliable factions and the relationship between the EP and other EU institutions, in particular the Council, is difficult to comprehend. Furthermore, the EP is not the sole legislator, as co-legislator together with the Council it cannot be held

[363] Interview with MEP, September 2001.
[364] Currently the "one person, one vote" principle does not apply to the EP: for example one German MEP represents 820,000 citizens, whereas one MEP from Luxembourg represents 65,000 citizens.
[365] This is the largest drop in turnout since the first EP elections in 1979 (EU Committee of the American Chamber of Commerce in Belgium (1999), p. 11.

accountable alone for the final compromise that results from the complex process of legislative decision-making.[366]

Finally, there is no European government that is based on a majority in the EP. The EP has to give its vote of approval of the Commission and of the Commission president. It can also force the entire Commission to resign by vote of censure. The EP thus has the power to vote the Commission out of office. However, it is not the EP but the European Council that selects the president and appoints the members of the Commission. Thus the composition of the executive is not based on the results of European elections. Changes to the Treaties do not have to be ratified by the EP, nor are members of the EP (up to now) present at Intergovernmental Conferences (IGCs) that decide changes and adaptations of the Treaties. This is changed insofar, however that for the preparation of the Intergovernmental Conference in 2004 a Convention has been set up to prepare the way for the next IGC as "*broadly and open as possible*". The Convention, which held its inaugural meeting on 1 March 2002, is inter alia composed of 16 members of the EP.[367]

It has also become apparent that the EU in general and the EP in particular, relies on "informal politics", on complex forms of intra-and inter-institutional bargaining that make it difficult to pinpoint who is in the end responsible for the outcome as has been illustrated extensively in this chapter. Major decisions are taken in smaller groups such as the trialogue that make consensus with other institutional actors such as the Council possible. The conclusion of complex (package) deals obscures, however, who has won or lost on particular issues.

The situation is complicated by the fact that MEPs are, unlike members of most national parliaments, confronted with a fundamental conflict of roles, namely that of the competent (co-) legislator versus the representative of the interests of the people who elected him/her. The former requires often rather technical expertise and knowledge and complicated negotiations within the committee and with representatives of the other EU institutions. The latter requires constant contact with the EU citizens. With the growth in the EP's legislative tasks, the burden of committee work will require more time and effort of MEPs, making it more difficult to tend to the interests of the "potential voter".

The evidence from the interviews suggests that at least some MEPs are aware of this conflict. They see the need to become specialists in certain policy areas and at the same time to stay in contact with their constituencies. It is common practice of MEPs to spend

[366] Benz (2000), p. 16.
[367] Raunio (2000), p. 231. For the exact composition of the Convention see: Laeken Declaration – The Future of the European Union, http://ue.eu.int/Newsroom/.

up to three days per week in their own Member States. Visitor groups are seen as another way to maintain contact with citizens and provide them with an opportunity to get acquainted with their MEP and the work of the EP. It is not unusual for an MEP to meet with one or two visitor groups every week. This provides MEPs at least the opportunity to answer questions about their work and explain their activities. This is, however, not done on a systematic basis.

Due to the fact that committee meetings are in general open to the public and committee documents are rather freely available, committees enhance transparency and thus do make it possible to follow debates and decisions taken in committees. Compared to other EU institutions the EP in general, and its committees in particular, are a forum and arena for communication, where the pros-and cons of a legal act are debated publicly.

EP Committees thus play an important role in a general opening-up process of the EP. They are also characterised by a deliberative element, when according to Eriksen and Fossum, "deliberation" is characterised by a "change of views, by the way the discussion helps to mould preferences and to move standpoints." What is seen as the main factor for the change of position of "strategic rational actors" is not only the force of the better argument, but the perspective of achieving success. In their view deliberative democracy does not preclude voting or bargaining, but places the emphasis on obtaining a "shared sense of meaning and a common will", both of which are the product of the communicative process.[368]

The evidence presented in this chapter supports this interpretation, EP committees do indeed provide a team for the preparation of decisions in relatively small face-to-face groups that allow for persuasion, argument and further discursive processes not only between its members but also with representatives of other EU institutions as well as private and public sectors interests.

It can not be ignored that this deliberative process takes place at an *elite* level, where the general public is scarcely involved, even if the deliberations in EP-committees are, contrary to Council working groups, carried out in public. This raises fundamental questions about democracy and accountability within the EU (and is not just limited to EP committees). Christopher Lord is not entirely wrong when stating that the EU might be characterised as a "democracy without the people" or a "system that is based on a plurality of elites." What is crucial in this context is that the public lacks the possibility to

[368] Eriksen/Fossum (2000), p. 18.

substitute one set of rulers with another, or at least to comprehensively "spring clean" the Union's political leadership.[369]

6. Conclusions

The real power of the EP is to a large extent based on the work of its committees. They play a vital role in shaping EU legislation. Our findings support this generalisation. They also enable us to compare the functions of the EP and its committees to those traditionally performed by national parliaments:[370]

- **Economisation of operation:** EP committees make processing of a growing workload possible and benefit from an increased familiarity with the subject. Committees play a vital role in the EP's quest to cope with its increasing legislative workload. This increased burden for (selected) committees has not led to a slowing down of the decision-making process.

- **Information acquisition:** The increased familiarity of committee members with particular issues leads to increased specialisation, thereby strengthening the confidence of non-committee members in the work of the committee. We have found that EP committees constitute an important arena for the communication of interests. MEPs can draw on a growing pool of expertise from members of the Committee Secretariat on the one hand and representatives of interests groups or NGOs on the other.

- **(Partisan) co-ordination**: Committee members are selected on a cross-party basis and through different methods: through the political groups, procedural rules, and bargaining. The political groups within the EP have found various means to maximise their influence within committees, for example by appointing shadow rapporteurs and group co-ordinators. Committees nevertheless provide an arena for the political groups to deliberate in order to find the necessary majorities.

- **Input of (smaller) political groups**: In certain instances committee membership provides a real chance for representatives of smaller political groups such as the Greens/EFA to take part in the shaping of legislation, by appointing the rapporteur for example.

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[369] Lord (1998), p. 129.

[370] These functions, developed for national parliaments, have been adapted for this study, see: MacCárthaigh (2001). Due to the fact that the EP is a "sui generis institution" these functions have been slightly modified: the category of "increased backbench participation" has been omitted. Opposition input has been modified to input of "smaller party groups".

- **Consensus-building**: The EP committee structure can contribute to consensus-building by providing an arena for detailed deliberation, which is not possible in plenary. We found that divisions in committees are very issue-specific and the committee chairs often play an integrative role.

- **Transparency:** Committee meetings are generally open to the public[371] and to the media. Committees allow members and committee chairs in particular to generate publicity, at least when controversial topics such as the BSE crisis are on the agenda.

Despite these similarities, the EP and its standing committees operate in a very different environment than committees in national parliaments. A major difference is the absence of a European government directly accountable to the EP and the unique forms of decisionmaking in the multi-level system of European governance. In this process of interaction of the EP with other EU institutions, notably the Council and the Commission, the EP committees play a vital role. Committee-based division of labour brings order and structure into the work of the EP as whole.

Committees provide personnel and structural resources, which strengthen the negotiating position of the EP vis-à-vis the Council, especially in the co-decision procedure. Key players in committees such as group co-ordinators, committee-chairs and rapporteurs, not only contribute to cohesion and coherence within committees, but play a key role in finding acceptable solutions to problems, thus increasing the committee's output substantially. We have found that key players are often appointed due to their expertise in a particular policy area, frequently acquired in professional experience prior to the parliamentary career.

This and the fact that they can draw on a growing pool of expertise enhances their standing vis-à-vis other institutions. We also found that political actors who have gathered experience with these very specific forms of inter-institutional negotiations are later appointed to key positions to deal with co-decision, thereby contributing to the level of trust and coherence, especially during conciliation.

Committees increase accountability and transparency of the EP insofar as their meetings are generally open to the public and committee documents such as draft reports are rather freely available. Committee members also try to strengthen the link to EU citizens

[371] Individuals have access to the premises of the EP, if they specify which committee meeting they would like to attend.

by meeting visiting groups and spending a large part of the working week (as well as the weekend) in their constituencies. Furthermore, committees enable effective communication of relevant (citizen) interests to those involved in the process of governance. Contacts with lobbyists have become part of the daily business of committee members.

Despite these positive aspects, EP committees can do little to alleviate general structural deficits regarding accountability and legitimacy within the multi-level system, such as the lack of a European government, which is directly accountable to the EP.

F. Legislation and implementation: theoretical considerations and empirical findings

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1. Introduction

The vast majority of legal acts in the European Community are not adopted by the legislative authorities (Council and EP), but by the European Commission.[373] Most of them are adopted by the Commission after the Council has conferred implementation powers on the Commission and a so-called "comitology" committee, composed of civil servants of the Member States, has given its opinion on a proposal by the Commission. Although among these legal acts there are many "routine" measures, decisions with an enormous political and economic importance such as the embargo against British beef in connection with the BSE crisis in 1996,[374] are also taken according to comitology procedures.

The first comitology committees were established in the early 1960s when the Council recognised that it lacked the resources to make all the necessary implementation rules in the first agricultural market regimes. However, it did not want to delegate the implementation powers to the Commission without keeping some control. The committees – which have different legal "weights" depending on the type of committee – have the task of giving an opinion on a Commission proposed implementation measure[375] before the Commission can enact it.

The procedures for adopting EC implementing measures have been criticised ever since these procedures were set up in the early 1960s. Many suggestions and proposals have been made to ensure that decisions of a legislative nature or with significant budgetary implications are made following the regular EC legislative process, i.e. proposed by the

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[372] Part 3 of this chapter was initially structured and carried out by Georg Haibach and with the assistance of Marion Stulfa. We would like to thank both for their contribution to the project

[373] In 1996 the European Commission adopted -in addition to numerous decisions -2,341 regulations and 2,806 directives (being legal acts with general application), whereas the Council adopted 484 legal acts in total (European Commission, *General Report on the Activities of the European Union*, 1996, Office for Official Publications of the European Communities, 1997, pp. 424, 426).

[374] Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy, OJ No L 78, 1996/03/28, p. 47.

[375] According to the "Comitology Decision" of 1987 (Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 197, p. 33) there are I, II a) and b), III a) and b) committees. The "New Comitology Decision" of 1999 (Council Decision 1999/468 (EC) of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission OJ L 184/23 has reduced the procedures to three, I, II, III.

Commission and enacted by the Council either in consultation, co-operation or co-decision with the EP. The line that separates routine implementing measures from those with legislative and budgetary implications is, however, rather blurred and difficult to draw.

The European Court of Justice has in a series of decisions left it to the legislator to draw this line. The Council as legislator has tended to be rather generous in conferring implementing rights to the Commission, since it can control the Commission through comitology committees. The EP, which has virtually no influence on the committee procedures, wants to restrict the delegation of implementing measures to purely routine matters. This is the root of the conflict between Council and the EP.

Despite its theoretical and practical importance[376] and despite the long lasting conflict between the EP and Council over this issue, there has been very little research on how to define legislative acts and whether the Commission with the tacit approval of the Member State representatives in comitology committees has encroached on the legislative prerogative. It is the objective of this chapter to explore this uncharted territory, both theoretically and empirically. We did this in the following two steps:

- The development of a definition of the concept of legislation and its relevance for the implementation process (see 2. below).
- An examination of 800 implementing decisions of the Commission with the objective to identify critical cases where the Commission and the committee may have possibly exceeded their competences by encroaching on the prerogative of the legislative authorities (see 3. below).

2. Theoretical considerations

It is the task of this part to develop a definition of the concept of legislation and to assess its relevance for the implementation process. As the notion of 'legislation' or 'legislative' powers has been developed in the constitutional systems of states, it is first necessary to ascertain its meaning in this context. Secondly, against this background it will be analysed of how the EC Treaty allocates powers to the various institutions before any conclusions can be drawn as to which of those powers should be considered as legislative

[376] See the Laeken Declaration on the future of the European Union, p. 22 where the following question is raised: 'should a distinction be introduced between legislative and executive measures?'. The White Paper on European Governance of the Commission, COM (2001) 428 final, at p. 34 argues strongly in favour of separating legislative and executive competences.

and to what extent this is relevant for the implementation process. Finally, it will be assessed as to how the exercise of implementing powers with legislative implications should be controlled.

These theoretical considerations are then to be used for the classification in the empirical part (3. below) to examine whether and to what extent the EP's concern is justified that the Commission with the tacit approval of the Member States in the comitology committees attempts to extend its implementing powers and thereby encroaches on the prerogative of the legislative authorities.

2.1. The concept of legislation in the Member States

2.1.1. Legislation in form

In the classical tradition of the principle of the separation of powers, the authority to adopt legislative acts is vested in a legislative authority.[377] This authority is usually entrusted to parliament, as the representative of the people. However, not every decision of parliament will be considered as a legislative act. The adoption of such acts has to follow the procedure that is laid down in the constitution. Even though it will be parliament that adopts the act, the legislative procedure in the constitutions of the Member States of the European Union is characterised by the co-operation of various institutions. Most prominent in this respect is the government that generally initiates the procedure and ensures the implementation of the legislative act once it is adopted. Its superior resources and its usual control of the parliamentary majority through the party system make it difficult for parliament to make a strong impact on the content of the government's bill. The crucial function of parliament is the public scrutiny of the bill and the public display of arguments for and against a bill, often transmitted to the public through the media.[378] Where parliament consists of two chambers, usually both chambers have to agree on a text. Even though in most systems the directly elected chamber can ultimately prevail, both chambers have to co-operate to achieve a mutually agreeable result.

The complexity of the process, the participation of a broad spectrum of interests and the public display of the discussion, explain why a legal act adopted in accordance with the legislative procedure irrespective of its content enjoys a high degree of legitimacy, even

[377] See Montesquieu (1979), book XI, chapter VI; Locke (1980), chapter XI, § 141; Rousseau (1992, book II, chapter VI.
[378] Grimm (1995), p. 282; Habermas (1995), p. 303.

if ultimately the will of the majority in parliament will prevail.[379] Such acts cannot be reviewed by ordinary courts, and only some Member States provide for constitutional courts that are allowed to review such acts. Moreover, the characteristics of legislative acts have prompted some constitutional courts to preserve the legislative process against it being undermined by an extensive conferral of lawmaking powers to the executive. These constitutional courts would insist on the legislative act containing a certain minimum of regulatory content and would not allow the adoption of such essential rules to be left to the administration.[380] The requirement of a certain content in such legislative acts is also seen as a guarantee for fundamental rights. As such rights are not unlimited and have to be reconciled with other rights, it is considered to be the task of the legislative act to strike the balance between conflicting rights.

2.1.2. Legislation in substance

The classical doctrine of separation of powers would also suggest that legislative acts lay down legally binding rules of general application.[381] In this view the authority to adopt acts of general application is vested exclusively in the legislative authority. The increasing need for law-making and the complexity of this task, made it clear that not all acts of general applicability could be decided upon in the legislative procedure, but that a substantial part had to be adopted by the executive. In order to preserve the law-making authority of parliament, executive law-making requires an authorisation in the legislative act. Such executive law-making cannot be considered as legislation in the formal sense, as it is not adopted in accordance with the legislative procedure, but only as legislation in the substantive sense, containing as it does acts of general applicability.

Due to their general applicability, legislation in substance is similar to legislative acts in the formal sense. In comparison with acts of individual application, they enjoy certain privileges. The rationale for such different treatment is seen in the fact that legislation in substance does not consider certain individuals, but views them in general and in the abstract and thereby attempts to ensure equal treatment and legal certainty.[382] However, in contrast to legislative acts in the formal sense, acts that are adopted by the executive are treated as administrative acts and can therefore be reviewed by ordinary courts.

The differentiation between the legal treatment of legislation in the formal sense and legislation in the mere substantive sense should, however, not be seen in the different

[379] See Luhmann (1997), pp. 174 ff.
[380] For the German *Bundesverfassungsgericht* see BVerfGE 83, 130, at p. 152 (*Josefine Mutzenbacher*); for the French *Conseil Constitutionnel* see 75-56 DC of 23 July 1975 (*Juge unique*)at *considérant* 6.
[381] See Rousseau (1992), book II, chapter VI.
[382] See de Laubadère et al (1996), p. 582; Ossenbühl (1996), para. 12.

institutions that adopt the act. The difference in democratic legitimacy between parliament and the executive in modern parliamentary democracies is one of degree: It is primarily located in the difference in the procedures for their adoption. The adoption of legislative acts in substance by the executive is not characterised by a co-operative procedure. They are drafted, adopted and promulgated by the government behind closed doors. Cabinet meetings are not suitable for a public discourse, as they could, at best, reflect the internal divisions of the government. Public scrutiny and public discourse are not comparable to those of legislative acts in the formal sense. On the other hand, executive law-making is more apt to react to changing circumstances or unforeseen situations by providing a fast procedure that is less complex than the legislative procedure. Moreover, it allows the legislative process to be freed from the consideration of a considerable amount of detail.

The relation between legislation in form and that in substance should consequently be perceived as one between acts adopted through different procedures, which fulfil different functions.[383] Legislation in the formal sense is the constitutionally provided option for the adoption of binding laws to deal with important issues, whereas executive law-making complements legislation in the formal sense by filling in the necessary details. Executive law-making is therefore dependent on and linked to legislation in the formal sense, which it implements.

2.1.3. Hierarchy of norms

Law-making should therefore be conceived as a process from the more general to the more specific rule, a process of specification. Such a hierarchy proceeds in various stages from the Constitution to an act of parliament until the act is specific enough to be applied by the administration to the citizen. The higher ranking norm provides the procedure, in accordance with which the lower ranking norm can be adopted and lays down the substantive rules which the lower ranking norm has to respect when specifying it. Each act would find its legal basis in the higher ranking norm, which it complements creating thus a system of norms that determines the law to be applied in a specific case.[384]

This creates a layered system of law-making and provides at different levels of the hierarchy different procedures and institutions that are authorised to adopt the respective acts. At each level the characteristics of the procedure would then have to be adequate for the content of the act to be adopted. Such a complex system of law-making is however only necessary where intervention by legislation in the formal sense is

[383] See Staupe (1996)
[384] See Kelsen (1934).

required. Outside this area, a certain amount of autonomous law-making by the executive is therefore permitted by most of the constitutional systems of the Member States.

2.2. Allocation of law-making powers in the European Community

It seems doubtful to what extent acts adopted by EC institutions can be qualified as legislative. On the one hand the width of EC competences, enlarged in successive Treaty amendments, and the involvement of the EP in their adoption suggest that the attribution of law-making powers in the EC shows similarities with that of the Member States. The increase in legal acts adopted by the Community institutions seems to confirm this. On the other hand, it is widely accepted that the EC is not a state.[385]

The special features of the Community somewhere between an international organisation and a state[386] do not allow for national concepts being applied without further consideration to the Community legal system. It is therefore necessary to examine the characteristics of legal acts adopted by the EC institutions in order to draw conclusions as to whether they are functionally equivalent[387] to the dual notion of legislation in the Member States.

2.2.1. Principle of attributed powers and hierarchy of norms

An essential characteristic of the EC legal system is that it is not based on the principle of separation of powers. Instead, EC institutions can only act, where specific powers are conferred upon them in the EC Treaty. The principle of attributed powers, as laid down in Article 5(1) for the EC in general and in Article 7(1) for its institutions in particular, excludes any general law-making power by the EC and does not vest, in principle law-making power in one institution.[388]

On the other hand, the EC Treaty does not allocate law-making powers at random. A survey of all provisions that confer powers on EC institutions reveals, that the Commission has in almost all provisions the monopoly to make proposals for acts adopted on the basis of the EC Treaty. Moreover, it will in almost all cases be for the Council to adopt the act, even though the voting procedures might vary from one provision to the another. Finally, the EP will be involved to a greater or lesser extent in

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[385] See Piris (1999), p. 565.
[386] Dashwood (1996), p. 127.
[387] See Zweigert and Kötz (1987), p. 31.
[388] See Joined Cases 188 to 190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545, at p. 2573.

the adoption of such acts. Where the codecision procedure applies, the EP will adopt the act together with the Council as colegislator thereby sharing political and legal responsibility in the law-making process.

In addition, not all acts adopted by the EC institutions are based on the EC Treaty itself. In the seminal case of *Köster* the Court found that 'the legislative scheme of the Treaty, and in particular the last paragraph of Article 155 [now 211], establishes a distinction between the measures directly based on the Treaty itself and derived law intended to ensure their implementation.'[389] The Court also pointed out that the essential elements have to be laid down in the basic act in accordance with the procedure provided by the Treaty, whereas implementing measures do not have to follow that procedure.

The Court thereby confirmed that the EC Treaty contains a hierarchy of norms, similar to that of its Member States. At each level legal acts are adopted by different institution in accordance with different procedures. Provisions of the EC Treaty could be found at the top, below acts adopted by the competent EC institution as attributed by the EC Treaty (basic acts) and acts adopted on the basis of such acts with a view to implement basic acts (implementing acts). Consequently, at each level the characteristics of the procedure would have to be adequate for the content of the act to be adopted and *vice versa*.

2.2.2. Basic acts as legislative acts

It is tempting to assume that basic acts are legislation in the dual sense. Legislation in the formal sense could then be defined as acts adopted in accordance with the procedure laid down in the EC Treaty and, where they are of general applicability, could be considered as legislation in the substantive and formal sense. This approach seems to have been adopted by the Council in Article 7 of its Rules of Procedure[390], where it attempted a definition of when it acts in a legislative capacity. This definition has been prompted by Article 207(3)(2) of the EC Treaty[391], which requires the Council to define instances where it acts in a *legislative* capacity with a view to grant greater access to its documents in such cases. Article 7 of the Council's Rules of Procedure reads:

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[389] Case 25/70 *Einfuhrstelle v Köster* [1970] ECR 1161, at para. 6.
[390] Council Decision 2000/396/EC, ECSC, Euratom of 5 June 2000 adopting the Council's Rules of Procedure, OJ [2000] L 149/21.
[391] Article 207(3)(2) reads: 'For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its *legislative* capacity, with a view to allowing greater access to documents in hose cases, while at the same time preserving the effectiveness of its decision making process. In any even, when the Council acts in its *legislative* capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.' (Emphasis added).

> "The Council acts in its legislative capacity within the meaning of the second subparagraph of Article 207(3) of the EC Treaty when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)".

The concept of legislation used in this provision uses formal and substantive elements. The Council acts in its legislative capacity where it adopts acts based on the 'relevant provisions of the Treaties' (formal element) provided they are not of an administrative nature (substantive element). In the following it will be examined whether such a definition could be used to determine the concept of legislation in the EC legal system.

It seems to be clear that basic acts, where they are of general applicability should be considered as legislation in substance[392], as such a qualification does not require a specific procedure or institution for its adoption. However, whether basic acts can also be considered as legislation in the formal sense, seems to be doubtful. Attorney General (AG) Lagrange in *Producteurs,* in accordance with the tradition of the French *Conseil d'Etat*[393], considered a Council regulation as an act that was administrative in form, as it had been adopted by an executive body (Council).[394] This might explain why Article 230(4) of the EC Treaty, in contrast to national legal systems, allows private parties to challenge EC legal acts regardless of the procedure in accordance with which they have been adopted.

Whether basic acts should to be regarded as legislation in form depends on the characteristics of such acts. Basic acts that are adopted under the co-decision procedure are characterised by their co-operative nature, as they involve a proposal from the Commission, representing the Community interest, which has to be approved by the Council, representing the national interests at EC level, and the EP representing the interests of the peoples within the EC. In this procedure, the EP, and in particular its

[392] Article 230(4) makes a distinction between regulations and decisions. The Court determines regulations as acts of general applicability and consequently considers them as 'being essentially of a legislative nature'. See Joined Cases 16 and 17/62 *Producteurs de Fruits v Council* [1962] ECR 471, at p. 478.
[393] See CE of 26 June 1959, Syndicat général des ingénieurs-conseils,Rec.,p.394.
[394] Joined Cases 16 and 17/62 *Producteurs de fruits v Council* [1962] ECR 471 and 484.

committees[395], also provides a channel for communication and public debate in this respect, which was considered above as an essential element of a legislative procedure. Even though the function of this public forum is limited at the moment, it should not be taken according to Habermas as a

> "historical-cultural *a priori* that makes democratic will-formation possible, but rather as the flowing contents of a circulatory process that is generated through the legal institutionalisation of citizens' communication".[396]

Acts adopted under the co-decision procedure and the assent procedure, which shows similar characteristics, should therefore be considered as legislation in form. Basic acts adopted in accordance with other procedures that lack these characteristics can therefore only be referred to as legislation in substance, when they are of general applicability.

2.2.3. Implementing acts as legislative acts

Implementing acts are characterised by the fact that they derive their competence from the basic act. On the basis of Article 202, 3rd indent the basic act can provide for different procedures and institutions in the implementation process. It can confer powers on the Commission alone or subject to certain requirements. In the latter case the basic act can require the Commission to follow a specific procedure, which involves the participation of a comitology committee, comprised of representatives of Member States. In this case, the basic act has to comply with the new Comitology Decision[397], Article 2 of which lays down the criteria applicable for the choice of procedure. Article 202 3rd indent finally stipulates that the Council can, in specific cases, adopt implementing acts itself.

Implementing acts cannot be considered as legislation in form, because they follow a different procedure than that provided for by the EC Treaty. Moreover, none of the implementing procedures shows the characteristics that are necessary to regard them as legislative in form. On the other hand, implementing acts can be legislation in substance, when they are of general application. In *Binderer* the Court made it clear that what matters is the 'nature of the measure itself and the legal effects which it produces' and not 'the procedures for its adoption'.[398]

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[395] See chapter E.
[396] Habermas (1995), p. 306.
[397] Council Decision 1999/468 (EC) of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L 184/23.
[398] Case 147/83 *Binderer v Commission* [1985] ECR 257, at para. 14.

It is admitted that the Court has had great difficulty in drawing the line between acts of general applicability and those of individual applicability. This should, however, not detract from the importance of the qualification of acts as legislation in substance in the case law of the Community Courts. The qualification is considered to be relevant:

- for judicial review under Article 230(4)[399],

- the rules on publication of legal acts[400],

- the rights to participation of individuals in the procedure for the adoption of an act[401]and

- the consultation of scientific committees in the absence of a statutory requirement[402].

However, this does not mean that all implementing acts of general applicability, and therefore in substance of a legislative nature, should be treated in the same way. It is suggested that every implementing act should be adopted in accordance with the procedure that is adequate for its content. This approach is already applied in the New Comitology Decision in relation to the participation of Member States in the adoption of implementing acts by the Commission. Article 2 of that decision provides that the management procedure (see Article 4 of the decision) should apply to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications. The regulatory procedure (see Article 5 of the decision) applies where 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. Article 2 consequently determines the implementing procedure that has to be chosen in accordance with the content of the decision to be taken.

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[399] In Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, at para. 19 the Court held that even though acts are legislative in nature, they can be of direct and individual concern. It seems, however, that the legislative nature of an act still has an impact on the finding of individual concern, see Arnull (2001), p. 51. See below 2.3.2.

[400] Cases T-186/97 etc. *Kaufring v Commission*, judgement of 10 May 2001, at para. 28. The Court of First Instance found that since the measures in issue 'were of a general legislative nature, their publication in the Official Journal was, as a matter of principle, an essential pre-condition for their having binding effect on their addressees'.

[401] See Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469, where the Court in paras. 13 and 14 held that the right to make ones views known was to apply in *administrative* proceedings.

[402] Türk (2000), pp. 240-245, where it was suggested that, in the absence of a statutory duty, the consultation of scientific committees before the adoption of implementing acts of general application is not compulsory.

The procedure to be followed for the adoption of implementing acts of general application has to take into account not only the importance of these acts for the Member States, but also for individuals. Acts of general application affect categories of individuals. It would usually not be feasible or even desirable to let them all participate in the procedure. However, where individuals are particularly affected by the adoption of an implementing act, their participation in the procedure that leads to the adoption of the implementing act seems to be a requirement of the rule of law. In such a situation the basic act should determine their right to participate in the procedure. Even though some basic acts[403] already provide for such participation, basic acts should systematically be examined as to whether they provide for the participation of individuals that are particularly affected by implementing acts. This is particularly important as the implementing authority is usually not required to hear third parties before the adoption of acts of general application[404] unless the basic act provides for such participation. The participation of individuals is also of relevance where they want to challenge such implementing acts under Article 230(4). The Community Courts have been very reluctant to grant standing to individuals against an act of general application unless they played a prominent role in the procedure that led to the adoptionof suchanact.[405]

2.2.4. Relationship between basic acts and implementing acts

The different procedures that apply for the adoption of basic acts and implementing acts require that the content of these acts is adequate to the procedure in accordance with which they were adopted. Indeed, the Court requires basic acts to contain the 'basic elements' of a subject matter. It has, however, left it to the legislative authority to determine what is essential and has not enforced this requirement with great rigour.[406] This means that the legislative authority is relatively free to confer any matter to the institution responsible for the implementation of the basic act.

It is submitted that the basic act has to contain a certain level of detail and cannot delegate powers to the implementing authorities that fall within the prerogative of the basic act. First, this is necessary to preserve the principle of attributed powers, whereby the EC Treaty provides a specific procedure for the adoption of a basic act. If it is the implementing act that lays down the relevant rules following a different procedure than that provided in the EC Treaty for the adoption of the basic act, then the procedure laid

[403] E.g. Council Regulation 384/96/EC of 22 December 1995 on protection against dumped imports from countries not members of the European Community OJ [1996] L 56/1, as amended.
[404] See supra note 401.
[405] See 2.3.2 and 3.4 below.
[406] Türk (2000), pp. 224-227.

down in the EC Treaty loses its relevance. Secondly, such an approach safeguards the institutional balance. As the institutions involved in the adoption of the implementing act differ from those participating in the adoption of the basic act, the participation of institutions in the basic act could not be circumvented by transferring the adoption of the relevant rules to the implementing level. This is particularly relevant in the case of the EP, the powers of which in the adoption of basic acts have been steadily increased, but which is only marginally involved in the adoption of implementing acts. Thirdly, the question as to which act is adopted in accordance with what procedure is also of relevance for the protection of fundamental rights of individuals. Where the law interferes with these rights, it is not necessary that the basic act determine all aspects of such interference. However, the characteristics of the procedures for the adoption of basic rights are relevant as to the amount of detail that has to be laid down in the basic act. The greater the interference with fundamental rights, the more detail should be expected in the basic act, as these procedures, in particular the participation of the EP, offer greater guarantees for the protection of individuals. Fourth, the procedures laid down in the EC Treaty, requiring the involvement of both Council and the EP, help to enhance the legitimacy of EC acts, which is based on its Member States and the directly elected EP.[407] Finally, it is necessary that the basic act contain an adequate level of detail in order to avoid that difficult issues, which are not solved at the level of the basic act, are merely transferred 'downstream' to the implementation level prolonging intra-and inter-institutional conflicts for which the implementing procedure is not adequately equipped to deal with.

On the other hand, the basic act also has to consider the efficiency of law-making, which can be obstructed if too much detail is contained in basic acts.[408] The complexity of the procedures provided for the adoption of basic acts is suitable for the consideration of essential elements, but is not flexible enough to cope with rapidly changing or unforeseen circumstances. Here the implementing procedures provide a more adequate means of legal intervention.

[407] See the Commission's White Paper on Governance (2001), p. 7.
[408] See the Commission's White Paper on Governance (2001), in particular p. 23.

2.3. Control of implementing measures

2.3.1. Participation by Member States

In a multi-layered system of governance[409], where the Community adopts binding law for its Member States, the participation of representatives of the governments of the Member States in the comitology committees is an important element for the functioning of the system. It ensures that the impact of the measure on the Member States is taken into account. It also facilitates the application of the measure by the Member States and its legitimacy within the national systems. Moreover, the various procedures in the new comitology procedure allow Member States a variable impact on the decision-making process. The participation of the Member States in the committees depends hereby on the importance of the implementing measure. The idea, expressed in the Commission's White Paper on Governance, to call into question the 'need to maintain existing committees, notably regulatory and management committees'[410], needs to be seriously questioned.

However, it should not be ignored that the Member States through their participation in the comitology procedures are part of the decision-making process. The functioning of committees shows that the Member States can take considerable influence on the final content of an implementing act.[411] In some cases it is difficult to attach political responsibility for an act to the Commission, when in fact the act appears as a joint effort by Commission and Member States to arrive at a mutually acceptable compromise[412].Itis therefore doubtful to consider the participation of Member States in the implementation process as mere supervision.

2.3.2. Judicial review

It follows from the above that the role of the Court in the review of the legality of implementing acts is of considerable importance. The principles that should guide the Court in that role follow from the above considerations as to the characteristics of basic and implementing acts. First, the Court has to examine whether the basic act itself confers implementing powers that should have been adopted in the procedure laid down in the EC Treaty. This is necessary to preserve the institutional balance and enhances the protection of fundamental rights of individuals. This does not mean that the Court should

[409] See Chapter B.
[410] Commission's White Paper on Governance (2001), p. 31.
[411] See Chapter G.
[412] See Chapter G.

substitute its opinion on the matter of which powers can be delegated to the implementing authority for that of the competent legislative authority. However, it has to intervene in cases, where the principle of adequate procedural allocation has manifestly been violated. Article 220 requires the Court to ensure that the law is observed. This also includes the observance by the Court as to whether the EC institutions have followed the correct procedure.

Second, the Court also has to observe that the adequate implementing procedure has been adopted in the basic act. Even though it is doubtful whether criteria laid down in Article 2 of the new comitology decision of 1999 are meant to be binding, it is submitted that they reflect a general principle of law, the observance of which is, as a matter of law, to be ensured by the Court. This follows from the fact that the procedures involve the various institutions to a differing degree. It is therefore necessary to ensure that the institutional balance that is provided for by these criteria is not undermined by a choice of implementing procedure that has not adequately been justified and is manifestly unsuited for the adoption of the implementing measure in question.

As far as the review of implementing acts is concerned, the Court has to ensure that the implementing act stays within the powers laid down in the basic act to protect the rights of the institutions that adopted the basic act. In addition, the Court has to ensure that the rights of individuals to participate in the implementing procedure are observed. Where such procedural rights are not provided for in the basic act, the Court has to preserve these rights through the application of general principles of law. In case of implementing acts of general application, procedural rights should, however, in the absence of a right of participation in the basic act, only be granted where individuals are particularly affected.[413] Finally, the Court has to secure the participation of scientific expert committees in the implementing process as a valuable tool to ensure, as far as possible, that decisions in that area are made on the basis of the relevant scientific expertise.[414]

Access to the Community Courts under Article 230(4) has been notoriously difficult for private parties[415], as they had to show not only that the act was of direct and individual concern to them, but also that it was a decision in substance.Implementing acts of general application were therefore beyond the reach of private litigants. Even though the Court of Justice in *Codorniu* allowed a challenge to an act of general application, and thereby disengaged the nature of the act from the requirements of direct and individual

[413] See supra note 401.
[414] See Joerges (2000), pp. 375-377; Türk (2000), pp. 240-245.
[415] See Arnull (2001), p. 7.

concern, the subsequent case law of the Community Courts seems to suggest that the legislative nature of an act still has an impact on the finding of individual concern.[416] It might be justifiable to safeguard the legality of basic acts that could be considered as legislation in form by subjecting the standing of private parties against such acts to restrictive conditions. However, implementing acts of general applicability should not enjoy such privileges due to the different procedures that lead to their adoption.

The same rationale applies to the liability of EC institutions under Article 288(2). In accordance with the Court's judgement in *Bergaderm* [417] an EC institution is liable for compensation where it has committed a sufficiently serious breach of EC law. Where that institution enjoys discretion in the exercise of its law making powers it will have committed a sufficiently serious breach only in case of a manifest and grave disregard of the law. On the other hand where the institution in question has only considerably reduced, or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. It is submitted that such an approach is flawed as it privileges an EC institution irrespective of the procedure in which the act is adopted. Instead, only acts that can be considered as legislation in form should benefit from the privileged test (liability only in case of a manifest and grave disregard of the law) that the Court attaches to discretionary acts.[418] In case of implementing acts, even those of general application, the institution should be liable for compensation for a mere infringement of Community law.

The same considerations are also of relevance to the Court's dictum in *Foto-Frost*[419] that national courts could not rule on the validity of an act adopted by an EC institution. This judgement requires a national court that has serious doubts as to the legality of an EC act to make a reference to the Court under Article 234. On the basis of the present analysis, the rule in *Foto-Frost* is subject to criticism as it does not take into account the procedure in which the EC act has been adopted. It could be argued that the rule in *Foto-Frost* should only be applied to EC acts that could be regarded as legislation in form and therefore benefit from the exclusive jurisdiction of the Court to declare such acts invalid. National courts should, however, have the competence to rule on the validity of implementing acts, even where they are of general application.

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[416] Arnull (2001), p. 51.
[417] Case C-352/98P *Bergaderm and Goupil v Commission* [2000] ECR I-5291.
[418] See also Ward A. (2000), pp. 313-318.
[419] Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199.

It is, however, doubtful whether that should also mean, as the Court decided in *Nachi*[420], that implementing acts of general applicability, which are obviously of individual concern can become definitive, where they have not been challenged within the time-limit laid down in Article 230(5). This seems to be an unnecessary restriction of the judicial remedies available to private persons and does not seem to be in line with the principles of administrative law in the Member States.

The difficulties regarding access by private parties to the Community Courts for the annulment of implementing measures of general application, could be remedied by liberalising the rules on standing under Article 230(4). This could be achieved either by an amendment to the Treaty or by a more liberal approach to individual concern by the Community Courts[421]. It should be noted that the Community Courts have been more willing to grant standing where a basic acts has provided procedural guarantees to private parties that are particularly affected by implementing acts.[422] This highlights the importance of such procedural guarantees not only with respect to the protection of individuals in the procedure that leads to the adoption of implementing acts, but also subsequently where the individual seeks access to the Community Courts for judicial review of such measures.

2.3.3. Participation of interest groups

The participation of groups involving affected sections of society through consultative or expert committees in the preparation of a proposal for legislation on a compulsory basis does not exist currently. The Commission is free to establish and to decide whether and when to consult such committees. The compulsory consultation of such groups would allow bringing the decision-making process closer to society. This would be helpful in particular in case of implementing measures of general application which only concern individuals in their objective capacity as traders, manufacturers etc. and do not lend themselves to the participation of every possibly affected individual.

The unequal nature of access to the process by interests groups, which exists at the moment, can thereby not be eliminated, but it might be possible to reduce it. The danger of impeding the efficiency of the process might be avoided by carefully drafted rules that preserve the efficiency of the process, but also guarantee the adequate participation of

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[420] Case C-239/99 *Nachi Europe GmbH v Hauptzollamt Krefeld*, judgement of 15 February 2001.

[421] See the Opinion of AG of 21 March 2002 in Case C-50/00 P Unión de Pequeños Agricultores v Council where he suggests at para. 102 that 'an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests'.

[422] This is in particular the case in anti-dumping, state aids and competition cases. See Albors-Llorens (1996) and Ward (2000).

such groups within it.[423] This balance is also in issue in case of access to documents of comitology committee meetings.[424] On the one hand transparency serves to enhance the legitimacy of the process and provides interested parties with valuable information. On the other hand, an excessive right to documents might seriously endangered the efficiency of the process.[425]

2.3.4. Supervision by the EP

The direct involvement of the EP in implementation[426] law making has to be viewed with some scepticism. Parliaments in national systems lack the resources to compete with the expertise of their governments and therefore lack efficacy. Moreover, the procedures of a national parliament for the review of general acts adopted by government are less thorough and comprehensive, as those required for the adoption of legislative acts by parliament itself. This is no less true in the EC legal system. The EP's resources may be greater than that of any national parliament, but still are no match for the Commission. In addition, involvement in the implementation procedure diverts resources from the participation in basic acts. Finally, such participation would make the EP part of the decision-making process, which would frustrate its supervisory function. The involvement in the adoption of implementing acts should therefore not be a priority for the EP. Parliament should limit its role to monitoring the implementation process and to examining the functioning of the process. The EP is best equipped to investigate *ex post* implementing decisions, thereby holding the implementing institutions to account and strengthening the legitimacy of the process[427].

Consequently, it is of crucial importance to safeguard the prerogatives of the EP in the procedures for the adoption of basic acts. This means foremost that a sufficient amount of detail in the basic act has to be ensured. This can be achieved by the EP itself in acts adopted under the co-decision procedure, whereas the prerogatives of the EP in other procedures, where the impact of the EP is not as strong, has to be safeguarded by the Court.

In this context, Article 8 of the new comitology decision, which gives the EP the right to pass a resolution on whether in its view the Commission has exceeded its implementing

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[423] See also Commission's White Paper on Governance (2001), pp. 17, 20.
[424] See Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463, where the Court of First Instance held that documents of comitology committees are those of the Commission. See also Case T-111/00 *BAT v Commission*, judgement of 10 October 2001, where the Court of First Instance allowed the applicant access to the minutes of a comitology committee with details of individual Member States' positions.
[425] For a more detailed discussion on the impact of transparency on comitology committees, see Chapter G.
[426] See also Chapter E.
[427] In this sense also the Commission's White Paper on Governance (2001), p. 30.

powers granted by the basic act[428], should be assessed. This *ultra vires* procedure was introduced to alleviate concerns of the EP that the Commission in collusion with the Member State representatives in the comitology committees would encroach on the prerogative of the legislator. The third part of this chapter sets out to establish whether this concern is in any way justified by examining whether the Commission has actually exceeded its implementing powers by adopting legal acts that went beyond the legal authority set by the basic act (*ultra vires*) or, where it had such authority, that due to their importance should have been decided in the legislative procedure.

3. Empirical findings

For the empirical part of this chapter, we have examined some 800 Commission implementing acts with the purpose of determining whether the Commission has stayed within the limits set by the legislative authority in the basic act. To this end, we had to operationalise the theoretical considerations established above and apply them to the 800 selected implementing measures. First, we describe the selection procedure for the 800 case studies and conclude with a description of the critical cases.

3.1. Selection of Committees and Collection of Measures

We first selected 51 committees from the policy arenas (corresponding to Commission DGs) chosen for empirical inquiry by all subprojects (Employment and Social Affairs, Environment, Enterprise, Research and Internal Market). After we had obtained the texts of the measures adopted by these committees[429], we noticed that some of these committees had not been involved in the adoption of any measure in the time period chosen for analysis (1997-2000). We therefore added 4 committees from the area of Agriculture and 2 committees from the area of Health and Consumer Protection (for more detail, see Annex 1.).

[428] The *ultra vires* procedure in Article 8 of the New Comitology Decision applies, however, only where the basic act has been adopted in the co-decision procedure.

[429] The Office of the Secretariat-General of the European Commission had assured us that it would assist us in obtaining the texts of the measures. Despite their efforts we could obtain the texts of only 39 measures adopted with the involvement of 12 of the 51 committees. For this reason we chose a different way of obtaining the texts of the measures: The list of comitology committees published by the Commission in August 2000 ([2000] OJ C 225/2) contains the "basic instrument(s) according to which a committee has been set up and thus stipulating for the first time the procedures governing it". With the help of CELEX (which lists all measures based on each basic instrument of Community law) we could identify the measures adopted with the involvement of the committees we had selected.

Table 7. Policy Arenas, Number of Committees and Number of Measures selected for Analysis

DG	Number of Committees	Number of Measures
Employment and Social Affairs	1	2
Environment	11	79
Enterprise	4	225
Research	1	1
Internal Market	2	6
Health and Consumer Protection	2	353
Agriculture	4	137
Total	25	803

The different policy arenas chosen can be seen as representative for all Community policy fields because of their density of regulation: the Internal Market is the core policy of the Community, Agriculture the most densely regulated Community policy, Environment and Health and Consumer Protection are regulatory-type policies, Research and Development redistributive-type polices and Employment and Social Affairs and Enterprise interventiontype policies.

The comitology committees selected can be considered as representative for all implementation committees since all types of committees according to the 1987 Comitology Decision[430] are represented. We did, however, deliberately focus on the 'heavier' types of committee procedures (IIb, IIIa/b) since we suspected a greater likelihood of possible transgressions of its limits by the Commission here. We also included the Management Committee for Bananas (IIa) in this scrutiny as an interesting exception because this committee is dealing with politically sensitive issues. And indeed, as will be shown below, this approach was vindicated by the fact that only 5 of the 25 committees chosen participated in the adoption of measures which we later classified as possibly 'critical' because the legislative limits might not have been respected.

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

3.2. Short Descriptions of all Measures

Next, we wrote "short" descriptions for all 803 measures, containing the following information:

- the number of the document;
- the number of the legal act;
- the responsible Directorate-General of the Commission;
- the name and type of the comitology-committee;
- the legal basis of the measure;
- the legal basis of the committee;
- the date of adoption of the measure;
- the publication reference in the Official Journal; and
- a short description of the content of the measure.

3.3. Classification of Measures and Identification of possibly Critical Cases

We then classified each of the measures into a typological scheme which differentiates three types of rule making implementation and two types of budgetary measures as follows[431]:

- ***"Rule application":*** refers to measures, which are adopted within the clear limit values of the basic legal act (e.g. routine decisions in the market regimes of CAP, but also for decisions like the embargo against British beef in the BSE case).
- ***"Rule interpretation":*** refers to cases in which minor adaptations of the original legal act are made and the Commission has certain discretion/room for manoeuvre (e.g. Commission decisions concerning mergers of companies).
- ***"Rule-setting/evaluation":*** refers to measures where, within a general framework of a legal act, particularly directives, more specific rules are adopted

[431] Compare Schaefer et al, (1999), pp. 8-9.

(e.g. the setting of limit values in environmental law or adjusting safety requirements due to technological change).

- ***"Routine fund-approving":*** refers to funding decisions within a specific, well-defined framework laid down by the legislative authorities (e.g. the management of specific R&D programmes and economic aid to third world countries).

- ***"Extension/new specification of fund-approving":*** refers to measures in which either existing programmes are extended or modified (e.g. modification or revision of an expenditure programme in R&D or foreign aid).

In addition to differentiating implementing measures according to the type of rule making or fund approval, we also needed to take the nature of decision into account. We used three categories for rule-making and two categories for fund-approving measures as follows:

- ***"Routine"*** (within clearly defined limits such as the setting of prices in market regimes or approving specific research projects);

- ***"Normative"*** (setting/amending legal requirements like annexes of directives resulting in a substantive change of the norms set out in the original legal act);

- ***"Programmatic"*** (setting up new programmes in the field of R&D or initiating new activities on the basis of an existing legal act);

- ***"Budgetary I"*** (inside/internal clearly defined budgetary limits);

- ***"Budgetary II"*** (the significant extension or modification of a budget line leading to a significant change in expenditure).

The criteria chosen reflect our theoretical considerations above, in which the importance of the general applicability of implementing measures[432] for their legislative nature was stressed: 'rule application' measures such as the approval of a specific project in the area of external relations do not have general applicability. On the other hand, 'rule interpretation' and 'rule-setting/evaluation' measures such as setting of limit values in the environmental area do have general applicability. The relevance of our criteria do, however, not only differentiate implementing measures with and without general

[432] This criterion is also of relevance under the new comitology decision (Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L 184/23). Article 2 of the decision stipulates that the new regulatory procedure is supposed to be used for 'the adoption of measures of *general scope* to apply essential provisions of basic instruments' (emphasis added).

applicability, but further distinguish between different types of implementing measures with general applicability (namely rule interpretation and rule setting/evaluation).

By combining the two sets of categories we obtained the following matrix:[433]

Table 8. Matrix for classifying Implementing Measures

	Routine	Normative	Programmatic	Budgetary I	Budgetary II
Rule application	279	55	38	6	-
Rule interpretation	25	8	1	-	-
Rule-setting/evaluation	232	97	-	-	-
Routine fund approving	-	-	-	46	-
Extension of/new specification of fund approving	-	-	-	16	-

We considered the measures placed in the grey boxes as possibly 'critical' cases where it could be suspected that the executive might possibly have overextended its competences and the involvement of the legislative authorities might have been required. Since cases of 'rule application' do not have general application, it is highly unlikely that the legislative limits are not respected. The same is true for 'routine' measures. On the other hand, measures of 'rule interpretation' and 'rule setting/evaluation' do have general applicability and are therefore possibly critical cases. Of all budgetary measures, only the significant extension or modification of a budget line leading to a significant change in expenditure can be considered as possibly critical.

In total there were 106 possibly critical cases. As the matrix shows, most of them were normative and rule setting/evaluation, and there were no fund approving measures at all.

It is interesting to observe that committees asked to adopt measures placed in the grey boxes can be found in all policy arenas:

[433] The figures in the boxes indicate the number of measures classified to fall in the respective boxes.

Table 9. Overview of Critical Cases by Policy Arenas

DG	Number of Committees	Number of Measures
Employment and Social Affairs	1	2
Environment	7	24
Enterprise	4	33
Research	1	1
Internal Market	1	2
Health and Consumer Protection	2	25
Agriculture	4	19
Total	20	106

The fact that only 5[434] of the 25 committees chosen did not give a single opinion during the time period examined on a measure placed in a grey box further reinforces the conclusion that in the selection of the committees we had successfully tried to choose a representative sample of interesting cases.

Subsequently, we wrote "long" descriptions of the 106 possibly critical cases. In addition to the short descriptions, the long descriptions contain the text of the legal basis of the measure, and the background (reasons and other considerations) of the adoption of the measure. This additional information was necessary for a detailed analysis of the 106 possibly critical cases, with the purpose of arriving at a conclusion whether or not the implementing measure have exceeded the limits stipulated in the basic act. For this aim we compared the content of the measure with the text of its legal basis. The borderline cases were clarified in interviews with Commission officials with responsibilities for the respective committee.

[434] Of those 5 committees, one was a IIa (Management Committee for the application of the directive on the standardisation and rationalisation of reports on the implementation of certain directives relating to the environment), one was a IIb (Committee on the protection of individuals with regard to the processing of personal data and on the free movement of such data) and three were IIIa committees (Committee for the application of the regulation authorising voluntary participation by undertakings in the industrial sector in a Community eco-management and audit scheme (EMAS), Committee for the adaptation to technical progress and application of the Community award scheme for an eco-label (ECO-LABEL), Committee for the implementation of the directive on integrated pollution prevention and control (IPPC).

3.4. Critical Cases

All legal acts require for their adoption a valid legal basis. The legal basis for implementing acts can be found in a basic act, which lays down the institution that is authorised to act and also prescribes the procedure to be used. We consider those cases as critical, where the implementing authority has exceeded the limits of its powers. Such cases can arise, where the implementing act does not make it clear which basic act constitutes its legal basis. Critical are also those cases, where the implementing authority misinterprets the scope of its authority, in other words where it claims powers that the basic act does not confer on it. In such cases the implementing authority acts without a legal basis. However, in some cases it might be difficult to ascertain the scope of the implementing powers provided in a basic act. It can be noted that the number of cases, out of the 106, which we consider to be critical cases, is less than 10. These will now be presented in 5 groups.

The first group comprises implementing acts, the legal basis of which is unclear. It is clear from the case-law of the Community Courts that implementing acts have to make it explicit to which basic act as legal basis they refer if this cannot be ascertained from the provisions of the implementing act.[435] Therefore, implementing acts have to make it clear to which legal basis they refer. We identified certain implementing measures, in which it is rather doubtful what their legal basis is and whether they are indeed implementing acts.

Council Regulation 2026/97 on the protection against subsidised imports from countries not members of the European Community[436] is an interesting example. In its preamble it refers as its legal basis to Article 113 [now 133] and to

> "the Regulations establishing the common organisation of agricultural markets and the Regulations adopted pursuant to Article 235 [now 308] of the Treaty applicable to goods manufactured from agricultural products, and in particular the provisions of those Regulations which allow for derogation from the general principle that protective measures at frontiers may be replaced solely by the measures provided for in those Regulations".

It is submitted that such a reference is not sufficient to make it clear, on which legal basis the act is based and whether it is a basic act or an implementing act. Regulation

[435] Case 45/86 *Commission v Council* [1987] ECR 1493, at para. 10.
[436] OJ [1997] 288/1.

2026/97 could be a basic act as it refers to Article 133 of the EC Treaty. On the other hand, the act could also be an implementing act, as it refers as its legal basis to certain Regulations which were adopted on the basis of the EC Treaty.

Another example is Directive 97/4[437], adopted by the EP and the Council, which refers to Article 100a ECT [now 95] and Articles 6(2)(c) and (3) and 7 of Council Directive 79/112.[438] Again, on the one hand the act could be a basic act as it refers to Article 95. This would indeed be a sufficient legal basis as acts under Article 95 are adopted by the EP and the Council in accordance with the co-decision procedure. On the other hand, Directive 97/4 also refers to a Council Directive as legal basis and could therefore be considered as implementing act.

In the second group we find implementing acts that refer to a provision of a basic act that does provide for Community action, but does not stipulate the institution or procedure that has to be followed. Commission Regulation 50/2000[439] is a case in issue. It states as its legal basis Article 4(2) of Council Directive 79/112. That provision stipulates that

> "Community provisions applicable to specified foodstuffs and not to foodstuffs in general may provide that other particulars in addition to those listed in Article 3 must appear on the labelling".

It is submitted that Article 4(2) cannot in itself provide a legal basis for Community action, as it does not specify the institution that is authorised to act and the procedure that should be used.[440]

The third group contains implementing acts that do not seem to have a legal basis or where the (implementing) institution misinterpreted the scope of the authority it was given in the basic act. Commission Directive 1999/51/EC[441] was adopted on the basis of

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[437] Directive 1997/4/EC of the European Parliament and of the Council of 27 January 1997 amending Directive 1979/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs OJ [1997] 43/21.

[438] OJ [1979] L 33/1, as amended. See also Directive 98/72/EC of the European Parliament and of the Council of 15 October 1998 amending Directive 95/2/EC on food additives other than colours and sweeteners OJ [1998] 295/18.

[439] Commission Regulation (EC) No 50/2000 of 10 January 2000 on the labelling of foodstuffs and food ingredients containing additives and flavourings that have been genetically modified or have been produced from genetically modified organisms OJ [2000] 6/15.

[440] However, the legal basis can be found in Article 4(3) of Council Directive 79/112, as amended.

[441] Commission Directive 1999/51/EC of 26 May 1999 adapting to technical progress for the fifth time Annex I to Council Directive 76/769/EEC on the approximation of the laws, regulations, and administrative provisions of the Member States relating to the restrictions on the marketing and use of certain dangerous substances and preparations (tin, PCP and cadmium) OJ [1999] 142/22.

Article 2a of Council Directive 76/769[442]. Article 2a provides that amendments required to adapt the Annexes of the Directive to technical progress shall be adopted in accordance with a comitology procedure. The Commission, by amending point 24 of Annex I of Directive 76/769, simply prolonged the derogations granted to Austria and Sweden in the Act of Accession in order to allow them to maintain stricter rules on the use of cadmium than were provided for under point 24 of Annex I of Directive 76/769. Advocate-General Jacobs in *Netherlands v Commission*[443] came to the conclusion that such a derogation was not an adaptation to technical progress and that therefore the Commission could not adopt the measure on the basis of Article 2a of Directive 76/769.[444]

It has to be admitted, though, that it is not always easy to determine the correct scope of an authorisation granted in the basic act. This is demonstrated by the interpretation of Article 6(1) of Council Regulation 2377/90 laying down a Community procedure for the establishment of maximum residue limits (MRLs) of veterinary medicinal products in foodstuffs of animal origin.[445] Article 6 of that Regulation stipulates the conditions and provides the procedure for the inclusion in one of the Annexes of the Regulation of active substances contained in veterinary medicinal products. In *Boehringer v Council and Commission*[446] the Commission on an application by Boehringer added clenbuterol to Annex III of the regulation, however, with the proviso that the maximum residue limits (MRLs) only apply for certain therapeutic indications. The Commission found that it had to add the proviso due to the fact that Council Directive 96/22[447] limited the marketing of substances containing beta-agonists, such as clenbuterol, to therapeutic treatment. The Court of First Instance annulled the Commission act on the ground that by adding the proviso the Commission had exceeded its powers. On appeal, the Court of Justice[448] overturned the judgement of the Court of First Instance and held that the Commission was entitled to add the proviso. Similarly in *Monsanto v Commission*[449], the Commission

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[442] Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations OJ [1996] L 262/201, as amended

[443] Case C-314/99 *Netherlands v Commission*, Opinion of AG Jacobs of 15 November 2001.

[444] For a similar example see Case C-93/00 *European Parliament v Council*, judgement of 13 December 2001, where the Court found that the Council could not prolong the voluntary system on the labelling of beef on the basis of Article 19 of Council Directive 820/97.

[445] OJ [1990] L 224/1, as amended.

[446] Joined Cases T-125/96 and T-152/96 *Boehringer v Council and Commission* [1999] ECR II-3427.

[447] Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, OJ [1996] L 125/3.

[448] Case C-32/00 P *Boehringer v Council and Commission*, judgement of 26 February 2002. See also the Opinion of AG Colomer of 4 October 2001.

[449] Case T-112/97 *Monsanto v Commission* [1999] ECR II-1277. It should be noted that in the virtually identical Case T-120/96 *Lilly Industries Ltd v Commission* [1998] ECR II-2571 the Court of First Instance also annulled a Commission act on the same grounds as in *Monsanto*, however, this time the Commission did not choose to appeal and the judgement has therefore become final.

refused the inclusion of sometribove in Annex II of Regulation 2377/90 on the ground that it contained bovine somatrophine (BST), a substance on which the Council had imposed a moratorium with the result that the substance could not gain market authorisation. The Court of First Instance opted again for a narrow interpretation of Article 6(1) of Regulation 2377/90 by holding that the Commission had exceeded its powers and should not have taken into account the moratorium. Again the judgement was reversed on appeal by the Court of Justice[450] holding that a wide interpretation of Article 6(1) should be preferred and that the Commission could indeed take into account the Council's moratorium.

The disputes reveal that the interpretation of Article 6(1) of Regulation 2377/90 has not been an easy matter for the Community Courts. It has to be noted that the contested acts were implementing acts of general application, which the companies most likely could not have challenged in the Community Courts under Article 230(4) had it not been for the fact that Regulation 2377/90 granted them the right to participate in the procedure leading to the adoption of these implementing acts. This highlights the necessity to provide for adequate procedural participation of individuals in the adoption of implementing acts, even if they are of general application, where the interests of such individuals are particularly affected by the implementing act. Moreover, it shows that only companies with a 'deep pocket' can afford to sustain the expense of lengthy proceedings.

Similar problems to determine the competences of the Commission in the implementation of basic acts arose with regard to the interpretation of Article 3(1) of Council Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.[451]

In the fourth group we find cases, where a legal basis exists, but requires that action be taken before a certain time limit. Article 16(1) of Council Regulation 259/93[452] provides that 'the Commission in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC, shall, as soon as possible, and at the latest before 1 January 1998, review and amend Annex V of this Regulation'. The Commission, by adopting Regulation 2408/98[453] only by 6 November 1998, acted beyond that time limit. Does this

[450] Case C-248/99P *Monsanto v Commission*, judgement of 8 January 2002.
[451] OJ [1992] L 208/1, as amended. See Joined Cases C-289/96, C-293/96 and C-299/96 *Denmark, Germany and France v Commission* [1999] ECR I-1541.
[452] Council Regulation (EEC) 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community OJ [1993] L 30/1, as amended.
[453] Commission Regulation (EC) No 2408/1998 of 6 November 1998 amending Annex V to Council Regulation (EEC) No 259/1993 on the supervision and control of shipments of waste within, into and out of the European Community OJ [1998] L 298/19.

mean that the measure was adopted out of time? Does it also mean that all subsequent amendments are void?[454] This would presuppose that Article 16(1) provides a legal basis that is limited in its temporal scope. Even if the answer is -most certainly -that it does not, it could be argued that apart from a violation of its obligations, the non-action of the Commission might trigger its non-contractual liability under Article 288(2) of the EC Treaty.

Critical cases also can be found where the legislative authority should have dealt with certain issues itself and was not allowed to delegate its legislative power to the implementing authority. In other words, these are cases, where the implementing authority encroaches on the prerogative of the legislative authority[455]. It is submitted that an example of such a critical delegation can be found in Article 1 Directive 75/442[456] on waste. Instead of defining the terms "disposal" and "recovery", Article 1(e) and (f) of Directive 75/442 refers for the definition of these terms to Annexes II A and II B. Both Annexes can be amended by the Commission on the basis of powers granted in Article 17 of that Directive[457]. This practice might be considered as critical having regard to the judgement of the Court of Justice in *Atlanta v Council and Commission*[458]. The Court of Justice annulled the judgement of the Court of First Instance (CFI) on the basis that the CFI had not dealt with the argument that the Council had not defined the term 'operator' in relation to the common market in bananas under Council Regulation 404/93[459] and had therefore made an unlawful delegation. Even though the Court in this case ultimately rejected the argument that the term 'operator' was insufficiently defined by the regulation, this judgement could be of importance for those cases, where the legislative authority leaves the definition of key terms of a legal act to the implementing authority, such as Article 1(e) and (f) of Directive 75/442.

Even if one takes into account that due to the large number of legal acts we examined, some critical cases might have escaped our notice, it is nevertheless obvious that it is a rare occurrence for the Commission to exceed its authority. The reason can be seen in the system of checks and balances that exists within the comitology system. First, an internal control exists within the Commission at several levels. The drafting officer has

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[454] See e.g. Commission Decision 1999/816/EC of 24 November 1999 adapting, pursuant to Articles 16(1) and 42(3), Annexes II, III, IV and V to Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community OJ [1999] 316/45.
[455] Legislation is here understood in the formal sense, as legal acts that are based directly on the EC Treaty.
[456] Council Directive 75/442 of 15 July 1975 on waste OJ [1975] L 194/39, as amended.
[457] See also Article 4(2) of Directive 2000/53 of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles OJ [2000] L 269/43.
[458] Case C-104/97P Atlanta and Others v Council and Commission [1999] ECR I-6983.
[459] Council Regulation 404/93 on the common organisation of the market in bananas OJ [1993] L 47/1, as amended.

responsibility that its draft text stays within the powers granted by the basic act. Moreover, every legal act is subject to the inter-service procedure, which includes the review of the draft by the Commission's legal service[460]. Secondly, Member State representatives in the committee can state objections. Thirdly, interest groups that have access to the draft will voice concerns to the Commission or Member States where they feel the act does not have an adequate legal basis. Fourthly, the EP has the power to intervene in the comitology process when it feels that the Commission exceeds its powers. Due to the mass of implementing acts, it does not seem likely that the EP has or even should devote the resources to scrutinise every implementing act. It seems more likely that the EP will feed on information provided from the outside, in particular by interest groups. The danger of this approach lies in the fact that powerful lobby groups could "hijack" the EP. All the same, it is submitted that the procedure, if operated efficiently, can benefit the protection of minority interests that might be ignored by a powerful alliance of Commission, influential interest groups and a majority of Member States. This is of crucial importance, given the notoriously difficult access to the Community Courts for private litigants under Article 230(4).

4. Conclusion

The findings of this Chapter can be summarised as follows:

- The concept of legislation has a dual notion in the legal systems of the Member States. Legislation in form denotes legal acts adopted in accordance with the procedure provided for that purpose in the Constitution. The specific legitimacy of such acts, and the legal privileges they enjoy, is derived from the characteristics of the procedure in accordance with which they are adopted. The special features of the legislative procedure have led certain constitutional courts in the Member States to require that the legislative act has to contain certain essential elements, mostly defined in relation to the impact of the legislative act on fundamental rights of individuals.

- Legislation in substance refers to acts of general application regardless of the procedure in which they were adopted. The adoption of legislation in substance by the executive is a common feature of all Member States' legal systems. Acts adopted by the executive that are of general application can, however, not claim the same privileges as legislation in form, as the procedure in accordance with which they are adopted does not have the same characteristics as that for

[460] Compare chapter G.

legislation in form. For the same reason, they should also not deal with elements that are considered as being so essential that they are reserved for the legislative procedure. Nevertheless, executive acts of general application enjoy some privileges in relation to administrative acts of individual application.

- The legal system of the European Community contains a hierarchy of norms similar to the legal systems of Member States. Acts based on the EC Treaty are adopted in various procedures in principle by the Council and where the co-decision procedure applies by the Council and the EP. Only acts adopted under the co-decision and assent procedure display the necessary characteristics to be considered as legislation in form. Due to this fact they should be treated differently than basic acts that are not adopted in accordance with these 'legislative' procedures. The EC Treaty has, however, not yet been adapted to take account of this development.

- Acts implementing basic acts are in principle adopted by the Commission under the supervision of committees comprised of Member States' representatives (comitology committees). Where they are of general application they should be considered as legislation in substance. The procedure for the adoption of implementing acts does not display the same characteristics as that of basic acts, in particularly not those adopted in the co-decision procedure. Therefore they should not contain essential elements that should instead be reserved to basic acts. It is for the Court to protect this prerogative of the legislative authority. On the other hand, the implementing procedures allow for a speedier and more flexible adoption of legal acts. The allocation of law-making powers between basic acts and implementing acts should therefore take account of several criteria, in particular the impact on fundamental rights of individuals, the complexity of the issues and the need for flexibility. It is also proposed, in line with the Laeken Declaration on the future of the EU, to make the distinction between legislative (basic) acts and executive (implementing) acts more visible by providing different names for them.

- The adoption of implementing acts of general application adopted by the Commission has to involve the Member States as charged with the application the legal acts adopted, as providers of expertise and as source of legitimacy of these acts. The new comitology decision has introduced a useful set of procedures for this task. The suggestion in the White Paper on Governance by the Commission to abandon management and regulatory committees must on this basis be firmly rejected. The participation of interest groups should be welcomed provided the

procedure is not slowed down unreasonably and that access to such participation is ensured on an equal basis[461]. The basic act should provide for the participation of individuals, and in the absence of such a right the Court, in the adoption of implementing acts of general application where they are particularly affected. The role of the Court in this process is crucial. In particular judicial review for individuals to challenge implementing acts of general application has to be strengthened, if necessary by amendment of Article 230(4) ECT.

- The involvement of the EP in the implementation process should be carefully considered in view of its limited resources. It is suggested that the EP could best make use of such resources by inquiries *ex post*. However, it is doubtful whether it should participate in the adoption or day to day scrutiny of implementing acts. The concerns of the EP that the Commission with the tacit consent of comitology committees is overextending powers that they have been delegated to it by the legislator are largely unfounded.

- From the 800 implementing measures we examined, less than 10 can be considered as critical cases. Further analysis and particularly the interviews with the respective chairs of these committees revealed that these cases could be identified as 'critical', because the legal basis of the implementing act is unclear, the implementing act does not have a legal basis or where doubts exist as to whether the implementing authority correctly interpreted the scope of its powers, actions were not taken within a certain time limit or because the basic act should itself have dealt with the matter, e.g. key terms were not properly defined in the basic act delegating the implementing powers.[462]

- The Commission acts very carefully when it comes to legal matters. Every legal act must be reviewed by the Commission's legal service in addition to the legal experts in the respective DG. Control of legal aspects by Member State representatives is often not very effective, because they lack time and/or legal expertise[463]. However, when it comes to questions of substance, control by Member State representatives is very effective, as their experts' know-how may be superior to that of Commission officials.

[461] See chapter G.
[462] This confirms the findings of an earlier study. See Schaefer (1999).
[463] Compare chapter G.

G. How do comitology committees work: an insider perspective

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1. Introduction

In the previous chapter an effort was made to first elaborate a theoretical distinction between legislation and implementation in order to delineate and empirically test whether comitology procedures are used to resolve issues which are definitely of a legislative nature and should be done by a normal legislative procedure, either consultation or co-decision. It became apparent that the distinction can be well argued from a theoretical perspective, empirically we found it difficult to maintain it and virtually no evidence that comitology procedures were used instead of legislative procedures. In the 800 specific measures we analysed we found only very few "critical" cases.

The original intention was to look at these critical cases in considerable detail through interviews with the chairs and several members of the committees. We decided to carry out the interviews nonetheless, but give them a different focus: to gain a general insight in how comitology committees actually work, on how the question of legislation versus implementation was treated in practice, on practical aspects like frequency of meetings, use of languages etc., and particularly on the role of the chair and how the committees actually do their job.

We selected some 20 committees from the policy arenas from which we drew our sample of 800 measures. Deliberately we focused on committees that were not primarily dealing with routine matters, such as the market committees in agriculture, but committees that are likely to be confronted with rather difficult and controversial matters of policy implementation. Table 1 lists the number of committees, the policy arenas we selected and were able to carry out interviews:

Table 10. Policy Arenas Selected and Number of Interviews

Area	No. of interviews
ENTERPRISE	4
EMPLOYMENT & SOCIAL AFFAIRS	1
INTERNAL MARKET	2
HEALTH AND CONSUMER PROTECTION	2
AGRICULTURE	2
ENVIRONMENT	6
RESEARCH	1
Total	*18*

It was not possible in the short time available to complete all the interviews planned. In the end we were able to carry out personal interviews with 18 chair persons from the committees as listed in Table 1. We also attempted to verify the information from the chairs by telephone interviews with at least one or two Member State representatives on these committees. Getting appointments from committee chairs was often extremely difficult and getting Member State representatives on the telephone proved equally laborious. From the 44 potential interview partners we contacted, we were only able to talk with 21 on the telephone. The remaining 23 did either not return the questionnaires we had sent by e-mail although they had promised to do so, did not respond to our e-mail asking for a telephone interview appointment or could simply not be reached. Particularly in southern Member States, language problems, the availability of the contact persons and the reliability of the information about their co-ordinates caused problems.

Nonetheless, we are certain that we were able to obtain a reliable impression of how committees actually work. This will be presented in the remainder of the chapter[464].

[464] Most of our respondents requested for understandable reasons that the information they provided should be treated confidentially and made it a precondition to granting the interviews that it would not be possible to trace them. Inevitably this will lead occasionally to somewhat vague formulations in the following paper. In contrast to chapters D and E we are also unable to cite date of the interviews and organisational affiliation of the interview partners.

2. Legislation versus implementation in the daily work of committees

For those participating in comitology committees, both as chair or experts from the Commission and Member State representatives, legislation versus implementation is not an issue: *"We prefer and continue to work on a case-by-case basis".*

The Commission side is well aware of the legal basis and its limitations for every measure it proposes. The same can not be said for the Member State representatives, where we found an astonishing ignorance both about the legal basis under which their committee works and the procedures it has to follow. Interestingly enough, of the 18 committees 16 had only one legal act and/or its later amendments as a legal basis. The two other committees however, one in the area of agriculture and one in the area of consumer health protection, worked with 50 different legal acts. For those who worked only with one legal act, it was not uncommon that they would have to use different procedures according to the comitology decision of 1987 and 1999 for different subject matters they had to deal with.

The Commission takes every possible step to ensure that legal grounds for its implementing measures are within the limits of the delegated competences laid down in the basic act. Commonly, the DG's check with the legal service of the Commission, before they adopt a proposal for a measure, complain however, that this review is often rather formalistic due to the limited time that the members of the legal service have available. They also use legal experts in their own DG to make sure that there is no question about the legal basis of a proposed measure.

Member State officials are, with few exceptions, not in the position to do this; they usually are subject matter experts and lack the necessary legal competence, they also lack the time required. They have no choice but to trust the Commission that it has done its homework and they generally do. Nonetheless, 16 of the 21 respondents of the Member States expressed a latent suspicion, that the Commission now and then may overstep its assigned powers, but they could not give any concrete examples.[465]

This reinforces the conclusion from the analysis of the 800 measures: the fears of the European Parliament are unfounded that the Commission, together with Member State representatives, use the comitology procedure to extend the authority delegated to them

[465] An interesting case (C-263/95, 2 October 1998) along this line came before the Court where Germany argued against a measure adopted by a committee primarily on substantial issues, but in the end the Court decided the case only on the formal ground that the documents had reached the German representative a few days too late.

for implementing measures by the legislators[466]. This suspicion has been one of the driving forces in the long conflict between the European Parliament and Council over the question of comitology.

With respect to the general role of the EP in implementation, all respondents (Member States and Commission) expressed the view that the Parliament was ill-equipped to participate in the comitology process. MEP's lack the expert knowledge required, they lack the time to read the material and they could not appreciate the intricacies of policy administration and implementation. Members of Parliament should use all the resources at their disposal and concentrate on their legislative responsibilities to do a good job there, leaving implementation to the Commission in co-operation with the Member States. As one chair, -asked about a stronger role of the European Parliament in implementation responded: *„Oh my God, no! -the whole system would come to a halt"*.

3. General and practical aspects of committee work

Very little is known about the practical aspects of how comitology committees work. We expanded our interview guide for this reason and added questions of a more general and practical nature.

As expected we found great differences between committees on a number of practical questions like the frequency and duration of meetings, the number of measures adopted, the volume and mailing of preparatory documentation, language facilities etc. These refer particularly to the following:

- *The frequency and duration of the meetings:*

Some committees meet only once or twice a year, others meet every two or three weeks.

This depends entirely on the workload and the issues they are confronted with in our sample. 90 % of all committee meetings last a day or two. There are only a few cases where the meetings last less than a day. This is certainly different in the market committees in agriculture which meet in a weekly or biweekly rhythm. Here meetings frequently only last half a day. Both Member State officials and Commission chairs prefer a one-and-a-half or two-day meeting, because it allows for informal contacts during the evening through dinner and facilitates discussion and reaching consensus.

[466] Compare Schaefer et. al, (1999), pp. 21-22.

The trend seems to move to one day meetings where Member State representatives arrive in Brussels in the morning and leave again in the evening. This is partially or perhaps mainly the result of budgetary restrictions in the Member States[467].

- *The number of measures that are adopted at a meeting and the time used to reach a conclusion:*

At an average meeting four measures are usually discussed and perhaps approved. There are some cases where it is rather more 8 –10, but these are exceptions.[468] However there are cases where it may take several meetings to approve a single controversial and important measure. This seems to be the case particularly in committees in the area of environment where one chair indicated that it often takes months, sometimes years, before a specific implementing measure can be adopted, following many meetings and many elaborate and controversial discussions in the committee.

- *The amount of preparatory documentation and the timing of the mailing:*

On average roughly 100 – 150 pages of preparatory documentation are sent out. There are extreme cases however, illustrated by a Member State official who responded to this question: *„I have difficulty to put it in pages, I'd rather put it in kilograms"*. The quality and the importance of the documentation that is made available to the members of the committee also varies greatly. There maybe some key pages, perhaps 10 – 20, and extensive background information and documentation. In one case a Member State official reported that the Commission sent out the full text of a legal act of one Member State which was to be discussed.

The rules of procedure of the committee should determine how long in advance the Commission has to make the documentation available to Member State representatives. Most chairs indicated that they usually follow these rules; in a few cases we also found a rather indifferent attitude, as one put it: *„We send out when we send out"*. This relaxed attitude on the part of the Commission is not appreciated by Member States representatives who often complained that they did not have enough time to examine the material carefully and to carry out consultations within their ministry and/or with

[467] The Commission pays the travel expenses for one representative of each Member State. Overnight and per diem as well as the expenses of additional representatives must be covered by the Member State government.
[468] This would be certainly be different in the area where you have a large number of routine measures adopted as implementing acts like in agriculture. In 1998 the Commission adopted 2622 regulations of which 90% were in agriculture and of which again 78% were routine implementing measures. See Falke in Joerges/Falke (2000), p 47.

other ministries in their own government.[469] Distribution of documentation is done generally by e-mail or on special internet pages. In most cases three languages, English, French and German are being used. However, if the documentation contains legal texts that are to be adopted in the meeting, the Commission will make these texts available in all official languages. We found one committee where all documents were regularly mailed in all official languages.

- *Simultaneous interpretation during meetings:*

Interpreting facilities seem to be available in committee meetings, though not in all official languages. Usually 6–9languages can be spoken and are being translated into English, French, German and sometimes Spanish and Italian; translation into other languages: *„whatever is available"*. Some Member State representatives, particularly from the Mediterranean region, complained about the lack of interpretation in their languages and, when it is available, about their quality. They feel that their ability to work in the committee, to express their point of view clearly, is hampered by the lack of interpretation. Sometimes the lack of interpreting facilities is used by Member States representatives as an opportunity to put pressure on the Commission or to use formal arguments to delay or block agreement on policy substance. One respondent from the Commission reported the case of a representative from a large Member State who argued in the meeting that the lack of interpreting facility into the mother tongue of his Member State prevented him from participating in the meeting. Later during coffee break, it became apparent that the official was fluent in one of the languages for which interpretation was available.

There was agreement (with very few exceptions) that all matters that are dealt with in these committees are *"important"* and *"very difficult"*. The exceptions are committees in agriculture, where both Commission and Member State representatives consider most of their work not as difficult, but as routine, perhaps because *"these difficult things can become routine after a while"* as one respondent put it.

There seem to be very few meetings, where all Member States are represented. Most frequently missing are representatives from Luxembourg and Greece, but other Member States occasionally also fail to be present. In one instance a representative from a mediumsized Member State informed us that although their country had made concrete proposals for the next meeting, and since the next meeting was a two-day meeting, they

[469] Compare Bücker/Schlacke in Joerges/Falke (2000), p. 182.

were unable to attend because of budgetary constraints, as their government would have had to pay the overnight expenses.

Budgetary constraints increasingly become a problem for the proper functioning of the committees. Since the Commission pays the travel expenses for only one representative per Member State, the possibility of Member States to send more than one expert, because of the topics to be discussed can not be covered competently by one person alone, is becoming more and more limited. The countries which usually have the largest delegation are Austria, Belgium, Germany and the United Kingdom. The trend to one-day meetings with no overnight stay also limits informal contacts, which were viewed by all respondents as very important for both horizontal and vertical exchanges of information, co-ordination and efforts to resolve problems.

People representing a Member State do this usually for a longer period of time and fluctuations within the composition of committees is relatively small. This applies equally for small and large Member States. Representatives on comitology committees also meet in other fora: in Council working parties, in expert committees of the Commission or in other international contexts (OECD, for instance). They develop a „corps d'esprit": meeting in different fora encourages personal friendships and provides avenues for co-operation and possibilities to exchange information. As one respondent put it: *„We are akindofclub"*.

On the basis of the EEA and/or EFTA agreements non-EU representatives have the right to participate in committee deliberations as observers without a vote. In some cases accession country representatives may also be invited as observers. We received conflicting responses from Commission officials and Member State representatives on this question. The Commission officials, with only very few exceptions, stated that EEA, EFTA or accession country representatives were not present. In contrast, almost all Member State representatives indicated that on their committees, where it was appropriate, EEA representatives and in some cases accession countries, were regularly present and usually participated in discussions. A strange contradiction, which is not easy to explain. Perhaps Commission chairs only had "voting session" in mind while Member State representatives thought of all aspects of meeting including informal "expert" meetings[470].

All legal acts establishing comitology committees stipulate that the committees should adopt their own rules of procedure. In reality, there was great uncertainty (both on the Commission and the Member State side) whether the committee had in fact adopted

[470] See this chapter.

rules of procedure and what they were, in several cases they could not be found. Rules of procedure, if they exist and if they are known, do not seem to play a very important role in getting on with the work of the committees. A *"satisfactory"* practice had developed overtime, all the participants knew the *„rules of the game"*. There are only a few instances where rules of procedure had become important and where discussions about procedures seemed to come up on a regular basis, probably indicating that the procedural debate overshadowed underlying substantive conflicts.

According to the new comitology decision of 1999, the Commission was to develop standard rules of procedures for all committees to be subsequently adopted by each committee filling in such details as time frames for sending out documents, etc. The standard rules of procedure were published in early February 2001[471]. At the time of the interviews, in September/October of 2001, only 4 of the 18 committees had adopted new rules of procedures. The impression could not be avoided that particularly Commission officials were not very happy about this obligation and took their time to take the necessary steps to complete these requirements of the new comitology decision, reflecting the general attitude *"we know how to do business, all of those involved know it, why bother with formal rules"*.

An important aspect of committee work is voting. In management and regulatory procedures, voting is required and the general attitude of al respondents was *„yes, votes must be taken and are taken"*. In some cases, however, the chair attempts to arrive at a consensus which he/she summarise and enters in the record, that this was approved with qualified majority, or whatever the necessary voting requirements are. Member State representatives do not seem to object to this procedure.

Trying to reach consensus is the name of the game. Chairs never proceed to a vote, when they are not certain that they get the necessary majority. They go to any length in making sure that a consensus is reached in the first place. The consultation phase between the Commission and the Member State representatives can sometimes last up to 1.5 years until the draft is finally ready for being put on the agenda of the comitology committee meeting for a vote. As one chair put it: *"Anything that has to be done quickly ends up to be very complicated."*

[471] OJ C 38/2001 of 6 February 2001, p. 3.

4. The Role of the Chair

Chairs are important for the success of committee work. All comitology committees are chaired by a Commission official, usually he is a director or a head of a unit. Most of our respondents have chaired meetings for many years, at least 3 or 4. In some cases chair persons are experts in the subject matter the committee deals with; in others, they are experts in chairing and in successful negotiations. The latter rely for expert knowledge on their colleagues who are familiar with all the practical details of the subject matter to be discussed. Among the 18 chairs interviewed about half of them could be considered subject matter experts, the others were generalists with a great deal of experience in chairmanship.

What makes a chair a good chair? In the eyes of the Member State representatives it is good diplomatic skills, excellent chairing skills, being able to keep the meeting together, deliver good summaries and capable of leading the group towards a consensus or compromise. In the eyes of Commission respondents: to get the measures approved with a minimum of changes and adjustments and avoid having to send a measure to Council. The most important explanation for Commission officials' efforts to avoid at all costs the necessity to refer proposed measures to the Council are:

- the adoption of the measure will inevitably be delayed or in the case of a IIIb committee might never be adopted, if Council decides with simply majority against the measure;

- the Commission might have to make;

– from their point of view -undesirable political concessions;

- the case might arouse public interest, which could force the Commission to considerably modify or abandon its implementing measure, particularly as a result of pressure from the European Parliament.[472]

In order to reach compromise it is frequently necessary to contact Member State representatives before meetings and between meetings and to discuss problems they have with specific proposals. In some cases this is done by the chair; in about half the cases the chair delegates this to his colleagues, who are experts on the subject matter.

[472] The sparse empirical evidence available suggests that the Commission is indeed very successful in avoiding a referral to the Council. In the Commission Report on Committee Activities in the year 2000 (OJ C 37/2002 of 9 February 2002), p. 7 only 6 cases – about 0,2% -were mentioned. An earlier paper reported only 7 cases – also about 0,2%. See Ciavarini-Azzi (1996), p. 6. See also Falke in Pedler/Schaefer (1996), pp. 139-140.

The latter are responsible for carrying out detailed discussions upfront, trying to find a compromise or convince sceptical Member State representative of the necessity of a specific solution. Only when things get stuck and when perhaps some more prestigious Commission official could resolve the matter, the chair intervenes.

Every committee has a secretary, a Commission staff member, who plays a crucial role: he/she keeps the minutes, makes sure invitations are sent out and all practical matters arranged. The secretary knows best the Member State representatives and their problems and is able to resolve many problems before they come up and need to be discussed in the committee. In some cases we had the feeling that the secretary of the committee was more important for the success of the committee work than the chair.

The job of the chair is not always easy. Most of the chairs interviewed indicated that there were one or two *"trouble makers"* in the committee. They did not cause difficulties because of specific national interest, they simply were *"difficult characters"*. One chair told us that preparation and conduct of meetings can be very daunting but satisfying.

This job can be very difficult, particularly if specific decisions are necessary, required by legal acts and have to be done in a certain time frame. In other instances international obligations force the chair to pursue a policy that is not necessarily in the interest of the Member States or a group of Member States.[473] In this case, the task of a chair to lead the committee to adopt a measure which they are not enthusiastic about and reach a consensus about it, is a real challenge.

5. The functioning of comitology committees

Probably as a result of our choice of committees, i.e. committees that generally deal with important issues of policy implementation, we found the common practice that the comitology meeting is preceded by a more informal discussion generally referred to as „expert committee". In these "expert" meetings, the issues on the agenda are discussed informally, efforts are made to reach a consensus, which then will be finalised in the official "comitology" meeting usually with a formal vote. Frequently these „expert" meetings are not chaired by the chair, but by the secretary or subject matter experts from the Commission staff. Occasionally other matters that are not of immediate concern for policy implementation or adoption of specific implementation measures, may be discussed in these "expert" meetings and in this sense, the group may indeed be used by

[473] This is most likely to occur in the area of trade, enterprise and environment.

the Commission as an expert committee[474]. The informal character of these "expert" meetings contributes to the development of the „esprit d'ecorps" mentioned already above.[475]

Member State representatives do reflect national interest in both types of meetings. They can not go against instructions they have received before coming to the meeting, particularly in the case of difficult implementing measures where highly divergent national interest confront each other, as for instance the area of environmental policy. Instructions in other cases are sufficiently vague, to allow Member State representatives to agree to a common position. Difficulties arise when some Member State representatives consider their own position as superior to any other which may lead to tension in the committee and may force a formal vote in the end, isolating the one or two Member States who take this position.

Third parties, interest groups, industry and NGO's are always trying to influence the work of committees, both with the Commission and in the Member States with the Member State governments. This is normal procedure. As one chair put it: *„We learned to live with it, it is a "daily exercise"*. It also seems that in some instances Member State representatives act very much in the interest of strong national interest groups and have for this the backing of their national government. Commission officials in preparing their measures regularly actively seek the contact with outside expert know-how, both in interest groups, industry and NGO's. They see this as an additional source of valuable and important information, which increases the acceptance and the applicability of the proposed measures. In one committee it was practice in the past that industry representatives participated as observers in the meetings, particularly the „expert" part, but not when votes were taken. This has been abandoned with a new chair. The general rule is that only Member State representatives and in some cases representatives of EEA or accession countries participate in the meetings.

Coalitions between Member States do occur, but they are always based on common national interests and not on personal friendships. A common cultural background is an important factor in these coalitions. Typical coalitions are Austria and Germany, the northern countries, or some southern countries, the latter in varying combinations.

Member State representatives frequently expressed the view that the Commission enjoys a considerable advantage vis-à-vis the Member State officials in committee meetings.

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[474] The new "standard rules of procedure" specifically provides for this possibility in Art. 2, 2b, OJ C 38/2001 of 6 February (2001), p. 3.
[475] See Bücker/Schlacke in Joerges/Falke (2000), pp. 192-196.

The Commission has carefully prepared its proposed measures and the Member State officials often do not have the time to carefully check it. Commission respondents saw this somewhat differently: Member States representatives tend to leave it up to the Commission to do a good preparatory job, which they then proceed to criticise in the meeting. In cases where negotiations on specific measures are rather difficult and go on for months, Member State representatives are usually experts in this field and have sufficient background information and preparation to engage Commission officials in intensive discussions. In these situations, the Commission sometimes feels at a disadvantage since some Member State officials may be better prepared, may have better expert knowledge than the Commission staff. In the end, all agree that the process of discussion will lead to the best possible and acceptable solution, usually in the form of a compromise.

Against the background of the longstanding conflict between Parliament and Council over comitology we explored the questions of the relationship between committees and Members of Parliament. Even before the new comitology decision of 1999, informal contacts between Parliament and Commission staff, but never on the level of the chair, seems to have been a widespread practice. Now, on the basis of the comitology decision of 1999, the European Parliament has to be informed on committee business on a regular basis. It shall receive agendas for meetings of the committee, the draft measures submitted to the committee and about the results of voting and a summary record of the meeting.

All chairs are aware of their obligations to provide this information to the European Parliament. It is common practice that they send the documentation to the General Secretariat of the Commission, but do not know what happens to the information afterward. As one chair put it: *„The papers seem to disappear in a black hole“*. Feed-back from the European Parliament is rare, although all chairs insisted that there were informal contacts with the respective parliamentary committees, usually by a support member of the team and often not with Members of the Parliament, but with staff members of the parliamentary committee. These contacts often are the result of personal good relationships, either with MEP’s or with staff members. There also seemed to be occasionally attempts of individual Members of Parliament to influence committee work, usually in case of a politically important decision.

The new rules on transparency in the new comitology decision of 1999 (Article 7) require the Commission to publish a list of all committees, which assist the Commission in the

exercise of its implementing powers[476]. The Commission has to publish an annual report on committee work from 2000 onward. The first report was adopted by the Commission on 21 December 2001[477]. Furthermore, the general rules of access to EU-documents,[478] also apply to committee documents and the Commission should keep a public register of all the documents it referred to the European Parliament. Transparency of or at least access to information about committee activities has improved and became much easier. Some Commission respondents expressed concern that these new rules on transparency may negatively effect the way their committee was doing business. Almost 75 % of the chairs felt, however, that Member States representatives will not become more careful, rather that things will go on as they have in the past. It is already common practice to produce two sets of reports for committee meetings: an elaborate one for the members of the committee and a shorter one for the European Parliament and the public. Moreover, as many Member State representatives regularly brief interested parties in their country about committee activities, several chairs have now started to make committee business (agendas and decisions) available on the internet. This practice varies greatly from one committee to the other and depends largely on the attitude and views of the chair. When the rules on transparency of the comitology decision 1999, the new general rule on access to EU documents and the posting of committee business on the internet have become general practice, the comitology system will certainly have lost much of its opaque nature which characterised it in the past.[479]

6. Conclusion

The findings can be summarised as follows:

- The Commission acts very careful when it comes to legal matters. Every legal act must be reviewed by the Commission's legal service in addition to the legal experts in the respective DG. Control of Commission proposals through Member State representatives is not very effective with respect to legal aspects, when it comes to questions of substance it is very effective. In the first case they lack time and/or legal competence, with respect to substance, their experts know-how may top that of Commission officials.

- Working methods and styles differ greatly from one committee to the next. There are differences with regard to the frequency of meetings per year, the number of

[476] List of committees, which assist the Commission in the exercise of its implementing powers, OJ C 225/2000 of 8 August 2000, p. 2.
[477] OJ C 37/2002 of 9 February 2002, pp. 2, 9.
[478] OJ L 145/2001 of 31 May 2001, p. 43.
[479] The move to increase transparency has been strongly supported by recent court decisions. Compare chapter F.

measures discussed during a meeting, and how long it takes to reach agreement on a specific measure. There are also differences with regard to the rules of procedures and how they are used. Most important are the differences in working style, the way decisions are reached and decided. Here, the chair and equally important the secretary of the committee play the key role.

- Both chairs and Member State representatives agreed that the Commission is in the driver's seat when it comes to

  - knowing the rules of the game;

  - knowing the subject matter;

  - albeit with some exceptions;

  - preparing the ground for a favourable decision.

- While Member State representatives and the chairs have a different perspective on a number of practical issues like sending out of documents, translation and interpretation facilities or participation of EEA and accession countries, there is agreement on the following

  - if legal texts need to be approved they will be available in all languages;

  - most of the matters discussed within a committee meeting are viewed as "difficult" and "very important";

  - third parties, interest groups, industry and NGO's are always trying to influence the work of the committee;

  - good diplomatic and chairing skills rather than expert knowledge are important characteristics for a good chair.

- In all the committees every possible effort is made to reach a consensus. Votes must officially be taken, but it seems that they are only taken when the chair is certain that he/she has a qualified majority or when a full consensus is not possible. Both Member State representatives and Commission officials are quite content with this procedure.

- Budget constraints both in the Commission and the Member States increasingly impair the proper functioning of committees. The Commission pays the travel

expenses for only one Member State representative and Member States follow this policy. Meetings lasting for more than one day become ever more difficult, reducing the possibility of informal discussions in the evening that seemed to be very important in reaching a consensus. As a consequence, as time for discussion is being reduced, it becomes more difficult to reach a consensus and this reduces the quality of the work of committees.

Comitology committees are highly efficient instruments that carry a heavy work load. They are essential for the horizontal and vertical co-ordination and co-operation between the administration of the Member States and Commission services in the joint implementation of EC policy. Comitology committees are sometimes seen as an instrument of the Council to monitor and control Commission implementing policy. The evidence we were able to assemble suggests that comitology committees are primarily fora for negotiating a consensus or compromise on implementing measures that is acceptable to most if not all Member States. They are also fora for deliberation where in difficult discussions among experts – both Member States and Commission – solutions are sought which might take months and in extreme cases even years. Although not present at the meetings, private and public sector interests and NGO's successfully have an impact on the results. At the end of this process of negotiation and deliberation there is almost always a vote which the Commission rarely looses.

Successful committee work means discussing, negotiating and compromising until a consensus is reached, perhaps not the best one, but one with which most Member States and Commission can live with. The comitology committee is undoubtedly an effective and efficient instrument to solve problems of policy implementation in a heterogeneous multi-level system of governance.

IV. CONCLUSIONS AND POLICY IMPLICATIONS

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1. Introduction

How legitimacy is created and maintained in a political system is one of the classical question in political and the social sciences. It is also one of the topics that has attracted considerable attention among those analysing the EU. However, most of the analyses of the legitimacy of the EU so far have not been based on extensive empirical research, but have been carried out following major constitutional reforms of the community or were based on one or two specific case studies or were focusing on the formal organisation of the EU. In this project the ambition has been to try and fill this gap of knowledge by looking deeper into the every day life of the work of the committees, trying to get behind the official scene of decision making.

In most political systems the every day work of institutions such as the government and the parliament is handled by different types of committees, some of which have a formal and fully recognised position while others are of a more informal type. The existence of and the problems with legitimacy regarding committees is of course not news to anyone – already 50 years ago the British political scientist K. Wheare published a book on the British system with the title 'Government by Committee'[480], where he argued that the British committee system was hampering and sometimes even surpassing the power of the government and of the parliament. However, this old story of governments, or any other organisation for that matter, being controlled by an informal structure, creates new problems and breaks ground for new ideas when it is applied to a supranational level and the problem of legitimacy of committees takes on yet another dimension.

As the preparation of and the actual decision-making is often taking place in one or several of the more than a thousand of committees working within the institutions of the Community, the EU also has to face up to this problem. In fact, even the Commission tends to point its finger at the committees as being one of the major problems concerning the legitimacy of the Union: 'the opaque and confusing process of comitology which tends to favour a limited group of powerful and professional actors in any given

[480] Wheare (1955).

policy area'.[481] Furthermore, politicians are not believed to be in control since too much emphasis is put on the informal proceedings taking place before and after formal decisions, making politicians rely too much on experts and scientists.[482]

In an ambition to try and find out how accurate this characterisation is, we selected a few committees focusing on committees with a connection to the Parliament, the Council and the Commission – i.e. working groups in the Council, comitology committees and standing committees

The problem of legitimacy and democracy in a supranational government

As demonstrated by the fusion theory, it can be said that when integration reaches certain levels and is given a certain scope it is no longer possible to talk about one level being superior to the other one, nor will the influence be extended in one or the other direction; consequently sources of legitimacy will have to be found in both directions. This means that in a supranational government, because it has not been built on the image of a united people controlling a territory, legitimacy generated by national government will not always be complementary to the one created by supranational institutions, instead conflicting legitimacy processes seem to be at work. For example, a national government may 'blame' the European Union when it has to introduce drastic changes -changes that otherwise would have been difficult to carry out and to get acceptance for from the public. Institutions and processes which on a national level support each other, working towards creating legitimacy for the political system as such may not have the same effect when linked to a supranational level or copied on to a supranational level. Thus, there are no easy roads to travel for those who want to improve the legitimacy of the European Union, especially since the concept of legitimacy is far from clear.

In defining legitimacy, two different methods are normally used. The first one, from a sociological perspective, stresses the extent to which the public is prepared to accept government's ruling. The other one, from a legal perspective, is emphasising whether the rulers have established and are adhering to predefined rules and regulations concerning public decision making. In other words, what goes into the decision-making machine as well as what comes out of it of importance and it is possible to argue that non democratic governments have legitimacy as well as democratic ones. But when legitimacy is applied

[481] Lebessis/Paterson (2000), p. 15. However, it should be mentioned that the work done be the previous forward unit in the commission was not always presenting opinions that was shared be the Commission as such.
[482] Ibid.

on democratic governments the two concepts -legitimacy and democracy -become closely linked.

However, although legitimacy and democracy are closely related concepts, democratic governments can take on different shapes and sizes thus generating political legitimacy in quite different ways. But, as was revealed in the introductionary chapters of this report where previous research and theory in the field of democracy and integration was presented, four central concepts have emerged -accountability, openness and transparency, effectiveness and efficiency and, finally, checks and balances. It is now time to return to these four concepts and elaborate on their meaning and how they can be tied to the empirical result and the idea of a deliberative democracy[483].

2. Democratic accountability

Basically all democratic governments derive legitimacy from the people, either directly or indirectly, and ultimately if the people is not pleased with the rulers they can remove them from office. In a parliamentary system this is seen as a simple chain of command – the parliament is responsible to the people and the government is responsible to the parliament, in a power sharing (presidential) system the picture is more complex and an 'accountability game' is sometimes played out by governmental institutions when deciding who is accountable for what and to whom. And in a system where competing legitimacy strategies are possible, the '(con)fusion' of the situation may become even more complicated.

This concept has attracted attention during recent years. The Commission's White Paper on Governance listed it as one of five major principles of good governance, but defines it in a rather formal sense: accountability requires that the role of the legislative and the role of the executive should be clearly separated, that institutions must explain and take responsibility for what they do and that Member States should also assume their responsibilities under the Treaties[484]. A more useful definition for our purposes can be found in Eriksen and Fossum. To them, "accountability" means that decision-makers can be held responsible by the citizenry and that it is possible to dismiss bad or incompetent rulers:

[483] Compare chapter C.
[484] White Paper on European Governance of the Commission, COM (2001) 428 final, p. 10.

> "What, then, is required is that basic liberties are guaranteed and that people also have participatory rights to initiate, influence and object to proposals in formal as well as in informal assemblies"[485].

In today's complex system of decision-making which has been developed in the European Community this requirement is difficult to comply with. Most decisions are the outcome of a more or less extended process of negotiating and bargaining in different and between different policy-making arenas. An important aspect is the traceability of binding decisions in such a complex system, i.e. whether it is possible to trace the responsible actors or institutions and to hold them accountable, or whether the system resembles a black box which produces -as the European system of governance does -an impressive number of rules and regulations of all kinds. In a system of that type it is difficult to find out who initiated what, who influenced it, who participated in the final decision and who should be in the end held accountable. Given the fundamental structure of the European system where Member States play a crucial role, not only as masters of the Treaties, but also as masters of decisions of a legislative and executive nature in the Council and in comitology committees. With the increased legislative role of the Parliament, particularly after the Amsterdam Treaty, it has become even more difficult to identify those that can be held accountable and responsible. In both institutions, the Council and the EP, committees play a key role. Hence, accountability in both institutions is closely linked to role of committees within them.

It is of special importance in this context whether experts, specialists and civil servants are held accountable to politicians or whether the buck is just passed around between politicians and civil servants belonging to different institutions.

2.1. Democratic checks and balances

Legitimacy in democratic political systems is also based on complex mechanisms through which institutions check and countercheck each other. Even in parliamentary systems, although the government is accountable to the parliament and can be removed by a vote of no confidence, in many cases the government can dissolve the parliament. In power sharing systems the control exerted by the public institutions over each other is even further elaborated and checks and balances are at least equally important as accountability in generating legitimacy for the system.

[485] Eriksen/Fossum (2000), p. 21.

Furthermore in any democratic system the role of the opposition is essential to the creation of the legitimacy of the system as such. One of the most important functions of the opposition is to control the government, to point at the weaknesses in the government policy as well as the government's general performance. A government where everyone is part of, or taking part in decisions on the ruling side, may soon become corrupt and loose its legitimacy in the eyes of the public. Every democratic systems therefore needs free and independent institutions that can oppose and challenge current policy.

In the EU context, this concept refers to the way by which decisions by actors are checked and controlled by others, to conflict resolution, to how co-ordination and co-operation between actors is arranged and how a decision, consensus or compromise is reached. It means first inter-institutional checking and balancing between the three major actors in policy decision-making, Council, Parliament and Commission. An intricate net of cooperating and co-ordination mechanisms between these institutional actors practically make it impossible to identify which institutional actor could impose its will on the other. Results are always the outcome of a compromise. Secondly, checks and balances are also important within institutions, particularly in Council where checks must assure that no Member State is pushed to the wall. Even if it is a small Member State, its arguments must be listened to, debated and taken seriously. Checks and balances is about the protection of minorities, small or a small number of Member States. Voting is only the last resort, every possible effort must be made in debate to find a solution, a compromise which most can live with, and is a last resort only if one or two Member States cannot be convinced, then the majority should prevail. The name of the game is the search for a consensus. Working styles and modalities in comitology committees are similar to that of Council working parties. In the standing committees of the Parliament the question is how conflicts between political parties are reconciled and national preferences are balanced.

In other words, it is easy to see that the EU from a 'constitutional point of view' has developed into a power sharing system but, when we take a look behind the official scene, do we also find that this is the reality or do certain interests effectively dominate? Or, ultimately are the informal checks strong enough to add up to a well balanced system?

2.2. Democratic effectiveness and efficiency

The output side of the government activity has always, as developed in chapter B.[486], been an important element in legitimacy building in any type of government. The question here is to find a ruling system that not only takes decision but also finds solutions that are accepted by the people affected and has impact on the society as a whole.

This concept is problematic in the sense that there will always be a trade off between reasoned debate and legitimacy on the one hand and effective and efficient decision-making on the other. In functional terms efficiency means that decisions have to be made on time. The citizenry expects that government delivers, solves problems and does so on time. Deliberative governance requires debate and that takes time. Effective governance in a supranational context implies that the committees, the standing committees in the Parliament, the working parties in the Council and comitology committees effectively facilitate that decisions are made, that consensual solutions of problems are found and that fora are provided for open discussion, arguments and counter-arguments, i.e. a reasoned debate. However, most important of all is finding solutions to problems which are more efficient and effective than what could been achieved on a national level.

2.3. Democratic openness and transparency

Openness means in the first place that those who are effected by decisions have the opportunity to participate in shaping them. Inclusiveness requires that the preferences of interests that are affected by decisions are taken into consideration. Moreover, they ought to be included on a fair and equal basis. In the context of the EU committee system, this refers to the question whether and to what extend representatives of civil societies are involved in decision processes. Are they listened to, are they heard, are they taken seriously and is this done on a fair and equal basis? Transparency means that the process of arriving at conclusions and decisions should be open, or at least, that information should be accessible about how it was reached, who took what position, who argued in what way. Much of the debate on transparency is concentrated on opening up proceedings in the Council and in other decision arenas to the public, the media and interested parties. We feel that this is the wrong emphasis and particularly with respect to committees in the Council and comitology committees. Instead, the key issue is "legibility", "traceability", "visibility" and "understandability", the possibility to

[486] Compare B. 3.

"reconstruct" the decision, the ability of the public to find out who took the decision, who took what position in the debate and who was in the end for the decision or who voted against it. The public's business might have to be carried out sometimes behind closed doors, but then it should be possible afterwards to find out who took what position and how was the decision arrived at. If committee meetings and in the Council particularly COREPER and even at the ministerial level would always be open to the public, the debate would move to the coffee breaks and hallways away from the arena where reasoned debate can take place. In the Parliament it is naturally different, its plenary sessions and standing committees are as a rule open to the public, more precisely, the EP invites interest groups and even requests other institutional actors to participate in its meetings thus providing a general forum for a wide debate.

Openness and transparency has a third dimension: the decision-making process has to incorporate expert know-how. Today, decisions are extremely complex and require a high scientific or technical competence to carry out an open, transparent and reasoned debate.

3. Supranational accountability in practise

On first sight, the European system of Governance would score very low on any accountability scale. Decisions are made in a very complex system of negotiation involving the Member States and European institutions. In both, a plethora of individual and group actors participate in countless horizontal and vertical, formal and informal co-ordination meetings, making it almost impossible to assign responsibility to one particular institution or actor. Moreover, Brussels is far away in the minds of the citizens of the European Union. What happens there has only recently received increasing attention by the media and the average citizen has great difficulties to understand what is happening and why and who is taking the decisions. Still today, national politicians and media love to use the phrase "Brussels decided" or "it was decided in Brussels". The latter, perhaps because they do not know it better or think their reader would not understand it anyhow. The first often, because they want to obscure their own role in shaping the decisions, thus, escaping for being held accountable.

Again on first sight, the European Parliament would be expected to score high on an accountability scale: Its members are elected directly, and are presumably accountable to those who have elected them and every five years the elector has the chance to throw the rascals out. Closer examination of the daily reality is much more complex as chapter E. on Parliament demonstrates: the public is hardly interested of what happens in Parliament except in a controversial debate with high visibility, like BSE, fraud or when

the EP tries to vote the Commission out of office. The media and probably even those directly affected will take little notice when Parliament fights a "pitch battle" with the Council over the money that is to be spent on the LEONARDO or SOCRATES programmes.

Members of Parliament do try to keep in contact with their constituencies, spending as much as three days a week there, mostly on weekends. The increasing legislative load of MEPs makes this ever more difficult. Christine Neuhold also reports that visitor groups to Strasbourg and Brussels represent an important link between what happens in Parliament and the public. But these groups are highly selective, consisting primarily of politically interested, motivated and active people. Moreover, it will take several generations until a significant percentage of the population has had a chance to meet and visit their MEP. Nonetheless, these contacts – one or two groups per week -provide the opportunity for MEPs to explain and defend the positions they have taken and the decisions that they have participated in shaping. Defending and arguing ones position is an important aspect of accountability[487].

Chapter E. also stresses the important role of interest groups in committee proceedings. Interest groups, representing civil society acting for their "constituents" actively engage in debates with parliamentarians. They provide them with information, they are often contacted by MEP and committee staff for information, they attend committee meetings and one can sometimes not escape the impression that some MEPs are "highjacked" by interest groups. The question how representative these interest groups are, how fair, and equal their participation and their involvement is in shaping decisions is a difficult question to answer. Clearly, economically strong groups or groups, which have a strong voice in society have stronger influence than minorities or interest groups with few economic resources. But the opportunities are there, interest groups are using it and members of committees of Parliament are open to interest groups and the latter try to have an impact on the shape of the decisions.

Member State representatives in Council working parties are accountable to their respective governments. The governments of the Member States in turn are accountable to their electorate. But the electorate has very little means to follow, monitor and even less to control what their governments and their representatives do in Brussels, much less the opportunity to "punish" them. It is difficult to think of cases where a Member State government lost a vote in parliament or a popular vote because of what it had done

[487] Eriksen/Fossum (2000), p. 21.

or not done in Council or how it had instructed and guided its representatives in Council working parties.

Council working parties are not open to the public, nor are they open to the interest groups. But interest groups know very well what is taking place, what issues are taking centrepiece and they try to influence the positions of national governments by lobbying in the national capitals. They also try to get information from and feed information to the staff members of the permanent representations[488].

The question of accountability of members of Council working parties is further complicated by their role perceptions. The authors of chapter D. found strong evidence that they are frequently involved in role conflicts. On the one hand, it is their task to argue and defend their government's position[489]. On the other hand, they have no choice but to become frequently the representative of a compromise in Council to their own national government. Particularly the staff members of the permanent representations, the attachés and sectoral experts, due to their daily interactions with colleagues from other Member States and in view of their relatively long tour of duty tend to become members of a "club". *A corps d'esprit* develops across national boundaries with shared beliefs and values and with shared objectives to "*get the job done*", to reach a compromise. As negotiations in Council drag on trying to find a compromise or consensus, working party participants initiate and manage a parallel renegotiation process of their own government position. They are in constant contact via telephone, e-mail or special telegrams with their ministries in an effort to adapt national positions, to redraw the lines of what can be accepted in order to reach compromise. Empirical evidence presented in chapter D. strongly supports the hypothesis that working groups are not predictable intergovernmental battle grounds but sites of inter-Member States, inter-institutional and ideological mediation[490].

Comitology committees seem to work in a vacuum of accountability. Hardly anyone knows that they exist, very few of the proposed measures they endorse ever get public attention unless it is something spectacular like BSE. No one knows who the actors are and very few people understand how the system operates. Nonetheless, Member States representatives in the committees are accountable to their government. They come with instructions, which have been negotiated in their government, and although they may be often rather vague, it is nonetheless difficult for a Member State representative to strongly deviate from them. A process of continuous negotiation, parallel in the

[488] See chapter D.
[489] Compare Schaefer et. al in Eipascope (2000/3), pp. 29-35.
[490] See chapter D.

committee and in the national government, characterises this procedure just as it does in working parties. In the case of routine decisions, like many in the area of agriculture, Member State officials in the Committee themselves take this responsibility. If important and controversial implementing measures have to be adopted, like in environment, however, the process is again one of long deliberation of trying to reach compromise and consensus[491].

Additionally, interest groups are "present" informally in the proceedings. The commission, in preparing its proposal, regularly talks with interest groups and with representatives of civil society. The lobbyists present in Brussels know very well what happens in committees, probably know of the proposals the Commission is working on even before some Member State officials know about it and try to influence it. The same applies to the representatives of Member States in different degrees. Representatives of comitology committees regularly are in contact with Member States interest groups, particularly with those groups that are affected by the decisions that are at hand. Civil society's impact on comitology processes strongly influences the outcomes, but the same questions that were asked about fairness and equal access raised in the context of Parliament and Council, have to be raised here again. In conclusion we can say that accountability on second sight is probably not worse than in most national political systems, it is primarily the representative of civil society that participate presumably for their clientele in the shaping of policy. What is much more difficult on the European level is the problem of identifying who took the decision. Who should be held responsible for it and hence who should be 'punished' if those affected are not satisfied with the performance of those who made decisions.

4. Supranational checks and balances in practise

In many respects the system of institutional checks and balances that evolved in the European system of governance is almost a classical case of inter-institutional co-ordination and co-operation, at least in the first pillar and in policy areas where co-decision applies. None of the three major institutional actors is in a position any longer to impose its will on the others like it might have been in the early days of the European Community (in the '60s and '70s) where in the end the Council decided alone. In the second and third pillar and in the first pillar where consultation applies, it is still the Council that has the last word.

[491] See chapter G.

The European Parliament is the key arena for the inter-institutional debate. Chapter E. demonstrates repeatedly how standing committee meetings are occasions where all the other institutions are present, where they are listened to or heard, where they ask and are being asked questions, where MEPs have the possibility and use it to argue their positions.

Another instrument of inter-institutional checks and balances is the trialogue developed under the co-decision procedure in the '90s. A small number of representatives from Commission, Council and Parliament meet to find a compromise acceptable to all three partners. Christine Neuhold documents how the Parliament uses all means at his disposal to have a strong impact on the final outcome, sometimes even crossing the line of legality, like it did in the LEONARDO programme[492] where it tried to link different programmes to assure that this question was decided by co-decision although in the Treaty it clearly was consultation. Parliament has gained, particularly through the extension of co-decision procedures since the Amsterdam Treaty, considerable weight in the inter-institutional dialogue. It is in a much better position to influence the other institutions in reaching a compromise. Many legal acts and programmes would look very different if the Council would not be forced to reach a compromise with Parliament.

The internal procedures of Parliament encourage the participation of small political groups. The system of assigning chairs and rapporteurs and the role of party co-ordinators in committees allow small parties occasionally to assume leadership in committees as chair, rapporteur or draftsman. The balance of power and influence between Parliament and the Council has taken on a new dimension after the Amsterdam Treaty, particularly as a result of the introduction of the possibility of reaching agreement in first reading. This intensified the existing contacts between Parliament and the Council and made inter-institutional contacts and co-operation a necessity in order to reach results. The presidency plays a key role in this, as it represents the Council in these negotiations with Parliament. This increased influence of Parliament enables MEPs to become the champion and to speak for minorities and weak social groups that are at the periphery of political influence in the Member States.

In the Council, minority rights – understood here as a minority of Member States or small Member States -are protected by the working and decision style of the working parties. The process of long negotiations in an effort to find a conclusion acceptable to all, characterised by reasoned debate, by arguments, by changing positions and coalitions assures that minorities are not pushed to the wall. Consider for instance the drawn out

[492] See chapter E.

procedures in the adoption of the directive on the liberalisation of electricity markets. Five subsequent presidencies had a qualified majority on the last Commission compromise proposal; only France and Belgium opposed it. Negotiations went on for another 2 1/2 years until France had come on board. Clearly, if it would have been two small Member States the process would have been shortened. But the decision-making style in Council working parties is characterised by the search for consensus where different actors try to persuade each other and try to find a solution acceptable to all. It is time consuming and from this perspective inefficient, something that will be dealt with in the next part of the chapter, but it is reasoned debate, protecting minorities, minorities of Member States or even one large Member State. It should also be recalled that a large number of important policy arenas are still decided by unanimity in the Council where one Member State -and be it the smallest has the possibility to block a decision until the decision is acceptable to that Member State as well.

Comitology committees were invented for the very purpose of checking the Commission through a committee of the Council. When Council delegates implementing competences to the Commission it sets up these committees to control the Commission. The small number of cases where the Commission does not succeed in getting its proposal approved by the committee should not be interpreted as an indicator for ineffectiveness of the control mechanism[493]. The Commission goes a long way to persuade Member State representatives and adapts its proposed measure during negotiations to get most if not all Member State officials to support the compromise. It is this process of deliberation that proceeds the decision that is important.

The Parliament is not involved in comitology and has only recently gained some rights of information. But the interviews reported in chapter G. demonstrate that there are and have been informal contacts particularly between staff members of the Commission working on comitology decisions and staff members of the respective standing committees of the EP. The purpose of these contacts is not mutual control but co-operation and co-ordination to avoid conflicts later.

Relevant in this context is also the question of differentiating in practice between legislative and implementing decisions. The Parliament rightly insists that important and basic decisions should not be made through the implementation process involving comitology committees, but through a legislative procedure where those who are affected have a much greater possibility to be involved and to participate.

[493] See chapter G.

The EC legal system already recognises a formal distinction between basic acts (based on the EC Treaty) and implementing acts. The procedures for the adoption of implementing acts do not display the same characteristics as that of basic acts, in particularly not those adopted in the co-decision procedure. Consequently, they should not contain essential elements that should instead be reserved to basic acts. The allocation of law-making powers between basic acts and implementing acts should take account of several criteria, in particular the impact on fundamental rights of individuals, the complexity of the issues and the need for flexibility. It is also proposed, in line with the Laeken Declaration on the future of the EU, to make the distinction between legislative (basic) acts and executive (implementing) acts more visible by providing different names for them.

The evidence presented in chapter F. clearly shows that the Commission and the comitology committees stay very well within the boundaries that the legislator has assigned them. We found less than 10 cases out of 800 where the question of crossing the line required close examination[494]

The question of protecting minority interest and particularly the interest of those who are or will be affected by comitology decisions is rather problematic. Individuals or groups that are particularly affected by implementing acts are not involved in the procedure and they have great difficulties of getting access to the European Court to get redress for the grievances. Tuerk and Schaefer suggest that perhaps an important and necessary Treaty reform, should improve the access of individuals or companies directly affected by implementing rules to the Court.[495] On the other hand, organised interest and other parts of civil society do have a way to communicate their views and influence outcomes through contacts with the Commission and/or contacts with Member State governments.

Additional problems emerge when we look at the committee system from the perspective of checks and balances. What is clear from the empirical findings is that the Council and the Commission effectively participate in each others committees (although comitology committees are not formally speaking Commission committees) and the influence by the Parliament is increasing, although it does not directly participate in the Council or Commission committees. In other words, it really looks like the committees are bridging the gap between the three institutions making them partners in the decision-making game, not trying to curtail each others' powers. It is an asymmetric relationship, however, as on the one hand, the standing committees of Parliament offer an opportunity for (committee) representatives of the other institutions to exchange views and argue

[494] See chapter F.
[495] See Chapter F.

their respective case. On the other hand, Council working parties and comitology committees are closed to MEPs.

5. Supranational efficiency and effectiveness in practise

In view of the complexity of the institutional systems of checks and balances that developed in the European system of governance over time, one is tempted to conclude that it can hardly be efficient in the sense that its output responds to the needs of those concerned, the citizens, and does so in time. Somewhat surprisingly, the overall quantitative output of Community decisions in legislation and implementation is impressive. But quantity does not say much about quality. Critics will point out immediately that most legal acts are Commission implementing measures[496]. involving routine administrative acts in the area of agriculture and that important and controversial decisions will take a long time and that the Community is very slow in responding to needs of the citizenry[497]. This may well be the case but then often it might well be better, particularly for the kind of governance system the Community represents, to take time for deliberation and to find a solution that is acceptable to most of its constituent parts, particularly to the Member States that have created it.

Our findings on the other hand suggest that the Community system is very effective when it comes to reaching compromise and consensus. It is also very effective with respect to incorporating expert advise into the deliberation and the decision process. As Christine Neuhold reports, the standing committees of Parliament have developed a variety of avenues for acquiring expert advise, for instance through hearings, through civil society and last but not least through their own professional staff and the research DG of the General Secretariat. They also have become rather effective in channelling the influence of interest groups and civil society offering them an opportunity to participating in shaping decisions. The procedures described in chapter E. about how the committees work, how decisions are reached, how political parties are forced to compromise, often because of the necessity of organising an absolute majority in plenary, documents the effectiveness of the standing committees in reaching compromises and managing its recently acquired legislative tasks. It also demonstrates how MEPs by assuming the responsibility of rapporteur, shadow rapporteur or draftsman become experts in a particular policy area and that they are trusted by other members for their understanding of complex policy problems.

[496] Compare figure 1.
[497] See chapter G.

Council working parties and comitology committees can both be described as institutionalised expertise. The role of experts in both groups is dominant, although in Council working parties attachés introduce frequently more political arguments. Both observers of and participants in working parties insist to draw a clear line between "political" and "technical" issues arguing that working parties only deal with the latter. The authors of chapter D. present convincing evidence that this boundary can not be maintained and that working parties do get involved intensively in questions of policy and of political direction. In comitology committees, the expertise of the Commission staff, often supported from the outsides through interest groups and consultancies, is merged with the expert know-how of the Member State representatives.

Together they efficiently manage the extremely complex system of agriculture where the difficult becomes -perhaps even frighteningly -routine. Many and far reaching decisions are made in a weekly or biweekly rhythm. Other comitology committees confront difficult and controversial problems of adapting technical annexes to technical progress in long, often tedious negotiations – certainly not (time) efficient, but consensus efficient.

Finally, comitology committees effectively contribute to improving the implementation and application process of EC law in and through the Member States. Without the opportunities for horizontal and vertical co-ordination, which the committee meetings provide, the implementation and application of EC law would be much less efficient and effective on the Member State level. We are not arguing that implementation and application deficits do not exist, they do and they are serious, but they would be much worth without the comitology system. Suggestions to abandon or reduce comitology should be carefully re-examined. The comitology system is less an instrument of control of the Council over Commission implementing policy as it is an effective arena for co-operation in a very complex system of governance.

6. Supranational openness and transparency in practise

Critics of the European system of governance often describe it as one of the most closed and intransparent. The evidence presented in this report suggests a different picture.

First of all, the issue should not be reduced to the question whether committee meetings are open to the public. Instead it refers primarily to the nature of decision taking, the ability of interested parties and in particular those affected, to contribute to shaping binding rules. From this perspective all three types of committees we examined are rather more than less "open".

Parliament as a whole as well as its standing committees are very open to influence from civil society, interest groups and NGOs. Their input is not only accepted it is often actively sought after. Particularly the organised interest in Brussels follow closely what Parliament does, try to influence the procedures, have often close working and consulting relationships with MEPs, with rapporteurs and group co-ordinators in the committees[498].Thisistobe expected of a parliament.

Access to influence working parties is only indirect, primarily by way of influencing the negotiation position of a Member State in its national capital. Direct influence on working parties is simply impossible, given their structure and their working style.

Chapter G. also demonstrated the – again primarily -indirect involvement of interest groups in all aspects of the comitology committee activities. The Commission sometimes directly seeks the advises of those affected by its proposed implementing measures. Lobby groups in Brussels, are fully aware of what is happening in the implementation process and make an effort to have an impact on the shape of implementing decisions. The same applies to members of the committees from the Member States who often stay in a close contact with the affected interests, brief them after meetings and discuss issues and concerns, future needs and future developments.

Transparency is a different issues. The only committees meetings open to the public and to media are the standing committees of Parliament. This opportunity is used almost exclusively by representative of interest groups, occasionally by the media or visitor groups. In contrast to other institutions, Parliament has had for a long time a very open approach with respect to accession to its documents. Interested parties can read and follow the debates in plenary and have access to the documents of standing committees. With the Legislative Observatory, the Parliament established a remarkable instrument through which interested parties can check at any time the status of decision and discussion.

Council working parties and comitology committees are not open to the public and many consider this as a serious problem. There exists, however, a trade off between opening the meetings and effectiveness and efficiency in decision making. Working parties and comitology committees are arenas for intensive debate, argument, efforts of persuasion and of reaching compromise. It is impossible to do this in the public, in view of rolling cameras so to speak. The negotiation process would be shifted to other places, to coffee breaks, lunches and the hall ways. For these committees, openness to the public is less

[498] See chapter E.

important than getting access to information about the proceedings, the conclusions and how they were arrived, in order to be able to "reconstruct" the decision making process, to make it legible. The increasing concern about transparency, particularly since the Maastricht Treaty, as contributed significantly to making the EU policy process more open and accessible. Conclusions and summaries of the debates of minister´s meetings can be found on the internet a day or two after they took place. This does not apply to COREPER and certainly not to working parties. But reports of participants in working party meetings are related to the national capitals and at least in some of them, particularly the Scandinavian countries, these reports are thus in the public domain. People can have access to them and find out what happened.

The requirements on transparency of the comitology decision of 1999 make at least the most important parts of committee proceedings accessible to the public. The Commission has to inform the Parliament of all proposed measures and what decisions were reached. A recent Court decision, even required the Commission to inform interested parties not only about the results of voting but also about the position of the specific Member States in the discussions. Increasingly, chairs of comitology committees put the results of meetings in the form of short protocols on the internet, a practice that was started quite some time ago in the area of agriculture but has now spread. These developments contribute to removing at least some of the opaque nature of the EC committee system.

7. The European committee system: Pros and cons

In this project another picture than the traditional one has emerged. Our findings seem to indicate that the European Union is a quite tightly controlled system which functions well in many aspects – at least to a far greater extent than has been shown before. This positive image may partly be attributed to the method we used – most of the information has been collected with the help of interviews with persons working in committees. It is reasonable to believe that anyone who is participating on a regular basis in a decision-making process feels more sympathetic towards the process he or she is part of than an outsider. Furthermore, the committees selected for this study have not been handling more spectacular issues like Treaty revisions or implementation of the EMU, instead the focus has been on more traditional EU policy-making where today co-decision generally applies.

Nevertheless, what this study reveals is that there is much more accountability, effectiveness and efficiency in the system than what one is lead to believe by newspaper reports and from the EU debates. Very few of the persons we interviewed had problems explaining how the system worked and they did not seem to be lost in the established

power structure feeling that they were powerless when it came to influencing the decisions to be taken. On the other hand, the desire to explain and make visible to external observers such as journalists and researcher how decisions are reached seems lacking – internally knowledge is widespread about who did what, when and how – but this information rarely reaches the public at large. In other words, tracebility is possible but not encouraged by the way the system operates today. However, although those responsible for decisions or most influential in various matters can be identified, the link to the people will never be direct or easy to achieve in supranational governance.

From the point of view of efficiency and effectiveness the EU committees seem surprisingly skilful in finding solutions that can be accepted by almost all the Member States and it is worth noticing that citizens in the Member States so far seem prepared to follow and obey laws passed by the European Union at least to the same extent as they obey national laws.

An essential element for keeping the EU system under control is the different techniques of checks and balances. This is particular evident if one looks at how a proposal can shuttle back and forth between the Parliament and the Council several times, with the Commission giving its opinion on the arguments exchanged by the Council and Parliament in between. This kind of control is also clearly visible inside the world of committees. A proposal may for example be going back and forth from the working party to the COREPER several times before a final decision is reached to transmit it to a Council meeting. In other cases a scientific committee may be heard before a comitology committee takes a final decision. Interestingly enough, however, there are also signs indicating that the system has found ways to overcome the structures intended to enforce checks and balances – by means of the direct interinstitutional committee interaction.

Decision-making in the EU can be described as a procedure where proposals for new laws will pass through different stages (committees) until they reach the final destination when they are implemented by national governments. The starting point is usually when the Commission sets up an expert group to help the Commission to formulate a proposal to be presented to the Council and the Parliament. In the second phase the proposal will be discussed by working parties or groups, the COREPER and by standing committees in the Parliament and finally the decision taken by the Council and the Parliament will be implemented with the assistance of a comitology committee. A proposal travels through different decision-making phases were a fresh look at its substance is taken every time. However, this is only half of the story. In many cases it is more or less the same people who participate and meet in the different committees -although the exact composition is

rarely the same and the context is always different -one wonders to what extent a fresh and critical look is taken at the proposals in the different phases. It is also noticeable how intensively the Council and Commission participate in each others committees, while the Parliament is kept more to the side. It looks like we have an interesting difference here since Parliament is not taking part in the Councils' and the Commissions' committees, while the Council and the Commission are regularly invited to join and regularly participate in the deliberations of the standing committees of the Parliament. The introduction and subsequent extension of the co-decision procedure has somewhat changed this pattern. Particularly the possibility to reach agreement in first reading introduced by the Amsterdam Treaty has increased the number, frequency and intensity of contacts between Council working groups and EP committees in order to make every effort to find a solution during first reading and to avoid consiliation. Moreover, even if conciliation can not be escaped, and in politically controversial issues it rarely can, it is in the trialogue where a small group of representatives of the EP, the Council and the Commission reach a solution. Thus, some of the checks and the balances are called to a halt since the deals are done in an informal way and it becomes unclear who is checking who – if anyone.

On the other hand, this type of system where a proposal goes through one phase after the other and where different types of participants can emerge or re-emerge promotes transparency if not always openness. The meaning of openness and transparency may of course vary from one study to another, and if by openness we imply a system where all the deliberations and the decisions are taken in clear view of the public, the EU committees are very far off from this ideal world. However, if we use the words of openness and transparency to characterise a system where different interests have a chance of participating in and influencing the decisions that might effect them, the EU and its committee system does seem to come closer to the ideal picture – subject to the requirement that committees must leave understandable traces of their work. In many ways the EU committee system is a structure designed for repetitive negotiations among an elite, consisting of experts and civil servants from the Member States. That is, the same issues will be negotiated over and over again and they will sometimes go through a number of different types of committees before an agreement and a solution can be found. This means that the same people will meet on a number of occasions because the same type of issues are coming back on a regular basis but also because of the character of the decision-making process. This may sound as a tedious and boring process but it has its advantages since it creates trust among the participants by allowing those who feel they have been kept out of the process or who have been less influential in the earlier part of the process, can be heard or have the upper hand later on. Cleaver

manoeuvres on behalf of one actor or several will soon be discovered and lead to backlashes later on. This type of process is of special importance for interests which feel they have been exclude from the earlier parts of the process because they are controlled by different institutions. Instead of being exclusive and manipulated by a few this system actually seems, according to our findings, to be more inclusive and focused on finding solutions through reasoning not bargaining, at least when compared to many national governments. This is a system which uses socialisation as an important tool in making politicians, experts and interest representatives from different nations agree on issues of common interests. And precisely for that purpose ”committees” are created around which networks can be established.

8. The political system of the European Union-a misunderstood government?

Over the years the political system of the European Union has been compared to several other types of democratic government leading to the conclusion that it is rather different, if not unique. Thus, the European Union has been compared and contrasted to a parliamentary (majoritarian) or consensual government as well as with a federal (power sharing) government -all with different weak and strong points. A majoritarian government will, for example, always score high on accountability as the preferences of the majority as expressed in the latest general election directly effects the composition of the government. A parliamentary government will also service the people well by being both effective and efficient but this system will score lower when it comes to protection of the minorities.

However, creating a supranational regime will always be problematic if legitimacy primarily has to rely on accountability – i.e. a clear and direct link to the people – and in fact it is difficult to find any example of a government where parliamentary (majoritarian) government is applied to a people strongly dived by different cultures and languages since it ultimately may mean the suppression of strong minority interests.

Consensual government has a strong point in that it creates stable governments leading to a very efficient and effective decision-making process while at the same time giving better guarantees for minority protection than the ‘pure’ parliamentary system. On the negative side, though, we find problems of transparency, protection of new or small minorities which are not included in the groups forming the government and as a result a tendency to maintain status quo among the participating interests.

Power sharing or federal governments as they often are called, although all power sharing systems do not have a federal construction, is particular strong when it comes to protecting minorities -even a very small minority will always have a fair chance of getting

its voice heard. The problem here, of course, is that the system has strong tendency to become gridlocked, different types of majorities will outbalance each other and the status quo will often be the final result.

According to our findings, the European Union can be found somewhere between a consensual and a power sharing system. It operates by checks and balances, especially between the Parliament and the Council/Commission and the European Court of Justice (although the Court has not been part of this study) which is clearly visible especially inside of the informal structures of the system, i.e. its committees. However, in contrast to a power sharing system (federal) where there is a high degree of competition and where one side often tries to win over the other, this system, like a consensual is more inclusive and more effective in finding solutions pleasing most of those affected by the decisions.

In recent years increasing interest has been put on so called deliberative democracy, a theory which *inter alia* stresses how different interests (defined as those affected by an decision) be means of discussions where everyone has equal rights and is given a fair chance of expressing their opinions reach an agreement considered by everyone as the preferred and rational way of solving the problem at hand. Lately this type of ideal model for a government has been used when analysing the European Union. Eriksen and Fossum as well as Joerges and Falke have reached conclusion which coincide with ours: The EU strongly resembles this type of government. The EU of today is a system where different interests have a good chance of being listened to and if you are neglected on the national level this can be your second chance. Even very minor interests from a national or a supranational perspective may find that they will be heard if their arguments are strong or based on facts and scientific evidence since the ambition of this system is to find solutions acceptable to as many interests as possible and not only those of Member States'.

However, the EU is far from a perfect deliberative democracy. To begin with the interests of the Member States, in particular the large ones, often take precedence; bargaining and horse trading will also quite often take place on the political level. The fact that the Council dominates, or is believed to dominate by other actors, makes the system unstable since the other actors often try to use the issues at hand to enhance their influence. This type of double game makes the system less transparent and open – contrary to the ideal picture of a deliberative government. Furthermore the problem with a deliberative government is the idea of a government with no losers, everything can be solved through reasoning among equal partners, which presupposes the existence of a non antagonistic society – or expressed differently where do we find the opposition in a

deliberative democracy? Will there be a need for a ruling side and an opposition if everyone, whenever they feel like it, can participate and influence the decision-making procedure? Today the European Parliament, to a large extent, plays the role of the opposition and it is frequently seen as a nuisance by the Council and Commission, lacking knowledge and credibility on the issues they are dealing with – a typical description given by national government when asked to characterise the political opposition on the domestic arena. However, the problem here is that the ingrained ambition in the EU system to include every interest of importance may in the future disrobe the Parliament of its critical role as the opposition, demonstrating to the public what has been going on behind closed doors and what interests have been left out of the process.

To summarise: what has been argued in this study is that the European Union is a democratic system which is largely building its legitimacy on protection of minorities and the ability to deliver results (output), although procedures and majority decisions also play an important role.

Consequently we find, as this project shows, in almost every court and corner of the EU decision-making machinery procedures designed to control the system through checks and balances. Both the formal and the informal procedures which have been developed over time point in the same direction, the European Union is, through checks and balances, by internal means as well external, a thoroughly controlled system. But in contrast to national governments based on the power sharing principle, like the United States – where the government is characterised by the famous subtitle of Pressman and Wildavsky's book on implementation: 'How Great Expectations in Washington Are Dashed in Oakland; Or Why It's Amazing That Federal Programs Work at All' – the EU is much more focused on producing results (output). Or rephrased somewhat, the EU is capable of finding solutions which better serve the needs of the citizen than those formulated on the national level. What we find is a process with actors examining every detail, simultaneously trying to include in every phase of the decision-making process a great variety of interests and interest groups besides the Member States', which of course should take centre stage – perhaps something much more like what could be called a deliberative democracy than the ones we find on national levels.

Surprisingly, however, the power sharing and deliberative image focusing on implementation and minority protection does not seem to be the picture politicians have of the EU system when they describe or criticise the Union, or when they put forward suggestions how to change the EU. Paradoxically, it looks like the leading politicians talk about the European Union in one way but try to change it in another -or at least they seem to have stepped aside, letting it develop in another direction than the one

expressed as preferable. Thus, most politicians describe the European Union in terms of a system characterised by majoritarian rule based on procedures and accountability, a system similar to the one at home, i.e. a 'normal' parliamentarian system. And many of the suggestions as to how to change the organisation of the EU appear, badly disguised, to be quite similar to the political system we find in the Member State of the politician advocating the changes.

There could be a number of reasons for this discrepancy between words and real action, such as national politicians occasionally wanting to hide behind the EU when they have to carry out unpopular decisions at home, i.e. improving or maintaining the legitimacy on the national system's legitimacy at the EU's expense. Should, on the other hand, the national politicians strongly endorse the EU system this would indicate that there was something very wrong with the national system, which in the long run could undermine the legitimacy of national governments. In another words, tension is inherently built into the European system because of the fact that Member States are organised and governed according to one principle and the supranational level is organised and governed by another principle. And this conflict of perceptions, which could not occur in the US since the federal level is organised and functions in the same way as the state level, will not disappear as long as a one-dimensional analysis are made of the concept of democracy, leaving little room for any other ideal form of democracy than a parliamentary system. What is sometimes referred to as the dual legitimacy – a system based on a directly elected parliament as well as an indirectly elected council – could also, with a multifaceted analysis be seen as a system with inherent competing legitimacy principles.

The risk here, of course, is that those with an ambition to improve the legitimacy of the EU system by strengthen the majoritarian elements inside it, easily could jeopardise the more 'natural' means, through check, balances and deliberation, with which the system today tries to build its legitimacy. Forgetting that, although the EU does not look like or function as any other type of present day government but it is not a *'sui generis'* system either since it can be classified with other types of democratic regimes.

V. DISSEMINATION AND EXPLOITATION OF RESULTS

1. Dissemination strategy during the life-time of the project

Our initial plan as described in the project's proposal, was to disseminate the results of the project to three major target groups:

1) The people involved in the committee system in the EU institutions and the Member States;

2) The scientific and intellectual community interested in the development of European integration; and

3) The citizens of the European Union.

During the course of the project, the following steps for these target groups were taken:

1.1. People involved in the committee system

Civil servants in the Member States and those working in the EU institutions have always been interested in the subject matter and in obtaining new information. This became apparent during the interviews with civil servants from the Council, the EP and the Commission. During these interviews, most of the civil servants stated their interest in both our preliminary and final findings. We made this information available to them via:

- the workshop in Brussels (March4–7, 2001), where the intermediate findings were presented;

- the dissemination of the progress reports through the project's website http://www.eipa.nl/public/Topics/Comitology/research.htm;

- the EIPA seminars on committees, comitology and decision-making processes in the European Union. During the course of these seminars, in which in addition to the project leader, Guenther F. Schaefer, Christine Neuhold, Alexander Tuerk, Torbjörn Larsson are regularly involved, participants, primarily civil servants from Member States, increasingly also accession countries and EU institutions, empirical findings have been incorporated in the presentations.

1.2. Scientific and intellectual community

The scientific and intellectual community interested in European decision-making processes and European integration has a professional interest in the results of this research project. From our perspective and experience so far, we can say that the scientific and intellectual community is very much looking forward to learn about the final findings.

Preliminary findings were made available to them via

- the project's website http://www.eipa.nl/public/Topics/Comitology/ reserach.htm;

- articles in scientific journals about specific aspects of the research results, see Annex;

- the participation of the project leader and partners in several conferences and seminars. During last year's ECSA conference in Madison, Wisconsin (USA), the project team had been given the opportunity to use a separate panel to present its intermediate results. The panel was attended by 30 people.

As this project for the first time goes beyond case studies and examines comparatively how committees actually function in different institutional settings, the interest in our final conclusions is considerable.

1.3. Citizens of the European Union

As pointed out in the project's proposal, this is the most difficult group to reach. Citizens of the European Union often do not know about the committee systems in Council, the EP and the Commission. They have only a vague understanding about how decisions are made within the EU system. During the course of the project, we realised that citizens may not be one of our major target groups. The study and its findings might be too abstract for people, who are either not involved in the system itself or are not interested in how decisions are made in the EU. However, the study is certainly aimed at the informed citizen, who wants to know about the working of the European Union and does not want to rely on the "it has been decided in Brussels"-phrase.

We continue to try to reach these citizens via he project's website http://www.eipa.nl/public/Topics/Comitology/reserach.htm.

2. Dissemination and follow-up of the project

2.1. Dissemination of the project

The two years of this study have shown us that our dissemination emphasis lies with the target groups one and two and not on group three:

In the project proposal we indicated our intention to develop a teaching kit for secondary schools. This idea was – at least for the time being – abandoned for two reasons: First, it would require considerable outside funding, which is difficult to find – as we realised, and secondly, none of the team members have the required training – and we would have to find partners to complement our competences.

Table 11. The planned dissemination activities for the next 1–2years

Title of Result	Partners involved	Exploitation intention
"Governance by Committee"	All partners involved	Colloquium on the project's results and workshop on possible follow-up projects, May 30/31 2002 in Maastricht
"Governance by Committee"	All partners involved	Publication of book on the project's results; Publication is planned by the end of the year 2002
"Governance by Committee"	All partners involved	Colloquia on the results of the project in France, the United Kingdom, Germany, Austria and Sweden during the course of 2002 and 2003
"Committees and Comitology"	EIPA	Presentation of results on the project's website
"Governance by Committee"	EIPA	Incorporation of research results in EIPA's numerous seminars on comitology and decision- making in the European Union
Yet unknown	Université de Bordeaux: Andy Smith and Jaques de Maillard	French version of chapter IV, which will be part of a book edited by Christian Lequesne and Yves Surel, date of publication yet unknown, Paris, Presses de sciences po
"Representing Europe and representing Member States"	Université de Bordeaux: Jaques de Maillard	Annual Convention of the International Studies Association, New Orleans (USA), 24-27 March 2002

"A Renewal of Parliaments in Europe? MPs' Behaviours and Action constraints" – Presentation of selected results on the work of EP committees	Institute for Advanced Studies: Christine Neuhold	ECPR –conference, Workshop 16, Turin (Italy), 22-27 March 2002
"EU-committee system and the problem of legitimacy"	EIPA, Guenther F. Schaefer	Proposal to present paper at the IPSA world congress in Durban (South Africa), June 29-July7, 2003

2.2. Follow-up of the project

During the course of the project we realised that similar types of inquiries should be considered with respect to consultative or expert committees of the Commission and committees in the second and third pillar. One member of the team, Torbjörn Larsson, has received financial support from the Swedish Ministry of Finance to start a preliminary study of expert groups.

Following our presentation at the ECSA-conference several European scholars showed interest in participating in a follow-up project. It was agreed that a workshop should be organised. It will take place following the colloquium in Maastricht in May. In addition to 4 members of the present team, interested scholars have indicated that they will participate.

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VII. ANNEXES

1. Annex 1. Chapters 4 and 5 -Methodology and Case Studies

The research findings in the chapters on Council working groups and on the standing committees of the European Parliament are based upon case studies of the role of these groups and committees in the production of EU law in five policy areas.

These areas were chosen to encompass a range of potential influences on Council decisionmaking (qualified majority voting [QMV] or unanimity [U]), policy rationales and the different levels of involvement of the European Parliament:

- Telecommunications as an example of the completion of the single market; (QMV and co-decision with the EP).
- Environment, as a first example of regulatory-type policy; (QMV and co-operation with the EP).
- Social Affairs as a second type of regulatory policy; (QMV, co-decision and co-operation with the EP).
- Research and Development as an example of redistributional policy; (QMV and co-decision with the EP since Amsterdam).
- Culture as an example of regulatory and redistributional measures; (Unanimity and cooperation with the EP, but also sometimes QMV and co-decision with the EP).

Within each sector, we chose up to four pieces of legislation that have recently become or are about to become EU law:

Telecommunications:

- Open network provision for voice telephony (Directive 98/10);

- Third Generation mobile communications systems UMTS (Decision 99/128);

- E-commerce (Directive 2000/31).

Environment:

- Landfill of waste (Directive 99/31);

- Protection of drinking water (Directive 98/83);

- End of vehicle life (Directive 2000/53).

Social affairs:

- Working time for seafarers (Directive 99/63);

- Working time (Directive 2000/34);

- Racial discrimination (Directive 00/43);

- Scaffolding (currently being processed, modifies Directive 89/655);

- Vibrations (currently being processed).

Research and Development:

- The 5th R & D Framework Programme (Council decision, 22.12.98).

Culture:

- LEONARDO DA VINCI Programme on vocational training (Decision 99/382);

- The SOCRATES Programme on training and education (Decision 98/576);

- MEDIA + (Decision 2000/821);

- CULTURE 2000 (Decision 2000/508).

In addition to using the various documents available on this legislation, we have undertaken semi-structured interviews with officials from different participants in the respective working groups (permanent representatives, national experts, Commission,

Council Secretariat). In total, more than 45 working group participants and members of EP committees were interviewed. The remainder of this document sets out the cases by sector in a format which summarises the issues involved in negotiating each piece of legislation in a rather draconian fashion. Indeed, we make no claim to have carried out full blown policy analysis in each case. Instead, each case enabled us to focus specifically upon the rules, processes and practices which take place within working groups and parliamentary committees.

1. Telecommunications

EU policy on telecommunications is indisputably part of the drive to complete the single market that marked the years 1985 -1992, a trend fuelled and justified by the adoption of neo-liberal ideas and arguments by many of Europe's political and economic elite during this period. The specific nature of the history of telecommunications policy (as regards with respect to electricity market for example) is that technological progress provided a "window of opportunity" through which actors in favour of ending public utility monopolies could argue for radical policy change. In general terms, this change has taken on two guises:

1) Broad contextual change shaped by the revitalisation of EU competition law and policy[499]. From this angle, large public telecommunications operators (particularly Post Offices) became vulnerable to criticism of Member States of monopolistic behaviour justified by vague commitments to "public service" (activation of article 90/2 and article 86 of the Treaty of Rome which forbid cross-subsidisation).

2) Detailed change involving deregulation at the national level and deregulation at the level of the European Union[500]. This process of deregulation has been seen both as a general movement with common properties and as a variety of different paths to change leading to a diversity of EU level regulatory regimes[501],[502].

In order to study the way European level policy has emerged and evolved, some authors have focused upon the Commission as a policy entrepreneur[503], whilst others have carried out research into the behaviour of large firms in Member States as protagonists

[499] Buigues et al (1998); McGovern/Cini (1999)
[500] Brénac (1994)
[501] Majone (1996); McGovern/Wallace (1996)
[502] Heritier (1996); Schmidt (1996); Radaelli (1999).
[503] Fuchs (1994)

for a single set of European laws and standards[504]. As yet, little research has been devoted to understanding how telecommunications policy is actually negotiated within the EU's decision-making machinery.

1.1 Three Case Studies

The basic framework for current EU policy on telecommunications was set out in a Green Paper on the liberalisation of this sector published in 1987 and brought into force as a directive in July 1996. Other than a committment to deregulate national markets, this legislation brought in the concept of "universal service" as a concept with which to replace that of public service and thus justify certain exceptions to an entirely deregulated market[505][506]. The 1996 directive also introduced a commitment to review the legislation on universal service every five years. This process began in the Commission at the end of 1999 and already includes the directives 97/33 and 98/10 concerning universal service[507]. During the time period examined in our research, a package of five directives were processed and adopted in this sector. From three directives that stem from earlier negotiations, we were also able to deduce some information about more recent ways of making decisions on matters related to telecommunications.

1.1.1 Open network provision voice telephony (Directive 98/10 adopted on 26.3.98)

In amending and replacing Directive 95/62, this directive was an attempt by the EU to set out the basic premises and criteria it wishes to apply to the regulation of voice telephony. Resumed under the title "Open network provision", this is a framework directive that was to be the basis for many more precise directives in the coming months. In particular, it set out provisions for safeguarding commitments to provide universal service for voice telephony. More precisely, taking into account other framework directives (97/33 on interconnection and 97/13 on operator licences), this directive tries to adapt EU law to a market where monopolistic operators no longer exist and define *"a minimum package of services of a specified quality at an affordable price, taking into account of the differences which exist between national situations"*.Inshort,the

[504] (Coen (1998); Brénac (1994)
[505] Rouban (1997), pp. 114-115
[506] In a declaration made on the 16th of February, 1994, the Commission generalized the concept of universal service as universality of access at affordable prices; equality of geographical cover; continuity or permanence of service. This position was later formalized in "Les services d'intérêt général en Europe", Communication de la Commission, Com (96) 443, 11th September, 1996.
[507] See the website http://www.ispo.cec.be/infosoc/telecompolicy:en/Main-en.htm

stated aimis *"to establish minimum requirements regarding service quality and consumer protection"*.

Although replaced by another framework directive in the 2001 package, this directive led us to investigate a central issue that continues to cause some controversy in this sector: in regulating the market for telecommunications at the EU level, what room should be left for 'social measures' and 'user rights'? By 1997-98, the debate over universal service had moved on from one of general positioning to the question of how the 'affordability' of providing such services should be calculated and who should calculate it? More precisely, the Commission sought to put into place a funding mechanism to ensure that other telecommunications operators compensate the main universal service provider.

Initially, the Commission and the EP both wanted this set at a the EU level. But due to the resistance from several national delegations in the working group, this debate then shifted to one over whether the comitology committee set up to follow this matter should be regulatory or advisory. In the end the Commission decided to make the most of a succession of favourable presidencies and sided with the Council instead of the EP. Finally, it is interesting to note that both the affordability calculation and the question of comitology resurfaced as sources of conflict in the 2001 negotiation. The Commission met resistance from national delegations and the EP over its quest to shift to a form of calculus based on definitions of 'market power' and because it sought to retain a form of veto during the comitology stage (articles 6 and 14).

Chronology:

Date	Event
4.11.96	Initial proposal
20.2.97	Debates and vote on 1st reading in plenary session of the EP (rapporteur, Imeda Read, PSE, UK). 34 amendments proposed. In response, Commissionar Bangemann argues for market regulation rather than social measures.
27.2.97	ESC opinion: in favour but wants mobile phones included in the scope of this directive.
4.6.97	Amendment of initial proposal by the Commission which takes over 19 of the 34 amendments adopted by the EP.
9.6.97	Common position which takes over 12 of the EP amendments out of the 19 approved by the Commission
12.6.97	In its assessment of the common position, the Commission is positive but regrets that Council has not retained all measures on user rights; has chosen a type IIIa regulatory committee for the technical alignment of annexes.
3.9.97	EP Committee adopt recommendation for second reading re-establishing many amendments refused by Council. The issue is couched in the form of users' and consumers' rights and seeks to ensure that "the concept of the affordability of the universal service to be defined at European and notatnationallevel".
17.9.97	EP vote on 2nd reading amends Council's common position but qualified majority not reached so unable to rebate amendments from first reading.
20.10.97	Commission opinion 2nd reading. Accepts 14 of 17 amendments proposed by EP but not on 1) the rights of users and consumers; 2) rules for financing universal service; 3) European guidelines on the concept of the affordable price.
10.12.97	After 2 "trialogue" sessions, a compromise is reached. The Council gives in on services for disabled users and agrees that Member States may impose additional requirements on the provision of telecom. services. However, this cannot determine the costing of universal service or be financed through mandatory contributions from operators.
28.11.98	Debates and vote in plenary -no controversy.
26.2.98	Implementation. Comitology begins. Commission is assisted by the (consultative) ONP committee.

1.1.2 Third generation mobile communications systems (Decision 128/1999, 14.12.98).

In setting a European level standard for "third generation" mobile telephones (Universal mobile telecommunication systems: UMTS), this Council decision requires national governments *"to take all actions necessary in order to allow the co-ordinated ad progressive introduction of the UMTS services on their territory by 1.1.02 at the latest and in particular to establish an authorisation system for UMTS no later than January 2000".*

In particular, this legislation concerns wireless access to the Internet. As such, it extends the harmonisation process of Directive 97/13 on licensing, which sets up co-operation with the European Conference of Postal and Telecommunications Administrations (CEPT) and a comitology procedure. The overall aim was to set up common standards and rules enabling companies to repeat the "success" of the previous generation GSM system *"where early standardisation boosted rapid deployment of competitive networks and services"*.

For our purposes, this case was interesting for four reasons. First, as a negotiation that took just nine months from start to finish, this case provides an example of how, when there is 'political will' in the national capitals, the EU can make legislation relatively quickly. This political will is linked in part to the fact that behind a technical standard lay a trade issue, in particular between the EU and the USA. In addition, each Member State wanted to auction rights to the mobile phone market at the national level and needed an EU norm to be agreed on before going ahead with these sales.

Second, the process was also quick because the Parliament backed the Council. Actors involved in this issue consider that this was partly due to the qualities of the rapporteur and even more to those of the Parliament's administrative staff, who actually drew up the EP's draft opinion.

Third, consultation prior to the tabling of the draft directive was handled 'effectively' by the European Telecommunications Standards Institute (ETSI). This "quasi-committee" thus contributed greatly to shaping the problem and the solution for more officially recognised policy-makers[508].

[508] (Greenwood (1997)

Finally, one must also note the major role played in the Council by the Telecom working group. This meant that neither COREPER nor ministers intervened at all in this decision[509].

Chronology:

Date	Event
11.2.98	Initial proposal which follows the Communication from the Commission of 15.10.97 (COSO569).
3.6.98	The EP's Economic and monetary affairs committee (rapporteur Felipe Camisonn Asensio, PPE), approves the Commission's proposal but suggests several amendments "to ensure sufficient coverage in less populated areas and full compatibility between GSM and UMTS".
17.6.98	Debates in plenary where Commissionar Bangemann says the Commission cannot accept these amendments. Vote first reading retains these amendments however.
27.7.98	Commission's amended proposal incorporates 8 of 10 EP amendments but not the two mentioned above.
24.9.98	Council common position sides with Commission.
10.11.98	EP committee votes to approve Council common position without insisting on amendments.
18.11.98	EP vote 2nd Reading: adopted without debate.

1.1.3. The e-commerce directive (2000/31, adopted on 8.6.00)

This directive sets out norms for regulating trade via the Internet at the EU level. More precisely, it consecrates efforts made by the Commission in particular in order to regulate at the EU level in order to prevent two developments: the emergence of purely national (and thus potentially contradictory legislations); the emergence of a myriad of legislation set at the level of each sector of the economy.

In terms of substance, the key debate concerned the acceptance of a principle of responsibility in the country of origin. According to the Commission, this principle was the only practical way to legislate for e-commerce[510]. In addition, it argued that its proposals were completely in accordance with the concept and practice of the single market. A

[509] It is interesting to note, as many actors involved do, that the processing of this legislation contrasts strongly with the way a decision on the spectrum of radio frequences was dealt with in 2001. In the latter case, negotiations had dragged on since 1992 because of resistance from a pre-existing international telecommunications expert body (the CPT) and because of resistance from the EP's rapporteur.

[510] On this question, see a paper prepared by one of the Commission's officials, E. Crabit. 'L'univers de la directive sur le commerce électronique', paper presented to the colloque *L'internet et le droit*, La Sorbonne, Université Paris 1, 25-26 September, 2000.

number of national delegations (e.g. Belgium) were concerned that the principle of country of origin would raise jurisdictional problems. More generally, as in many framework directives, RPs were also wary of a proposition that might mean the Commission could in future use it to modify other existing directives.

From the point of view of our study, the decision-making process was of major interest for four reasons. First, this issue was taken up not by the Commission's DG INFSO, but by the Internal Market DG. As a consequence, the draft directive was processed by the relatively new Council working group, 'Services of the Information society', and put to the Internal Market Council of Ministers. The negotiation thus provided an opportunity for examining a different working group that intervenes in the telecommunications sector but also rivalry over such matters within the Commission.

Second, the European Parliament agreed with the Commission. In particular, it supported the country of origin principle and pushed for rapid implementation of the directive in the Member States.

Third, the negotiations took some time, largely due to disagreements within national delegations (in particular between lawyers and politicians or politically-minded officials). An indicator of this tension is that three COREPER meetings were needed in order to get agreement.

Finally, one can also see the importance of politics in the decision-making process because of the support sought and obtained from the European Council (Cologne, Helsinki, Lisbon) and also the commitment of the Finnish presidency to get this legislation through (no doubt largely because of the importance of e-commerce for Finland's economy).

Chronology:

Date	Event
5.2.99	Initial proposition by the Commission
6.5.99	Opinion of the EP (first reading)
28.2.00	Council reaches a common position
4.5.00	Opinion of the EP (second reading)

2. Environment

Although some EU wide measures existed beforehand, the 1986 Single Market Act fully legitimated EU intervention in the field of the environment, and the Maastricht Treaty reinforced this trend. However, questions of subsidiarity also simultaneously have been introduced. So far, academic research on this question has looked in particular at the emergence of common standards, in particular relating to water[511], at effects of the European context on national environment policy[512], at issues of implementation[513],and at the closed nature of many EU committees working on this subject[514]. As regards environment, we chose to look at three cases: landfill of waste, protection of drinking water, and end of vehicle life.

2.1 Landfill of waste (26.4.99, Directive 99/31)

This directive set up a permit system for landfill sites and other technical and monitoring requirements. The stated purpose of this legislation is to *"prevent or minimise, as far as possible, negative effects on the environment arising from landfill, by means of the introduction of strict technical and operational requirements with respect to waste and landfills"*. In more concrete terms, the directive defines different categories of waste and sites (for hazardous waste, for non-hazardous waste and for inert waste), outlaws certain forms of waste and its treatment in landfills, and introduces minimum conditions for landfill permits. It also requires that Member States ensure that all set-up and maintenance costs are taken into account, and obliges existing landfill sites to comply with these rules within 8 years of the adoption of the Directive (1 -3 years for hazardous waste). Targets for the percentage of biodegradable municipal waste are also dealt with.

History of the initial proposal:

The Commission made a first proposal on landfill in 1991[515]. This was a rather prescriptive proposal, which gave the impression of an academic exercise, more about techniques of checking than about pollution control. However, negotiations were processed in the Council on this basis. A common position was reached, but was challenged by the EP in 1996, which pulled together enough votes to reject the Council's common position on the ground that permitted exemptions would apply to less than half

[511] Bodiguel, (1996).
[512] Lowe/Ward, (1997).
[513] Demmke, (1997).
[514] Flynn, (2000).
[515] Flynn, (2000).

the Community's territory. The basic objection was that the common position had no teeth and that the related directive would not achieve anything. This was due to southern Member States in particular, who had pushed for loose phrasing, exemptions and exceptions, arguing that it would cost them too much.

In March 1997, the Commission made a second proposal with the stated objective to set high standards for the treatment of waste and discourage landfill. Basically, it started from the former Council common position and tightened it under a more programmatic approach, containing indicators on the levels of non-biodegradable waste in landfills.

Issues at stake in the negotiation:

This case study was of great interest for us because its negotiation was coloured by a large variety of national situations as regarding the use of landfill in dealing with waste[516], explaining rather diverging interests and opinions of Member States on this directive. First, there was the question of physical constraints on space, e.g. the Netherlands is quite different from Sweden or Spain. The climate was another point to be taken into account as defining very different conditions for landfill of waste. The case of Spain is a good example and the Spanish attaché put it in the following terms:

> " Cette directive a été assez difficile à négocier pour nous, en particulier car elle voulait faire de l'incinération la panacée alors qu'en Espagne le mode de traitement des déchets le plus répandu est celui de la mise en décharge. On a beaucoup de terrains, donc cela en fait un traitement peu coûteux pour nous (tandis que vous pensez bien que dans d'autres pays comme aux pays bas, c'est différent!), en plus il ne pleut pas donc les dangers de ruissellement sont moindres. Par contre, l'incinération nous pose des problèmes, surtout à cause des contestations sociales. En plus, compte tenu de notre habitat dispersé sur le territoire (la plupart de la population est sur la côte et dans le centre, avec des petits villages éloignés un peu partout), construire des stations d'incinération impliquait des transports massifs de déchets: donc l'équilibre sur le plan environnemental n'est pas si évident que ca! Pour nous, donc, l'incinération est parfois pire sur le plan environnemental qu'une mise en décharge contrôlée.Le deuxième point de friction sur cette directive concernait les exigences pour la mise en décharge, qui étaient à nos

[516] As Paul Brown underlined in *The Guardian* for example ("What a waste", 11.10.00), while the UK puts the major part of its rubbish into landfills (83%), as Italy (80%) and Spain (74%), Germany has already reduced this figure to 34% and the Netherlands to 12%.

> yeux parfois inutiles. Par exemple: l'imperméabilisation de la couche supérieure du terrain. Il nous semble évident que ces exigences doivent être adaptées à la nature du terrain; mais il est bien difficile de faire comprendre à un Hollandais qu'il existe des endroits il ne pleut pas et ou la nappe est très très profonde!"

Moreover, across time, countries had adopted different solutions. Finally, there is also the competition issue (waste is also a trade product, meaning that there can be market distortions between "producers"), which is also linked to the question of time frames for adaptations and cost implications.

It should also be noted that as a result of the previous negotiations that had been fully focused on exemptions (cf. section above), everyone focused here upon a revision of what could and could not be exempted. However, if basically the same categories of exemption were there, they were phrased in a more precise way. This case study was very interesting for us, because it shows the very crucial "political" role that can be endorsed by the working group level in the decision-making process. Towards the end, when the philosophy of the directive was accepted by all the delegations, the blocking point was the percentage of reduction in landfill on non-biodegradable waste. This sort of thing would have usually been left to ministers, but this was not the case this time: under the Luxembourg presidency in particular, it was argued that these figures needed to be dealt with within working group, so as to restrict the range of figures to be discussed by ministers.

Another important point relates to the role of the EP in the decision-making process. As a consequence of its increased role during the second negotiation period compared to the former, the Council anticipated resistance from the EP.

As regarding the involvement of the European Parliament, MEPs focused more on existing landfill sites than in the earlier debate. They also looked at the cost implications of change in waste treatment -there is always the danger of creating new waste streams, for example by switching to incineration. Otherwise, in this directive, the question of 'who pays' was not a central issue -implicitly subsidiarity meant that the national level would deal with this, but, as usual, the EP had trouble taking such an argument into account.

Chronology:

Date	Event
1991	First proposal by the Commission
1996	Commission withdrew proposal because EP rejected Council common position.
5.3.97	Initial proposal.
21.1.98	Decision of EP Committee (Environment, public health, consumers; rapporteur Caroline Jackson, F., PPE), as part of co-operation procedure. Amended report is adopted with one abstention -the rapporteur! (against targets set on biodegradable waste and insists that there may be cases where landfill is the best possible option).
17.02.98	Debates in plenary. Commissioner Bjerregaard accepts 16 of the EP's amendments.
26.3.98	Amended proposal incorporates 13 of the 29 amendments adopted by the EP at 1st reading.
4.6.98	Council common position incorporates 13 of the 33 EP amendments. But the legislation is made less strict by introducing new exemptions (for islands in particular) and extending time frames (particularly on biodegradable waste targets and extension from 5 to 8 years for existing landfills).
20.1.99	EP proposes 19 amendments to the Common position. These cover in particular defining landfill as the last resort, ensuring that costs are not born by the public purse, distinguishing non-hazardous from inert waste, shortening time frames particularly for existing landfill sites (back to 5 years)
26.3.99	Commission opinion on 2nd reading supports the EP position.
16.7.99	Council decision: not all amendments accepted (in particular for existing landfill sites: 8 years is maintained).

2.2 Protection of drinking water (3.11.98, directive 98/83 that updates 80/778)

This directive sets out to "protect human health from adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean".In legislative terms, it "seeks to simplify, consolidate and update Directive 80/778/EEC in the light of scientific and technical progress and with account being taken of the subsidiarity principle". Moreover, the experience of enacting the original directive (Demmke, 2000) has shown the necessity "to create an appropriately flexible and transparent legal framework for Member States to address failures to meet standards relating to the production and distribution of water". In concrete terms, Member States are obliged to ensure that minimum requirements (quality parameters) are met as regarding drinking water (in particular, maximum lead levels are reduced

from 50 to 10 micrograms per litre). In addition, Member States are required to ensure that water quality is systematically monitored and that remedial action is taken quickly whenever this is necessary.

As a case study, this directive was interesting as it revised a former one. This offered a specific configuration which was worth examining. It lead to less controversial negotiations than new subjects and to a quicker decision-making processes –at least at the beginning. In fact, the origins of this directive lie in a Court judgement of 1992 against British application of the former one, and upon the Commission's 11th annual report of the Monitoring the Application of Community Law of 1993 which identified problems in Italy, the Netherlands, and the new German Laender.

A difficult point in the negotiation was related to the question of "where" water quality had to be measured. The Commission wanted it to be measured at the tap: where the "public" meets the "private" (a definition they finally succeeded in getting accepted). Finland and Sweden have legislation where all the water underneath is the property of the land owners. And then in Finland another problem was that they use a lot of lake water for showers whereas the Danes were worried that children might drink shower water. As a consequence, some time was also spent defining 'drinking water'.

As regarding the definition of settings and standard levels, three main problems were raised during the negotiation process: lead levels and lead piping, copper levels and copper piping, and the question of exemptions for parameters and time frames. On lead, the UK and France have a big problem because of their use of lead piping, which consequently induced high levels of lead in the water. Setting a norm at a low level would have induced for them to have all the private water-piping networks changed, meaning very high financial costs. The discussions here were on how quick countries should change. Copper was a problem brought in late by some lobbies, and reserves were made by Spain on this point behalf of Chili, a big copper producer. On the EP's behalf, radioactivity and some hormone levels were included in an annexe at the end of the negotiation.

Chronology:

Date	Event
4.1.95	Initial proposal by the Commission.
June 1995	"Public hearing" held by EP environment committee at time of adoption of report on bathing water. This report concludes "there is an urgent need to review the existing series of water quality directives and decisions".
20.9.95	Opinion of the committee of the regions demanding EU funding for encouraging the replacement of lead piping.
21.11.96	Environment committee (rapporteur Ken Collins, UK, PSE) tables 124 amendments to Commission proposal.
11.12.96	Commissioner Bjerregaard declares the Commission can only accept 35 of these amendments (22 in full, 13 in part).
12.12.96	EP vote 1st reading.
19.12.97	Council common position adopts 39 of the EP's amendments. Debate was centred on lead and associated provisions.
22.4.98	EP Committee approved Collins's position unopposed with one abstention.
13.5.98	EP vote 2nd reading tables amendments for restrictive derogations and demanding Member states come up with a plan to remove all lead piping within 5 years.
8.7.98	Commission accepts amendments but also rejects some as "unworkable".
3.11.98	Implementation of the decision.

2.3 End of vehicle-life directive (18.09.2000, directive 2000/53).

In general terms, this directive attempts to "preserve and improve the quality of the environment and to ensure the functioning of the internal market and avoid distortions to competition". With this aim in mind, the directive establishes measures regarding prevention of waste from vehicles (including restrictions on the use of hazardous substances in new vehicles), collection of old vehicles, treatment and recycling.

This is an interesting case, because both "environment" and "internal market" items are at stake at the same time in such a debate. Consequently, parts of the Commission and of the Council dealing with both these fields were involved in the negotiation. It also raised the "who" pays question, a classical debate linked to the formulation of regulation policies, which often appears at the EC level.

From a historical point of view, this question had been raised at the EC level since the beginning of the 80's. At that time, the Member States had achieved a so-called "political consensus" which designated half a dozen issues needing European intervention, amongst which figured the end of vehicle's life question. But the first proposal presented by the Commission in this field has been made July 1997, with the aim that all new vehicles are recyclable by 2015. Based on the "polluter pays" principle, the philosophy of this proposal was to make manufacturers contribute to preventing environmental damage and waste. The Commission made its proposal after having undertaken a wide consultation of the various interested parts and published an information report in 1994, which is worth being underlined because it was not at all systematic.

But the proposal was blocked, especially under the British presidency. The situation relaxed with the Austrian presidency, and the end of vehicles life directive became a priority again. The negotiation process was thus reactivated, and a political compromise achieved at Council level by December 1998. This was the output of very hard discussions especially on the behalf of the Germans, who were faced with intense pressures exerted by their car industry lobby. Anyway, the compromise was finalised and the only thing missing was then the agreement of the EP.

Under German pressure in particular, a number of amendments were adopted by the Parliament, aiming in particular at enlarging the implementation delay and the range of materials to be excluded from the scope of the directive –e.g. cadmium, mercury, hexavalent chromium. Consequently, with the beginning of the German presidency in January 1999, the negotiation of the directive was slowed down again; very controversially, the subject was even removed from the agenda of the environmental Council. It is only with the Finnish presidency that the file was opened again and the directive adopted under qualified majority voting rules (Germany opposed, Spain and United-Kingdom abstained, France and Italy, meanwhile big car producers, voted for).

This directive was also interesting for us, because it was among the most controversial directives of our sample. Moreover, as many interviewees underlined, this case study was particularly interesting because the negotiation also seemed to have featured intersectoral bargains, which seems to be rather exceptional in the environmental field at the EU level.

Chronology:

Date	Event
9.7.97	Initial proposal
2.2.99	EP Environment committee (rapporteur Karl-Heinz Florenz, EPP, D) tables 137 amendments, but many of which "were adopted by very slender majorities".
11.2.99	EP vote first reading. In a resolution, the EP tries in particular to bring forward the time frame (to 2005) and to outlaw products that contain cadmium, mercury and hexavalent chromium. 43 amendments are voted in all.
28.4.99	The Commission takes up 17 of the 43 EP amendments.
29.7.99	Council common position accepts 20 of the EP amendments, 13 of which were not accepted by the Commission.
1.10.99	Commission largely accepts the common position but resists over the change in time frames and insists on some derogation in the technical annexes.
3.2.00	EP vote 2nd reading largely approves the Council's common position but refused amendments designed to shift the burden of costs from the manufacturer. Spare and replacement parts have to be included and the time frame must be 2005.
16.3.00	Commission accepts 13 of the 32 amendments adopted by the EP. However, the inclusion of spare and replacement parts is not accepted as being in the scope of the Directive. The issue of heavy metal phase-out is also put back. Above all, the issue of producer responsibility is not accepted.
20.07.00	Decision of the Council.
06.11.00	Decision of the European Parliament.
18.09.00	Directive 2000/53/CE of the European Parliament and of the Council.

3. Research and Development

The European Union has funded research and development since the 1950s. Today, R & D represents around 4% of the EU budget. As important as the money involved, however, is the way policy has been devised and implemented[517]. Many specialists of the EU argue that through involving industrialists in the formulation of policy in the early 1980s, R & D policy developed a method that was later extended to many other sectors. The Commission in particular began to use consultation of industry as a means of legitimating its proposals and getting them through the Council (e.g. activation of the

[517] Jourdain (1995).

"European Round Table" of big companies). Since that period, such ways of working have become routine. Some specialists see this as having a negative influence on policy outcomes[518].

The negotiation we chose to study was the one of the 5th R & D framework programme for 1998-2002. The overall programme was adopted by the Council on 22 December 1998. According to the general report of the Commission's activities, this programme marked "a real departure" from its predecessors, and this, for various reasons. First of all, because of its approach: it focused on a smaller number of research programmes, more clearly defined than before, as to better classify research priorities, target objectives and concentrate funds ("prioritisation" and concentration). It also planned to fund social and economic research, which had never been done before at the EU level. Second, greater attention was to be paid to the dissemination and exploitation of research findings. Third, there was an attempt to simplify the administrative procedures at stake, giving a smaller role to programme committees and a larger one to the Commission. Finally, this programme marked a drive to "more efficient management". The final budget of the Fifth R & D Framework Programme was 14.96 billion Euro. On 25th January 1999, the Council adopted 10 specific programmes under this framework.

From the point of view of our own research interests, this case was interesting for various reasons. First of all, of course the negotiation of the 5th Framework Programme was of great interest due to its redistributional aspects. As what we call an 'allocatory' EU policy, it involves large sums of money being shared between the Member States. As such, it illustrates the tension existing between on the one hand the Commission's desire to limit the number of research programmes funded and the general Council commitment to support this desire, and on the other hand, the strategies of many national governments to maximise the captured funds for their respective research communities, resulting in an inflationist tendency.

Secondly, it is a good illustration of the intense relationship that can exist between various types of committees and working groups at the EC level; indeed, the research working group and the CREST Committee have very intense relationships and shared roles in the decision process.

A third reason for this case to be of great interest for us is of an institutional nature. In 19971998, the R & D issue was dealt with by co-decision procedures, using the unanimity formula. However, the Treaty of Amsterdam brought QMV, introducing the

[518] Jourdain (1995).

possibility that the Council-Commission relationship would undergo change during the processing of this legislation. However, our empirical inquiries showed that simple majority rule applied heavily; the objective was then to obtain the minimum compromise. Compared to the initial proposal, more things have been added than removed, on the basis of different member states demands (for example, the "city of the future" key action became "city of the past and of the future" to include historical patrimony, a transformation supported by Spain, France, Greece, Italy and Austria. Another example is an oceanography key action that was added to fulfil a Greek demand).

As regarding the negotiation within the Council, the situation opposed broadly the big Member States to the small ones. Already having large research budgets and defined priorities, the former were favourable to budget "prioritisation" and concentration, whereas the latter were much less in favour of this course of action due to the lesser chances they would have to benefit from them (if Airbus is a 'European' research priority for example, it obviously benefits France much more than Greece). As regarding the new socio-economic part, it was really only actively supported by Sweden, Portugal, and Austria, who insisted to increase its budget size and make a sub-programme of it. But the main part of the issues for negotiation, was of a budgetary nature, respectively regarding the global amount (notably with the Parliament), its ventilation (with each Member State depending on their priorities), and its compatibility with the forthcoming financial perspective (for Spain in particular, supported by Greece and Portugal, who did not want to fix a total amount of budget for research before being sure of the next financial perspective agreement, fearing they would loose other budgets as a consequence. This is why the "clause guillotine" was used, meaning that the common position adopted would formally be enforced only after the financial negotiations in ECOFIN some weeks later).

Chronology:

Date	Event
30.4.97	Initial proposal
11.8.97	Amendment of initial proposal -Commission proposes that the increased budget exceed the simple maintenance of the average percentage of GDP: an increase of 3%, i.e. a package of 14.833 Euro broken down into 5 "activities"
4.12.97	EP Research and Energy committee (rapporteur Godilieve Quisthoudt-Rowohl, PPE, D) accepts the Commission proposal but pushes for a higher budget. There are also some differences within this committee (notably with Christoff Tannert, PES, D).

16.12.97	EP vote 1st reading. Budget asked for is 15.4 billion Euro, the principal argument being the power of US and Japanese research. Also want to reintroduce sectoral themes
14.1.98	Commission's second amended proposal resists resectorisation of the research policy. But does accept to break the first "activity" down into four themes. No support for budget increase demanded by the Parliament.
23.3.98	Council common position accepts some EP amendments but proposes a budget of only 12.74 Euro. Also begins to break down the budget by theme.
30.3.98	Commission assessment of common position very critical of Council's desire to effectively cut this budget.
3.6.98	EP committee rejects Council common position to cut budget.
17.6.98	EP vote 2nd reading. Call for budget of 15040 million Euro, for more measures for SMEs and commitment not to finance genetically modified products.
3.7.98	Commission opinion 2nd reading maintains position of 1.98
17.11.98	Conciliation committee. Council agrees to small increase and to aid SMEs. Use here of the "guillotine clause".
15.12.98	EP vote 3rd reading – approves solution negotiated.
22.12.98	Final decision in Council -back to many and disparate themes!

4. Culture

Although still formally the preserve of national governments, since their timid beginnings in 1977 and 1982 (first meeting of culture ministers in Naples), cultural actions have emerged at the level of the EU around three types of issues[519]. The first concerned the protection and enhancement of heritage sites, an objective essentially funded by the structural funds. The second issue concerned subsidised exchange programmes for students, lecturers and (more recently) young people in general. The third issue is much more controversial as it concerns the regulation of markets for cultural goods[520][521]. Government-set prices for books led to a number of political and legal battles in the

[519] Pongy (1997).
[520] Harrison/Woods (1999, 2000).
[521] A brief quote from Jacques Delors, then President of the Commission, illustrates this point: "La culture doit être défendue pour ce qu'elle est, mais aussi pour ce qu'elle n'est pas -et elle n'est pas une marchandise comme les autres. Le débat en cours sur l'audiovisuel est bien connu; c'est un enjeu extrêmement sérieux, où il est question ni plus ni moins de l'identité de l'Europe. Cette forme de culture ne peut accepter de se banaliser sous la domination de grands groupes multinationaux. Elle a besoin d'encouragements, de mécénats". Speech to La Foire du livre, Frankfurt, 5th October, 1993 (reproduced in J. Delors, Combats pour l'Europe, Paris, Economica, p. 108).

1990s[522]. However, the ferocity of these exchanges cannot match that engendered by the regulation of the cinema and broadcasting sectors[523].

A general question for us here concerns the split between the Culture and the Education and Youth Councils of ministers and their respective working groups. Partly for this reason, we chose to focus upon the processing of four pieces of legislation: the CULTURE 2000 Programme, the MEDIA + Programme 2001-2005, the LEONARDI DA VINCI programme on vocational training and the SOCRATES programme on training and education.

4.1 CULTURE 2000 (Decision 2000/508, adopted 14.2.00)

The CULTURE 2000 programme seeks to rationalise and improve the effectiveness of cultural co-operation initiatives through a single financing and programming instrument replacing the 3 current programmes: KALEIDOSCOPE, ARIANE and RAPHAEL. Rather paradoxically given their reticence over EU cultural interventions, this integration was been pushed by the Dutch presidency (although it is traditionally very opposed to any ambitious programme in cultural affairs) arguing that it was a means of getting rid of fragmented and incoherent programmes. Instead, the programme was to set out several broad objectives including: mutual knowledge of the cultural history of the European people; international dissemination and greater mobility of artists and their creations; promotion of cultural diversity; contribution of culture to socio-economic development, development of dialogue between European cultures and other cultures around the world.

From the point of view of our study, this case was of interest because it involved both unanimity voting in the Council and co-decision. Within the working group and within the Council, two issues were particularly conflictual:

- The main line of opposition was the controversy between "small" and "large" states. The former were looking for a wider repartition of the budget, the latter sought more concentration on big projects. The draft directive introduced an unstable equilibrium between "actions 1" (called "individual actions") and actions 2 (called "sustainable cooperation" (coopération durable).

- Some countries were very unhappy with the budget proposed by the Commission (167 millions Euro), especially UK, Germany and the Netherlands. The negotiation

[522] Surel (1998).
[523] For a detailed description of these actions see *Politique audiovisuelle de l'Union européenne*, European Commission, 1998. For updated descriptions see http://europa.eu.int/comm/dg10/avpolicy.

was blocked for 6 months within the Council, because the Netherlands opposed any budget increase (they finally accepted during the German presidency). Here, the rule of unanimity clearly played a key role.

As regards the involvement of the EP, this was long and difficult. An inter-institutional meeting was even cancelled because the EP found the declarations of some ministers to be unacceptable. The main issue here was financial. The EP wanted a budget of 250 million Euro, an amount that was above what the Council could accept. The negotiation as a whole was been marked by the strength of the agreement made in the Council in the form of a common position. The Netherlands, especially, would not accept to go beyond 167 million Euro.

Chronology:

Date	Event
6.5.98	Initial proposal
13.10. 98	The EP's committee adopts the report by Nana Mouskouri (PPE, G) amends the Commission's proposal by proposing a total budget allocation of EUR 250 millions (rather than the EUR 167 millions proposed by the Commission), consider greater importance should be given to small projects and demands change in comitology.
5.11.9 8	EP vote 1st reading (conform to the amendments of the rapporteur).
16.11. 98	Amendment of initial proposal by the Commission (but refuse amendments concerning budget and comitology).
28.6.9 9	Council common position. Maintain the budget proposed by the Commission and change the comitology (by introducing a management committee rather than advisory).
28.10. 99	EP vote 2nd reading: The Parliament adopts the recommendation for the second reading drafted by Mr. Vasco Graca Moura and confirms its previous position
3.12.9 9	Commission accept all amendments but budget.
9.12.9 9	Conciliation committee. Agreement at its second meeting despite the problems caused by the need for the Council to act unanimously. The central element of the agreement is a combination of a global budget of EUR 167 millions and a number of compromise amendments on the other budgetary questions
3.2.00	EP vote 3rd reading
14.2.0 0	Entry into force

4.2 MEDIA + Programme (Decision 2000/821, adopted on 20.12.00)

This programme sets out to encourage the development, distribution and promotion of European audio-visual works. It is assumed that the European audio-visual industry must be able to seize the opportunities opened up by the development of digital technologies and take account of the international dimension of the market. Moreover, the Programme is intended to address a lack of investment in development in this sector in the EU.

1) Development: the basic objective is to stimulate greater investment by industry with an emphasis on projects which are targeted at European and international markets and offer the best prospects for commercial success.

2) Distribution sector: the programme aims to encourage investment in the distribution of various types of media, from cinema screening to on-line distribution

3) Promotion and market access sector: the priority actions will focus on improving the conditions for access, promoting the use of databases and any other tools for exchanging information and experience and supporting audio-visual festivals that feature a significant proportion of European works.

In terms of the negotiating process, the wide scope of these objectives meant that in effect there were two different programmes within MEDIA +:

- MEDIA Development which fell under by article 157 of the Treaty (because it is considered as "industrial"), i.e. unanimity and Consultation.

- MEDIA Training ruled by article 150 of the Treaty (because it is considered as "training"), e.g. qualified majority and co-decision.

Within the Council, and as for CULTURE 2000, a central cleavage emerged between small and large member states. The repartition of funds between development and distribution relies on the separate interests of states: development is interesting for small countries enabling them to produce, distribution is interesting for an industry that already exists[524]. Consequently, the overall budget was at the centre of long discussions (it has been the last point solved, in mid-November 2000). Even if, according to some negotiators, the

[524] Even if things were not quite this simple. As one attaché told us : " Attention, la logique n'est pas aussi simple : soutenir le développement c'est aussi obliger les distributeurs à intervenir le plus en amont possible, ce qui va à l'encontre d'une tendance tenace du marché " (interview, march 2001).

agreement (a budget of 400 million Euro) was quite predictable, the Germans, British and Dutch contested it until the end.

Another point concerned the type of comitology committee. Here a rather classical opposition emerged between the Commission and Member States. The Commission had proposed a consultative committee, but the Member States unanimously defended and obtained a management committee.

As regards the strategy of the EP, this was basically to obtain as much influence as it could on MEDIA Development (despite being limited by the consultation procedure), by conditioning its vote on MEDIA Training (and also the speed of its vote)[525]. So both texts were accepted after a second reading, and following negotiation between the presidencies (Portuguese and French), the General Secretariat of the Council, the Commission and the rapporteur of the EP. Here it is important to note that the two main presidencies were opposed over the directive. The Portuguese presidency was considered to be "biased" by some of the Member States, because it led a campaign of amendments and sought to influence the text in such a way that compromise would have been impossible. On the other hand, the French presidency admits it played the COREPER rather than the working group in order to get its way[526].

Chronology:

Date	Event
14.12.99	Initial proposal
6.7.00	EP vote 1st reading. Adopts the resolution drafted by the rapporteur of committee (Ruth Hieronymi EPP/ED, D) amending the Commission's original proposal: increase of the financial reference from EUR 350 millions to EUR 480 Millions, management procedure rather than advisory procedure, increase of the emphasis on support for European cinema.
20.12.00	Final decisions: strengthening the sectors which help improve the transnational movement of European works, respect for and promotion of linguistic and cultural diversity in Europe, promoting the development of production projects submitted by independent enterprises, in particular small-medium sized. The financial reference amount for implementation of the programme for the period 01.01.2001 to 31.12.2005 shall be EUR 350 millions

[525] According to one attaché: "Avec le parlement on a passé un " gentleman agreement " : le parlement avait peur de ne pas voir ses amendements sur Media développement retenus, donc on en a tenu compte, en échange ils ont donné un accord rapide pour Media Training" (interview, march 2001).

[526] "C'est vrai qu'on a plus joué le COREPER, parce qu'en COREPER ça permet de jouer sur la stratégie alors qu'en groupe, c'est plutôt la substance. On avait la nécessité d'arriver une solution rapidement parce qu'il fallait renouveler Media", interview with a representative.

4.3 The LEONARDI DA VINCI programme (Decision 99/382 adopted 26.4.99)

This Council decision sought to introduce the 2nd stage of the LEONARDO programme on vocational training for the period from 01.01.2000 to 31.12.2004. The financial statement contains an indicative amount of 1 billion Euro for the implementation of the programme. The aim is to create a "Europe of knowledge", which fosters lifelong education and allows full exercise of citizenship. One of the major innovations of LEONARDO II is the launch of "European knowledge centres" allowing players and beneficiaries of other Community youth education programmes to regroup at local or regional level. Introduced in the Council in June 1998, it was adopted rapidly and in a context dominated by the proximity with the elections of EP.

Three issues in particular were at stake**:**

- The preselection of applicants: Although the Commission wanted a selection procedure that would be both national and European altogether, the member states obtained the right to filter the applications to be transmitted to the European level selection process.

- Programme budget: The Commission, together with the EP, defended a budget of 1.4 billion Euros. But certain member states, especially the Netherlands, Germany and the UK, were opposed this outright at the beginning. Progressively, however, they made their position more flexible, without wanting to go beyond 800,000 Euro. Finally a compromise in the Council was found at 1.15 billion Euro.

- Rules of functioning of the Programme committee: the Member States amended the proposal of the Commission in two ways: the composition was enlarged (attaining "a number too important" according to officials from the Commission); and some constraints were introduced in the repartition of the budget per annum.

Chronology:

Date	Event
27.5.98	Initial proposal
5.11.98	EP 1st reading. Amendments proposed: change the duration of this programme to run from 01.01.2000 to 31.12.2006, promoting the lifelong acquisition of qualifications and facilitating the adaptability of workers, promoting entrepreneurship through co-operation activities between training institutions and enterprises (SMEs), remove all forms of discrimination and inequality and facilitate the vocational and social integration of disabled people.

2.12.98	The Commission accepts in full or in part 44 of the European Parliament's amendments, but rejects those amendments which modify the length of the programme and relate to the rules of procedure the arrangements for consultation of Community institutions or budgetary rules.
21.12.98	Council common position. It takes into account significant amendments (clarification of the objectives and measures of the programme, opening the programme's measures to members of the public of any age, more explicit reference to new technologies, the length of the programme) but doesn't accept amendments relating to access to the programme for disabled people and the question of budget.
6.1.99	Amendment of initial proposition by the Commission: the Commission accepts the text proposed by the Council to speed up negotiation, even if the Commission disagrees with the budget and the timing.
23.3.99	EP vote 2nd reading
11.6.99	Entry into force

4.4. The SOCRATES programme (Decision 576/98, adopted on 23.2.98,)

This decision raised the SOCRATES budget by 70 million Euro to 920 million (a figure set by the Directive 95/819). Adopted under co-decision, within the Council this negotiation raised three sets of issues:

- Semantic question: There was discussion concerning the use of the term of "espace éducatif européen". Certain Member States were afraid that the Commission could get some legitimacy in this field. Arguing that article 149 of the Treaty didn't indicate the role of the Commission on education, issues the negotiation was very long on this point and ended with a compromise, that some actors involved saw as unacceptable[527].

- Selection of projects: Another tough negotiation concerned the procedure of selection. For centralised actions in particular, Member States wanted to be present at each step of the negotiation so as to be able to give their opinion on prepropositions and propositions, to control the experts chosen by the Commission, to have an increased role in the Programme Committee. The Commission was very critical about this role given to states, arguing that it would make the implementation procedures even longer.

[527] " En tout cas, on est arrivé à un compromis (art 1.3 du texte final) qui est un véritable non sens, incompréhensible " (interview with an official of the Commission, January 2001).

- Budget: As usual, there was a conflict between countries on this point. The countries that are net contributors were quite unhappy with an large budget. Germany, Netherlands and the UK did not want to accept a total budget superior to 1.4 billion Euro.

In addition, there was conflict between the Council and the EP. Part of this problem concerned the rules for the selection of projects. On these questions, the positions of the EP were similar to those of the Commission, i.e. in favour of a simplification of procedures. According to some Commission's officials, the EP helped get an agreement on this point. But the main issue was the budget: The EP wanted a budget of 2.5 billion Euro, but the common position was 1.55 billion. Finally, an agreement was reached at 1.85 billion Euro. Conciliation was long and arduous[528]. It should also be noted that this specific debate was linked to the general issue of Agenda 2000, i.e. the general financial equilibrium of the EU.

5. Social Affairs

Like culture, the EU is generally seen as having been kept out of social policy-making by national governments. In reality, EU level action on social affairs is longstanding. However, legislation in this field tends to be limited to specific matters such as health and safety or minimum standards regarding working hours and pay[529]. Indeed, a commonthreadinall these actions is the emphasis laid upon regulation rather than redistribution. This orientation towards cheap but effective actions suits the Commission in particular because it does not have to demand or manage new budgets[530]. However, in the context of high unemployment and already high labour costs, national governments often resist EU legislation in this field in the name of reducing government interference in industry. This of course largely explains the weak nature of the Social Protocol that was appended to the Maastricht Treaty. More recently, the Amsterdam Treaty has added employment as an objective for the EU, the reason for which the social affairs council is now called employment and social affairs.

Although many social policy initiatives fall under the requirement of unanimity voting in Council, others have been passed using QMV by being connected to the completion of the single market programme. Our cases cover both these scenarios. In the second case (and particularly regarding health and safety) one could surmise that procedures are

[528] According to one official involved, " On est allé au bout des trois procédures de conciliation " ; " on est allé assez loindans la dramaturgie politique… à se faire peur l'un l'autre " (interview, January 2001).
[529] Liebfried/Pierson (1998).
[530] Cram (1993); Majone (1996).

highly routine since such issues have been dealt with for many years almost entirely at the EU level.

5. 1. Working time directive for excluded sectors

The general directive concerning working time was adopted in 1993 (Working time directive, 93/104/CE, adopted the 23rd of November). This directive did not include certain sectors considered as being too socially sensitive (such as young doctors). Moreover, it generated a conflict between the EU and the British government, the latter accusing the former to have exceeded the competencies given by the Treaty (and the British government lost the trial, ECJ, decision 18 November 1996). New proposals were made by the Commission at the beginning of 1998 to cover these "excluded sectors".

Specifically, two directives were adopted:

5.1.1 Working time for seafarers (Directive 99/63 adopted in June 1999)

This directive implements framework agreements concerning fixed time work. According to members of the Council secretariat, this directive is an example of where the EU had little room for manoeuvre against the strength of social partner agreements. More precisely, the Consultative committee is in effect a decision-making *arena* and not just a *forum* for ideas[531]. The principal protagonists here are the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers Unions (FST). The European Economic and Social Committee had a very reduced role, its opinion being only formally taken into account.

5.1.1.1 Excluded sectors (Directive 2000/34/CE, adopted 22.6.00, modifying directive 93/104/CE)

This directive was proposed to cover the sectors that were not covered by the initial one. Railways, junior doctors, transport have been the main issues of this legislation. After a long negotiation, marked by a difficult co-decision procedure, the final text was adopted in June 2000, under the Portuguese presidency.

In terms of the issues at stake, for the general directive (2000/34) the main issue was again over junior doctors in the UK. But many other countries had some difficulties on other topics,, such as railways and transport. The British RP helped the other Member States on the different issues, inducing a better deal for each Member State (and thus

[531] Jobert, (1994).

favouring solidarity with the UK on the particular issue of junior doctors). If the UK was the Member State which concentrated the main difficulties, three other countries were also having difficulties to adapt the directive's intentions to their current systems: France, Spain and Ireland. The negotiation was further complicated by the fact that Ireland and the UK had to cope with different constraints. On the Irish side, the system could be changed quite fast in the medium-term, but the Irish government couldn't set up reforms in the short term. Conversely, the UK government could launch a reform quite rapidly but claimed to be unable to implement the reform completely for 13 years. Finally, a common position was taken based on the British demands. This solidarity within the Council must be understood by keeping in mind the British RP's successful strategy to make some shifting alliances with several Member States on different items (railways, transport, seafishing), thereby avoiding being isolated on the particular issue of junior doctors.

This directive also involved conflict with the EP going as far as conciliation. The EP's committee disagreed profoundly with the Council's common position (it proposed, at the beginning 4 years, instead of 13 years for the Council for junior doctors). In addition, this controversy was a way of testing the new British government. Finally, it was also the first conciliation procedure on social affairs[532]. The final deal was essentially a victory for the Council: the period of transition will be 12 years long (instead of 13). The minor concession made to the parliament was the necessity of a report made by the Commission at the end of the transition period.

5.1.1.2 For seafarers and civil aviation

Here the type of negotiation was quite different. The Council had a more minor role: either refuse the agreement by the social partners as a whole, or accept it as a whole. Therefore, not a lot of discussions took place within the Council.

- Negotiations concerning the timing of implementation of the directive (with a difference between the position of the Commission and that of the Council) and the existence of penalties in case of non-implementation (penalties that are proposed by the Commission but refused systemically by the Council).

[532] Not surprisingly, the conciliation was rather not consensual. On the council's side, every Member State remained "solidaire" ("we said to the other Member States: if we remain united, we can't lose", the British attaché told us). The Portuguese presidency, especially, worked well with the British. Moreover, the British RP had prepared a very complete expertise, based on statistical data, that backed the Council's position (contrary to the Parliament which had only a few arguments founded on serious data).

- Attachés can also ask for some clarifications from the social partners (questions that are submitted by the Commission which has a role of go-between). On this issue, one of the main concerns of the members of the Council is to check the representativeness of the social partners involved in the agreement (in order to protect themselves in case of a trial in the European Court of Justice).

Chronology:

Date	Event
18.11.98	Initial proposal
14.04.99	EP vote 1st reading under co-operation procedure the EP approved the report by Hugh McMAHON (PSE, UK) which approves the Commission proposal
06.05.99	EP vote 1st reading (following the entry into force of the Treaty of Amsterdam the EP confirmed as its first reading under co-decision procedure its vote of 14/04/99).
12.07.99	The Council's common position follows the Commission's initial proposal except changes to the definitions (e.g. "ships" and "complaints") and implementation period is extended by one year to 30 June 2002.
04.11.99	EP vote 2nd reading: The EP adopted the recommendations drafted by Hughes (rapporteur for 2nd reading) and the Council common position without amendment.
13.12.99	Final Decision: this directive complements the agreement reached by the Social Partners of the Community's shipping industry Entry into force in Member States no later than 30 June 2002

5.1.2 Racial discrimination (directive 00/43, adopted 29th June, 2000)

This directive sought to put into effect article 13 of the Amsterdam Treaty regarding discrimination and employment. This legislation is interesting for us because:

- a decision was made to get this directive through before others on other types of discrimination (on the grounds of sex, etc);

- it was pushed through very quickly by the Portuguese presidency.

More generally speaking, the issue had been on the political agenda since the mid-90's. After a "Year against racism" (1997), a process of concertation led by the Commission was initiated (with official meetings in Liverpool, Innsbruck and Vienna) and culminated in the proposal made in November 1999 (after slowing down during the "Santer crisis"). The "anti-discrimination package" was composed of two directives (one against racial discrimination, another against employment discrimination) and a program. At the beginning of 2000, the negotiation process was accelerated by the participation of the

Austrian extreme right in a governing coalition. During the Lisbon European Council, it was decided to adopt the two directives and the program as soon as possible. From the outset, all of them were negotiated at the same time, without knowing which of them would be adopted first and when the negotiation would end. This uncertainty lasted several months. Finally, it was decided to adopt the racial discrimination directive first (during the Portuguese presidency) and the employment one later (it was adopted during the French presidency in October 2001). In the end, the racial discrimination directive was adopted quite rapidly "thanks to Haider" said one of our interviewees with heavy irony.

In terms of the issues at stake, the parliament's involvement quickly became very important. It seems that the European Parliament did not accept that article 13 of the Amsterdam Treaty did not set up a co-decision procedure for such matters. Thus, even if it had no legal powers, the EP's committee sought to influence the process by giving its opinion in time and obtaining concessions from the Council. As a consequence, there was negotiation between representatives of the Council, members of the Commission and the EP committee. Nevertheless, only a few proposals of the EP were retained in the final text. Moreover, some of the amendments proposed by the Parliament (such as the question of incitement to discrimination deemed as discrimination) accepted by the Council were going to be made in any case by some member-states.

Within the Council, and despite the common will to rapidly reach a compromise, a number of articles were subject to intense discussion:

- "Race": The use of the term of "race" constituted a first problem. Some Member States, like France, Sweden and Spain contested the use of "race" in the directive, although some other were readily to accept it without any problems. A compromise was made with a recital recalling that "The EU refuses any theories based on racial criterion".

- The proof of racial discrimination raised a second issue: can/must it be demonstrated by statistical data? Again, the cleavage within the Council was the same as above (France, Sweden, Spain and others vs. the Netherlands and the United Kingdom). As a compromise, the use of statistical data was put into the recital and was considered as one means amongst others of demonstrating racial discrimination[533].

[533] This question of "proof" was very much linked to the "Gender" directive of 1997).

- Independence of agencies devoted to evaluate the potential situations of discrimination: some Member States could not cope with this proposition of the Commission because they already had set up some state-run agencies. A compromise was found with the idea of "independent activities".

- Harassment: How does one define it? The initial proposal of the Commission was said to be too vague, so the Member States added several adjectives in order to make it more precise.

From a more general perspective, the constraint of time had a strong impact on negotiations as much within Member States (between different ministers) as between Member States (in the Council). For instance, lots of footnotes on some articles were made because of the vagueness of national positions. The processing of this directive also features an effective linkage between the Commission and the social affairs working group: the member of the Commission was a former member of the group (as UK representative). Finally there was also an institutional and political dimension: in March 2000, a decision was taken to finish negotiations before the end of the Portuguese presidency. Subsequently, negotiations sped up (meetings became very frequent in April and May).

Chronology:

Date	Event
25.11.99	Initial proposal
18.05.00	EP vote 1st reading. It adopts the resolution drafted by K Maria BUITENWEG (Greens/ALE, Netherlands). The main amendments were: incitement instructions or pressure to discriminate shall fall within the definitions of direct and indirect discrimination, Member States will set up penalties such as payment of compensation to the victim, in public procurement tenders authorities may include demands that discriminate in favour of persons falling within the scope of the directive.
31.05.00	Amendment of initial proposal: Commission adopted a package of proposals to combat discrimination. CoR and ESC gave their opinions on 12.4.2000 and 25.5.2000 respectively. In the light of those opinions the Commission has modified its original proposal: the directive now applies to legal as well as natural persons, definition of indirect discrimination (incitement to discriminate has been clearly deemed to be discrimination), the directive applies in the private and public sectors
29.06.00	Final decision

5.2 Health and safety at work

On this type of directive, one can be struck by the fact that debates have a very strong technical nature. In a number of cases, the negotiation is about the agreement on a common "limit value" that could be acceptable to all the participants. To determine national positions, experts play an essential role, by being able of arguing on the necessity of adopting a certain value compared to another one. Unsurprisingly, attachés are always accompanied by one or two experts coming from capitals for meetings of the working group. This technical dimension of the debate does not mean that political negotiation has been ruled out. Reaching an agreement, even on technical matters, requires negotiation, e.g. some mutual concessions, which relies on relational activity. One could even say that negotiation is political, to the extent that these negotiations deal with some central issues of contemporary societies (especially, conflicts between employers' and workers' interests).

5.2.1 Vibrations (directive not yet adopted)

Dealt with under the co-decision procedure, the beginning of this process took place in 1993, when there was a global proposal made by the Commission and named 'Physical agents' (this encompassed three themes: 'vibrations', 'noise' and electro-magnetism'. But the Member-States refused the proposal because they found it too heterogeneous (the physical agents concerned were not similar and the degree of knowledge in each field was unequal). This proposal was partially rewritten during the German presidency by focusing on vibrations (the Germans were especially interested in the questions of vibrations caused by pneumatic drills).

Initially very reluctant towards this initiative, the Commission ended up considering it could be a means of getting part of its initial draft legislation adopted. Technically, however, the text proposed by the Germans remained problematic because it was just very simplistically deduced from the initial proposal of the Commission without any adaptation. As a consequence, a great deal of work was needed to restructure the text in order to adapt it to the particular issue of vibrations.

During the negotiations the following issues were raised:

- "Whole body vibrations": in the beginning, the procedures of measurement proposed by the Commission were contested by some Member States (especially the UK). Progressively, however, experts reached a compromise on this question. A second more central issue concerned the determination of the "limit value". The proposal of the Commission was 0.8, but during the Finnish presidency, under the

pressure of some southern countries and the UK, it went to 1.3. Finally, after a long discussion, a political agreement was found at 1.15 in the Council.

- Who is included in the directive? The question was to know if seamen and farmers were concerned by this directive. Italy, especially, was much in disfavour of the extension of such measures to farmers.

The "political agreement" reached within the Council on a limit value of 1.15 continued to cause controversy. Some of the Member States were not satisfied with it, finding that it was not sufficient as a measure of protection and hoping – knowing? – the EP would not accept such a value. But the relationship with the EP was quite complicated. A first opinion had been given on the first proposal (made by the Commission), but after the Treaty of Amsterdam, this domain has been included in co-decision, rather than co-operation. It has generated quite a few problems to know what was the adequate procedure in such a situation.

5.2.2 Work equipment (directive 01/45, adopted June 27th, 2001)

This proposal was left on the table for several presidencies because it was not considered a priority. Two discussions have arisen in the social affairs working group: over the methods used to set up scaffolding and security for workers working at height. An agreement was found quite easily within the working group. The Netherlands had some problems, because of its many small cleaning enterprises using scales that were unable to change radically their rules of protection for work at height. Representatives of the Netherlands say they have been quite disappointed by the reactions within the working group[534]. Finally, they obtained a transitional period that is two years longer for small enterprises.

Nevertheless, the Council retained its common position for a few months because it sought to find an agreement with the EP on the first reading. There were long negotiations with the Committee of the EP during the French presidency concerning the training of workers and an enlargement of the persons concerned by the directive (especially self-employed people). Finally, an agreement was reached after the second reading of the EP. According to some, such an informal process negotiation with the EP makes for a considerably longer decisionmaking process.

[534] "Dans ce cas là, personne n'a voulu nous aider… c'est plutôt la Commission qui nous a aidés ", Interview with RP, 2001.

Chronology:

Date	Event
27.11.98	Initial proposal
21.09.00	EP vote 1st reading: The EP adopted its opinion on the Commission's proposal introducing a number of technical amendments
10.10.00	Amendment of initial proposal: The changes made by the Commission are of 2 types: formal changes following the entry into force of the Amsterdam Treaty and minor changes concerning risk assessment, worker training, standard of safety/risk.
23.03.01	Common position: The Council respects the objectives put forward by the Commission and supported by the Parliament while introducing a number of amendments to the proposal. It sets out the requirements relating to quite specific situations at work, namely the use of work equipment allowing access to and use of work stations at a height. The common position allows the Member States a transitional period to take account of practical problems of implementation which may be encountered by small and medium-sized enterprises in particular.
30.03.01	Commission Assessment of Common Position: In general the Council's common position complies with the spirit of the Commission proposal. The most significant difference is the introduction of the possibility for the Member States to make use of the transitional period of not more than 2 years in order to facilitate the practical implementation of the Directive.
25.04.01	Decision of committee responsible: The committee adopts the report by Peter Skinner (PES,UK) approving the Council's common position without amendment under co-decision procedure.
14.06.01	EP vote 2nd reading: The European Parliament votes to approve the report by Mr. Skinner without amendment. This can be explained by the fact that EP and Council had achieved a consensus as regards to this directive already in first reading

2. Annex 2. Chapter 6 -Overview of Committees and Measures

DG Commission/ Our committee number	Number of committees/name of committee	Type of committee	Number of measures
ENTERPRISE	4	I/IIa/b/IIIa	225
1	Management Committee on horizontal questions concerning trade in processed agricultural products not listed in Annex 2	IIa/II	80
2	Telecommunications Conformity Assessment and Market Surveillance Committee (TCAM)	I/IIIa	2
3	Standing Committee on approximation of the laws relating to construction products	IIIa	43
37	Committee for the adaption to technical progress of legislation on the removal of technical barriers to trade in motor vehicles and their trailers	IIb/IIIa	100
EMPLOYMENT AND SOCIAL AFFAIRS	1	IIIa	2
6	Committee for the technical adaption of legislation on the introduction of measures to encourage improvements in the safety and health of workers at work	IIIa	2
INTERNAL MARKET	2	IIb	6
32	Committee on the second general system for the recognition of professional education and training	IIb	3
38	Committee on the protection of individuals with regard to the processing of personal data and on the free movement of such data	IIb	3

HEALTH AND CONSUMER PROTECTION	2	IIIa/IIIb/III	353
44	Standing Veterinary Committee (SVC)	IIIa/IIIb/III	277
45	Standing Committee for Foodstuffs (SCF)	IIIa/IIIb/III	76
AGRICULTURE	4	IIa/IIIa	137
46	Committee on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OAP)	IIIa	35
47	Committee on certificates of specific character for agricultural products and foodstuffs	IIIa	6
48	Standing Committee on Organic Farming	IIIa	14
49	Management Committee for bananas	IIa	82
ENVIRONMENT	11	IIa/IIIa/b	79
10	Management Committee for application of the directive on the standardisation and rationalisation of reports on the implementation of certain directives relating to the environment	IIa	5
11	Committee on the conservation of natural habitats and of wild fauna and flora (Natura)	IIIa	2
12	Committee for the protection of species of wild fauna and flora by regulating trade	IIIa/IIIb	12
15	Management Committee to monitor production and consumption of substances that deplete the ozone layer (SDO)	IIa	7
16	Committee for application of the regulation authorising voluntary participation by undertakings in the industrial sector in a Community eco-management and audit scheme (EMAS)	IIIa	2
17	Committee for the adaption to technical progress and implementation of the directive and the deliberate	IIIa	8

	release into the environment of genetically modified organisms		
18	Committee for the adaption to technical progress of legislation to remove technical barriers to trade in dangerous substances and preparations	IIIa/IIIb	12
19	Committee for implementation of the directive on packaging and packaging waste	IIIa	7
20	Committee for the adaption to technical progress and application of the Community award scheme for an ecolabel (ECO-LABEL)	IIIa	17
40	Committee for implementation of the directive on integrated pollution prevention and control (IPPC)	IIIa	2
41	Committee for the adaption to scientific and technical progress and implementation of the directives on waste	IIIa	5
RESEARCH	1	IIIa	1
21	Committee on the arrangements for the application of the rules for the participation of undertakings, research centres and universities and for the dissemination of research results for the implementation of the fifth framework programme of the European Community (1999-2002)	IIIa	1
TOTAL	25		803

3. Annex 3. List of Publications and Conference Presentations

1. European Institute of Public Administration Maastricht

Information and results of the project so far are presented on the project's website: http://www.eipa.nl/public/Topics/Comitology/research.htm.

Preliminary Findings of the project have been presented at the Workshop "Legitimacy, democracy and the European Committee system", Brussels,5–7 March, 2001.

Preliminary findings of the project have been presented at the ECSA Seventh Biennial International Conference, Workshop 10d: "Governance by Committee, the Role of Committees in European Policy-Making and Policy-Implementation", Madison, Wisconsin (USA), May 31 – June 2, 2001.

The institute has numerous seminars on comitology and on understanding decision-making in the European Union. Within these seminars, in which several project team members are involved, the project findings have already in the past and will be in the future integrated in presentations and discussions.

2. Université de Rennes, Institute d'Etudes Politiques Rennes

Eve Fouilleux presented preliminary findings of the project at the ECSA Seventh Biennial International Conference, Workshop 10d: "Governance by Committee, the Role of Committees in European Policy-Making and Policy-Implementation, Madison, Wisconsin (USA), May 31 -June 2, 2001.

Preliminary Findings of the project have been presented by Eve Fouilleux at the Workshop "Legitimacy, democracy and the European Committee system", Brussels, 5–7March, 2001.

3. Université de Bordeaux

Andy Smith, Jaques de Maillard: "Pratiques institutionnalisees ou politiques publiques? Les enjeux methodologiques d'une comparaison intersectiorielle europeenne" at the colloquium: "Faire de la politique comparée au 21ème siecle" (atelier 2: Les outils méthodologiques), Sciences-po, Bordeaux, 21-22 February, 2002.

Preliminary Findings of the project have been presented by Andy Smith at the Workshop "Legitimacy, democracy and the European Committee system", Brussels, 5–7March, 2001.

4. King's College London

Alexander Tuerk presented preliminary findings of the project at the ECSA Seventh Biennial International Conference, Workshop 10d: "Governance by Committee, the Role of Committees in European Policy-Making and Policy-Implementation, Madison, Wisconsin (USA), May 31 – June 2, 2001.

Preliminary Findings of the project have been presented by Alexander Tuerk at the Workshop "Legitimacy, democracy and the European Committee system", Brussels, 5–7March, 2001.

5. University of Cologne

5.1. Papers and Articles, in which preliminary findings of the research project were presented by Andreas Maurer:

The German Presidency', in: Journal of Common Market Studies: The European Union 1999/2000, Annual Review, London, Blackwell Publishers 2000.

Die Ständige Vertretung Deutschlands bei der EU -Scharnier im administrativen Mehrebenensystem' (with Wolfgang Wessels), in: Knodt, Michèle/Kohler-Koch, Beate (Ed.): Deutschland zwischen Europäisierung and Selbstbehauptung, Frankfurt, Campus 2000.

The European Policy-Making Machinery in the Berlin Republic: hindrance or hand-maiden?' (with Simon Bulmer and William E. Paterson), in: German Politics, Nr. 1/2001.

Entscheidungseffizienz and Handlungsfähigkeit nach Nizza: Die neuen Anwendungsfelder für Mehrheitsentscheidungen im Rat der EU', in: Integration, Nr. 2/2001.

Das Entscheidungs-and Koordinationssystem deutscher Europapolitik: Hindernis für eine neue Politik?' (with Simon Bulmer and William Paterson), in: Jopp, Mathias/Schmalz, Uwe/Schneider, Heinrich (Ed.): Neue deutsche Europapolitik, Bonn, Europa Union Verlag 2001.

The European Parliament: Win-Sets of a Less Invited Guest', in: Laursen, Finn (Ed.): The Amsterdam Treaty: National Preference Formation, Interstate Bargaining, Outcome and Ratification, Odense, OUP 2002.

The German case. A key moderator in a competitive multi-level enviornment', in: Kassim, Hussein/Menon, Anand/Peters, Guy (Ed.): National Co-ordination in Brussels: The role of the Permanent Representations, Oxford, OUP 2002.

Europeanisation in and of the EU system: Trends, Offers and Constraints' (with Wolfgang Wessels), in: Kohler-Koch, Beate (Ed.): Linking EU and National Governance, Oxford, OUP 2002.

Germany -fragmented systems fitting into the Union', in: Wessels, Wolfgang/Maurer, Andreas/Withtag, Jürgen (Ed.): Fifteen into One? The European Union and its Member States, Manchester, MUP 2002.

5.2. Conference contributions by Andreas Maurer with preliminary versions of the final paper

17.-18.2.2000	MAPEUROP-Project Conference, Lisbon (Legitimacy building in CFSP/ESDP)
28.-30.5.2000	MAPEUROP-Project Conference, Lisbon (Legitimacy building in CFSP/ESDP)
22.-23.6.2000	TEPSA Presidency Conference, Paris (Legitimacy building and the IGC 2000)
23.9.2000	Regional Conference, Bündnis 90/Die Grünen on EU policy making, Bonn (Legitimacy building and Participative Democracy)
8.-9.5.2001	COSAC-Working group, Swedish Parliament, Stockholm (Legitimacy Building, the European Parliament and national parliaments)
31.5. – 2.6. 2001	ECSA Seventh Biennial International Conference, Workshop 10d: "Governance by Committee, the Role of Committees in European Policy-Making and Policy-Implementation, Madison, Wisconsin (USA)
25.11.2000	National Thematic Conference on EU policy making, Bündnis 90/Die Grünen, Hannover (Legitimacy building and deliberative democracy)
24.-26.10.2001	Seminar with the Carl-Duisberg-Gesellschaft on Comitology, Ljubljana

22.-23.11.2001	TEPSA-Presidency Conference, Madrid (Legitimacy building and EU policy making through the new method of open coordination)
1.12.2001	University of Warsaw, Conference on the post-Nice process (Legitimacy building, the parliaments and interparliamentary cooperation)

6. Institute of Advanced Studies, Vienna

Preliminary Findings of the project have been presented by Christine Neuhold at the Workshop "Legitimacy, democracy and the European Committee system", Brussels, 5–7March, 2001.

Christine Neuhold presented preliminary findings of the project at the ECSA Seventh Biennial International Conference, Workshop 10d: "Governance by Committee, the Role of Committees in European Policy-Making and Policy-Implementation, Madison, Wisconsin (USA), May 31 – June 2, 2001.

Christine Neuhold published preliminary findings in the European Integration online Papers (EIoP), Vol. 5/N°10; http://eiop.or.at/eiop/texte/2001-010a.htm.

4. Annex 4. Judgements

Joined Cases 188 to 190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545.

Case 25/70 *Einfuhrstelle v Köster* [1970] ECR 1161.

Joined Cases 16 and 17/62 *Producteurs de Fruits v Council* [1962] ECR 471.

Case 147/83 *Binderer v Commission* [1985] ECR 257.

Case C-309/89 *Codorniu v Council* [1994] ECR I-1853.

Cases T-186/97 etc. *Kaufring v Commission*, judgment of 10 May 2001.

Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469.

Case C-239/99 *Nachi Europe GmbH v Hauptzollamt Krefeld*, judgment of 15 February 2001.

Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463.

Case T-111/00 *BAT v Commission*, judgment of 10 October 2001.

Case 45/86 *Commission v Council* [1987] ECR 1493.

Case C-314/99 *Netherlands v Commission*.

Case C-93/00 *European Parliament v Council*, judgment of 13 December 2001.

Joined Cases T-125/96 and T-152/96 *Boehringer v Council and Commission* [1999] ECR II-3427.

Case C-32/00 P *Boehringer v Council and Commission,* judgment of 26 February 2002.

Case T-112/97 *Monsanto v Commission* [1999] ECR II-1277.

Case T-120/96 *Lilly Industries Ltd v Commission* [1998] ECR II-2571.

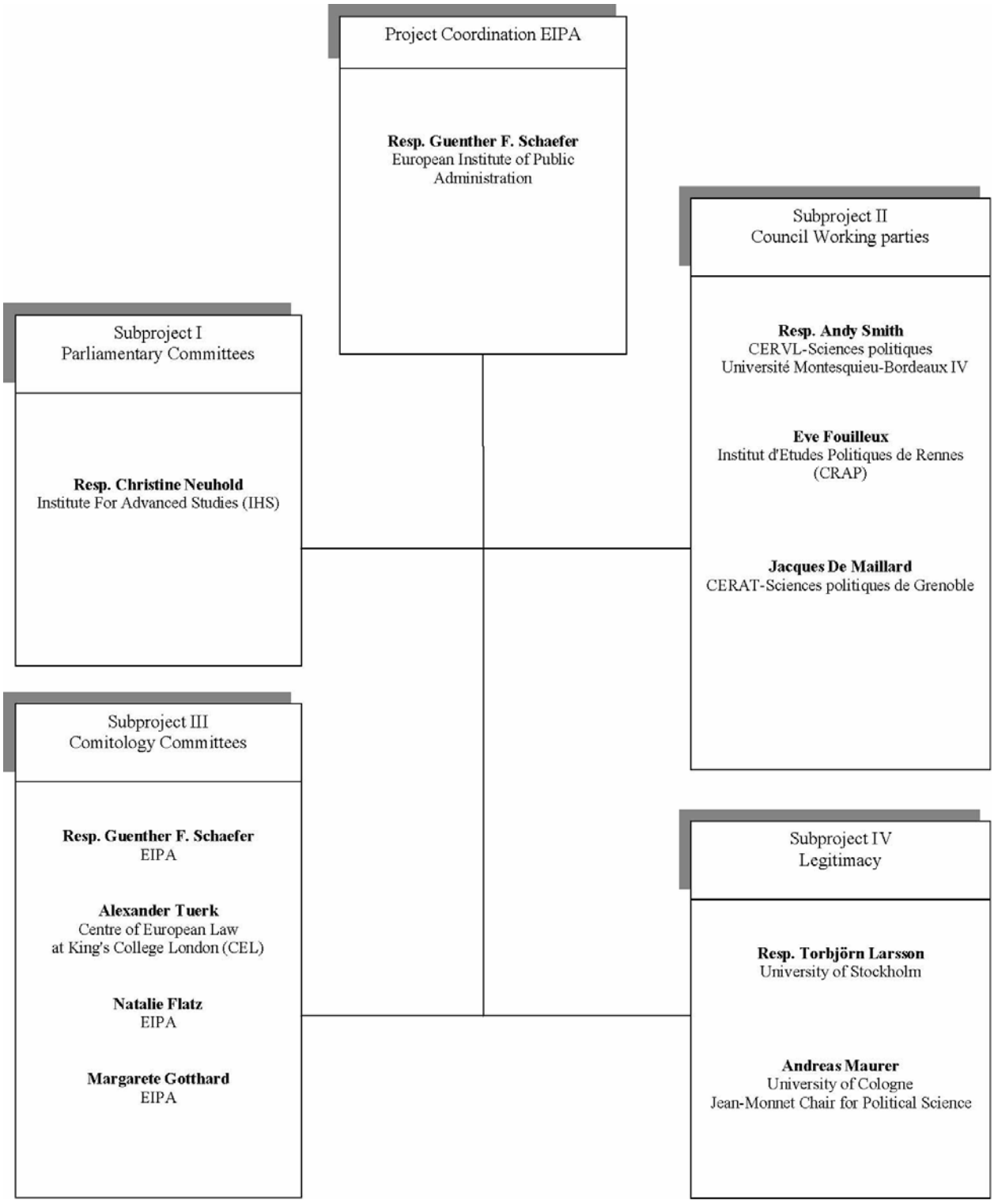
Case C-248/99P *Monsanto v Commission,* judgment of 8 January 2002.

Joined Cases C-289/96, C-293/96 and C-299/96 *Denmark, Germany and France v Commission* [1999] ECR I-1541.

Case C-104/97P *Atlanta and Others v Council and Commission* [1999] ECR I-6983.

Case C-263/95 *Germany v Commission* [1998] ECR I-00441.

5. List of the research teams Spring 2002 Project Management and Co-ordination:



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