The Role of Committees in the Policy-Process of the European Union

Legislation, Implementation and Deliberation

Edited by

Thomas Christiansen
Senior Lecturer, European Institute of Public Administration, Maastricht, the Netherlands

Torbjörn Larsson
Stockholm University, Sweden

Edward Elgar
Cheltenham, UK • Northampton, MA, USA
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Contributors

Thomas Christiansen is Senior Lecturer at the European Institute for Public Administration in Maastricht, having previously worked as Director of the Jean Monnet Centre for European Studies at the University of Wales, Aberystwyth. He is also Professor at the College of Europe in Bruges as well as Executive Editor of the Journal of European Integration. He has published widely on different aspects of the institutional politics of the European Union. Among his publications are four edited volumes, including Informal Governance of the European Union (Cheltenham: Edward Elgar, 2004), edited with Simona Piattoni, and The Social Construction of Europe (London: Sage, 2001), edited with Knud Erik Jørgensen and Antje Wiener.


Simon Duke is an Associate Professor at the European Institute of Public Administration (EIPA), Maastricht, the Netherlands. He completed his D.Phil at Oxford University in 1986 and, since then, has worked at the Stockholm International Peace Research Institute, Ohio State University, Pennsylvania State University and the Central European University, Budapest. He is the author of several monographs on European and transatlantic foreign and security issues, including The Elusive Quest for European Security: From EDC to CFSP (Macmillan/St Anthony’s, 2000).
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The EU and Crisis Management: Development and Prospects (EIPA, 2002) and Beyond the Chapter: Enlargement Challenges for CFSP and ESDP (EIPA, 2003). He has also published on similar themes in numerous academic journals.

Eve Fouilleux is a CNRS (Centre National de la Recherche Scientifique) Research Fellow in Political Science at the Centre for Research on Political Action in Europe (CRAPE), Rennes, France. She has been working on the European system of governance for many years, with a special focus on the EU Common Agricultural Policy and its reform process. Among her main and more recent publications are: 'CAP reforms and multilateral trade negotiations: another view on discourse efficiency' (West European Politics, 27 (2), March 2004, pp. 235–55) and La PAC et ses réformes: Une politique à l’épreuve de la globalisation (Paris: L’Harmattan, 2003). In 2003 and 2004 she worked at the United Nations Food and Agriculture Organization as a visiting scientist on agricultural policies for development. Her research is now increasingly focusing on development policies and politics.

Torbjörn Larsson has been an Associate Professor at the Department of Political Science at Stockholm University since 1994. From 1996 to 2001 he was an associate professor at the European Institute of Public Administration in Maastricht. Torbjörn Larsson has been lecturing at the University of Stockholm on a regular basis since 1975. He has published extensively in the fields of political institutions and politics, legitimacy and legitimacy building in political systems and the EU, judicialisation, public administration and public policy, intermediate level of government, comparative government and research methods. The latest book, Precooking in the European Union – The World of Expert Groups, was published in 2003. He has also participated as an expert in several Swedish commissions of inquiry and provided research reports to institutions like the Swedish government and its agencies and the OECD.

Pamela Lintner works in the Federal Ministry of Finance of Austria and was previously Research Assistant at the European Institute of Public Administration, Maastricht. She studied law in Linz and Vienna and participated in the II. Course of the Catedera Jean Monnet de Cultura Jurídica Europea in Madrid. After her graduation from the University of Vienna she received a postgraduate scholarship from the Austrian Ministry for Science, Education and Culture for a PhD fellowship at EIPA. She has conducted research and published on the question of democratic control over the implementing powers of the EU executive, which is also the subject of her doctorate.
Jan Murk works as an assistant in the European Parliament. He was previously a trainee at the European Institute for Public Administration (EIPA) and researched the Commission's use of expert groups during that period. He completed his studies in Policy and Organizational Sciences at the Catholic University of Nijmegen in 2002, specialising in European Affairs. His thesis, 'Expert Groups in DG Enterprise', is a qualitative study on the variety of expert groups in the European Commission.

Christine Neuhold is Assistant Professor and Director of the Master in European Public Affairs at the University of Maastricht. She has published on the role of the European Parliament and is author of *The European Parliament in the EU Policy Process: Democratic control over the implementing powers of the European Commission* (Frankfurt/Main: Peter Lang, Europäischer Verlag der Wissenschaften, 2001) and co-editor of *Dynamics and Obstacles of European Governance* (Cheltenham: Edward Elgar, 2007). She has also worked on controlling powers of national parliaments over the Council of Ministers and examined the role of committees within the European system of governance.

B. Guy Peters is Maurice Falk Professor of American Government at the University of Pittsburgh, Professor II at the University of Bodoe (Norway), and Honorary Professor at City University of Hong Kong. Among his recent publications are the *Handbook of Public Policy* (London: Sage, 2006) and the *Handbook of Public Administration* (London: Sage, 2003), both co-edited with Jon Pierre, and *Institutional Theory in Political Science* (2nd edn) (London: Continuum International Publishing, 2005).

Guenther F. Schaefer was Professor of Public Policy at the European Institute of Public Administration until early 2004 and now works as an independent consultant in the area of committees and comitology in the EU. He has published widely on public policy and public administration in the European Union and is editor, with R. Pedler, of *Shaping European Law and Policy – The Role of Committees and Comitology in the Political Process* (Maastricht: EIPA, 1996) and author, with E. McInerney, of *Strengthening Innovativeness in Public Sector Management* (Maastricht: EIPA, 1988).

Pierpaolo Settembri is a Researcher in EU Institutions and Decision-Making at the European Institute of Public Administration (EIPA), Maastricht. He holds a degree in Political Science from LUISS ‘Guido Carli’ University, Rome (2001), a masters degree in European Political and Administrative Studies from the College of Europe, Bruges (2002), and a doctorate in Political Science from the University of Florence and the
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IEP of Paris (2006). He is also assistant to the chair of Political Science at LUISS ‘Guido Carli’ University and spent the 2006–07 academic year as a Global Emile Noel Fellow at New York University. He is preparing a publication based on his doctoral research as well as a co-authored monograph on the European Parliament.

Andy Smith is Directeur de Recherche at the French Fondation Nationale des Sciences Politiques. He conducts his research at the CERVL research centre and teaches at Sciences Po Bordeaux. He has recently published Les commissaires européennes: technocrates, diplomates ou politiques with J. Joan (Paris: Presses de Sciences Po, 2002) and Le Gouvernement de l’Union européenne: Une sociologie politique (Paris: LGDJ, 2004) and edited Politics and the European Commission (London: Routledge, 2004). He is currently working on the production and implementation of international trade norms in the food and beverage sectors.

Alexander Türk is Lecturer in Law at King’s College London. He is Director of the Anglo-German Programme of the School of Law and Director of the Postgraduate Diploma in EC Law by Distance Learning. He studied history (MA) and law (first and second state exam) in Augsburg, Germany. He obtained an LLM in European Law at the College of Europe in Bruges, Belgium. Thereafter, he worked for one year as Lecturer at the EIPA, Maastricht. He also holds a PhD from the University of London. His publications include in particular Delegated Legislation and the Role of Committees in the EC (Kluwer Law International, 2000), which he edited together with Mads Andenas.

Beatrice Vaccari is Senior Lecturer at the European Institute for Public Administration in Maastricht. She studied at the University of Florence and at the European University Institute in Florence and subsequently worked in various positions in the European Commission in Brussels. She also lectures on the International Relations Masters Programme at the Université de Paris I (Sorbonne). She has previously published on different aspects of comitology in the European Union and is currently editing an Italian-language volume on this subject.
### Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AFET</td>
<td>Committee on Foreign Affairs (European Parliament)</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CHODS</td>
<td>Chiefs of Defence Staff</td>
</tr>
<tr>
<td>CIVCOM</td>
<td>Committee on the Civilian Aspects of ESDP</td>
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<td>COREPER</td>
<td>Committee of Permanent Representatives</td>
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<tr>
<td>COREU</td>
<td>COREu TErminal SYstem</td>
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<td>CORTESY</td>
<td>COREu TErminal SYstem</td>
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<td>DG</td>
<td>Directorate-General</td>
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<tr>
<td>ECAP</td>
<td>European Capabilities Action Plan</td>
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<td>EPC</td>
<td>European Political Cooperation (precursor to CFSP)</td>
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<td>ESDP</td>
<td>European Security and Defence Policy (part of CFSP)</td>
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<tr>
<td>EUMC</td>
<td>EU Military Committee</td>
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<td>EUMS</td>
<td>EU Military Staff</td>
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<td>EXSPEC</td>
<td>Exercise Specifications</td>
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<td>GAC</td>
<td>General Affairs Council</td>
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<td>IGC</td>
<td>Intergovernmental Conference</td>
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<td>MILREP</td>
<td>Military Representative</td>
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<tr>
<td>NAC</td>
<td>North Atlantic Council (part of NATO)</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>PoCo</td>
<td>Political Committee</td>
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<tr>
<td>PSC</td>
<td>Political and Security Committee</td>
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<tr>
<td>RELEX</td>
<td>DG External Relations</td>
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<tr>
<td>SG/HR</td>
<td>Secretary-General/High Representative</td>
</tr>
<tr>
<td>SITCEN</td>
<td>Situation Centre</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<td>WEU</td>
<td>Western European Union</td>
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Preface

This book presents the results of long-standing research interests of the editors and the contributors. A major part of the content is based on a research project led by Guenther Schaefer at the European Institute of Public Administration in Maastricht. This project, ‘Governance by Committee, the Role of Committees in European Policy-Making and Policy Implementation’, was launched in 1999 and has been financed by the European Commission as part of the EU’s 5th Framework Programme, ‘Improving the Socio-economic Knowledge Base’.

The project co-ordinator was the European Institute of Public Administration and five partners participated – the Centre of European Law at King’s College London, Institut d’Etudes Politiques de Bordeaux, Université Montesquieu Bordeaux IV, Institut d’Etudes Politiques de Rennes, Institute for Advanced Studies, Vienna and University of Cologne Jean-Monnet Chair for Political Science. The aim was to generate new knowledge with regard to the practical procedures and processes in the EU policy-making process, challenging some of the existing theories of the day – by means of extensive and thoroughly empirical research.

This volume can be seen as an extension and expansion of that original research project. Authors have updated their initial findings and related areas that were not included in the original project have been added. The material on specific types of committees has been put into the context of a wider analytical structure that includes themes such as deliberation vs. strategic bargaining; formalisation vs. informality in EU policy-making; and related normative concerns about good governance in the EU.

Now that the book is published, we feel it is important to stress the contribution of Guenther Schaefer – without his initiative, enthusiasm, hard work, leadership and charm this project would not have been as successful as it was and this book would certainly never have been written.

The volume has been a long time in the making, and we would like to thank all the members of the original research team for their patience and their willingness to revise and update their chapters after sometimes long intervals during this journey. We are equally grateful for the contributions from those who signed up to the book at a later stage and had to adapt
their work to an already existing framework. Everyone has always been very understanding and supportive of the demands from the editors. Irina Dettmann at EIPA helped us enormously in bringing the various chapters together, formatting the text and preparing everything for the submission of the final manuscript – a major task that was executed meticulously and professionally. At a later stage, Filiz Hayirli also provided much appreciated editorial assistance.

We owe a note of thanks also to the staff at Edward Elgar, who have been a model of good cooperation and support for editors and authors. Special mention must be made of Alex O’Connell for her patience, unwavering support and constant good spirits; and of Edward Elgar himself, who, from the moment the proposal for a book was made, was fully behind our project.

We hope that all who have contributed to the making of this book are as satisfied with the result as we are. Above all we hope that the reader will find this a useful and topical addition to the literature on the European Union.

Thomas Christiansen and Torbjörn Larsson
Maastricht and Brussels, Spring 2006
1. Introduction: The role of Committees in the policy-process of the European Union

Thomas Christiansen and Torbjörn Larsson

INTRODUCTION

This volume seeks to illuminate an aspect of European integration that is omnipresent yet frequently overlooked. It concerns, almost by definition, the ‘low politics’ of the European Union since it deals with the plethora of committees that prepare, shape, and implement the decisions that are taken by the European institutions. The attention of the media and the public, and largely also of the academic community, tends to focus on the political fora in which decisions are taken – the European Commission, the Council of Ministers, and the European Parliament. And while these institutions indeed are formally responsible for EU policy-making, and as such accountable to the public, looking at them often reveals only a small part of the story. The political level represented by these institutions is the tip of the iceberg of European governance. Submerged below the water-line is a much larger body of administrative interaction, which to a significant degree involves the work of committees.

Indeed there are so many committees, with such variation in powers, membership and procedures that it is difficult even for the initiated to find their way through this jungle. Of course, part of the problem lies in the ubiquity of the term ‘committee’, which is used to describe many different kinds of collective meetings in which aspects of EU policy-making are discussed. But beyond the inherent problem of the inflationary usage of ‘committee’, the potential for confusion is heightened by the particular nature of institutional arrangements in the EU. Committees are present in all stages of the policy-process, from expert groups advising the Commission in the pre-proposal stage, via Council working parties and EP committees in legislative decision-making, to the so-called comitology committees working with the Commission in the policy-implementation phase. In addition, the EU Treaty’s pillar structure introduces further differentiation, with committees in the area of the Common Foreign and
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Security Policy having a particular role that includes both deliberation of policy and decision-making.

This book will cover the role of these different kinds of EU committees, seeking to illuminate the ways in which they contribute to policy-making. In doing so, the individual chapters will answer a number of wider questions that need to be asked about the role of committees in the EU. In particular, we seek to address a number of wider issues through the study of individual committees. Given the nature of 'committee governance' as a microcosm of the EU, the detailed study of the role of committees in EU policy-making can reveal important aspects which are of relevance for our understanding of European governance more generally.

In doing so, the book contributes to the rising interest that there has been in this subject matter. While committees are regularly part of the story when specific policies or indeed particular pieces of legislation are being studied, there has been little treatment of committees per se. An early publication from the Economic and Social Committee (1980) presented the work of various consultative committees, and later publications looked in more detail at the Committee of the Regions (Warleigh, 1999). In the late 1990s a number of texts also engaged more specifically with the work of committees in the legislative process. Van Schendelen (1998) produced a collection of case studies of individual committees, covering both comitology committees and Treaty-based committees. Comitology – a particular aspect of the way in which EU policies can be implemented – was also the subject of books by Pedler and Schaefer (1996a), Joerges and Vos (1999) and Bergström (2005). The broader issue of 'committee governance' was introduced by Christiansen and Kirchner (2000), a theme that was also explored in more detail and with the use of survey data by Egeberg, Schaefer, and Trondal (2003). But since then no attempt has been made to address the role played by the different kinds of committees across the policy-process of the European Union. This book, then, constitutes a way of bringing together systematically the discussion of committees in the various stages of the policy-making process in the EU.

THE ROLE OF COMMITTEES IN THE EU’S POLICY-MAKING PROCESS

Before going into the detail of the arguments and the plan of this book below, it would seem appropriate to briefly review the policy-making process of the European Union and take a look at the way in which the various institutions and – within or beside them – different kinds of committees contribute to the taking of decisions. When talking about decisions we are
Introduction

focusing in particular on the taking of legislative decisions, which means the setting of legal norms. Certainly, the EU institutions – and therefore the relevant committees involved – are also involved in much that is non-legislative work, such as the making of a Common Foreign and Security Policy for the Union or the activity within the Lisbon Strategy that involves the Open Method of Co-ordination. The latter method works specifically through a number of committees that were precisely set up to monitor developments in areas such as employment and social protection policies. However, in this volume we focus on the committees that are involved in the context of the more traditional ‘Community method’ as well as on the committees in the second pillar.

The EU policy-process can be conceptualised as consisting of three distinct phases: first, the agenda-setting or pre-proposal stage; second, the decision-making stage; and, third, the policy-implementation stage. The main focus of attention is usually on the decision-making phase, that is to say the phase in which the formal institutions take legislative decisions. This phase begins with the Commission’s proposal being submitted to the legislative institutions, namely the Council of Ministers and, depending on the procedure, the European Parliament. In areas of co-decision there are then also elaborate processes to co-ordinate the efforts of Parliament and Council, involving informal tripartite meetings together with the Commission aiming to prepare agreements at first or second reading or ultimately in the Conciliation Committee. Much attention in this stage is paid to the level of the political summit of each institution, the ministers in the Council and the MEPs in the EP’s plenary – these are the political players who are ultimately held to account and who are politically responsible for the outcome of the process. This outcome is the passage of a legislative act, a European directive or regulation, and when that decision is formally taken, the decision-making phase has come to an end.

However, in the course of the decision-making process, an important element in the procedure is – in both Council and Parliament – the committee stage. In the Council, legislative dossiers move up and down between COREPER, the Committee of Permanent Representatives, which prepares the agenda of ministerial meetings, and the more specialised working parties that discuss Commission proposals initially. COREPER allocates proposals to a specific working party of member state representatives, whose members then engage with the dossier, seeking to find consensus. Eventually the working group will report to COREPER the degree of agreement that has been reached and indicate in which areas, if any, further negotiation in COREPER or, as the case may be, among ministers is still necessary. More than half of the Council decisions are informally agreed on these
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administrative and diplomatic levels of the Council, and only a minority are ultimately left to the debate among ministers.

In the European Parliament, a Commission proposal is dealt with in the first instance by one of the 20 parliamentary committees. It is here that a ‘rapporteur’ is appointed to prepare the EP resolution on the draft legislation and propose amendments to it. Once the committee has agreed a draft resolution, this is submitted to the plenary for further debate and the final vote. In the case of co-decision procedures, committee chairpersons and rapporteurs are prominent in the informal tripartite meetings at first and second reading, as well as in the ‘trialogues’ which prepare the Conciliation Committee, together with the chair of the EP delegation. Generally speaking then, most of the legislative work of the Parliament is done by the committees, given the size of the plenary and the specialised knowledge that this responsibility requires.

Both before and after the formal decision-making, important aspects of EU policy-making take place. This applies both to the agenda-setting stage which precedes the Commission’s adoption of a legislative proposal and to the implementation phase which follows the approval of the legislative act.

Looking first at the pre-proposal phase, we need to recognise that this is a crucial stage in the policy-process because it permits the actors involved to frame the issues that are being considered for legislative action, to set the legislative agenda of the Union, and to ‘pre-decide’ the issue somewhat. In the formal decision-making phase a decision is taken, but only on the proposal that is being submitted, and that usually means that the options are limited by the ‘pre-decisions’ that have been reached in advance, excluding some possible solutions and prioritising others by including them in the proposal.

Clearly the Commission is in the driving seat in this phase, having the monopoly of initiative in the legislative process, and it is therefore not only privileged to decide what is proposed but is also in a central position vis-à-vis the multitude of organised interests and national actors that seek to influence the process during this stage. The Commission, being the object of such intense lobbying from a wide range of public and private actors, has been described as a spider in the centre of its web – the network which exchanges information and ideas with respect to the domain within which legislation is being prepared.

Such ‘attention’ being bestowed on the Commission is a natural part of the political game by which other actors seek to influence the drafting of proposals – an important game given what we said above about the significance of agenda-setting. But beyond the politics of interest representation the Commission also has a genuine need to gather information about the issues at stake. The Commission is generally regarded as under-resourced and in need of external expertise, and therefore not only tolerates the contact
with organised interests but in fact encourages it. If more information flows into the Commission from the outside at this stage, Commission officials are better able to get a handle on the policy they are seeking to shape.

Beyond gathering information the Commission can use the interaction with other actors in this pre-proposal stage as a way of legitimising subsequent initiatives: the consultation of organised interests and national authorities can assist the later passage of legislation in the decision-making process, and subsequently the implementation in the member states. Systematic consultation with the member states allows the Commission to be more confident about the achievement of the relevant majority in Council, and the results of consultation with private actors can be used by the Commission to bolster its position also vis-à-vis differing opinions in the European Parliament. And, beyond the actual decision-making, the implementation of policies should be smoother the more authorities and other actors in the member states have an opportunity to comment on draft legislation and the Commission has a chance to react to such comments.

The interest of the Commission in consulting widely externally in the draft stage of legislation is therefore threefold: maximising the infl ow of useful information, having an early indication of likely voting intentions in Council and Parliament, and legitimising the proposed action from the outset.

Moving from the early to the later stages of EU policy-making, we also need to consider the implementation phase. The EU is a decentralised system of administration, meaning that while decision-making is done centrally, implementation is largely done within the member states. Directives – the EU’s most common legislative instrument – require transposition through national parliaments, and it is then the obligation of national authorities to implement EU measures. Part of this decentralised system of administration is the involvement of national courts, which are the place in which non-compliance with EU law can be challenged by private actors, while it is the prerogative of the European Commission to take member states to the ECJ if and when it considers member states not to be complying with EU laws.

However, it is important to recognise that not all EU implementation is decentralised. Within the administrative structure that has developed in the EU over the past decades, there is ample scope also for centralised implementation, that is for the Commission to execute policies on behalf of the member states. If and when provision is made for this in the legislation, the Commission makes use of such delegated powers through the adoption of implementing measures. Part and parcel of this method of implementation is the use of committees composed of national representatives who control the Commission. Depending on the procedure chosen in the relevant legislative act, these implementing committees supervise the way in which
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the Commission uses its delegated powers in different ways, from a merely advisory role to the possibility of blocking proposed measures.

This type of implementation is therefore also a domain with an extensive role for committees – committees which are located between Commission and member states and which have been identified as part of the ‘fusion’ of national and European administration. While the executive delegation enjoyed by the Commission is established practice also at the national level, the creation of such implementing committees is unique to the EU. Presumably that is why a particular term – comitology – has been created to describe this phenomenon.

These so-called ‘comitology committees’ have been a long-standing part of the EU’s administrative governance and not only serve to shape the way in which individual pieces of legislation are implemented but also function as a feedback loop within the policy-making process: The systematic exchange between Commission officials and national representatives in the implementation committees provides the Commission with insights into the functioning of national administrative systems and thereby helps the Commission not only with policy-implementation but also with policy-initiation. Sometimes this is done formally, for example when the Commission uses a comitology committee for the preliminary discussion of a legislative initiative. But it also works in a more diffused way, by the Commission learning from the experience of implementation in previous legislative acts and using that experience for future initiatives.

Obviously, such policy-learning is the ideal rather than the norm, and what happens in some cases might not happen in other cases. But this conception of implementation through comitology as a learning exercise for policy-initiation is a useful normative concept. Taken to its logical conclusion, it means that we can view the policy process as a cycle, with initiation via decision-making leading to implementation and then back to initiation. The various steps in this cycle are linked dynamically to one another, as the actors involved use their knowledge about the likely behaviour of others in the later stages of the process to determine their own action (for example the decentralised nature of implementation – and the knowledge that national actors who do not agree with a particular measure might not comply – leading to the search for consensus among member states in the decision-making phase, even when decisions might otherwise be taken by qualified majority voting).

For our purposes here, the overview of the EU policy-cycle conducted above helps us to understand better the role and positioning of the various types of committees within the EU’s institutional structure. It should be clearer now that committees are present in all the stages of EU policy-making and how they can be distinguished from one another. Before looking
in more detail at the way in which different kinds of committees have been tackled by the contributors to this volume, we need to review the kind of questions that arise in the study of committees in the EU.

NORMATIVE AND EMPIRICAL QUESTIONS IN THE ANALYSIS OF EU COMMITTEES

Given the omnipresence of committees within the EU’s administrative structure, they are a phenomenon that is in need of systematic study. In this book, the various contributions address a number of different questions that can be regarded as the key issues in this context. These key questions concern both normative concerns and empirical issues. This section examines in more detail the agenda regarding the normative and the empirical analysis of EU committees.

One important issue concerns the kind of interaction that participants in committee meetings have with one another: is this better characterised in terms of deliberation and persuasion or as strategic bargaining? In other words, do committee members come to meetings with previously formed preferences on the basis of which they then engage in the representation of particular interests? Or, is this rather a question of developing opinions and positions in the process of negotiation? If it is the latter, committees may be regarded as arenas for policy-learning that contribute to the shaping of interests. This is an important question in the wider debate about European integration, and indeed decision-making in general, and the empirical study of committees in the EU context promises valuable insights in this respect.

A second question that this volume will address concerns the degree to which committees either contribute to or detract from the formalisation of EU decision-making. The creation and subsequent evolution of committee structures implies, on the one hand, the potential for the institutionalisation of mechanisms such as coordination, inter-institutional relations, and multilevel governance. However, they can also be seen as the cause of more informality in EU policy-making. As committees become established and their internal procedures are codified, the need for informal interaction among their members grows. Also, the (formal) work inside the committee may contribute to the formation of networks among and beyond committee members, which in turn creates further impetus for informal governance in the EU.

These questions about the degree of formalisation of, and deliberation in EU committees are essentially empirical questions. They need to be answered through the study of the way in which committees work and relate to the other institutional structures of the Union. As the contributions to this
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volume demonstrate, the answers to these questions differ across different types of committees, and indeed from one committee to another. That is why this book examines the full range of different kinds of committees from the various stages of the policy-making process of the EU.

Beyond these empirical questions we also need to raise a number of normative issues about EU committee governance. The first of these concerns a central debate on the process of integration in the current phase of its development, namely the legitimacy of political action at the European level. Does the presence and intervention of committees in the EU’s decision-making process aid the legitimacy of the EU, its institutions and policies, or does the involvement of committees instead detract from the EU’s legitimacy? On the one hand, we can observe that throughout the policy cycle the intervention of committees – be it in the pre-proposal stage, in the decision-making stage or in the implementation stage – contributes to the removal of policy-setting from the public eye. Committees tend to meet in private, and their proceedings are usually less transparent than those of the formal institutions that are, in any case, more the subject of public scrutiny.

Many committees are also populated by technical experts, who tend to speak their own language and are frequently already part of policy networks. We might want to exempt EP committees from this judgement, but even here one should mention the committee officials from the EP Secretariat who should be recognised as technical experts in this regard and who might interact in such policy networks on behalf of MEPs. All this contributes to, indeed reinforces, the image of technocratic governance that is usually associated with the European Union. To the extent to which ‘committee governance’ is a synonym of technocracy, one might expect committees to have a detrimental effect on the legitimacy of the integration process: the image of unelected technical experts taking de facto decisions behind closed doors is clearly not what the Union needs at a time of unprecedented popular scepticism about the direction of European integration.

However, it is of course precisely the expertise that is harnessed in committees that is regarded as crucial for EU policy-making. Moreover, committees permit a systematic process to harness technical expertise for the taking of decisions in the EU, provide for an equalisation of access to information for the members of committees and therefore can also be seen to democratise the influencing of decision-taking. This observation leads us to the fourth question that the chapters in this book will seek to address, namely the way in which committees can be seen, despite the normative limitations mentioned above, as contributing to good governance. They may do this by providing an efficient space for deliberation and de facto decision-making, which means that a diverse range of opinions can be
heard in committees, that reflection about the implications of decisions can take place in them, and that ultimately, as a result of the involvement of committees, the policy-process leads to better outcomes.

The normative concerns surrounding the important role played by expert groups advising the European Commission is also the reason why over the last few years increasing attention has been paid to the regulation of this aspect of EU policy-making. The European Commission, benefiting on the one hand from this systematic access to expert opinion, is on the other hand wary of the negative consequences that (over-)reliance on ‘undemocratic’ input from organised interests might have on its legitimacy. Hence the attempts to provide for greater transparency such as the creation, in 2005, of a public register of expert advisory groups which are formally appointed by the Commission.

OUTLINE OF THE BOOK

Before we go into the empirical detail of the various committees, however, there are two chapters devoted to the discussion of the theoretical and conceptual underpinnings of the study of committees in the EU. First, Torbjörn Larsson discusses the notion of deliberative democracy and the way in which its supranational version compares with other, more traditional forms of democratic theory. The central argument is that although the EU system has its unique features from a classical democratic point of view, in reality it is not as different from other forms of democratic government as we are made to believe. Guy Peters provides an account of the way in which various mechanisms in the policy-making of the EU can be seen as part of the informal governance that has developed over time. For him, EU committees are one aspect of this trend, and his chapter therefore contributes a useful conceptual perspective to the subsequent empirical studies of the different kinds of committees.

These more empirical investigations are contained in the subsequent chapters, which logically follow the EU policy-process as we have introduced it here. Torbjörn Larsson and Jan Murk explore the rather complex system of expert and advisory groups which assist the Commission in its many functions, and discusses how these different types of groups have become arenas for deliberative governance and linking formal and informal elements of EU governance.

Eve Fouilleux, Jacques de Maillard and Andy Smith present their research on working groups in the Council of Ministers. Avoiding deadlock and maintaining flexibility are two essential ingredients in a deliberative decision-making process, explaining the relative success of the work done
by the Council working parties. Chapter 5 provides an in-depth account of the way in which these working groups operate in the first and third pillars of EU policy-making. The particularities of the second pillar deserve special treatment in this context, and this is provided by Simon Duke in Chapter 6. He illuminates what happens inside the ‘black box’ of the Council machinery by discussing the high-level committees and working groups active in the second pillar. Particular attention is paid here to the evolution of the Political and Security Committee, which has come to rival COREPER in recent years as the key institution preparing policy-decisions in the CFSP and ESDP area.

Completing the picture as far as committees in the legislative process are concerned are Christine Neuhold and Pierpaolo Settembri with a chapter on the role of committees in the European Parliament. As discussed above, most legislation in the EU today requires co-decision with the Parliament, which means that parliamentary committees also play an increasingly important role in the decision-making process. Chapter 7 illustrates the internal workings of parliamentary committees and discusses the degree to which deliberation in these committees influences EU policy-making.

Finally, the examination of committees throughout the policy-process is completed with a contribution on the role of implementing committees by Guenther Schaefer and Alexander Türk. Chapter 8 provides a comprehensive account of comitology committees and their role in the process of implementing EU policies when powers have been delegated to the European Commission. Particular attention is paid here to the nature of deliberation in committees which bring together representatives of national administrations who are frequently technical experts.

This study of comitology is complemented by two chapters that do not look at the operation of the implementing committees themselves but at the way in which the workings of these committees have been regulated and formalised by the intervention of the European Parliament and the European Court of Justice, respectively. Pamela Lintner and Beatrice Vaccari, in Chapter 9, discuss the evolution, current practice and future challenges of parliamentary scrutiny over comitology committees, demonstrating the way in which such parliamentary control has over time become more formalised. Alexander Türk, in examining the role of the European Court of Justice in the area of comitology, provides an analysis of the extent to which the case law of the ECJ has regulated comitology committees and thus influenced their potential as arenas for interplay between formal and informal implementation procedures. Taken together, these two chapters illustrate the way in which the work of comitology committees is determined not only by the European Commission and the member states but also by the other European institutions.
The volume returns to some of the questions raised here in the concluding chapter by Thomas Christansen, Torbjörn Larsson and Guenther Schaefer. In particular, we come back there to the question of legitimacy of EU policy-making, in the light of the empirical and conceptual discussions on the role of committees. Looking again at the issue of committee governance in the terms of democratic theory that have been discussed previously, we conclude that the picture that emerges in the light of the analyses presented here is a mixed one. Despite the cumbersome nature of many of the procedures governing the work of EU committees, the system as a whole appears to be working fairly efficiently, not least because informal arrangements tend to accompany the formal procedures. Even if committee governance in the EU does not comply with the expectations of ideal-typical models of democratic rule, be it majoritarian or deliberative, it gains legitimacy from the inclusiveness of the process and the way in which it brings technocratic expertise to EU policy-making.

Important questions and further research remain in the study of EU committees. Among these the issue of EU enlargement and how this will affect the work of committees ranks highly. One might ask, for example, whether the enlarged membership in individual committees, be these expert groups, Council working groups or comitology committees, changes fundamentally the way in which these interact. Socialisation among members may be different in larger groups, and formal procedures such as the tour de table more difficult to follow, something that might in turn require a further shift to informal arrangements to overcome these obstacles. These questions and other questions will need to be answered in the future, when EU policy-making has adapted to the enlarged EU.

As far as past experience and current practice are concerned, we are glad to be able to present in this volume a comprehensive treatment of the way in which committees contribute to EU policy-making in the various stages of the process. It should be a thorough guide to the role of committees in the EU and, as such, hopefully also the foundation for further work that might look at more specific questions that have been raised in the course of this study.

NOTE

1. The authors are grateful for helpful comments on a draft of this chapter from Edward Best and Beatrice Vaccari. The responsibility for any remaining errors remains, of course, our own.
INTRODUCTION

A classical discussion 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 breakthrough of democracy at 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 (Olsen, 1983, p. 14).

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.

Many critics have argued that the existence of such a large number of committees and their often very informal character has led to a policy-making process behind closed doors, dominated by bureaucrats and experts
out of sight of the public and uncontrolled by the politicians. What is argued in this chapter is that the existence of this huge and very complex committee system needs to be understood in terms of the rather special character of the EU government and how it tries to generate its legitimacy.

The focus therefore needs to be put on what type of government the EU is and how legitimacy is generated in that type of democratic regime compared with other types of democratic systems. The EU has over the years been compared with several types of national government. The comparison has, depending on what type of attitude one has toward the EU, been done with a parliamentary system (usually by those who at the moment are critical of the EU), with a federal system (by those more in favour of the EU) and in other cases with the consensual model or even with the Swiss system.1 On the other hand, alternative analyses have concluded that the EU is a totally unique type of government – a sui generis. However, what is argued in this chapter is that, although the EU may be a new form of government and governance, it is not as different from other types of democratic regimes as one is often made to believe. Nevertheless it is different from other types of government that we have seen so far and consequently it needs to build its legitimacy in a somewhat different way from national government – which is where the EU committees and groups come into the picture. But let us start from the beginning and look at the original sources of governmental legitimacy.

POLITICAL LEGITIMACY AND SOME OF ITS HISTORICAL BACKGROUND

The discussion of political legitimacy has roots far back in history, long before the representative and 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 led to bad governments, and Aristotle questioned whether it was ‘more convenient to be governed by the best men or by the best laws’ (Bobbio, 1989, p. 91). 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?’ (Bobbio 1989, p. 82). An important solution to this problem was the use of lots in selecting politicians, a method not only practised in the Athenian
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democracy but also frequently used in ancient time by societies where the power did not rest with a hereditary monarch (Manin, 1997, p. 42).

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 (Mosca, 1939). 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. Additionally, relying on God almost always entails giving a lot of influence to the clergy – who are not always a reliable source of support for the King’s intentions (Aquinas, 1948).

In ‘pre-democratic’ days, at least two more types of argument 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 cannot be set aside.

When using historical arguments to justify the 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 get their special legitimacy simply from being very old, just like some institutions and regulations (Burke, 1790). 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, those with a more radical approach also used historical arguments in their legitimacy strategy, but here the historical 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 – traditional, charismatic 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 (Weber, 1978). 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, that is, 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 (Weber, 1977, p. 42). What is especially interesting with Weber in terms of legitimacy is his emphasis on 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 (Rothstein, 1992, p. 47). However, stressing the results or the output of government activities as a way of legitimating power is nothing new; Hobbes had already argued in *The Leviathan* 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 God (Ball and Dagger, 1999, p. 55).

This brief overview has 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 why legitimacy is to be found are sometimes contested (Laffan, 1999, pp. 331–2). And 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 grips 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.

**COMMON ORGANISATIONAL FEATURES OF DEMOCRATIC REGIMES**

The responsibility of a government is basically twofold: the authoritative allocation of resources and legitimacy-building (support) (Easton, 1957,
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p. 383). Or, to rephrase it, a government tries to regulate basic conflicts in society by solving different types of what are regarded as the current societal problems, such as unemployment or healthcare. Legitimacy-building and problem-solving are interrelated and there is input (procedures) and output (results) in both cases.\textsuperscript{2} 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 (Scharpf, 1999, p. 7). 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 (Weiler, 1993, p. 253).

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 (Lasswell, 1936). 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 (Arblaster, 1991, p. 68). 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 (Majone, 1996, p. 286). Furthermore we will always find people claiming that democracy is not only instrumental but a goal in itself – a way for human beings to develop (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 institution: an elected assembly (parliament), an executive (government) and a judiciary (courts).\textsuperscript{3} 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 commonly) appointed, or hereditary. 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 task of 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 be of either 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
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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 various 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 individuals to appeal against government decisions 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 application of the law is the key to their authority, which sometimes is also true for other governmental institutions such as the central bank and the auditing office.

Finally, it is important to remember that these entities do not function independently 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 (Pierson, 1996, p. 127). 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 (Olsen, 1983, p. 37).

DIFFERENT TYPES OF DEMOCRATIC GOVERNMENT 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 we will find the demarcation line between governments based on power-sharing (presidential or pluralist governments) and governments based on the parliamentary idea (Olsen, 1983, p. 37).

**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; that is, 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 (Olsen, 1990, p. 83; Nino, 1996, p. 3). 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; that is, 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 of ‘the will of the people’ in a parliamentary democracy means the right for a stable majority to rule for a certain amount of time, that is, until the next general election or when a new government is formed.
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 or 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 accord between the executive and the parliament; that is, both must come to the same conclusion on the phrasing of a new law.

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 levels. 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, that is, where it all began (Wildavsky, 2002, Chapter 6).

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 (Coultrap 1999, p. 107).

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 in public opinion.

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.

CONSENSUAL GOVERNMENTS

So far we have only discussed the formal (constitutional) part of the 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 a special emphasis on political parties.

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

In parliamentary systems 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 and the early 21st century is not the leading role of the parliaments but of the political parties (Bobbio 1989, p. 105). 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
suggests are in reality normally in favour of increasing the power either 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, the media (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.

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 it takes 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 (Lijphart, 1999, p. 65).

If, 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 defined only 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
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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), as 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 to make abundantly clear to the general public the major drawbacks of 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 some kind of power-sharing system, whereas a parliamentary government is better suited to fill the needs of a more homogeneous society (Dahl, 1998, p. 149). 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 is given 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, that is, 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 models for organising a democratic regime – the parliamentary (majoritarian), the power-sharing and the
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consensual model – all three are in many ways similar but also different and in fact when the three are compared along the lines of democracy and legitimacy a possible fourth model emerges.

DEmOCRACY AND LEGITIMACY IN CONTEMPORARY GOVERNMENT

Democratic structures are quite 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) legitimacy vs. results (output) legitimacy.

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; that is, the majority rules over the minority. Those arguing that the majority principle implies tyranny by the majority are usually met with three counter-arguments. First, should we reject the majority principle, we end up being ruled by the minority. On the assumption that all people 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.'

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 will sometimes find yourself on the winning side – the majority – and at other times on the losing side. Thus, in a democracy an individual will not always have all his or her personal preferences satisfied when government decisions 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 quite common for compromise to be stressed as an (or 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 – meaning 51 per cent versus 49. This should be a rare exception, not the norm (Ross, 1967, p. 114).

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 cannot be right that there could be no way of preventing a majority from taking a 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, for example, 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, such as constitutional definitions of which types of governmental decisions 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 handle 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) – that is, how to make authoritative decisions in areas where public interests are at stake (Held, 1997, p. 223). 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 focuses more on citizens being able 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 that 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), that is, 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 government loses its ability to take decisions and to solve the problems in society, it will soon lose 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
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legitimacy when dealing with regulatory policy, as opposed to distributive policy which has to be based on a system of procedural democracy (Scharpf, 1999, p. 109).

To complicate the picture further, results and procedures are interrelated and sometimes it is not clear whether something is to be regarded as input or as output. What is clear, though, is that a government cannot 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 rule but differ in their protection of minorities, so 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 results of the government decision-making (output legitimacy). The two dimensions are interrelated, as illustrated in Figure 2.1, suggesting four ideal types of democratic government.

What should be highlighted here is that democratic regimes get their legitimacy from different types of arrangements – through majority rule and the protection of minorities as well as through procedure and result 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 to the one we used to find in the UK. Other countries have a power-sharing type of government and are consequently more focused on procedures for protecting the basic

![Table](image)

**Figure 2.1 Ideal types of democratic government**
The role of committees in the policy-process of the EU

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 a 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. This corresponds to large (permanent) coalition governments like those in Finland, Belgium and Switzerland.

However, as Figure 2.1 indicates there is room for a fourth type of government, which is probably the most interesting and challenging political system of all, having to rely to a large extent on legitimacy derived from achieving results in a government based on minority protection. 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, and a common language to promote a common identity are non-existent or insignificant in terms of real influence. Thus the European Union cannot 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 from that of 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 as illustrated by Figure 2.1. But whether it is fair to characterise the fourth model as deliberative government, and consequently the European Union form of deliberative government, is of course another matter and the answer depends on how deliberative democracy is defined and on what the European Union and its institutions base their legitimacy today. Let us therefore take a closer look at the deliberative discussion and later on compare some of the findings of that discussion with the theory and organisation of the European Union.

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. Virtually an eruption of publications and ideas has occurred in this field in the last decade and it is of course not possible in a limited chapter like this to go into great detail on this discussion; instead the focus will be on major elements of the theory.5
In a democratic society it is of course of utmost importance that the members discuss the issues that affect 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.

Yet, 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 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, necessitate 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.⁶

However, when it comes to arguing and deliberative processes, ultimately someone has to change position or at least change their 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; that is, a moulding of the common will is required.⁷

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 quite 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 supposedly they 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’.⁸
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.9

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.10

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.11

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 other and to engage with its difference, violence and exclusion could disappear.12

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 (Mouffe, 2000, p. 101).

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 start 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 for stressing too much the possibility of different interests reaching an agreement through discussions, democracy cannot tolerate a total disagreement between a majority and a minority; there must be some kind of common belief 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 of the people (groups, segments of society) 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. There are also those who see deliberation theory as a process (input) oriented form of democracy, a better way of bringing the people into the political process and a fairer way of conducting a dialogue between those concerned by a matter. 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 be organised and operate. In short it could be characterised as a system that lacks a stable majority to build its legitimacy on and instead relies on a process where the different participants, through reasoning and negotiating, try to find solutions to serve a common good. This process focuses on inclusiveness – all those affected by a decision should be allowed to participate on an equal basis – but at the same time the aim is not just to reach a compromise which will satisfy all the participants but effective solutions to the problems at hand which are acceptable to everyone concerned.

This situation is perhaps best captured by the question which is often directed to a reluctant Member State towards the end of a long European Council meeting, where decisions normally have to be taken by unanimity: ‘Can you live with this?’, which roughly translates as: ‘For the common good, do you accept this decision even if it wasn’t your first choice?’

In fact, some studies have already argued that the deliberative elements of the EU are crucial in promoting the creation of deliberative networks by means of ‘comitology’ – the output part of the EU policy-making process (Joerges and Falke, 2000). This argument has been further explored by Eriksen and Fossum, since according to them the EU system lacks:

- an independent decision-making structure 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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- a sovereign community based on fixed, contiguous and clearly delimited territory
- a set of explicit principles established and sanctioned by international law.\(^{13}\)

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’.\(^{14}\) The validity of these arguments, especially with regard to comitology, can be debated but nevertheless they bring us on to the European Union and how it and its institutions generate legitimacy.

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 very little in the European Union which resembles that particular chain 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 constitutes 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 make it unique compared with 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 outranks 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.
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From the beginning the legitimacy of 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 to 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 and 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 (Obradovic, 1996, p. 201). Secondly, it was built on non-majoritarian institutions and processes, relying on expertise and trying to enhance impartiality (Radaelli, 1999, p. 30). 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 we scrutinise 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 part, 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]? This is 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 – that is, 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 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 (Laffan, 1999, p. 346) – 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 the Union as a democratic system of its own with its own legitimacy? It is here that the EU committees come into the picture.
EU COMMITTEES AS ARENAS FOR DELIBERATIVE GOVERNANCE?

The functioning of a committee is 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 seems 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.\(^{15}\)

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 their work among cabinet committees in order to be able to handle the workload better and to establish an internal power structure. Likewise, it is quite common for national governments to set up committees (commissions) to prepare governmental proposals or to supervise the implementation of government policy or as a response to some kind of crisis or malfunction in the political system.

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 to monitor not only whether 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.

A closer look at how the EU is organised and functions reveals not only a huge number of committees and groups but also that committees and groups are of different types and performing many different functions. Committees and groups can be classified into four main categories – working parties in the Council, comitology committees, standing committees of the Parliament and the expert groups of the Commission.\(^{16}\)

There are officially about 160 working parties (groups) in the Council preparing proposals and assisting COREPER and other committees.
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However, the exact number is much larger than indicated by the official statistics, since under the same label (the official name of the group) quite different subjects may be discussed and consequently the composition of the group varies accordingly.

Working parties consist mainly of civil servants representing the Member States but in many cases a Member State is not represented by only one person but by several, although only one person is allowed to be the spokesperson for his or her country. Usually at least two persons are present per Member State – one from the permanent representation and one from the relevant ministry – but it is also common to find civil servants present from other administrative bodies in the Member States, such as agencies and regional and local government. In addition, less official groups also exist in the council such as attaché groups which are informal groups, consisting only of civil servants from the permanent representation. Civil servants from the Commission are usually present in almost all Council committee and group meetings. The aim of the deliberations in working groups and attaché groups is to sort out areas where consensus can be reached before meetings with ambassadors and ministers take place, and once an agreement has been reached that issue is not further discussed at the higher levels.

Approximately two-thirds of all issues are solved by working parties or attaché groups, in spite of the fact that it is far from a free exchange of opinions that takes place, since all civil servants are working under instructions from their respective governments. In other words, the working parties and attaché groups are arenas where national interests are supposed to be articulated and sorted out. Voting rarely happens and sensitive issues are usually left for ambassadors and ministers to deal with. Meetings are usually chaired by the Member State holding the presidency, at least under the first pillar matters.

Comitology committees are even more common than working parties, numbering around 250 according to the official statistics. But, as for working parties, there are more of them than first appears, because many comitology committees have one or more subgroups. Comitology committees are set up by the Council and Parliament as means whereby the Member States control how the Commission implements, manages and evaluates EU legislation. But in practice the function of these committees is not just about control; they are also used as means whereby the Council facilitates the legislative process, by leaving many of the tricky details in new legislation to be sorted out by them. In this way the Council can in its deliberation focus more on general principles which are easier to agree on – as we all know, the devil lies in the detail. And it is precisely for this reason that the EU Parliament has always been very sceptical about the existence of comitology committees, because Member States are represented in comitology committees but the Parliament is not.
Thus comitology committees consist of representatives, that is, civil servants, from Member States and sometimes also representatives from European Exchange System (EES) countries but without the right to vote. In comitology committees it is rather unusual to find civil servants from the permanent representations; instead it is quite common that they are from national agencies and regional and local governments as well as ministries. The Commission chairs the meetings and provides the secretariat, which is responsible for presenting a draft measure to the committee. The committee will then take a vote on the Commission proposal and in some cases, should the draft measure not be adopted by the committee, it will be sent to the Council for further deliberations. It is extremely rare that a proposal put forward by the Commission is not adopted by the committee, simply because the Commission will not submit anything for a vote unless they are pretty sure it will be adopted. The discussions in comitology committees are guided, as in the case of working parties, by instructions given to the participants by their Member States.

The largest number of committees and groups are set up by the Commission; an estimated 800–1200 so-called expert groups or consultative groups assist the Commission in its many functions. Most of these groups are set up by the Commission of its own accord but some are set up as a result of legislation. Many of these groups are of a permanent character and are set up for regular consultation between the Commission and the relevant interests in different policy areas. An expert group can be almost anything, ranging from just a few members with very special knowledge to a very complex structure with several subgroups, sometimes including hundreds of persons from almost every walk of life. In addition, it is not uncommon to find more than one expert group being active in the same area, which means in the end that quite complex deliberative structures can be built with the help of expert groups and consultative groups. Furthermore, in expert groups there will be all kinds of participants: experts, civil servants, politicians, union leaders, NGOs, industry, interest group representatives, civil servants from Directorates-General (DGs) in the Commission other than that under which the expert groups is placed, and so on. In contrast to working parties and comitology committees, the activities of expert groups are not limited to one specific part of the decision-making phase of the policy-making process. Generally speaking, expert groups are used to help prepare new legislation to be drafted by the Commission, but also to coordinate and facilitate an overview of different policy areas and to a large extent help to implement legislation adopted by the Council and the Parliament. Many of the proposals to be put forward to working parties and comitology committees have previously been discussed and prepared with the help of expert groups and consultative groups.
In other words, expert groups are everywhere but in contrast to working parties and comitology committees participants are not officially expected to be, although in practice in many cases they are, working under instructions from their governments (Trondal, 2001, Chapter 6). The Commission often chairs this type of committee and provides the secretariat, but far from always. However, in many cases the expert groups avoid discussing and handling issues that are extremely controversial; the push is not to reach an agreement at all costs if there are heavy political commitments involved. In this arena the focus is not on reaching an agreement by voting or in the shadow of the number of votes each Member State can mobilise later on in the legislative process, but on facts and valid arguments.

The EU Parliament, the third partner in the EU power triangle, also has many committees and groups at its disposal, of which perhaps the most important ones are the standing committees of the Parliament. Of course, one should not be surprised to find that the power of a parliament lies to a large extent within its standing committees. Today the EU Parliament has 20 committees and the membership of each committee varies from 20 to 60 members. The committees of the EU Parliament are to large extent similar to those of national parliaments, but in contrast to ordinary parliaments the division into a ruling side and an opposition is missing and therefore a proposal put forward by the Commission cannot automatically count on support from any segment of the committee to which the proposal is submitted. For that reason an important process is the selection of the ‘rapporteur’, who will be in charge of drafting a proposal on which the standing committee will vote, and in that way deciding which proposal shall, later on, be presented to the Parliament for a final decision.

There are, of course, other types of committees besides the four categories that have been presented in this chapter, but what makes these four categories especially interesting is that – besides the fact that most of the EU committees can be classified as belonging to one of them – each category corresponds more or less to one of the four ideal types of government presented in Figure 2. Working parties are close to a consensual regime, where everybody knows that in many cases the discussions are carried out in the shadow of possible qualified majority voting or unanimity. Comitology committees are committees working more in the shadow of power-sharing; if agreements cannot be reached, the decision-making authority will be transferred to the Council. Expert groups and consultative groups stand out as the most plausible arena for where genuine deliberation can take place: voting and number of votes are of less importance; instead, arguments and knowledge are decisive in the discussion between the participants. However, most participants in expert groups and consultative groups know that their discussion will not be the final word on the matter; other committees and groups will usually take over and continue the deliberation that they have
started. The EU Parliament, finally, is the arena where one comes close to a majoritarian regime. The major political parties may often try to reach an agreement but the need for unanimity or qualified majority voting is not pre-eminent here in the same way as it is in the Council.

However, it would be wrong to look at working parties, comitology committees, standing committees of the Parliament and expert groups as separate arenas, when in fact they are in many ways closely linked to each other. This is especially true when it comes to expert groups, as was mentioned earlier, which are often active in all three phases of the EU policy-process – policy development (initiating new policies), formal decision-making and implementation (Larsson, 2003). In many cases expert groups are shadowing and supporting the work that goes on in the working parties, comitology committees and standing committees of the Parliament. In other cases there is substantial overlap in terms of who participates in the different types of committees. It is not uncommon to find that the very same person can appear in expert groups, working parties and comitology committees. This is especially true for civil servants from smaller Member States. Furthermore, special techniques are often developed to bridge the potential gap between the different arenas. The increased power of the EU Parliament as a co-decisions-maker with the Council has, for example made it urgent to bring the Parliament earlier into the decision-making process in order to prevent stalemate. Part of the solution to this problem has been the use of the ‘trialogue’ before the first reading – civil servants in the Council and from the presidency together with representatives from the Commission meet their equivalents from the relevant standing committees in the Parliament to sort out issues that can be agreed upon before the formal proceedings get started in the Parliament. There are, of course, many more ways to integrate the four arenas besides the ones that have been mentioned here, but all in all what the EU committees seem to be doing is not only to bring as many experts, politicians and expert group representatives as possible into the decision-making process but also to create a system of ongoing deliberation where the traditional borders between initiating (agenda-setting), formal decision-making and implementation are being blurred.

 SUMMARY

What has been argued in this chapter is that every democratic political government builds its legitimacy both on input and output measures and includes a balance between the two principles of minority protection and majority ruling. However, all types of governments have their problems (deficits). For majoritarian governments the risk of suppressing and alienating minorities is always present, and power-sharing governments
may fail to produce efficient outcome in terms of results, just to give two examples. But the structural weaknesses that will be found in any type of government are somewhat compensated for by informal arrangements and institutions. On the other hand, informal structures and procedures are often criticized as arrangements that might threaten a democratic regime.

The government of the European Union is in this case no exception. Behind the formal structures of the EU we find a vast number of informal structures and procedures without which the EU would not function at all (Christiansen and Piattoni, 2003). It is from this perspective we should understand the vast number of committees and groups we find in the EU. They are important tools in creating an informal structure to compensate for the obvious weakness in the formal one. As has been argued previously in this chapter, the obvious weakness in the EU system is that there is no ‘people’ from whom it can deduce its input legitimacy. Instead it has to a large extent to rely on output (results) legitimacy, but in contrast to consensual governments the policy that is formulated and implemented must not only please the larger segments of the society but also a vast number of minorities. Traditionally, how decisions have been reached (that is, the decision-making process) in the EU has been of less importance; what counts is the results.

In other words, the committees and groups of the EU are there to compensate for the lack of the existence of a people and to promote output legitimacy that satisfies different kinds of minorities. Another way of expressing this phenomenon is that if you cannot bring the people in you can try to bring everyone else in instead – politicians, bureaucrats, experts, NGOs, interest organisations, private business and so on. And this is precisely what the vast system of committees and groups tries to do, bringing together different kinds of experts, civil servants, politicians, interest representatives and other persons with status and authority and getting them to agree on European policies. Thus, while in national government conflicting policies will be legitimated by the majority principle, in the EU the argument put to those who object to a certain policy will be that almost anyone with expertise, knowledge and authority on the matter has agreed that the pursued policy is the best and is working.

In the end, perhaps a cautious conclusion therefore could be that its system of committees makes the EU, although far from the ideal version, closer to a deliberative government than most national governments of our time – with its problems and constraints. Understood in this way, the critical issues to be raised about how the EU is organised and functions are different from those being raised by analysis stressing the democratic deficit. Instead of issues about the degree of accountability, ministerial (commissionary) responsibility and parliamentarianism, the focus will be on questions such as:
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1. To what extent do the committees promote the participation of a plurality of interests (especially non-national interests) and the protection of minorities? Are certain interests excluded and what constitutes a legitimate interest?

2. What characterizes the discussions in the committees – aggregate vs. deliberative elements? Is power symmetrically or asymmetrically allocated to the members of a committee?

3. How are decision-making procedures linked to the implementation procedures? Are committees capable of delivering results and finding solutions that are acceptable to those affected?

4. In what way is the work of committees co-ordinated into a broader framework? What type of structure exists for the creation of conflicts and the solving of conflicts?

NOTES

2. Sometimes the concept of throughput is used as a third category besides input and output, stressing openness and transparency as particularly important elements in generating legitimacy in democratic regimes; see Haus and Heinelt (2005).
7. Ibid.
9. Or, in more detail by Benhabib (1996): ‘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.
11. Ibid.
3. Forms of informal governance: searching for efficiency and democracy

B. Guy Peters

INTRODUCTION

A number of academic observers of the changing nature of governing have argued that there has been a shift from ‘government to governance’ (see most notably Rhodes, 1997), in which formal institutions of government are less capable of actually making authoritative decisions than in the past. Less extreme versions of this argument have pointed to the growing importance of non-governmental actors in providing direction to society and the economy. For example, the phrase ‘governing at a distance’ has been used to describe the indirect forms of governance in the Netherlands and similar political systems (Kickert et al., 1997; Kooppenjan and Klijn, 2004), and ‘network governance’ and ‘democratic network governance’ have been applied to patterns of governing in Denmark and elsewhere (Torfing and Sorensen, 2002; Milward and Provan, 2000). Approaching the same general phenomenon from a different analytic direction, Lester Salamon (2001) has described the instruments of ‘new governance’, indicating a shift from using command and control instruments such as regulation to using more collaborative instruments such as partnerships and framework legislation.

All these mechanisms described above, and many more, could be described as ‘informal governance’. That is, these mechanisms all involve governing through mechanisms that depend to some extent upon the cooperation of the non-governmental actors involved. To some extent governments have been engaged in informal governance for most of their existence, using, for example, interest groups as means of delivering public services in areas such as agriculture and professional licensure. Central governments have also engaged in complex inter-governmental arrangements for making and implementing policies. Governments have tended to rely upon command and control regulation and ‘hard law’ as their primary instruments for
intervention, but have not been loath to utilize other arrangements when they were available, appeared appropriate to the case, and had advantages for government, such as reducing costs or the apparent intrusiveness of the policy.

Although ‘soft law’ and other forms of informal governance actually have been used for some time, it is also clear that governments have come to rely more heavily on these forms of intervention. There are a variety of reasons for the shift to informality in governance. One is the declining trust in, and respect for, government in many countries (Pharr and Putnam, 2000; Nye et al., 1999). Most formal instruments for governance rely on the legitimate authority of a government to be successful, and if that legitimacy has waned then popular compliance is less certain. Likewise, governments have found that using direct mechanisms for intervention is costly and inefficient compared with using the private sector as partners in implementation. Not only are there economic issues involved in the delivery of services, but also the non-state actors may be more effective in dealing with certain types of clients and with ambiguous situations in which formalized law will not be effective. In addition, the flexibility of informal governance permits matching particular social needs with forms of action, rather than assuming that one size will fit all. Also, a wider range of non-state actors have themselves become more capable of being effective partners in delivering public services, and see this strategy as a means of preserving their own legitimacy with their members. Finally, changes in the ideology of governing, in the direction both of the New Public Management and ‘governance’ models involving networks, have stressed the need to move away from direct government provision of programs to more indirect forms of governing (see Peters, 2004).

Not only has the use of informal modes of governance increased, so too has the variety of instruments that are being used. This increased interest in informality when delivering public services represents some real changes in governing, as well as intellectual developments of concepts such as ‘networks’ (see above), ‘soft law’ (Mörth, 2003), ‘multi-level governance’ (Marks et al., 1996; and Bache and Flinders, 2004) and the ‘enabling state’ (Pierre, 2001). Informal governance is now conceptualized as including a variety of different mechanisms through which the public sector interacts with the private sector, and several levels of government interact with each other, in order to make and implement policy. These alternative mechanisms are often discussed primarily on the output side of the political system, but they are also used as means of institutionalizing the involvement of non-state actors in the formulation of policy. Committee structures, in particular, have been crucial as input devices to control policy-making and also to provide advice – both technical and political – to policy-makers.
Although to some extent they are institutionalized structures mandated to perform some public functions, committee structures also fall into this general category of alternative forms of governance. Committees in the European Union have been long established as mechanisms for collecting advice, making decisions, and structuring implementation processes within government (Christiansen and Kirchener, 2000, pp. 4–5). Some European societies (Scandinavia, Germany) have relied more on committees as a means of governing than have others, and in particular some have relied upon these structures as alternative forms of representation. That having been said, these structures have not been well understood as a generic instrument for governing, and there is some need to think of them in more analytic terms, including comparing them with other alternatives to command and control from the centre of government. There are a variety of types of committee involved in EU policy-making, and generalization is always dangerous in such an environment, but there should be some opportunities for considering committees as a policy instrument for European governance.

For committees as well as for other instruments of informal governance, the increased concern with informality in providing public services has not been associated with an equal increase in the extent or sophistication of the analysis of these modes of governing. There is already a substantial literature that has discussed individual mechanisms for informal governance and their utility (see Eberlein and Kerwer, 2002). There has, however, been some tendency among scholars to treat all forms of informal governance as virtually identical. Identifying that the public sector had decided not to act alone, or perhaps had been forced not to act alone, has often been considered a sufficient revelation, and little attempt has been made to move beyond that and consider the alternative formats for governing and their differential impacts on state and society. These forms of intervention in the name of the public, if not always by public actors, need to be considered more carefully and from the perspective of understanding the political, economic and administrative logics of choice involved.

This chapter will attempt to further the analytic understanding of informal governance. It will examine a range of informal modes of governance and the political logics involved in their selection and use. The chapter will also consider these mechanisms in context and their appropriateness for different types of policy problems. After describing a number of mechanisms for informal governance, I will assess those modes of governance along several dimensions. First, several empirical attributes will be used to help us understand the dynamics of these modes of governance and the differences among them. Also, I will assess the normative dimensions of these forms of governance, and how well they conform to important criteria for governance such as transparency and accountability. The expectation is
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that this analysis will significantly increase our intellectual understanding of informal governance, and also help to advance thought about how to design these interventions.

These criteria are especially important for understanding the democratic impact of informal governance and its potential for complementing representative institutions and formal bureaucracies. My argument throughout is that although these informal modes of governance do have the potential for involving more social actors in the policy-process their impact on the democratic nature of governance is suspect. This suspicion is especially apparent if we focus on the transparency and accountability of public actions (see Kaufman et al., 2005). While some forms of informality may open government for a range of inputs, the public as a whole may lose the capacity to monitor policy effectively and to exert influence over the choices. The system of governance may therefore become one of ‘exclusive democracy’, while the basic nature of democracy should be to enhance inclusion.

FORMS OF INFORMAL GOVERNANCE

The first task required for this analysis is to attempt to develop some conceptual point at which informal governance can be distinguished from formal governance. This is a difficult task, given that only at the extreme can it be said that governing does not involve some elements of cooperation between the governed and the governors. That extreme may be identified in cases in which the government has decided on a policy with no consultation of social actors, implemented that programme using its own personnel and its own resources, and done so without negotiations with the affected parties. Further, government would have to be able to ensure very high levels of compliance with the edicts of this programme if it were to undertake such an autocratic form of governing. Even in traditional government instances of governing of this rather extreme sort were relatively infrequent, and some degree of informality, through consultations if nothing else, could have been found in most attempts to govern.

At the other end of the spectrum, very few instances of governing can be said to be fully informal. Some scholars have argued that ‘governance without government’ is possible, and that autopoeitic networks of societal actors (In ‘t Veld et al., 1994) are more capable of governing than are formal, and presumably thereby, clumsy institutions within the public sector. While there may be some instances in which networks and other informal structures will dominate decision-making and will be capable of delivering services effectively, I will argue that these attempts at governance always function within ‘the shadow of hierarchy’, and that the public sector will
have established some framework for action (Scharpf, 1994). This statement assumes, of course, that I am concerned with public governance, and not with the capacity of social and market actors to organize many private affairs on their own.\(^5\)

In this chapter I will focus on modes of governance that are found clearly toward the more informal end of the spectrum. A more complete discussion of the issues involved in informality in governing, however, would require identifying more precisely the characteristics of an informal mechanism and determining the extent to which one or another mechanism can contribute to the efficiency and the democratic nature of governing. A second task required for this analysis is an enumeration of the types of informal governance that are currently being used by governments. This task is itself daunting, given the creativity that individuals in and out of the public sector have used in an attempt to devise means of delivering public services that do not involve traditional command and control instruments. Further, as already noted, informal mechanisms are being used at the input stage of the political process as much as at the stage of implementation. And even if we were able to enumerate all of those mechanisms, we would then still have to begin to understand the informal mechanisms that have been developed to handle the judicial functions of the public sector.\(^6\)

The rudimentary analytic scheme presented here is intended to help clarify the internal complexity of this concept of informal policy. The first thing that might be undertaken is to differentiate the use of informal techniques at the various stages of the policy-process. Process or stages models of policy-process (Jones, 1984; but see Hupe and Hill, 2006) identify a number of different stages in the process, but at this initial stage of the analysis the most important might be a differentiation between making policy and implementing policy. On the one hand governments may attempt to open up the policy-process and permit a range of actors to be involved in shaping policy. On the other, governments may attempt to use private sector actors to assist them in actually delivering the programmes, and also find ways of permitting greater flexibility in administering social actors and citizens in general.

It appears that some of the existing literature on the use of informal mechanisms in governance tends to conflate those two aspects of public policy. Although that conflation can obscure important differences in the politics and technical characteristics of policy, it is also important to note the extent to which these aspects of governing are linked. One manner of linkage is compensatory. In particular, informality at one stage of the process may compensate (in democratic terms as well as perhaps in terms of effectiveness) for formality at another stage. For example, in the European Union at one stage of the policy-process there are mechanisms that enhance
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the involvement of social actors who might be excluded in the more formalized political processes of the Union. One of the standard critiques of the European Union political process is that there is a ‘democratic deficit’, with a substantially weaker role for the popularly elected parliament in governing than is characteristic of governments in the constituent countries. The inter-governmental nature of the EU is associated with the central role for officials appointed by the constituent national governments and the strong role of the executive (the Commission) in making policy, and the technical nature of much of the policy-making within the EU tends to emphasize the bureaucratic nature of the politics in this system (Peters, 1992). This bureaucratic and formalized pattern of policy-making often will exclude a range of social interests that are not identified as the immediate clients of the programmes.

These formalized methods of making policy in the European Union are to some extent compensated for by substantially greater involvement of social actors in the implementation process and increasingly informal means of putting EU policies into effect. Most notably, the ‘Open Method of Coordination’ (Borras and Jacobsson, 2004; Wincott, 2003; see also below) does involve government and the Commission perhaps more than the advocates of the method might want to admit, but there is still substantial latitude for national actors and social actors to shape policies and programmes. Likewise, implementation of European programmes through national administrative systems may permit social actors at that level to influence outcomes very much as they do for national programmes.

Although the differences between the stages of policy-making may be indistinct at the borders, there are some of the same differences in using informal mechanisms at different stages of governing at the national level as in the European Union. Increasingly, the greater openness and accountability of processes associated with public bureaucracies are able to compensate for the decline of traditional democratic actors such as political parties (Clarke and Stewart, 1998). In addition to the importance to democratic values of the use of informal techniques in governance, there are also some efficiency values that can be enhanced through the use of these techniques. Hierarchical methods of administering programmes tend to assume that ‘one size fits all’, while in reality programmes are often more effective if local conditions and different perceptions of social needs can be accommodated in the design and implementation of public programmes.

As well as compensating for democratic deficiencies at one stage or another, the use of informal techniques emphasizes the non-linear nature of a good deal of policy, and makes the ‘garbage can model’ of policy (Cohen et al., 1971) appear substantially more viable than more rational and linear models of the policy-process. Making the policy-process less
formal, whether the intention is to do so for implementation or for policy formulation, makes more apparent the extent to which how programmes are implemented influences the reality of policy formulation and likewise how attempting to make initial policy formulations constrains the range of options available for implementation at a later date.

As well as affecting the outcomes of the policy-process, making governance more informal will tend to alter the policy-process itself. All the methods of making the formulation stage of policy-making (or governance) more informal have the effect of opening the policy-process to the influence of a range of groups in the society. To the extent that these groups are involved a wider range of interests may have some representation, but also the process itself may be altered. One obvious effect may be that governing is slowed, and the need to consult and perhaps also to bargain imposes greater decision-making costs. Scharpf’s familiar argument referenced above is that multiple actors in governance systems can also reduce the quality of the decisions by driving those decisions to those that are the ‘lowest common denominator’. This is, of course, especially true if the actors are given the status of veto players (Tsebelis, 2002).

I should also note that the distinction between mechanisms for input and those for output is to some extent artificial. It is perhaps especially evident that structures and procedures that are designed primarily for implementation can also have a significant influence on policy formulation. For example, public–private partnerships might be thought to be primarily concerned with putting policy into effect, but they are also important instruments for linking actors and helping to design programmes that can be more effective once they are implemented. Similarly, involving social actors in the design of programmes may be considered to be an input activity, but by coopting those representative of the affected interests the implementation of the programme will be facilitated.

MECHANISMS FOR INFORMAL GOVERNANCE

Despite the linkages between input and output activities in governing, I will use this distinction as a means for organizing the presentation. I will begin with informal mechanisms associated more with implementation, given that this has been the primary focus of most contemporary efforts to understand the importance of informal governance. The emphasis has been on implementation largely because of the need to gain compliance with the programmes by the public sector, and the increasing resistance of many societies to command and control. Further, as already noted, governments
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Committees

I have already noted that there are a variety of committees involved in European Union governance processes. The most commonly discussed of these are the ‘comitology’ committees linking Brussels and national governments and involved for the most part in overseeing the implementation of EU directives by the member state bureaucracies (Dogan, 2000). These committees involve primarily official actors from the member states as well as the Union, along with experts from the economic and social sectors more directly affected by the policies. Although tabulations vary there are hundreds of these committees working on a regular basis to bring expertise, along with some national interests, to bear on the implementation of policies.

The comitology committees are not, however, the only form of committee used in the European Union, and the many attempts on the part of Brussels to alter public perceptions of its policy-making style as autocratic and remote have included committees in a variety of forms. For example, the working groups used at the policy initiation phase are committees under a different name, again involving national representatives and some social actors as well. Also, the Open Method of Coordination has been creating a series of committees to advance the social agenda of the EU, involving a range of social actors in coordination and consultation activities (Borras and Jacobsson, 2004). Seemingly, the further away a policy area is from the heartland of the Union and the Community Method, the more likely it is to be impacted by these informal structures and processes (Kerremans, 1996).

And it is not only the Brussels bureaucracy that seeks to escape being labelled as ‘bureaucratic’ – the member countries have political reasons to open the European policy-making system to greater involvement by actors from civil society. Therefore, in addition to their involvement in the comitology processes these governments have incentives to permit and foster the greater involvement of social actors in these policy-processes and to make committees more relevant. At the same time, however, they need to defend their own national interests in European policy and so must walk something of a tightrope between inclusion of social actors and the latitude of action for the committees.

One of the virtues of committees for the purposes of the European Union is that they are indeed informal mechanisms for governance that often eliminate some of the needs for formal voting and other instruments that may emphasize divisions among member states and differences between
the Commission and the member states. This informality permits reaching a working agreement without necessarily having to identify winners and losers in the process, and therefore without straining what can be already strained relations among the actors in the Union policy-process.

Although democratic legitimation is an important goal of the use of committees in the EU, these structures are not necessarily well designed for that purpose, and their procedures, and in particular their tendency toward secrecy, make them less effective legitimators than committee systems in many national governments. If one of the fundamental justifications for the use of informal governance mechanisms is to open up government then the committee systems may not perform that task as effectively as some of the other mechanisms of informal governance have done. On the other hand, however, the use of expertise is another source of legitimation for policy, and these committees would score high on that dimension. Further, the committees would involve a greater range of expert opinion than would the European bureaucracy, and may be more inclusive simply by that fact.

**‘Soft Law’**

One of the most commonly discussed mechanisms of informal governance has been called ‘soft law’ (Mörth, 2003). This term is used in contrast to the ‘hard law’ of legal commands and formal regulations. In the softer versions of regulation the public sector establishes general guidelines for action, or may permit the participants in the policy-process to make their own frameworks, benchmarks, guidelines or standards. The basic idea is that the public sector will not establish all the rules but instead will permit social actors to bargain within the broad policy statements that have been established. Further, the softness of the law extends to some variations in implementation, allowing the participants to shape policy outcomes more directly.

One of the clearest examples of soft law has been negotiated rule-making in the United States. Rather than mandating that the bureaucratic regulations used to implement federal law be developed through the usual ‘notice and comment’ methods, negotiated rule-making permits the affected interests to bargain among themselves, and with the relevant government agencies, about the final nature of the rules. The outcome of this bargaining process and the consensus-building is then accepted as authoritative, assuming that the rules comply in principle with the general purposes of the law that they are meant to be implementing. These rules therefore are a means of implementing a law but also represent making rules and therefore making law.

As noted above, the democratic potential of soft law has to be considered carefully. On the one hand, involving the social actors permits the interests affected by the policies to have a substantial influence over policy. On the
other hand, the range of actors involved may be relatively restricted, so that the democracy involved is exclusionary. Further, to the extent that the guidelines and benchmarks involved in the process are established by private, responsible organizations, the degree of public accountability involved is restricted (Mattli and Buthe, 2005), and questions must be posed about the possibility of imposing some level of public accountability on essentially private actors.

Networks

Another commonly discussed mechanism for informal governance is the use of networks and other structures of this type as a means of making and implementing policy. Networks are a generic policy instrument that can be used in a variety of manners, and clearly also bridge any possible gap between policy formulation and policy implementation. Networks and networking are used both in more precise theoretical terms and in a more informal sense of simply the interaction of individuals and organizations who have some common interests, and that dual usage has at times produced some confusion about the actual impacts of networks on governing. I will, quite naturally, be dealing with networks in the more clearly defined conceptual sense. In particular I will be referring to the large volume of literature developed on network governance and the linkage between these structures and policy decisions (Torfing and Sorenson, 2002). This literature discusses a number of mechanisms through which state and society have become more closely linked, especially in Scandinavia and the Low Countries, and the manner in which the formal nature of governing has been affected by closer involvement of social actors and the legitimation of these interactions.

Thinking about networks can also be a useful means of getting considerations of governance out of the sector-by-sector approaches that have been dominant in policy studies for most of its existence. Although analytically we may choose to begin the analysis with the networks that surround a particular policy area, as conventionally defined, the networks must extend more broadly. For example, if we begin with an analysis of employment and labour market issues, this analysis cannot be done effectively without considering linkages to social policy, education policy, and probably a range of other conventional policy areas. The important aspect of networks in this consideration is that the members of one network may also be tied into the others with complementary purposes, and hence policy coordination can occur quite naturally.

The use of networks has been conceptualized as a means of enhancing democratic participation by many scholars working in this area (Sorenson, 2003). The basic argument is that networks enable social actors to participate
directly in making and implementing the services that affect them, and hence fulfill a fundamental requirement of democracy. As already pointed out, however, the degree to which this argument about democracy can be accepted depends to a great extent upon the inclusiveness of networks, and to the extent that inclusiveness is enhanced the decision-making capacity of these structures may be reduced.

**Partnerships**

Public–private partnerships are another informal mechanism for implementing public programmes. The basic idea of these arrangements is that some more or less enduring relationship is developed between the public sector and one or more private sector actors, with the intention being to cooperate in delivering a service (Pierre, 1998). Generally these relationships are expected to be formalized in some form of a contract, but if they are to be successful then building trust is at least as important as any formal contract could ever be in solidifying their cooperation. All levels of government have participated in partnership arrangements, but they tend to be more common at sub-national levels. These structures involve complex patterns of governance and therefore require skilful and flexible management practices in order to be effective (Lowndes and Skelcher, 1998).

One of the most interesting developments in partnership arrangements has been the Private Finance Initiative (PFI) in the United Kingdom (Ruane, 2000). This programme is designed to leverage private financing for public projects and is directed at programmes that will be able to yield some financial returns to the investors after some period of time. The idea is simply to open up some areas traditionally dominated by public finance to private investors, while at the same time reducing the need of the public sector to incur more direct debt and debt interest. Although this mechanism for leveraging private money for public purposes may have some positive outcomes for society, it can hardly be said to enhance the democratic content of governing, but rather may produce rather opaque connections between government and certain economic interests. Hence, although they may enhance some forms of participation, partnerships present major problems of accountability and control for the public sector (Andersen, 2004).

**Co-production**

The idea of co-production of public services as a means of softening the role of government and involving the public is related to the idea of partnerships. The basic idea of this method is that the public sector will cooperate with private actors in the delivery of a service, and may devolve the necessary
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authority to the private actors. Even within this area, however, there are a number of differences and a number of levels of devolution of public authority. For example, at one end we might encounter ‘neighborhood watch’ and analogous programmes that involve citizens to a limited extent in local policing. The public sector retains virtually all the formal authority in this area, although the private sector actors involved do have some influence over implementation and hence can to some extent shape the meaning of the programme.

In other cases of co-production the private sector actors may be able to utilize a good deal of authority on their own. For example, tenant management of housing projects (Sorenson, 1997) and teacher–parent management of schools operate with a grant of significant latitude of action from the public sector. The public sector will usually establish the basic frameworks and will inspect and oversee the operations of the facilities, but the participants in the policy-process are empowered to act in the name of the public and given some space of discretion within which to make binding decisions. These structures have the virtue that the individuals directly affected are given the right to have substantial influence, but they do exclude the public at large.

Interestingly, although arising from different intellectual roots, some aspects of co-production are compatible with the ideas of New Public Management. In particular, this instrument can be a means for government to ‘steer and not row’. It has the additional virtue that it encourages the passengers to do a good deal of the rowing. This style of governing also conforms to the ideas of ‘empowerment’ that have been an alternative strand of thought driving public sector reform over the past several decades.

Multi-level Governance

Multi-level governance is primarily the result of an interaction among different levels of government, in which the presumed hierarchical arrangements among those levels of government are circumvented through negotiation and informal arrangements. These interactions have long been familiar in federal, and even in unitary, states (Grémion, 1976) but have attained an increased prominence through analysis of changes within the European Union (Marks et al., 1996; Szczerski, 2005). In all these cases policy decisions and coordination among the actors are the result of bargaining among the participants, and the relationships become hetarchical rather than strictly hierarchical.

Since the actors usually identified as participating in multi-level governance are all governments, multi-level governance might not be thought to be ‘informal’ in the usual sense, but the use of these interactions as a means
of undercutting traditional hierarchical models does provide social actors greater opportunities for influence than in usual forms of governing in the European Union in particular. Further, the indeterminacy of the bargains in these arrangements appears to make multi-level governance look a great deal like the garbage can in which solutions often pursue problems and the outcomes are highly unpredictable.

**Open Method of Coordination**

Although this chapter is not concerned entirely with the European Union, the Open Method of Coordination (OMC) is important in its own right, but also is a clear example of informal methods of governance. In some ways, the Open Method is a form of soft law as described above (see Hodson and Maher, 2001), given that it relies on mechanisms such as benchmarking and sharing ‘best practice’ in order to change the behaviours of the governments within the EU. Further, the OMC is, like several of the other methods, not a single thing but a variety of individual mechanisms. The general idea of the OMC is that, rather than mandating action, diffusing information and standards will tend to produce enhanced policy-making on the part of national governments. Thus, this method may be able to achieve policy goals without the direct intervention of governments, although these activities may always be conducted within ‘the shadow of hierarchy’.

Although the Open Method of Coordination is a specifically European Union mode of governing, the basic idea of benchmarking (also closely allied to soft law) to some extent generalizes the model and demonstrates some of the utility of this approach. The OMC can also be considered a form of networking and a means of linking multiple actors (both public and private) in joint determination of policy. To some extent this particular method reflects a very clear reaction to the formality and bureaucratic domination usually associated with ‘the Community method’ in the EU, but analogous forms of policy-making at the national level help to make this potentially a more general reaction to the needs of governing.

**Summary**

While the features of the OMC pointed out above help to emphasize the extent to which informal governance can be differentiated into a series of individual methods, there is a general pattern involved in informality. Informal governance tends to involve means of comparison and spreading ideas about policy with more extensive linkages between state and society. Still, the various methods discussed here do have some important elements of emphasis that differentiate them from others, and also help us to better
understand how the public sector can intervene in society through less
direct methods that may be as effective as the more conventional means of
making and implementing policy.

EVALUATING THE METHODS

I have now distinguished seven different versions of informal governance
encountered in many contemporary governments, and have asserted that
there are relevant differences among these methods. If there are such
differences, the methods should also be significantly different on a range
of political attributes, and Table 3.1 attempts to assign some ordinal ratings
to the characteristics of these methods. These ratings are subjective, and
the dimensions selected comprise only a sampling of the dimensions along
which the modes of informal governance could be evaluated. Despite that,
this table will hopefully be another step forward in understanding the
significance of these informal means of making and implementing policy.

Descriptive Dimensions

The dimensions used to assess the modes of informal governance are in part
descriptive. Governmentality, for example, describes the extent to which
formal government actors are involved in the particular method – this is to
some extent a measure of the degree of informality found in the method.
Although all these methods represent some deviation from a standard of
government autonomy in action, some retain a greater role for the public
sector than do others, and hence the shadow of hierarchy is somewhat
darker for these methods. These methods may therefore be appropriate
for policy areas that involve more directly the legitimate authority of the
State but in which there is still some attempt to open up to greater public
access. For example, ‘neighborhood watch’ programmes, as a form of co-
production of police services, operate in areas in which the public sector
remains dominant yet there is room for private actions.

Access is a measure of the apparent openness of the particular method
of informal governance to non-government actors, and is related to the
dimension of governmentality above. This dimension, however, is an
attempt to assess the range of actors that are permitted, or encouraged,
to become involved in the policy area. In some instances the public sector
may cede a good deal of control to private sector actors, but do so to only
a limited set of actors with exclusive powers. The most obvious case would
be professional licensure in which medical or legal societies are given the
right to set standards for practising a profession and also to enforce those
Table 3.1  Characteristics of informal methods of governance in the European Union

<table>
<thead>
<tr>
<th>Method</th>
<th>Governmental involvement</th>
<th>Access</th>
<th>Legitimation potential</th>
<th>Bargaining potential</th>
<th>Coordination potential</th>
<th>Decision-making potential</th>
<th>Process change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soft law</td>
<td>Medium</td>
<td>Medium</td>
<td>High</td>
<td>High</td>
<td>Medium</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td>Networking Partnerships</td>
<td>Low/medium</td>
<td>High(?)</td>
<td>Medium</td>
<td>High</td>
<td>Low</td>
<td>High</td>
<td>Medium</td>
</tr>
<tr>
<td>Co-production</td>
<td>Medium</td>
<td>Medium</td>
<td>Low</td>
<td>High</td>
<td>Medium</td>
<td>Low</td>
<td>Low</td>
</tr>
<tr>
<td>Multi-level governance</td>
<td>High</td>
<td>Low</td>
<td>Medium</td>
<td>Medium</td>
<td>Low</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Open Method of Coordination</td>
<td>Medium</td>
<td>High</td>
<td>Medium</td>
<td>Medium</td>
<td>High</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Committees</td>
<td>Low/medium</td>
<td>Low(?)</td>
<td>High</td>
<td>Medium</td>
<td>Low</td>
<td>High</td>
<td>Low</td>
</tr>
</tbody>
</table>
The role of committees in the policy-process of the EU

standards. In contrast, higher levels of access will open the policy-making to a wide range of private sector actors, as is the case in many networks around policy areas such as labour markets and social policy, or indeed other aspects of health service delivery.

Evaluative Dimensions

The remainder of the dimensions used to categorize informal governance methods involve more evaluation rather than description. These dimensions attempt to assess the extent to which each of these methods is capable of ‘solving’ the problems, and seizing the opportunities, that arise in the policy-process that have led to the more frequent adoption of the informal methods. Christiansen and Kirchener (2000, pp. 165–70) mentioned three important evaluative criteria for assessing the role of committees in the European policy-process – effectiveness, transparency and deliberative rationality.

The dimensions developed by Christiansen and Kirchener are important, but there is a broader array of evaluative criteria that should be considered. The evaluative dimensions discussed here touch on the capacity of the informal methods, notably committees, to legitimate the outcomes of the process (Carter and Scott, 1998; Joerges and Neyer, 1997a) as well as the capacity to make decisions without the (sometimes excessive) formality and bureaucratization of the conventional means of making decisions. Further, the evaluation of these methods must be concerned with their efficiency in achieving public purposes and their ability to prevent excessive agency loss in the policy-process (Brehm and Gates, 2000).

One dimension for characterizing informal governance in the European Union is the nature of the actors involved in these informal processes. Again, much of the literature on informal governance, especially the large body of literature on the European Union, tends to treat all actors involved in informal governance as virtually the same. There are, however, important consequences of the differential involvement of public sector actors and private sector actors in the informal arrangements. Several of the arrangements for informal governance may involve both public and private sector actors, so that these hybrid methods perhaps require some additional consideration, but the simple dichotomy between public and private can be informative for understanding how informal governance will function (see ‘governmental involvement’, Table 3.1, column 1).

The different levels of involvement of public and private actors is relevant for several aspects of informal governance. The most obvious difference is the relative legitimacy of the two types of actors. While I would not want to deny that some private sector actors do have considerable legitimacy, at least with their own members, everything else being equal national and perhaps
especially sub-national governments will have greater legitimacy than will most private sector actors for the public at large. The difference in the level of legitimacy will be especially marked for those private sector actors who clearly have something to gain from their involvement with the policy-process. This differential level of legitimacy may also extend to the decisions made by these methods, for example, multi-level governance, in a way that would not be true for actors lacking an electoral basis of legitimacy. The flexibility of private sector organizations may be especially valuable when providing services to minority and disadvantaged populations that have had difficult relations with the public sector (Lipsky and Smith, 1990).

As well as a differential impact on legitimacy, public and private actors will differ in their own flexibility, especially in implementation of public policy. Part of the logic of moving toward using informal politics, especially those forms that involve private actors extensively, is to make governing more capable of responding to different clients and to different settings. The private actors are less bound by formal procedural rules, and hence often can respond to the needs of clients more effectively. On the other hand, the possibility of agency loss in these settings is such that government may have to be more careful when selecting informal methods for certain types of policy that require uniformity, for example those involving the basic rights of citizens and groups.

The flexibility of an informal governing arrangement may be associated with the bargaining potential of that mode of governing. Although the public sector may retain the capacity to step back from governing arrangements and to impose their own solutions – the shadow of hierarchy – some of these modes of informal governance are premised on the willingness of the actors involved to bargain and to move away from imposed solutions. All these modes of governance, and indeed all forms of governance, will involve some level of bargaining, but that level will vary and so will the capacity of these arrangements to bargain to solutions that can be more effective than the lowest common denominator solutions that have been argued to result from bargaining in many multi-actor settings in the public sector.

Another evaluative dimension of the various forms of informality is their capacity to produce coordination across policy areas. While coordination generally is not a central concern in the adoption of these methods, the impact of informal modes of governance to assist in the creation of greater coherence in governance should be considered (see Peters, 2006). The general impact of informal governance may be to reduce levels of coordination in government, given that these methods tend to link public programmes with stakeholders in the private sector and hence limit the capacity for bargaining and manoeuvre in the public organizations. That having been said, however, some level of bottom-up coordination can be
achieved because those stakeholders may be involved in a range of different policy areas and be able to exert some pressures on the various public organizations to make their actions more compatible.

Finally, the informal methods of governance may have some consequences for the more official forms of governing. The informal methods generally have been added on to existing formal means of governing, or have been designed to compensate for some specific deficiencies in those forms of governing. For example, the Open Method of Coordination has tended to alter patterns of policy-making in social and employment policy by opening these areas to a wider range of ideas and also by using benchmarking as a means of linking formal public policies with the patterns of social power and the options for alternative policy. Likewise, the comitology surrounding the European Commission is a means of involving the member countries in decisions that otherwise might be dominated by technocratic actors. Therefore, as well as the actual impacts of an informal policy-process on governing, these methods can be used as a means of transforming governance more fundamentally.

THE CONSEQUENCES OF INFORMALITY

Up to this point the consequences of developing informal mechanisms of governance have been implied more than stated overtly. I will now attempt to assess the consequences of choosing an informal means of governing as opposed to the more familiar, formal mechanisms of governing. The most important of these consequences are the normative ones, having to do primarily with the capacity of the public to hold government accountable for the actions that are carried out in its name, even if they are carried out by actors who are less official. There are also, however, a number of empirical consequences that should be considered carefully when thinking about these modes of governing.

Empirical Consequences

To some extent the empirical consequences of moving toward a more informal manner of making and implementing policies are obvious. These various forms of making policy permit a wider range of actors to be involved in policy and at least to make their views on the policy known to the actors who have the formal capacity to legitimate decisions. Further, as mentioned above, the increasing number of actors in the process will tend to slow the process and to introduce more complex bargaining among the actors. That slowness may or may not matter to the public, depending on the policy area or the country, but it may well be a consequence.
Forms of informal governance

In the case of the European Union the informality that is being designed into the policy-process has been characterized as producing a ‘garbage can’ by several scholars (Richardson, 2001). By this these scholars have implied that the decision-making process is unstructured, the number and nature of the actors involved are variable, and goals are often emergent rather than determinate.\textsuperscript{17} This concept of a loosely coupled and emergent political process does appear to correspond well to the nature of some of the informal processes within the EU. Further, the looseness of this system appears to imply a more democratic form of governance than that found in the formal processes of the European Union dominated by a bureaucracy and by representatives of national governments.\textsuperscript{18}

On the other hand, however, the loose structuring implied by the garbage can, and by other forms of informal governance within the European Union, may mask the exercise of power by those actors – notably the Commission and its DGs – that do have a very clear idea of the policies that they wish to pursue (see Pierre and Peters, 2005). If collective goals are to emerge through the interaction of the players within these informal decision-making processes, then those actors who begin with the clearest sense of goals are more likely to be successful in the bargaining process. The individual interest groups involved in the process may have some clear ideas about what sort of policy they would like to see emerge from their involvement in making policy, but if the process is inclusive of the full range of interests then there are likely to be directly contradictory ideas about the desirable outcome. In such a setting the central role of the Commission participants is likely to prevail against the divided universe of social actors, or the national actors in comitology.\textsuperscript{19} The involvement of multiple and contending groups in the policy-process can be successful, but will require a great deal of time, and often a very particular political culture, in order to be successful.

Much the same empirical consequences observed for the European Union can be observed for individual countries in Europe and elsewhere. The greater informality that is being built into political process and governance does reduce the predictability of the policy and administrative processes. The contrast at the national level may not be as marked as that observed for the European Union, given that the more democratic nature of many governments would in most instances produce less predictable results than the more bureaucratic processes characteristic of the EU. That reduced level of predictability and uniformity is largely intended, and may be for many policy areas a desirable outcome in that there can be greater efficiency by matching more specific choices with specific needs.

Another potential concern arising from informal governance processes is the potential for the ‘mutual cooptation’ (see Duran, 1999) of the participants in the process. While social actors, or sub-national governments in the case
The role of committees in the policy-process of the EU

of multi-level governance, may believe that they are being successful in influencing the decision-making processes that they have targeted, if they are indeed successful they may soon lose their independence from those processes and from the official actors that ultimately must sanction the decisions taken in the seemingly informal processes.

This account of the cooptation of interests in the European Union is reminiscent of Martin Heisler’s argument, made some decades ago (1974), about the nature of the ‘European Polity’. Writing about individual European states rather than the Union, then at an early stage of development, Heisler argued that the smaller countries of Europe in particular were able to govern effectively by coopting interest groups into the political process, and those organizations were willing to exchange, for guaranteed access to the policy-process, their acquiescence to decisions once they had been reached. While this pattern does facilitate the involvement of these groups, it may also remove some of their independence and their capacity to function as more effective advocates for their memberships, so that informal governance transforms actors as well as the rules within which those actors perform their functions.

Another of the potential empirical consequences of a more informal policy system is an increased difficulty in making coordinated and integrated policies within the European Union. Even if more informal policy-making is successful within individual policy areas it will tend to exacerbate the enduring problem of policy coordination. Informal processes imply that each policy area will be less controlled from the centre of government, and hence the policies will be less likely to be vetted for common policy concerns (Jensen, 2003; Puetter, 2003). These informal systems will tend to develop their own normative structures, and to reinforce the particular professional and epistemological differences that exist across policy areas in any setting (see the discussion of Freedman, 1980). Further, because the agreements reached by bargaining among the stakeholders are often the result of long and difficult negotiations, it will be difficult for those implementing the agreements to trade away anything to other organizations or other networks in order to better coordinate their activities. We may therefore be left with the paradoxical result of each policy or programme area doing better but the collection of policies as a whole being less effective.

Normative Implications

If the empirical implications of transforming governance to include more informal modes of decision-making and implementation are significant, then the normative implications may be even more significant. As noted, in addition to increasing the efficiency of governing, these informal modes of
forms of informal governance are also intended to enhance the democratic nature of governing (see also Torfing and Sorenson, 2002). This enhancement of democracy is true within the European Union perhaps even more so than in nation states, given that the perennial problem of the democratic deficit continues to be a common stereotype of the EU, among professionals in the field as well as many ordinary citizens.

Compared with some of the conventional means of making policy in the European Union, the more informal means of making and implementing policy decisions may well enhance the democratic component of governing. As already noted, the informal methods of governing do facilitate a range of social actors having at least some influence over policy, in contrast to the relatively closed modes of decision-making that have characterized much of the EU process. Further, considering the multiple points of access that are available to influence outcomes in the increasingly informal process, these methods of governance may significantly enhance the real opportunities for influence for social actors.

At the same time that these forms of governance do increase the number of points of access for citizens, they may also have some adverse impacts on democratic accountability in governing. The problem of ‘many hands’ in governing has been identified with respect to agencies and other autonomous organizations (Mulgan, 2000) but may exist in an even more extreme manner when the more informal means of governing are employed. When there are multiple actors involved in complex systems to provide services, the public may not be able to identify effectively who is responsible and how to exert control. Similarly, political officials may find themselves being made accountable for actions over which they have little control, and hence may have to find less direct means for influence over policy.

The role of committees, and most particularly those referred to as elements of the ‘comitology’, may be the reverse of the problem of ‘many hands’. That is, the logic of using these committees and including a number of hands is to provide some greater accountability. The committees may therefore become the external reference so important for establishing effective accountability. Their capacity to be effective in legitimating actions and enforcing accountability is a function of the involvement of a number of actors, with functional expertise and a political justification as well.

Finally, informal governance may reduce the uniformity of governance and the uniformity of services delivered to citizens (see Hooghe and Marks, 2004). Again, this is to some extent a matter of design and building responsiveness to local demands. But at the same time citizens may have some rights to uniformity in some service areas, and in policy areas dominated by informal mechanisms those actors not involved in those processes will have little influence over the policies adopted and implemented. If networks
and other informal devices are indeed open and inclusive then some of these normative concerns may be alleviated, but many of these mechanisms are more exclusive. Hence, again we need to examine the consequences of informality, both empirical and normative, rather carefully.

SUMMARY

There can be little doubt that there has been an increase in the use of informal governance in the industrialized democracies, and in many other political systems as well. These moves are motivated by the need of the public sector to manage their costs and their legitimacy deficits, as well as by the public and their desires for greater impact over policy. Although the mechanisms are commonly discussed under the single rubric of informal government, there are actually a number of internal variations that are relevant for understanding their impacts and their politics. Further, it is important to note that very few policies are completely formal, and perhaps none really totally informal. Therefore, we need to consider developing a dimensional analysis of these programmes and the extent of informality that is involved in them.

This chapter has presented a brief enumeration of the varieties of informal governance that are used in the European Union, as well as in individual countries. This listing is a sketch of the variations that exist among these approaches to policy, and could well be extended. In addition, I have linked these various forms of informality with a series of descriptive and analytic dimensions that can help us understand these forms of governance. This analysis is, however, still only an introduction to the complexities of informal governance, and a great deal of analytic work remains to be done before we have an adequate understanding of these phenomena and their role in governing. In particular, the democratic potential of these forms of governance needs to be examined carefully. Committees are an important variation on the themes presented here, but share a number of characteristics with the other forms.

What is most striking perhaps, in the findings, is that the instruments of informal governance tend to have a bipolar impact on levels of democratization in governance. On the one hand, some of the instruments that have been developed can open up governing to a range of influences from civil society, especially parties affected directly by the decisions, and provide alternative points of access for social actors in the policy-process. On the other hand, some of the forms of informal governance tend to grant a good deal of power to actors that are at best aresponsible, so that although the
formal institutions of representative democracy may be complemented, this is being done in a manner that does not necessarily improve accountability. These methods of involvement may be excellent opportunities for the groups involved in influence policy, but may exclude individuals and organizations that are not deemed sufficiently connected with the policy area. This point may be true for the committees used in the European Union, although the evolving rules for inclusion in most of these cases may obviate some of those problems (but see Vos, 1997).

This finding about the democratizing effects of informality in governance tends to emphasize further the basic point of this exercise – informal governance is not a single thing but a whole array of options for governing, employing a range of different actors and different instruments. The methods all share some common features of informality but they also vary significantly along a number of other dimensions. The simple admonition arising from this finding is that both the scholar and the institutional designer need to be extremely careful when generalizing about forms of governing, and when using any simple dichotomy for a phenomenon that is as complex as contemporary governing.

The final point must be one about democracy. The above discussion of various forms of informal government has argued that increasing access may not be associated with increasing accountability, and indeed the two values may be inversely related. A fundamental question therefore is how access is granted, how inclusive it is, and what role actors (social and public sector) outside the immediate network or group have in maintaining public accountability. To the extent that benchmarking, partnerships and analogous instruments are used, holding the actors involved accountable may be difficult, and to be effective these instruments may have to be closed and relatively opaque. These mechanisms may well enhance efficiency of public services, and permit leveraging the involvement of important private actors, but there may well be a cost incurred.

NOTES

1. The level of compliance may vary by policy area. The loss of compliance has been perhaps particularly evident in areas such as tax policy in which citizens have a clear self-interest in avoiding the law.

2. As Stein Rokkan (1967) argued about advisory committees and other analogous forms of involving social actors in the public sector, these structures can serve as a means of creating countervailing power to parliaments, especially when there is a hegemonic political party.

3. An earlier version of this analysis in the context of the European Union will be published in a special issue of *European Politics and Society* (Jan van Tatenhove and Jeanette Mak, eds) Interestingly, much of the discussion of informal governance has been with respect
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to the EU (Christiansen and Piattoni, 2003), but national governments have been at least as active in developing and using these mechanisms.

4. We have developed ideal type models of governance for comparative purposes; this style of governing would be characteristic of an étatiste style that focuses almost entirely on the state and state actors in making and implementing policy.

5. This statement, in turn, depends upon a clear distinction between the public and the private. One feature of contemporary society, and therefore of contemporary governance, is that this distinction is perhaps less clear than in the past. Further, the distinction may be more important in some political systems than in others, with Anglo-American contractual conceptions of governance tending to posit the sharpest dichotomy.

6. For example, governments have attempted to use alternative dispute resolution and mediation to avoid the expenses and the contentiousness of formal court proceedings. In addition, mechanisms such as ‘drug courts’ have been used to try to cope with the problems of juvenile delinquency without giving the young people involved permanent criminal records.

7. This logic may return the old distinction between top-down and bottom-up implementation processes to a more central position in our understanding of governing. In particular, the notion that policy is implemented and designed ‘from the bottom up’ directs attention to the linkages among aspects of the policy-process.

8. Likewise, the Buchanan and Tullock (1962) argument about decision-making costs and exclusion costs in designing constitutional arrangements implies that the more actors that are involved in a decision the higher will be the decision-making costs. Thus the increased informality of policy-making will tend to be related to greater difficulties in making decisions, especially when those modes of making decisions tend not to have formalized rules.

9. It should be noted, however, that the notice and comment system established by the Administrative Procedures Act (Freedman, 1980) does permit substantial involvement of affected interests, although bureaus within the public sector are clearly in charge of the process.

10. Although the obligations of the public sector here are kept off the balance sheet, they are obligations nonetheless, so this is in some ways a bit of an accounting manoeuvre that effectively hides the full range of public debt.

11. Sorry to let the metaphor run away like that.

12. Borras and Jacobson (2004), however, point to some important distinctions between the Open Method and other types of soft law.

13. An important exception may be the popular acceptance of the expertise of professional organizations as legitimate regulators within the health sector, and to some extent in areas such as law.

14. In some ways multi-level governance is not dissimilar to inter-governmental politics typical of federal political systems, and to some extent all political systems. In that regard multi-level governance is not really as novel as its ‘discoverers’ have made it appear.

15. As I have argued elsewhere, the iterative nature of the games being played is important for moving the outcomes beyond the poor-quality decisions assumed by Scharpf (1988). Further, given that the same actors may be involved in bargains in multiple policy areas, the capacity to trade gains in one sector versus losses in another may also help to improve the quality of the decisions reached.

16. That is, after a public organization has negotiated with its stakeholders and with other public organizations about a policy, they may be loath to reopen discussions in order to make this one programme more compatible with others. The extent to which coordination is resisted will be a function of the number of stakeholders involved in the discussions and the delicacy of the solution achieved.

17. This weakness in the specification of goals would, of course, disqualify this pattern as governance under the relatively strict criteria advanced at the outset of this chapter. That having been said, however, examining the garbage can perspective does permit...
us to consider the full range of possible consequences of using informal means when attempting to govern within the EU.

18. Given that many of these officials are ministers, they generally have a democratic mandate of some sort, although it is not one especially for dealing with EU affairs.

19. The Commission may itself be divided, but this is usually at an earlier stage of internal bargaining and discussion among the DGs, often displaying the characteristics of ‘bureaucratic politics’ as the individual DGs utilize the decision situation as an opportunity to enhance their own position within the institutional framework.
4. The Commission’s relations with expert advisory groups

Torbjörn Larsson and Jan Murk

INTRODUCTION

The Commission and the Council are usually regarded as the two most important operators of the EU institutions, even if the Commission’s influence has decreased in line with the increased power of the European Parliament, according to some observers. One of the main reasons the Commission remains influential is its mandate to initiate and shepherd the policy-making process. As mentioned in the introductory chapter, the policy-making process is to a large extent about shaping arenas where different interests can meet and discuss issues of common concern. The structuring of these arenas can be carried out in a number of ways, ranging from very formal and fixed to very fragmented and informal. In a democratic society the setting up of committees and working groups is very important and this tool is often used to shape arenas for interaction between competing interests. Thus, how and why committees and groups are set up and organized are important elements in determining the result of the policy-making process in terms not only of practical policies but also of whether those policies will add to or reduce the legitimacy of the EU system as such, as discussed in Chapter 2.

It is a well-known fact that not only do the European Parliament and the Council have their own committee systems but the Commission also has a vast number of committees and groups for its different functions. And what we are talking about here are not the so-called comitology committees, which over the years have become well-regulated entities with a high degree of public recognition and a high standing (see Chapters 8–10). Instead, the focus is on the so-called expert groups or the consultative groups/committees.

In comparison with the committees and groups of the Parliament and Council, the Commission’s groups and committees are less formalized – the Commission has a rather free hand in setting up and abolishing these groups.
The Commission's relations with expert advisory groups

and committees. And, as the Commission officially acknowledges, they are active in all parts of the policy-making process (see Register of expert groups, 2006). However, until recently very little was known about these groups and committees. To date hardly any scientific work has been done that includes specific analyses of these groups, with a few exceptions (Van Schendelen, 1998, Christiansen and Kirchner, 2000, Larsson, 2003). In fact, over all very little attention has been paid to these committees and groups, and, as opposed to comitology committees, there has been very little controversy regarding their existence.

This chapter therefore includes some basic data as well as more analytical questions. More specifically the following questions will be asked:

- How many and what types of expert groups are operative?
- How does the Commission control the setting up of an expert group?
- What are the functions of expert groups and what role do they play in the EU policy-making process?

In the concluding part of this chapter, four fundamental questions relating to the main themes of this book are raised. The first one addresses the issue of to what extent the committee system is controlled by the Commission and can thus be seen as an instrument in controlling the policy-making process of the EU. Or can expert groups also be seen as means for Member States and other external actors to control the Commission? In other words, are the Commission's committees the tools of strategic bargaining or are they better understood as deliberation arenas for free and open discussions of issues and problems? The second question refers to the role of expert groups in the tension between formal and informal governance, as discussed by Guy Peters in Chapter 3.

A third question emphasizes the legitimacy aspects of the use of these types of committees and groups in the EU policy-making process. Finally, a normative aspect is discussed, that is, whether or not the expert groups work in favour of a fair and equal system for participation of different interests and institutions.

In this study three types of data are used: the Commission's own statistical data, data from a special study of Directorate-General (DG) Enterprise, and brief surveys of specific expert and consultative groups/committees. An important part of the information was gathered through in-depth interviews with a number of civil servants in the Commission and national civil servants. In most cases those interviewed have been guaranteed anonymity. However, it was often possible to complement the oral material with written
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documentation, published either on the Internet or in the form of printed reports and books.
Up until 2001, the Commission compiled data from the different DGs and secretariats regarding the number of expert and consultative groups/committees on an annual basis, but owing to changes in the budget system the Commission no longer regards this data as reliable and has therefore ceased collecting it. However, in 2004 new efforts were made and the Commission has now published on its website a special link to its register of expert groups. In the register we find not only the names of the different groups but also some information about their aims and purposes and how they are classified.

NUMBER AND TYPES OF EXPERT GROUPS

To define an expert or a consultative committee/group with sufficient precision to be able to establish what separates it from other types of groups and committees is – as has already been indicated – not always easy. One way in which it differs from, for example, working parties in the Council and comitology committees is that the expert or consultative group/committee does not necessarily consist of national officials. When an expert group is working with, for example, agricultural issues, the members are likely to be recruited from interest groups (Nugent, 1994, p. 102). We also find groups with a mix of representatives from the scientific world, regional and local organisations, the private sector and national authorities. Another fact to keep in mind is that an expert group may not have been established by the Commission but by a Council decision, in which case the Commission will usually not play a leading role but will simply provide the secretariat. We need to bear in mind that groups/committees established on the basis of the EU Treaty or other directives, which are more or less mandatory for the Commission to set up and which cannot be dismissed on its own initiative, are usually called committees but the label expert groups is normally used only for entities that the Commission may set up and dismiss of its own accord. The terminology is, however, far from consistent. Neil Nugent, in his study of the European Commission, prefers to make a distinction in what he calls advisory committees, which are further divided into two sub-groups – expert committees and consultative committees. According to him the difference between the two types is:

Expert committees consist of national officials and experts. Although nominated by national governments the members are not normally viewed as official governmental spokesmen so it is usually possible for the committees to conduct
their affairs on an informal basis. Many of these committees are well established, meet on a fairly regular basis, and have a more or less fixed membership; others are ad hoc – often set up to discuss a draft of a Commission legislative proposal – and can hardly be even described as committees in that they may only ever meet once or twice. As for their interests and concerns, some of the committees are broad and wide-ranging, such as the Advisory Committee on Restrictive Practices and Dominant Positions and the Advisory Committee on Media, while others are more specialised and technical, such as the Advisory Committee on Unfair Pricing Practices in Maritime Transport and the Committee on the Export of Cultural Goods.

Consultative committees are composed of representatives of sectional interests and are organised and funded by the Commission without reference to the national governments. Members are normally appointed by the Commission from nominations made by representative EU-level organisations: either umbrella groups such as the Union of Industrial and Employers’ Confederations of Europe (UNICE), the European Trade Union Confederation (ETUC), and the Committee of Agricultural Organisations in the European Union (COPA), or more specialised sectoral organisations and liaison groups such as the European Association of Consumer Electronics Manufacturers (EACEM), the European Biotechnology Coordinating Group (EBCG), and the Committee of Transport Unions in the Community (ITF-ICFTU). The effect of this appointments policy is that the consultative committees are overwhelmingly made up of full-time employees of associations and groups. (Nugent, 2001, pp. 244–5)

In this chapter we have applied a wider definition but one which is more or less identical to what the Commission uses in its internal statistics, namely: expert groups are structures that the Commission sets up or dismantles by itself without needing anyone else’s consent or are listed by the Commission as expert groups in their own statistics. Since 2004, when the Commission revised its policy on expert groups, it has defined expert groups as a form of consultative entity. This means that in this chapter Nugent’s consultative committees are called expert groups, a definition that takes into account the fact that expert groups can be used not only during the policy development phase but also in other parts of the decision-making process. Hence the label expert groups will be used for the purpose of the following analysis. A further discussion on how to categorize different types of expert groups will follow later.

The Number of Expert Groups

For years the General Secretariat of the Commission, in co-operation with the DGs and Services, collected and compiled data on an annual basis for internal and external use with reference to the number of committees and expert groups, how many meetings they had and how many of the groups were actually active.
The role of committees in the policy-process of the EU

In the 1999 communication from the Commission it says that the number of expert groups added up to 796, of which 415 were permanent and 381 were ad hoc groups. Furthermore, it was concluded that 118 expert groups had stopped meeting during 1999.

However, the Commission statistics from 1999 only give a vague indication of the actual number of expert groups. A closer look at the figures shows, for example, that a great number of the expert groups set up sub-groups and sub-groups can be just as important and active as the main ones. Therefore, after a more detailed look at the data collected in 1999/2000, we found that the number of groups was significantly higher.

Table 4.1  Number of expert groups – an overview

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>Per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent</td>
<td>710</td>
<td>53</td>
</tr>
<tr>
<td>Ad hoc</td>
<td>642</td>
<td>47</td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td>1352</td>
<td>100</td>
</tr>
<tr>
<td>Regular</td>
<td>851</td>
<td>63</td>
</tr>
<tr>
<td>Sub-group</td>
<td>501</td>
<td>37</td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td>1352</td>
<td>100</td>
</tr>
<tr>
<td>Passive</td>
<td>193</td>
<td>12</td>
</tr>
<tr>
<td>Total number of groups</td>
<td>1545</td>
<td></td>
</tr>
<tr>
<td>Number of meetings</td>
<td>3874</td>
<td></td>
</tr>
</tbody>
</table>


In Table 4.1 a distinction has also been made between active groups, that is, groups which are operative even if some may not have met during the relevant period, and passive groups. However, it is important to remember that passive groups are indeed groups that have not been abolished even though they have ceased to meet.

It is worth pointing out that the above distinctions are tentative. A closer look reveals that a number of ad hoc groups have been active for quite some time and that, on the other hand, some main groups never meet – only the sub-groups under them. And in some cases the Commission data indicate not only that a sub-group can have sub-groups of its own but also that meetings of these sub-groups of sub-groups are registered as ordinary meetings. Furthermore, we have found groups registered under certain names but no indication of them ever having had meetings.

Table 4.1 shows that in 1999/2000 the number of expert groups was 1545 and that 501 (37 per cent) of them were categorized as sub-groups. In
total there were 710 permanent and 642 ad hoc ones, including sub-groups. Finally, there were 193 completely passive groups. In the same period, 129 groups (including sub-groups) had been abolished and 128 groups had had no meetings, despite the fact they were classified as active – the reason for this normally being that only the sub-groups met, not the main groups. In total the groups had held 3874 meetings, with an average of three meetings per group (including sub-groups) annually.

In other words, the Commission’s statistics paint a rather confusing picture and, in order to get a better understanding of the number of expert groups and what categories they belong to, a special study was done on the DG Enterprise of the Commission. When the number and categories of expert groups in DG Enterprise are compared with the Commission’s statistics, some interesting variations are found, which contradict previous findings. Firstly, the number of operative expert groups could well be smaller than expected, since only 39 per cent of the expert groups listed for DG Enterprise were active at the time of our study. Secondly, out of these 39 per cent only some could be defined as an expert group according to the ‘old’ definition, that is, a group of specialists advising the Commission during the policy-development stage. From this, a fairly obvious conclusion is that the Commission’s statistics are not a safe basis for general conclusions on the number of operative expert groups or on the role of these groups in the policy-process. Whether the new efforts of the Commission to improve its statistics in 2004 have had any real effect is so far an open issue.

To summarize: as far back as the mid-1990s Rometsch and Wessels estimated that the number of expert groups was somewhere between 700 and 1000, at the same time commenting how difficult it was to establish the correct figures (Rometsch and Wessels, 1997, p. 226). In fact, it appears the statistics regarding expert groups and their status have always been rather shaky and the classification into permanent and ad hoc groups can also be questioned. In many cases so-called expert groups are simply duplicates of committees, and quite often we find groups functioning as expert groups but not listed as such because they are financed outside the EU budget. The general impression one gets is that not even the DGs themselves, let alone the General Secretariat of the Commission as a whole, really know the number of expert groups and their present status. This means that the status and the existence of these groups are known only at a decentralized level.

A Typology of Expert Groups – an Overall Picture

What are the different types of expert groups that can be distinguished regarding their structure, internal functioning and task in the system of EU policy-making? From previous research and the statistics compiled
by the Commission, presented above, the following can be deduced. The main differences between groups are two – they are either permanent or temporary (ad hoc) and they are established either by the Commission or in rare cases by the Council. The Commission classifies ad hoc groups and permanent groups with the help of two different codes and before the study on DG Enterprise was carried out the reason for this was not known. The reason is still somewhat unclear, but at least we can now say that the classification has fairly little to do with the group's function. In DG Enterprise we found, for example, several permanent groups that had only met for a few times and an ad hoc group that had been active for over ten years. The distinction permanent/ad hoc is only made on the basis of the initial expectation of the duration of the group.

Furthermore, the survey of DG Enterprise revealed other and more important distinctions between different types of expert groups and their roles in the decision-making process. The first one is that between groups working in the legislative area and groups in the non-legislative area. Groups in the non-legislative area, where the Community does not have legislative power, were described by an interviewed Commission official as ‘information networks’. Approximately 20 per cent of the groups were of this type in this DG. These groups can best be described as platforms for exchange of experience and information between the Commission, the public and the private partners. The information the Commission receives from these groups is not directly connected to draft proposals for new legislation or to adaptations or revisions of existing legislation.

In the legislative area it is possible to recognize two major distinctive groups – implementation groups and development groups. Figure 4.1 shows the typology of expert groups based on their functions in the policy-process.

![Figure 4.1 Commission non-comitology groups](image-url)
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Types of Expert Groups in Policy Development

Four types of expert groups could be discerned in the area where the community has agenda-setting power (policy development). Firstly there is the senior officials group (Figure 4.2(a)) or high-level group. Each DG has several of these groups and their main purpose is defining a general framework or direction for the Commission’s policy in an entire DG or a specific policy area. The issues discussed can be characterized as agenda-setting, determining the boundaries for the Commission units within which they will be starting their work on policy development.

These groups provide the Commission with information on the current situation in the Member States and the technical and political capabilities to develop new legislation. In DG Enterprise these groups consisted of a Commission chair and one or two high-level officials from each of the Member States. Similar groups exist consisting of industry representatives, having the same informative function as regards the Commission. After a senior officials group has finished the discussion on the general framework, such as determining what boundaries for harmonization in a certain sector might be acceptable to the Member States, the units of the Commission’s DG start working out actual proposals within these boundaries.

Secondly, so-called umbrella groups (Figure 4.2(b)) were found, although the concept is not officially used. This type of group can be extremely important in certain areas, especially if five or six Member States have a strong interest in the field and send high-level officials to participate, because this means that the other states will follow with representation on the same level. Typically an umbrella group will have several specialized groups (subgroups) submitting opinions and conclusions to it, and then the umbrella group will comment on and sometimes put together the comments in a final
The role of committees in the policy-process of the EU

report, which may or may not be sent to a comitology committee or the Council and the Parliament, depending on the issue at hand.

Thirdly, there is the regular expert group (Figure 4.3) which is busy working on a draft proposal, amending or creating new legislation to be put to the Council (the Parliament), or to a comitology committee, or even to an umbrella group. In this type of group we often find, in addition to the representatives from the Member States, representatives from industry, interest groups and even NGOs.

The fourth type of expert group that is quite common is the sub-group (Figure 4.4), or working group as it is sometimes called, with a mission to assist the main expert group. A main group can have a significant number of sub-groups, as shown earlier, and in many cases they do much of the actual deliberation on the more time-consuming, sensitive issues and the drafting of the proposals. In most cases there is significant overlap between members of sub-groups (working groups) and members of a regular expert group. In fact, as is shown in Figure 4.4, some working groups may serve more than one expert group.

To summarize: more than one type of expert group can be established in a certain policy area and the degree of closeness in the relationship between groups may vary – regular expert groups may report to an umbrella group (steering group) but the umbrella group does not normally include the members of the expert groups. Below expert group level we sometimes find
sub-groups including members from the regular expert group. Umbrella groups and regular expert groups, in contrast to sub-groups, have more of an official standing, although quite a few sub-groups may exist as well. There are also differences in terms of the number of participants; a regular expert group may comprise as many as 80 participants while a sub-group has between 5 and 15 participants, and groups preparing decisions to be taken by an umbrella group seem to be larger than those preparing the draft legislation. Finally, senior officials groups, umbrella groups and regular expert groups can all set up sub-groups.

But why are there so many expert groups and why such a wide variety? When we look for an answer to those questions two possible approaches emerge: one stresses the ambition of the Commission to control the EU process and the other stresses the functional aspects of the EU.

THE CONTROL AND MANAGEMENT OF EXPERT GROUPS BY THE COMMISSION

Primarily, the setting up of expert groups and how they are organized is in the hands of the Commission and it is the Commission which decides how the work performed by an expert group shall be used. Consequently, expert groups are an administrative tool that the Commission can use in order to try to influence and even control the decision-making process of the EU.

Anyone in charge of setting up committees or groups will have unlimited possibilities to use this to his/her advantage to influence the outcome of the committee or group by deciding on who is going to chair the committee or group, who will be its members, who is going to be the secretariat, and so on. However, the most important influence is perhaps deciding whether an expert group should be set up or not and the Commission can always close down a committee that is thought to be on the wrong track or the Commission may choose not to act on the results of the deliberations. A special technique frequently used is to put a committee on the shelf indefinitely, officially calling it inactive (passive) but with the possibility of taking it back down off the shelf (sometimes with a new composition), should the times change and turn out to be more favourably inclined to the original ideas.

In reality the need to set up an expert group is to a large extent dependent on whether the Commission is going to take an initiative. But, although the Commission has a monopoly on taking initiative under the first pillar, most initiatives do not emerge spontaneously in the Commission. Several observers have tried to estimate the number of initiatives that emanate from within the Commission, with results varying from 5 to 20 per cent.
of all initiatives (Nugent, 2001, pp. 236–7). Many of the initiatives are the result of some kind of external pressure being exerted or the logical consequence of the ongoing policy in a certain area, such as fulfilling the obligations laid down in international treaties or simply carrying out an evaluation of a specific policy that has already been decided (McCormick, 2001, p. 86–7).

On the other hand, the Commission also plays an important role in other areas where the right to take initiative is shared with other institutions/entities. Thus, since the formal power of the Commission varies between different areas, the Commission may redefine issues in ways that bend them towards those areas where they yield power (Matláry, 1997, p. 143).

Another aspect of the Commission’s preparation of its proposals is how it is financed and how large a budget is allocated to an expert group. Considering that the Commission has limited resources, there are strong economic incentives at work when the Member States are brought into the process at an early stage.

Another important aspect to remember is that the result of the work of an expert group is the property of the Commission; it is up to the Commission to decide how to use the reports presented by the expert groups. It is not unusual to find that the Commission has made changes in the proposal made by an expert group before the final draft is published and sent to the Council and Parliament for further deliberations and formal decisions. The pushing and lobbying constantly goes on all the way through the decision-making process and not least the haggling and hauling between different units and DGs in the Commission may lead to changes in the final draft proposal presented to the Council and Parliament compared with the original report delivered by the expert group.

Selecting the Chairperson and the Secretary

One important way of influencing the outcome is by deciding who is going to sit on the committee, especially the chairperson and the secretariat. However, it is worth pointing out that it is not always an advantage to appoint one of your own personnel as chairperson. Appointing a chairperson from one of the DGs can be interpreted as the outcome already being anticipated by the Commission, or it may be an indication of just how important the Commission finds the subject. On the other hand it is easier for the Commission to distance itself from the outcome if it has not taken the chair. What is more, appointing someone from outside signals a willingness to pursue an independent investigation.

Another important aspect is that the Commission cannot put civil servants to chair all the expert groups, especially not in the more specialized
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areas where they need to bring in external expertise. In many cases it is regarded as an advantage to be a specialist if one is to chair an expert group since they are often set up to deal with a very technical subject. However, being a specialist can also sometimes be a disadvantage since it can mean not being trained to keep the necessary overview over the topics to be discussed. Therefore, although most of the time the chairperson is from the Commission, it is sometimes more convenient to recruit an outsider. Not only when the Commission lacks someone with enough knowledge in a certain field is an outsider needed but it can also be a question of possible strategic advantages. Two examples were given in a study of DG Enterprise – one concerning the Road Traffic Noise group and the other the Motor Vehicles Emissions group. In both groups the chairperson is or has been from a Member State, not from the Commission. The reason for this was that the work in these two groups was linked to what went on in two corresponding UN groups in the same field and it so happened that these UN groups were already chaired by a representative from an EU Member State. Therefore it seemed appropriate to have the same person chairing both the EU group and the UN group.

The main responsibility of the chairperson, according to the DG Enterprise study, seems to be to conclude the broadest possible agreement in as few meetings as possible (Murk, 2002). However, many of the discussions are carried out on an informal and person-to-person basis between the chairperson and the participants. The instrument used most when there is disagreement in an expert group is the setting up of a working group (a sub-group), where the participants with the strongest interest in the subject can work out a compromise that is then discussed in the larger group.

Normally, the Commission will provide not only the chairperson but also the secretariat of expert groups. It is a well-known fact that the one holding the pen has far more influence than most other members of a committee. It is probably safe to say that, although the Commission may sometimes decide to let an outsider chair an expert group, it will rarely leave the secretariat functions to a person not employed by or closely linked to the Commission.

The Commission's advantage derived from chairing the expert groups can be limited according to the status and recruitment of the other members and especially if many of the members of the group have more experience of this kind of work than the chair. Interestingly enough, the experts often participate in the work of a group for much longer periods than the (Commission's) chairperson, and many of the experts know each other quite well and communicate freely and frequently on the phone or via the Internet between meetings.
Inclusive or Exclusive Expert Groups

Until recently, few rules guided how the Commission may set up expert groups. But there have always been budgetary regulations that have to be observed, stating that the Commission will only finance travelling expenses and accommodation for one expert (exceptionally two) from each Member State. However it may happen that the representatives from industry are not financed by the Commission.

In 2002 the Commission published core principles and guidelines, applicable whenever the Commission departments collect and use expert advice from outside the responsible department. The aim is to provide for the accountability, plurality and integrity of the expertise being used, in the context of more general principles for better governance such as openness, participation, effectiveness, coherence, proportionality and subsidiarity. In the end, according to the Commission, it all boils down to three core principles – quality, openness and effectiveness.

Regarding quality, three determinants are mentioned as especially important: excellence, impartiality and pluralism. However, the Commission points out that excellence does not necessarily mean picking the best scholars in a certain academic discipline. Sometimes actors may be consulted because of their practical knowledge or knowledge they hold by virtue of their affiliation or nationality. The aim is to minimize the risk of vested interests distorting the advisory process and to promote a process characterized by integrity. Finally, pluralism means that whenever possible a diversity of viewpoints should be assembled (Commission COM(2002) 713).

The second core principle, openness, refers to the aim of being transparent towards the public when seeking advice from experts. Effectiveness, the third core principle, highlights the importance of departments striving to use limited resources effectively by weighing short-term costs (such as staff time) against anticipated longer-terms gains (for example, smoother implementation of robust policies and ensuring that methods for collecting data and using expert advice are both effective and proportionate (Commission COM(2002) 713).

What impact and practical effect these guidelines and principles will have on the actual agenda-setting processes within the Commission it is too early to tell, but they clearly indicate the Commission’s ambition to formalize the agenda-setting phases.

In more practical terms, there are also some rules of thumb applied by the Commission when recruiting members to their expert groups. Even if the Commission can call for the setting up of an expert group whenever it finds it necessary and appoint whoever it wants to chair it, it has less
control over the selection of the other participants. When civil servants or experts from the Member States are going to participate, the Commission will almost always turn to the permanent representations with a request for names and frequently, at the same time, to the responsible ministry in the Member States as well. When it comes to recruiting representatives from NGOs, industry or other interest groups, the Commission usually follows the unwritten internal guidelines stating that all sub-sector industries are invited if they are represented in a Europe-wide organization that is a solid federation. It has happened that interest groups wanting to become part of an expert group have been denied a seat owing to a lack of sufficient European coverage. Just to take an example, expert groups in DG Enterprise can consist of representatives from the Member States, industry, NGOs, the EEA (European Economic Area) countries, the candidate countries and notified bodies.

Since 2004 the Commission has officially recognized three broad categories of expert groups:\(^3\)

1. Groups which are made up solely of government experts/national officials from the Member States.
2. Groups consisting mainly of scientists or academics and/or representatives of a number of interest groups which are stakeholders in a certain area.
3. Groups including both government experts and scientists/civil society actors.

In reality the scheme is much more flexible and an expert group can be altered by the way the participants are chosen. It can be inclusive or exclusive, bringing everybody or a very limited number from the same group of people together, or the Commission can decide to separate or to connect people from different groups such as interest groups, NGOs, stakeholders and Member States’ representatives.

Thus the Commission may set up an inclusive expert group restricted to a certain category of participants, for example the Member States, typically called an umbrella group or a steering group. In other cases, the Commission sets up expert groups including interest groups, stakeholders, NGOs and so but not Member States’ representatives. The so-called pure expert groups are the groups consisting only of experts, and in many cases this means scientists. Finally, there is the category where expert group participants from the Member States are thrown together with interest groups, stakeholders, NGOs, scientists and so on, which can be either selective or inclusive. (see Table 4.2.)
The role of committees in the policy-process of the EU

Formal and Informal Instructions and Results

Obviously, the Commission can influence the work and the final outcome considerably by outlining the committee’s work either broadly or in detail. In some cases the committee is given a very clear instruction as to what the limitations are and in other cases it is left a more open mandate.

An important distinction can be made, as was mentioned before, between groups working in areas where the Commission is competent to draft legislation and those working in areas outside the first pillar (see Figure 4.1). In the latter case, the expert groups have more open discussions and it is more a true exchange of views between the participants than a procedure for formulating draft legislation to be forwarded to the Council and the Parliament. What seems to be clear with expert groups drafting the implementation of new directives and regulations is that it was the sole responsibility of the Commission to draft the proposal. The expert groups were there to provide information and work out technical details, although it might happen that members of the expert group had some good ideas that could be accepted by the Commission.

Most expert groups keep minutes of their meetings but only the final report is published; about half of the groups also publish their results on the Internet, judging by the findings in DG Enterprise.

Complex Structures

What may look like just an expert group can in reality be a very complex structure, as has been indicated earlier, with a three-level hierarchy: at the top we find a steering group or a high-level group under which one or several expert groups operate, and they in turn may have several sub-groups or working groups doing much of the actual work, each with its own chairperson and secretariat. It is of course largely up to the Commission to

| Table 4.2 Types of expert groups according to range and participants |
|------------------|-----------------|------------------|
| **Range**    | **Participants** | **Inclusive** | **Exclusive** |
| Experts       | All relevant experts | Selective number of experts |
| Member States | All Member States  | Selective number of Member States |
| Interests     | All relevant interests | Selective number of interests |
| Mixed participants | All relevant interests/experts/Member States | Selective no. of interests/experts/Member States |
The Commission's relations with expert advisory groups

decide whether it wants to have just one type of expert group or several in
order to keep the different interests and functions apart. In other words, it
is sometimes a rather complex mosaic that is created by the Commission in
order to control and manage the policy-making process. Figure 4.5 shows
what a structure of different types of expert groups may look like and how
issues are progressed.

Figure 4.5  An example of a complex expert groups structure in the
Commission

1. The Commission decides to discuss an initiative with Member States’
Senior Officials. The initiative is specified in the discussion and a general
framework is set up. Within the boundaries of this framework the DG’s
units can start their actual work on the initiative.

2. One or more units in the DG set up an umbrella group or arrange a
meeting with an existing umbrella group. A chair is appointed, usually
a Commission official, to coordinate the work. The national permanent
representations are invited to send an expert (or two) to the group. In
the case of an existing group the invitation may be sent to the national
ministries or directly to the expert who participated in earlier meetings.
Depending on the issue at hand, industry, interest groups and/or NGOs
might be invited to participate as well.

3. The initiative is discussed in the umbrella group and a general approach
is decided on. The group filters out sensitive matters or issues on which
more specific knowledge has to be gained to send to the specialized expert groups.

4. The outcome is sent to several expert groups. The procedure as described for the setting up or calling of the umbrella group (under 2) repeats itself. Within the framework created by the Senior Officials and on the issue(s) appointed to them by the umbrella group, several expert groups start working out initiatives on specific areas. The expert groups are generally supposed to reach an agreement in two to four meetings.

5. If some of the subjects are too sensitive or require more meetings for extensive discussion, sub-groups are set up. Sub-groups are created to discuss the difficult or most sensitive issues in the expert groups. Expert group members having an interest in the issue take part in the sub-groups. In a few meetings the sub-group discusses the problem and reaches an agreement; the sub-group ends its work.

6. The sub-group's conclusions are brought back into the expert group.

7. The expert group concludes its work on the issue at hand by discussing the sub-group's conclusions among all members and makes up its report. The expert groups that worked out specific parts of the initiative report send it to the umbrella group.

8. The umbrella group discusses the reports and, when the expert groups' results are satisfactory, here the reports are put together and form a final recommendation to the Commission. This recommendation forms the basis of the Commission's final draft report. This report is made public.

9. This report is sent, depending on the competences and procedure, to the Parliament and/or the Council or a comitology committee for decision-making.

However, to fully understand the importance of and role played by expert groups, a wider perspective needs to adopted which includes the EU policy-making process and other institutions than just the Commission.

THE FUNCTIONS OF EXPERT GROUPS AND THEIR ROLE IN THE POLICY-MAKING PROCESS OF THE EU

National governments usually have two main functions, initiating new legislation and the execution of legislation adopted by parliament, and what is true for governments is also to a large extent true for the Commission.

However, the Commission is not only responsible for initiating new legislation and implementation; it has many other functions as well. Seven functions are normally highlighted – besides the policy-initiating and the
executive functions – legislative, legal guardian, external representative and negotiator, mediator and broker and mobilizer. Some of these functions are explicitly mentioned in the Treaty – executive, legal guardian and policy initiator – while others are the result of how the system operates. The Commission’s influence on the legislation process is, for example, partly due to the fact that it is responsible for drafting new legislative proposals to be decided by the Council and the Parliament. The external representative and negotiating function is the result of the need for international trade negotiations and other types of bilateral and multilateral agreements between the EU and other states or international organizations. A power-sharing system, where many of the central institutions have overlapping responsibilities, also needs someone to take on the role of mediator and broker. In most cases this function is best carried out by the Commission, since it is supposed to act for the community as a whole and it is the only institution participating in all the stages of the decision-making process, from initiation to evaluation of policy. Furthermore, in a union with so many different facets – ranging from Member States to interest groups – the ability to mobilize vast support is important in order to be able to put a proposal through the scrutinizing process whereby it becomes official EU policy (Nugent, 2001, pp. 10–14). In other words the Commission has a vast responsibility and almost like an octopus the Commission, with the help of expert/consultative groups, spreads its feelers into each and every corner of the EU’s institutions and its policy-making process, as indicated by Figure 4.6.

The Commission

Expert groups

Development → Decision-making → Implementation

*Figure 4.6* The role of expert groups in the EU policy-making process
As was mentioned in the Introduction, the policy-making process of the EU is often described as consisting of three main phases – policy development, decision-making and implementation – but the different phases put different types of pressures and demands on the Commission.

During the first phase, policy development, the Commission naturally plays a crucial role in matters regarding the first pillar, owing to the fact that it has an exclusive right to take initiative. However, it is important to remember that, although the Commission has, formally speaking, this exclusive right and no legal acts can be adopted by the Council and Parliament if the Commission has not set the ball in motion, both the Council and the Parliament may ask the Commission to take an initiative – an opportunity frequently used by the Council and increasingly so by the Parliament.

In the second phase the role of the Commission is more defensive than in the first phase. Once the Commission has presented a draft proposal on the table of the Council and the Parliament it is expected to defend and fight for its proposition almost until the bitter end. The more proactive roles are played by the Council, with its rotating presidency, and the Parliament. And much of the real work during the decision-making phase is performed by the working parties and committees of the Council and the standing committees of the Parliament. However, the Commission retains its right to withdraw its proposal until the very last moment before a final decision has been reached by the Council or by the Council and the Parliament unless a conciliation procedure has started between Parliament and Council.

Finally, in the third phase, implementation, the Commission plays the leading part again and the Council, with the help of comitology committees, a defensive controlling role. The role of the Parliament during this third phase is very limited although not totally negligible. Figure 4.6 illustrates how the decision-making process may look, but noticeably the figure also indicates that expert groups are active not only during the first phase – policy development – but in all three phases. Let us therefore explore the decision-making model a bit further.

Once the Commission has decided to raise an issue in order to present the Council with a proposal, it often sets up an expert group (committee) to assist the drafting of the text. Previous studies have shown that the Commission sets up expert groups for a number of reasons, one being the Commission’s limited resources in terms of staff and knowledge of the issue, and another that the Commission needs strategic information regarding the situation in different areas in the Member States (Hix, 1999, pp. 201–2). A third reason is simply that the Council has taken a decision demanding that an expert group be set up, working in close collaboration with the Commission.
It is hardly a secret that the Commission also has expert groups that are active in the decision-making and implementation phases, as has been indicated above, or that the committees (comitology committees) and groups (working parties in the Council) officially belonging to these phases are used by the Commission to get an input of ideas and reactions to proposals during the development phase. Neil Nugent, for example, points out that this happens partly because the responsibilities of the Commission in the different phases overlap and partly because the Commission's willingness to be given good advice can help a proposal to glide through the different stages of the policy-making process (Nugent, 2001 p. 244).

What Figure 4.6 thus illustrates, to begin with, is that the Commission has many ways, as mentioned above, of retaining a tight control of the expert groups that are set up. Secondly, the Commission can then use expert groups to influence the policy development phase and in that way manipulate indirectly what can be agreed on in the two later phases of the policy-process. But what Figure 4.6 also illustrates is that the Commission can directly influence the decision-making and implementation phases, either by having one or more expert group(s) linked to these arenas as well (sometimes, for example, the Council may ask the Commission to set up an expert group to assist a working party in their work on some specific or technical matters), or by overlapping membership, where the groups/committees may have different names in the different phases of the policy-process but more or less the same people meet each time. The technique as to how the different phases of the decision-making process are linked (integrated) differs from one institutional arena to another depending on history and how the institutions are organized or the nature of the policy problem.

In other words, the decision-making process of the EU and its different phases involves and requires much of the Commission and the setting up of committees/groups is one of the instruments at its disposal to handle the overlapping and sometimes conflicting demands it faces. But perhaps the most important role is played by expert groups during the policy development phase and there are many reasons for that.

Policy Development and the Role of Expert Groups

To begin with, setting up an expert group/committee is of course no formal requirement, even if it is sometimes perceived in this way, and there are alternative methods for acquiring relevant information for the future decision-making process. The Commission may for example start a research project, or call on different consultancy firms, invite people to seminars and conferences or just have informal discussions on a bilateral basis with knowledgeable people and Member States' representatives to collect the
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same type of information as it gets from expert groups. In reality therefore it is left to the Commission and its DGs to decide how to organize the work when dealing with new issues and new policy-processes and how it listens to its constitutional environment (Schaefer et al., 2000). But there are exceptions: if a scientific committee has been set up in a certain area, by the ruling of the European Court of Justice, it has been established that the Commission must consult the committee before it takes a decision (see Chapter 10).

Fouilleux et al. point out in Chapter 5 that what happens (upstream) in the policy-developing phase of the process, of course, has consequences for what happens downstream. Consequently, the preparations going into an issue before it reaches the more official and public stages of the policy-making process are important and this is perhaps where the Commission really comes into its own according to Rometsch and Wessels, who concluded (1997, p. 226) that:

The Commission controls the game in this phase and its basic strategy is one of 'engrenage' (Coombes 1970, p. 86), i.e. to include relevant national civil servants and representatives of lobby groups early enough in its work to get additional information and insights, and also to establish a solid network of influence (Poullet and Deprez 1977). From the point of view of national civil servants, there is an expectation that their input will be taken seriously by the Commission and that its later proposals will not include unpleasant surprises for them. Thus 'engrenage' is a two-way process for establishing a set of mutually rewarding interactions.

This is of course not unique to the EU policy-making process; many political scientists have over the years pointed to the importance of what happens in the beginning of a decision-making process for the end result. In their classic work ‘Two faces of power’ Bachrach and Baratz (1962) stressed the importance of who controls the agenda-setting phase of the policy-making process. One way of interpreting the Bachrach and Baratz thesis is that there is one type of power struggle taking place centre stage while there is another one going on backstage. In the glaring spotlight of the stage, where different groups and individuals all try to force or persuade the others to accept their ideas and their solutions, much of the struggle is taking place before the very eyes of the media and the public. But what is going on behind the scenes is, for obvious reasons, hidden from the eyes of the public.

Nevertheless, agenda-setting theory also stresses the element of open political debate. Agenda-setting is quite often seen as what the current topics are in the media. A distinction is sometimes made between systemic agendas, which represent the sum total of all the issues in a political system
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that have been accepted as legitimate items for concern, and more specific institutional (formal) agendas (Peters, 1996, p. 63; Hinnfors, 1995, p. 66). Not all items on the systemic agenda will, in other words, make it to the institutional agendas and trigger a policy-making process, and not every governmental decision-making process starts with a public debate. In cybernetic policy-processes, for example, we very often find that the decision to regulate a certain policy has been taken at the very beginning of the decision-making process. And in many cases both the public and the media have limited knowledge concerning ongoing decision-making processes in the government. The secrecy and the red tape are formidable in some countries and it is not rare for the government to surprise both Parliament and the public with a decision to reform certain polices. Yet again, many decisions are taken and implemented without ever being noticed by the media or the public.

However, agenda-setting is not only about starting a public debate; it is also about how the debate is structured, that is, what is the problem and what are the possible solutions. In other words, it is very important for a political actor to be able not only to put an item on the political agenda but also to keep it there and to control its definition so that it works in his or her favour – the agenda-setting phase is perhaps the most creative of all stages in the EU process (Cini, 1996, p. 144). In many cases it is better not to put a topic on the agenda at all than to have an issue taken over by people with a different opinion from one's own.

Struggling over agendas is not, however, just about putting issues on the agenda or preventing unwanted topics from emerging in the public arena, that is, defining the issues in advance in a specific way; it is also about removing things from the arena. In a democratic society, it is a well-known fact that a government only has limited control over what topics will appear on the agenda. In an open society many things can and will go wrong; anything from an earthquake to the miscarriage of justice will call for the government to react. Some of the unforeseen events taking place will work to the government’s advantage, but many incidents are unwanted. This is the reason why the government needs strategies preventing some issues on the agenda from triggering decision-making processes, just as it needs strategies to control a decision-making process once it is up and running. Setting up committees of inquiry is one example of a technique whereby government can bury an unwanted and politically sensitive issue, or just make some issues cool down for a while. In other words, not all the government initiatives during the agenda-setting phase are intended to start a decision-making process; sometimes this is done to take an issue which is potentially difficult to handle off the agenda and deal with it out of everyone's sight (Hogwood, 1987, p. 46).
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Clearly, there are many reasons why the Commission sets up expert groups and the same expert group may fulfil many functions in the policy development stage. However, four seem to be of special importance:

- agenda-setting
- preparing an initiative
- mobilizing support and consensus
- fig-leaf.

Perhaps the best examples of expert groups dealing with agenda-setting are those working outside the first pillar or without a clear mandate laid down in the EC Treaty or given by the European Council. In many areas the Commission has managed to expand the European competencies by starting with very informal and exploratory discussion among the Member States. Gradually the discussion in these informal groups (policy networks) can become more important and agreements can be reached for activating a process leading to a common European policy in the area; a formal initiative is thus taken. The agenda-setting phase can also sometimes be described as sending up a pilot balloon, trying to find out whether there is any interest among the Member States and other interests in a certain topic.

The early agenda-setting phase is often followed by the preparing an initiative part, where the Commission sets up an expert group with a quite clear mission of producing a report to be used as the basis for a proposal to the Council and the Parliament. In these groups, the deliberations usually start with a brainstorming phase, a very open exchange of views, followed by a phase where the focus is on solving specific problems in the drafting of a proposal. In the second phase it is common to find coalition-building strategies put into practice as well as disagreement among the participants. However, if the issues are about amending existing regulations, not much brainstorming may take place before the more substantial and detailed discussions are launched. The expert groups usually aim for a unanimous recommendation, but the views expressed by an expert group have no legal basis whatsoever, and it is a well-known fact that Member States may change their positions later in the policy-process. Thus limited time and energy is spent on hammering out a compromise between the participants on politically sensitive issues in this first stage of the policy-process, because the positions are likely to change anyway later on. Consequently it is rare for participants from policy-making groups to have ever experienced taking a vote; decisions are always taken by unanimity and, in the rare cases when one or several experts disagree, this is mentioned in an accompanying note to the final report.
Thirdly, expert groups are set up to mobilize support and build consensus for a certain idea or policy. These groups can be either of a permanent or an ad hoc character. Household or otherwise prestigious names populate these types of expert groups in an effort to highlight the importance of certain issues or at an early stage linking persons to the decision-making process who might have an important part to play later on in the process. Tightly knit relationships may be created where the participants socialize themselves into a common view of how problems in a certain area should be understood and solved, with so-called networks or epistemic societies forming (Héritier, 1999, p. 59).

Finally, there is the fig-leaf example, when expert groups are set up more as a response to pressure from the outside than following an ambition to formulate new policy. In many cases, as mentioned at the beginning of this chapter, an initiative that officially comes from the Commission can be the result of somebody else’s activity. Although proposals coming from outside are often in line with the preferences of the Commission, this is not always the case. The setting up of an expert group can therefore sometimes be a way of satisfying strong interests that are putting heavy pressure on the Commission to act and try to solve certain issues which it has no real interest in or is even incapable of handling; in other words, taking the heat off. In other cases there have been promises made in advance to set up a new group in order to create legitimacy for a new programme. So-called evaluation groups in particular are sometimes born that way.

Expert groups fulfil a somewhat different function in the formal decision-making and the implementation phases of the EU policy-making process, since the role of the Commission is different in these phases. When a proposal has left the policy development phase, it is more a question of maintaining support for the original proposal when it is being fired at by the Council and Parliament, and an issue of essential importance therefore is how expertise is linked to the two latter parts of the decision-making process.

Involvement of Expert Groups in the Decision-making and Implementing Parts of the Policy-making Process

Several methods can be applied in organizational terms to link together the different phases of the policy-process with the help of expert groups. But even before taking any such steps, the discussions and the negotiations in the formal decision and implementation phases can be precluded by bringing in powerful actors at an early stage of the policy-process or by formulating technically advanced proposals during the policy development phase. However, if the strategy of streamlining the policy-making process during the policy development phase does not work out or breaks down,
there are at least four other different techniques the Commission can use
to take a proposal through the policy-making labyrinth.

To begin with, one and the same expert group/committee can be active
in two or all three phases of the policy-process, especially it seems in
third-pillar matters. During the policy development phase it will prepare
and/or comment on a draft proposal which in phase two will go directly
to COREPER; working groups will not be used at all. Then the proposal
will be formally adopted by the Council and perhaps the Parliament. In
the implementation phase, the same expert group can exert influence by
giving advice on questions referred to it by a comitology committee. Typical
examples of groups/committees performing these tasks are the consultative,
second- and third-pillar groups and groups shared by the Commission and
the Council.

In other cases, separate expert groups are set up for each phase of the
policy-making process. However, even if it does not occur very often, the
Council may ask the Commission to set up an expert group to assist a
working party.

Additionally many comitology committees appear in two guises: an expert
group for informal discussions and a committee for formal decision-making.
It can even happen that groups/committees change hats (authority) at almost
a moment’s notice in a truly fascinating way. When they do, they may look
the same but appear under a different name, and the participants may even
be the same, but there the similarity ends. In reality substantial changes
will have occurred in the organization and character of the committee and
individual roles may well have changed as well. This third type of link is not
based on the organizational structure as such but on the overlap, in terms
of persons participating in several groups and committees active during the
different phases of the policy-process. It is possible to find that more or less
the same groups of persons meet to discuss and negotiate a proposal as it
is shuffled from one expert group to another in the development phase, to
the working parties and attaché groups in the Council, finally ending up in
a comitology committee. It is not exactly the most common case, the same
persons meeting again and again, only changing the official name of the
group/committee when the meeting takes place, but it happens.

Finally, groups and committees active during the decision-making or
implementation phase of the policy-process which have not been set up by
the Commission, such as working parties, comitology committees or treaty
committees, can be asked by the Commission to fulfil the function of an
expert group. Occasionally, the Commission may ask a working party or
a comitology committee to comment on reports, ideas or drafts as part of
its preparation of a proposal to the Council and Parliament. And in truth,
any combination of these four ideal models is possible and can probably
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be found. In the end, what we find is a committee system which is large and complex, seemingly infinite. Even if we restrict the findings to the policy development area, we can see that several parallel or hierarchical groups can be active at the same time, and the enormous flexibility with which they are being put to best use is impressive.

So far the phenomenon of expert groups has primarily been regarded from the perspective of a system that can be controlled and managed by the Commission. In reality, however, this does not present the whole picture, since the Commission does not have complete control over the expert groups most of the time; this influence is shared with other actors who participate in the groups. Therefore expert groups are sometimes, as mentioned at the beginning of this chapter, better described as arenas for deliberations between different EU actors and institutions than as instruments of the Commission’s control.

EXPERT GROUPS AS ARENAS FOR DELIBERATION OR STRATEGIC NEGOTIATION?

Not only do we find a number of different types of expert groups but also many of them have different functions and play several roles during the policy-making process. As was shown earlier in this chapter, expert groups do not only have a function as administrative tools in the hands of the Commission enabling it to enhance its influence; they may also restrict the influence of the Commission and limit its room for manoeuvring. And for this we find there are a number of reasons. First, basic and extended knowledge on many specialized topics cannot normally be found within the Commission, it rests with external experts, scientists and experienced civil servants, lobbyists and other interests. Secondly, as was mentioned before, since many expert groups emerge as the result of skilful and intensive pressure from outside the Commission, the agenda may have been ‘confiscated’ by outside interests, leaving the Commission to perform the function of a secretariat putting together ideas and thoughts formulated by others.

Thirdly, although it may be of limited importance which interest is behind the policy-development part of the decision-making process, the weight of the arguments and the collected knowledge of the issue are of greater importance here than later on in the process. The Commission needs allies with good ideas and prospects in order for the expert groups to be able to open the door for interests which may not always have a strong position in other phases of the decision-making process in terms of economic resources, members or votes. Small Member States, for example, are often regarded as the Commission’s best friends and consequently the Commission often
tries to cultivate relations with them. Working with and participating in the Commission’s expert groups often gives ample opportunity for small Member States to exert a significant influence on new legislation which is of great concern to them. In expert groups the number of votes each Member State has is of less importance; what counts in reality is good arguments and expertise.

That being said, it is quite clear that less effort goes into coordinating the work of expert groups than the Council working groups and the comitology committees, which are much more controlled and supervised by the Member States. And quite frequently a Member State’s Permanent Representation finds out that the Commission proposal being presented to the Council has been prepared with the help of an expert from their own country who has been sitting on the expert group all the time, without their knowledge and even without the relevant ministry being informed of the fact.

Furthermore, it is worth pointing out again that an expert group may include, contrary to working groups and comitology committees, not only national civil servants but also independent experts, interest group representatives and other stakeholders – all with equal status. Another aspect of the expert groups that is also unique is that the participants are not officially expected to follow instructions from the government. In other words, although expert groups are set up by the Commission, other structural arrangements work in favour of creating an arena for free, informal and knowledgeable deliberation among equals. And the need to push for compromise, since often everybody knows that they are just at the beginning of a long process of discussions and negotiations, is not as strong as in later phases of the decision-making process. Well-known controversial political issues are often not even dealt with by expert groups but left for later phases in the policy-making process. This consequently opens up expert groups as arenas where consensual solutions can be reached on the basis of facts and logic.

On the other hand it would be a mistake to believe that the origins of group members are without importance. In expert groups set up to propose new legislation the discussions are often free and open to begin with, but from the Commission’s point of view experts sent out by Member States’ governments are expected to advocate the government’s opinion to some extent on the subject matter – they are not regarded as independent experts. From the point of view of DG Enterprise, experts and civil servants from the Member States are actually seen as representatives or semi-representatives; only one respondent, in our special study of DG Enterprise, stated explicitly that experts are not supposed to represent their country. In other words, the Commission does not only want to discuss technical details or brainstorm optimal solutions for Europe; it also wants to know what the
political opinion is on these topics in the Member States and what degree of resistance proposals are likely to meet, if any (Nugent 2003, p. 131).

Another aspect of deliberation as a way of making authoritative decisions is the idea of inclusiveness – those affected by a decision should be allowed to participate in and influence the decision-making process. Interestingly enough, there seems to be one exception to the general inclusiveness approach in the expert groups – the MEPs (Members of the European Parliament) are hardly ever invited to participate. Former MEPs can be found in the expert groups but rarely present members. The informal contacts with the Parliament in the early stages of the decision-making process are not handled by the expert groups of the Commission. In fact the *European Voice* reported in March 2006 that the Parliament had rejected an invitation to participate in a high-level group on energy, competitiveness and the environment, fearing that the group might undermine MEPs’ power to debate future policies.

But the expert groups are not a tool for centralized control by the Commission; not even the Commission DGs, as this chapter has demonstrated, seem to have full knowledge about their own expert groups. In reality, many expert groups look like instruments working for the policy networks or epistemic communities that quite freely pursue their own agendas, which is a different story altogether from that of the expert groups set up by national governments.

FORMAL AND INFORMAL ARRANGEMENTS

Another way of understanding the existence of expert groups is their role in linking formal and informal structures. It is a well-known fact that behind every formal rule and official structure in national governments there are informal ones – which may complement or contradict the formal and official picture of how a government is supposed to be organized according to the constitution (Joerges and Neyer, 1997b, pp. 620–21). And a committee (an expert group) is often the solution when greater flexibility is needed in the decision-making machinery of the government.

It is true that differentiating between the official (formal) structure of a government and the unofficial (informal) one is never an easy task, and this is especially true in the EU. This is due to the fact that many structures are of a semi-official character, their existence is known to the policy-making elite but is rarely perceived by the outside world. We can find a whole range of these structures, varying from very specific and constitutionally sanctioned ones to very informal and diffuse ones, totally lacking a foundation in authoritative decisions.
The EU’s policy-making system has developed gradually over time and quite often the structures and the procedures can be characterized as innovative or experimental; ideas and techniques are used which have not previously been applied by national governments. Expert groups are part of this creative and sometimes improvising style of government. An expert group can be used in the policy-development phase to generate information and knowledge, but it can also be used as a pre-negotiating arena to facilitate discussions and procedures later to evolve in the decision-making phase or implementing phase. Furthermore, expert groups can be used as a strategic resource, generating support for certain interests in the internal battle over resources and policies that constantly goes on in the Commission between commissioners, DGs and other administrative units. In the case of comitology, the concept of expert group can be used to relax the formal burden put on it by the European Parliament in terms of reporting duties (see Chapter 8), by shifting between formal and informal structures while addressing the same people. In other cases expert groups are not only active in the policy-development and agenda-setting phase of the process but also shadow the development of what comes later by being a resource that can intervene should anything ‘go wrong’.

But expert groups are not always structures behind the scenes; sometimes they are part of the formal structure as well as being officially recognized. Many expert groups have their own websites and publish reports on a regular basis. And many of the scientific expert groups are well known and formally acknowledged, sometimes set up as a result of a Council decision; in fact the Commission is obliged to hear a scientific expert group should one be set up in a specific area.

In other words, expert groups are not necessarily part of the informal structure of the EU process; sometimes they are bits and pieces of the formal structure, created to give their contribution to the overall official picture of a logical and consistent EU organization and process, which leads us on to the issue of legitimacy and legitimacy-building in the EU process.

LEGITIMACY AND POLICY-MAKING IN SYSTEMS WITH DIFFUSED POWER

The tension between formal and informal structures is also related to the issue of political legitimacy and, as was demonstrated in Chapter 2, a government bases its legitimacy on many different sources but the emphasis on what legitimacy strategies to use also differs from one type of government to another.
Parliamentary systems are commonly characterized by the concept of a quite direct and clear link between the people and those who rule them, the power of the people first being transferred to an elected parliament and then, by means of the parliamentary process, to the government’s control. In a parliamentary democracy the public power is thus concentrated in and rests with the government. In power-sharing systems, on the other hand, the power is diffused to different institutions with overlapping responsibilities in order to balance the power of the governmental organizations and to counteract any tendencies to concentrate public power in one institution.

However, since the EU is closer to a power-sharing system than a parliamentary one, it needs to develop an informal structure to compensate for some of the weaknesses characterizing that type of system, even though parliamentary governments also have informal structures. A power-sharing system creates much more uncertainty in terms of power, influence and responsibility than a parliamentary one. The institutions of the EU, the Commission, the Council and the Parliament are not only dependent on each other’s competencies; the different competencies also overlap. The knowledge that each one of the institutions can trespass into the others’ territory generates a high degree of uncertainty. Unless there are means of bridging the gap between the institutions and ways of creating links between the parts of the decision-making process, thus reducing the uncertainty, the system cannot work.

Furthermore, the EU system cannot, in contrast to national governments, build on the power-sharing concept and generate its legitimacy from the principle of a stable majority rule, that is, a division into a ruling side and the opposition. Instead, the political legitimacy strategy has to be based on consensus-building and generating efficient solutions which create the need for structures for bringing different types of interests into the policy-making process at an early stage, closely connecting the legislative phase with the implementation phase of the policy-process (Larsson, 2003, pp. 36–40). And since the Member States are normally responsible for the actual implementation of EU policy it is important that all of them are committed to the policy pursued. In fact, even when using qualified majority voting the Council usually aims for a consensual solution that can at least be tolerated by every state. Therefore, lacking an executive that can build its legitimacy on a public majority, it is forced to search for consensual solutions acceptable to different types of minorities, thus bringing together large majorities. In the EU the majority situation is not stable; some of those who were on the winning side one day may be on the losing side the next day (Abromeit, 1998, pp. 35–7), although decisions resulting in clear winners and losers are usually avoided (Peters, 1996, p. 73).
In that way the EU is more inclusive and consensus oriented than most national governments, where the political opposition is often kept outside. In the EU even a small minority has a good chance of making its voice heard. But, in terms of opaqueness, there is a price to pay – lack of openness and transparency, no overview and bad co-ordination of the policy-process. The effect of the large number of expert groups and committees is – at best – a partial overview and segmented control by the Commission and the Member States. Consequently, if you analyse the EU system expecting to find authority and leadership, you may be surprised when you find networks or policy communities instead. But the power within the networks and the policy communities is not always symmetrically diffused, since the Commission has great potential for influencing the operating of these arenas.

To summarize: expert groups can be used for any number of reasons and most expert groups are set up not for just one reason – in essence they are the lubricant of the policy-making and the administrative machinery of the EU, where formal and informal structures are constantly shifting with the help of these groups, where government and governance interact and where extensive deliberation is juxtaposed with the possibility of shrewd bargains.

EXPERT GROUPS – GOOD OR BAD FOR EUROPEAN GOVERNANCE?

In many ways expert groups are set up to improve the quality of the decision-making process by importing expertise and specialized knowledge on different topics. They also open up what otherwise might have been a rather closed deliberation behind closed doors in the Commission and limit the risk of the Council and the European Parliament being taken by surprise when proposals are put forward by the Commission. This is especially so now that the results of deliberation inside expert groups are published on the Internet in the form of reports which often include extensive descriptions of how the expert group has been organized and worked to formulate its recommendations.

In its paper on good governance the Commission has also clearly stated it is striving for excellence, plurality and impartiality when imparting expert advice, while at the same time admitting that the concept ‘expert’ can have a broad definition and include persons with knowledge of practical and procedural matters.

The main problem with expert groups, however, is the resulting fragmented policy-making structure, leading to a severe lack of overview and scant knowledge of exactly what interests are represented in what group.
Fragmented structures always run the risk of being hijacked by specialized interests which in the end may lead to unbalanced decisions. Poorly organized participants lacking extensive resources in terms of personnel and money usually find themselves excluded from the early stages of the policy-making process. Interestingly enough, so far very little attention has been given to this problem and the European Parliament seems to be far more focused on the comitology committees and the committees and the working groups in the Council than on the expert groups.

NOTES
5. Council working groups: spaces for sectorized European policy deliberation

Eve Fouilleux, Jacques de Maillard and Andy Smith

INTRODUCTION

Our principal focus in this chapter is the working groups of the Council of Ministers. More precisely, by examining through interviews and documentary analysis how legislation has been processed via such groups in different sectors, our research set out to shed light on the role played by Council working groups in EU policy-making. This objective was and is important because of the lack of attention paid by research to this subject. Apart from some specific case studies (Beyers and Diericks, 1997, 1998; Flynn, 2000), isolated references in readers on the Council (Hayes-Renshaw and Wallace, 1997; Westlake, 1999; Sherrington, 2000) and one unpublished PhD thesis (Trondal, 2001), working groups are somewhat of a ‘black box’ for political science, let alone the general public. A recent book questioning the influence of committees in the EU even excluded the case of Council working groups (Van Schendelen, 1998).

From examining how legislation has been processed via Council working groups in five policy sectors, our principal finding is that working groups always matter in EU decision-making but not because the Council is all-powerful. At a time when 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 towards compromise solutions take place. 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 ‘Europeanized’ decision-making arenas and processes can, at least to a certain degree, be said to have produced not only a European space of
Council working groups

In developing this central hypothesis, the chapter successively sets out responses generated by our research to two questions. First, in answering the question ‘how do working groups function?’, we set out some ‘thick description’ of their formal role, their composition and their actual ways of working. The second question examined is ‘why do working groups differ?’ Is it for recurrent (and legitimate) reasons? More particularly, is the difference due to treaty provisions, to the nature of policy instruments or to the impact of the brokering of compromise deals?

From an analytical point of view, empirically founded answers to these questions are important because they help us to characterize EU decision-making and determine its loci of power. From a normative point of view, our findings have considerable relevance for an ongoing debate on how to legitimate the EU and its institutions. Actors engaged in the Council itself have been active in raising the question of how the substructure of the Council should best be arranged. Indeed, our research also seeks to shed light on the question of whether working groups intensify or attenuate the supposed opacity of EU governance and its restricted form of political deliberation. 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 public perceptions of decision-making at the European level as a process that is arbitrary or random.

WHAT 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. (Westlake, 1999, p. 303)

Written by a practitioner, these lines give some idea of what the 175 or so working groups that operate within the Council are supposed to do and of an insider’s view of their importance. In general terms, the process of negotiation within a working group is as follows: the group is composed of one or two representatives from each member state, a member of the
The role of committees in the policy-process of the EU

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 in their status and rules, how their members form and convey national negotiating positions, and their internal dynamics.

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* (for example, for the cultural-educative programme LEONARDO), others are called ‘committees’ (such as the Committee for Education), while 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 representations of each member state (RPs) and ‘experts’ from national capitals;
- has a change of presidency every 6 months;
- deals with several pieces of draft legislation at a time;
- exists for a number of years;
- prepares COREPER and ministerial-level meetings.

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

- are not directly linked to the decision-making structure;
- do not always have every member state represented on them;
- can have the same president for many years;
- can have non-civil servants, and even junior ministers, sitting on them.5

To sum up this essentially descriptive viewpoint on what working groups are, the key criteria are their permanency and their place within
Council working groups

the machinery of the Council of Ministers. From this baseline, two further points will subsequently be developed.

First, most of the practitioners interviewed spontaneously defined 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 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 (Fouilleux et al., 2005).

Table 5.1 The working groups studied

<table>
<thead>
<tr>
<th>Policy sector/directive</th>
<th>Working group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telecommunications (e-commerce)</td>
<td>The Information Society working group</td>
</tr>
<tr>
<td>Telecommunications (ONP framework, UMTS)</td>
<td>The Telecommunications working group</td>
</tr>
<tr>
<td>Research</td>
<td>The Research working group</td>
</tr>
<tr>
<td>Social Affairs</td>
<td>The ‘Questions sociales’ working group</td>
</tr>
<tr>
<td>Environment</td>
<td>The Environment working group</td>
</tr>
<tr>
<td>Culture (MEDIA +)</td>
<td>The Audiovisual working group</td>
</tr>
<tr>
<td>Culture (LEONARDO)</td>
<td>Ad hoc Education working group</td>
</tr>
<tr>
<td>Culture (SOCRATES)</td>
<td>The Education working group</td>
</tr>
</tbody>
</table>

Second, the heterogeneity 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.

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 by their respective governments or can they develop sufficient leeway with which to bargain for the best (or least-bad) 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 just
The role of committees in the policy-process of the EU

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 is that traditions of concerted preparation differ from country to country. Territorially, some are highly centralized (like France), others more decentralized (like Spain and Germany, where the regions are consulted). Some include national parliaments in this process (Germany, Denmark), others do not. Some practise widespread social concertation (Austria, Sweden, Germany, Denmark and Belgium), while others tend to limit concertation to national ministries and funnel this through highly structured inter-ministerial procedures (France, the UK).

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’ (interview with Permanent Representative, January 2001).

Whatever the intra-national processes that 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 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 agency 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: division between governments in favour of liberalization (northern ones), state-led governments (southern ones)
and governments positioned in the middle of the road (‘but looking south’) such as France and Belgium;

• 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 opposition).

In the reality of working group negotiations, all these examples tend to demonstrate that working groups are arenas in 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 (Beyers and Diericks, 1998). 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 Permanent Representative are not always followed to the letter. 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 realize 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. (Interview, January 2001)

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’.

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 emphasized the role of time: ‘The longer 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’ (interview, January 2001). 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’ (interview, January 2001).

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

Finally, 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, the permanent representative is best described as an intermediary between a transnational process and national interests.8 As Hayes-Renshaw et al. noted some years ago, their attitude ‘gradually becomes ambivalent, the necessity to defend a position is accompanied by a constant desire to see the debate reach a successful conclusion’ (Hayes-Renshaw et al. 1989, p. 136).9

The Dynamics of the Working Groups

In view of this 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 angle of social groups in general in order to ascertain how each has developed its respective rules and processes. In other words, one needs 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 (Trondal, 2001). To be more precise, 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.

As regards institutional origins, the key variable concerns the balance within each working group between attachés from the permanent representations and ‘experts’ who come from the capitals specifically to negotiate
one piece of legislation. Some groups are made up mainly of attachés (Telecommunications, Research, ‘Questions sociales’, Culture) whereas others have different equilibriums, often involving national experts more directly (Information Society, Education).10 (See Table 5.2.)

Table 5.2 An example: different telecommunications working groups

<table>
<thead>
<tr>
<th>Working group</th>
<th>Composition and dynamics</th>
<th>Related Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telecommunications</td>
<td>Young, RPs, more familiar, more stable</td>
<td>Telecoms</td>
</tr>
<tr>
<td>Information Society</td>
<td>Experts and RPs, less ‘family-like’</td>
<td>Internal Market</td>
</tr>
<tr>
<td>Data Protection</td>
<td>Senior officials, coming from capitals</td>
<td>Internal Market</td>
</tr>
</tbody>
</table>

In the case of the Social Affairs working group, for example, it is clear that attachés know each other better and also deal together with several dossiers at the same time. Many of them have been in Brussels for several years – their average stay is five years – and 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)’ (interview, January 2001).11

Such difference between groups led by attachés and others led by national experts can be illustrated by 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 Permanent Representation’ (interview, March 2001).

This basic difference between attachés and experts, sometimes euphemized 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.\(^\text{12}\)

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 with representatives of regulatory bodies who now attend the Telecommunications working group meetings as part of national delegations. Finally, many attachés describe their opposite numbers from other permanent representations 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’ (interview, March 2001).

The second variable we have looked at stems from the observation that even amongst attachés some differences appear. If some working groups are composed mainly 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 estimating that only 4 out of 15 delegations sent non-environment 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 permanent representation, 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 whose objective is to avoid COREPER and ministers by taking decisions at this level. Similarly, the Research working group is also dominated by generalist diplomats. 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 as not adapted to working group rules and practices.

In sum, members of working groups clearly contribute more to EU negotiations than either they or academic specialists claim. Not only are working groups spaces within which the definition of European public problems and the crafting of legally-binding policy instruments partly take place but they often become arenas where key decisions regarding policy orientation are made. For these reasons, the sociological composition of each group frequently has considerable analytical and normative consequences.

WHY WORKING GROUPS DIFFER

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, determines 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 we set out 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.
The role of committees in the policy-process of the EU

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 the Council (qualified majority voting (QMV) or unanimity).

Our research shows that the European Parliament (EP) is now very much a constraint upon working group behaviour even in cases where co-decision does not apply (Fouilleux et al., 2005). As regards 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. However, this does not always occur as directly as one might have thought.

With the exception of Culture 2000 and the 5th R and D Framework, all 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’ (interview, Permanent Representative, January 2001). A number of other interviewees said, ‘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, it is mainly because alliances and splits are anticipated and a vote would simply confirm this and render them more difficult to modify. However, the bulk of our research 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 the country, the strategy of the presidency and the intricacies of the voting rules. For example, for an educational programme (like Socrates), a member state with specific demands (Spain, for example, on language issues) will not necessarily find support from other member states. In addition, the rule of unanimity for cultural programmes 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 its 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
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to the astonishment of many other negotiators, proposed the creation of a single cultural programme to replace the three 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 therefore made an initial proposal for what would become 'Culture 2000' with an overall budget of 167 million euros. During the Council negotiation that followed, the Austrian presidency managed to get the member states to agree to a budget of 156 million euros. 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' (interview, Council Secretariat official, January 2001). More precisely, the Dutch government agreed to the figure of 167 million euros 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 euros 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 euros 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 in getting agreement and the absence of co-decision does not totally explain the sidelining of Parliament.

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.13

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 above). When a proposal is discussed for a directive 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 each programme prestructured discussion on the second by ruling out some policy options. As mentioned by an actor interviewed regarding MEDIA Plus: ‘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’ (Interview, Council Secretariat official, January 2001).14

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 Open Network Provision (ONP) and e-commerce directives, tend to involve actors from different parts of the Commission, different EP committees and different 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 the most 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 (such as research, the Universal Mobile Telecommunications System (UMTS) decision) tend to feature negotiations in which the technical–political dichotomy is used in a straight fight between attempts to increase the powers of the Commission in a given sector and attempts 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 regulative or an allocatory type. Although excessively dichotomous, this distinction does enable one to reflect on 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:

- Allocatory-type policy instruments (such as the research framework programme and Culture 2000) tend strongly to lead to negotiations centred upon budgets. Thus they activate the involvement of politicians in the Council itself or anticipation of this in 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 sector and local authorities (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 perspective of the working group, this seems to generate more autonomy and thus a greater role in defining
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.

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. In short, 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 logics provide a more convincing response which can encompass, but not overstate, ‘the human element’ in decision-making. More precisely, we consider that brokering occurs at two levels that can be labelled inter-institutional and tactical.

Inter-institutional brokering

The inter-institutional level of brokering essentially concerns the manner in which agents within the Commission and each presidency set their priorities and try to get them shared by the relevant sectoral Council of Ministers. As is well known, each member state government organizes itself differently to take on the task of presiding over the Council as a whole. 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 rehierarchized at that time. As space and time for meetings is limited by physical, temporal and budgetary factors, 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’ (interview, Permanent Representative, January 2001)! 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 presidency of the European Parliament.\(^\text{17}\)

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 and avoid 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 liberalization 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”’ (interview with DG Environment official, November 2000). 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 inter-institutional level they are often not neutral enough to play the role of a genuine intermediary.

**Tactical brokering**

However, getting legislation onto the EU statute books is not only about ‘inter-institutional agenda’ brokering. The 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 crystallize 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 ‘Chairs of working groups are in a weak position and we as a secretariat cannot do anything. Meetings just roll on’ (Interview, July 2000).\(^\text{18}\)
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, 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 who 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. In short, not only can the expertise of a chairperson enhance their capacity to broker deals with their own government but this credibility also improves their chances of convincing other national delegations, Commission officials and perhaps even Parliamentarians of the need to compromise. In other cases (such as the vibrations directive), however, over-technically-minded chairs can 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 tactical brokering: the use of written texts. Many of our interviewees highlighted that in working groups ‘the text is our tool’. After the first reading of a draft piece of legislation, a range of national reserves flush out. Negotiations then begin in order to change wording and thereby remove as many of these reserves as possible before directly involving COREPER and ministers. 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 (Westlake, 1999, p. 307). Instead, the key resource of Commission officials is a capacity to accept or refuse changes to a text that they themselves initiated. 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 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’ (interview, July 2000). In reality, it is often clear that experience of legislation-making 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 of issue areas comes from the length of time most officials stay in the same job. Knowledge of Community law and judicial-linguistic skills are other assets which are built up 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. As the ‘institutional memory of the Council’, they are thus well placed to identify likely blockages and ‘non-flyers’ (Council Secretariat official, interview, July 2000). 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’ (Council Secretariat official, interview, January 2001), (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 and vice versa. Nevertheless, even in these circumstances, the capacity of officials from this institution to broker compromises seems unlikely to totally disappear.

The final aspect of brokering that interests us here concerns the transmission of draft texts to COREPER and to ministers. Both these levels can be, and often are, used to unblock working group negotiations. In addition to brokering specific to a single piece of legislation, it is important to add that COREPER in particular is often the arena for obtaining intra- and inter-sectoral deals. Two illustrations from our research 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, the Netherlands and the 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, this time involving both intra- and inter-sectoral brokering, concerns the 5th Research Framework Programme. In this case, an initial blockage in the negotiations originated 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 per cent 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 (Economics and Finance Ministers) 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 COREPER and ministers can turn into directives and regulations. 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 contextualized approach to institutions, institutionalization and inter-institutional exchange is essential.

**CONCLUSION**

We first restate the three principal empirical findings of our research on Council working groups and then draw a number of conclusions.
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 strike deals. Consequently analysis needs to take focus upon the composition and internal rules of such groups.

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 statute 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 '26th' and '27th' members: officials from the European Commission and the Council Secretariat. As the Commission officials are the authors of initial draft texts, the way they accept or reject changes to their propositions is an essential part of defining 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 exchanges which surround these set-piece events.

The first 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 are 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. When allied to the resource of voting arrangements in the Council, the perceptions and preferences of national actors clearly do still matter a great deal in EU 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 mindsets and behaviour of officials in the permanent representations and those who come to working group meetings from national ministries do appear to confirm Christiansen’s (2001) hypothesis that a process of ‘Brusselisation’ is an important part of European decision-making. Indeed, our research tends to suggest that permanent representatives 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 policy solutions, the term ‘mediation’ (Muller, 1995; Rochefort and Cobb, 1994) 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 summarizes the normative points that may be drawn from the third section of this chapter. 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, this difference is predictable and fits perfectly with ‘the rule of law’ (that is, 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 legal and functional characteristics of a policy sector.
- if difference is due to brokering, this means the process of negotiating EU legislation is unpredictable. One can see this either 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 as 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 ‘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 (Curtin, 1995, p. 85; Lord, 1998, p. 88). 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 homogeneous and consistent? What is ultimately at issue here are the depoliticizing and deresponsibilizing effects of intense competition 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, non-political process. If they define politics more widely and accept 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.

NOTES

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

2. The sectors chosen were Telecommunications, Research, Culture, Social Affairs and Environment. In each of these, we 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 and civil servants based in national capitals). Although we amassed a considerable amount of detail in order to process trace what happened in each instance, this process tracing was undertaken directly in monographies which accompanied our initial report. This chapter synthesizes the overall conclusions taken from our case studies.
3. Peterson and Bomberg (1999) also consider that Council working groups are ‘policy shapers’ in EU decision-making.

4. A 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. This declaration claimed 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’, 15 December 2001, p. 2).

5. In some cases, interactions can take place between a working group and a consultative committee in order to define 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 CREST, an organ incidentally chaired jointly by representatives of the Commission and the Council. 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 specialized 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.

6. As another interviewee put it, weak or ineffectual intersectoral co-ordination in national capitals shows up in working groups ‘when it becomes obvious that certain group members are simply giving their own personal opinions’ (November 2000).

7. In a recent questionnaire-based study of national officials involved in EU committees, only 35 per cent of those involved in Council working groups considered that they ‘had clear instructions about the “position” I should take’. In contrast 72 per cent claimed to ‘take the “position” I think is in the best interest of my country’ (Schaefer et al., 2000, p. 13).

8. Apart from perpetuating a binary distinction between supranationalism and intergovernmentalism, in our view Beyers and Diercks’ research design (1997, 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 both sets of practitioners 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.

9. Christiansen and Kirchner (2000, p. 9) 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’.
10. 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).

11. As Lewis (2000, p. 274) concludes, this socialization is important but this is not a matter of ‘wholesale change of identities and interests’.

12. More generally, Schaefer et al.’s questionnaire-based study of national officials involved in EU committees reveals that 45 per cent of respondents use English most frequently in committee meetings, while 15 per cent most often use French, 23 per cent Spanish and 17 per cent other languages. The trend here is accentuated for the language most frequently used in informal discussions, where 70 per cent of officials questioned use English, 19 per cent French, 7 per cent Spanish and only 4 per cent other languages (Schaefer et al., 2000, p. 8).

13. 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.

14. 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 have already met during previous negotiations (Leonardo I and Socrates I).

15. The problematical nature of this relationship is specifically mentioned in the Commission’s White Paper on Democratic Governance, 2001, p. 29.

16. The Council building has only 15 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 and food, and so on.

17. The Council presidency appears to have more direct influence over draft legislation that ‘arrives’ during its mandate, in particular because it may need to decide which Council of Ministers, and which working group, should negotiate it.

18. Successive enlargements have accentuated this trend, a point stressed in particular by an interviewee 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 nine member states (interview, December 2000).

19. 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).

20. 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).

21. In this respect our analysis largely concurs with that of Flynn of EU ‘expert committees’ (2000, p. 89): ‘one has to raise doubts about a true politics of expertise here more generally, not only 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’.

22. Which is where the difference between recitals and articles, as well as other subtleties of wording, can be very important. To use Westlake’s (1999, p. 307) evocative metaphor, the overall process can be described as ‘boiling off’ reserves from national delegations.

23. 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 matter 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’.

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24. 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 example from another sector saw a Council Secretariat official deliberately leaking documents to the press.

25. This appears to have been the case in the vibrations directive (Council secretariat official, interview, January 2001).

26. 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).

27. 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.
INTRODUCTION

The role of committees in the Common Foreign and Security Policy (CFSP) is rarely subject to the same type and depth of scrutiny as that of others in the Community. It is therefore of credit to the editors of this volume that they have specifically included CFSP committees as part of the examination. The committees in the CFSP area, using the broad terminology adopted in other chapters, include both the 'low' committees, primarily the working parties, and the 'high committees'. The emphasis in this chapter will be upon the latter and, more particularly, the Political and Security Committee (PSC). The justification for this is threefold. First, when compared with that of other EU high committees, the role of the PSC is perhaps underappreciated since it is at the hub of much of the EU's diplomatic activity and is the linchpin for a growing number of crisis management operations. Second, the role of the PSC is an interesting case study of 'Brusselisation', or the process whereby those competences formally attributed to the Member States are increasingly executed by Brussels-based fonctionnaires (see Allen, 1998). Finally, the relationship between the PSC and the other principal high committee, the Committee of Permanent Representatives (COREPER), is also of significance when trying to understand the role of committees in the CFSP area.

The significance of this chapter (and volume) is hopefully also to be found in the growing importance and influence of the committees and, hence, our need to understand them more clearly. As has been indicated, the 'higher committees' in the CFSP area include both deliberation and decision-making aspects. The CFSP area is impressive for the range of committee structures represented and the diverse way in which they are organised and function. It is also worth noting by way of introduction that the committee structure in the CFSP is evolving and, as will become apparent, many of the existing committees have been created in response to
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external circumstances. One of the implications of this is that the role and function of the committees vis-à-vis one another is not without an element of confusion, or even friction.

In terms of structure the chapter will examine some of the historical legacy of the current committee structures that are found in the CFSP area. This aspect is of some importance since CFSP’s predecessor, European Political Cooperation (EPC), was a parallel process to the Community and therefore not fully linked with the external aspects of the Community’s structures. This legacy explains, in part, some of the problems of consistency within and between the pillars, as well as the nature of the evolution of the CFSP committee structures. The chapter will then briefly consider the role of working parties in the CFSP area before moving on to the ‘higher committees’ with a particular emphasis on the PSC. The advent of the European Security and Defence Policy (ESDP) has ushered in a new, no less fascinating, range of committees and support structures that, for the sake of completeness, will be mentioned in passing but this should not be considered authoritative. Finally, the chapter will attempt to draw some general conclusions regarding the nature and function of committees and working groups in the CFSP area.

Before commencing in the manner laid out above, it is perhaps important to mention at the outset that this chapter does not attempt to explain in detail how CFSP works. Rather, the concentration is very much upon the committees and their various roles and not upon the formal decision-making carried out at the political level by the Foreign Ministers sitting in the General Affairs and External Relations Council. Nor will much be said of the important, but essentially political, role of the Secretary-General/High Representative for CFSP, Javier Solana, except to note the role and function of the bodies that report directly to him and support his role. The dividing line between the political and administrative aspects should not be considered as hard and fast since a number of committees, such as COREPER and the PSC, clearly straddle this fence.

EPC’S LEGACY

CFSP has its origins in the European Political Cooperation (EPC) process which stemmed from a meeting of the Heads of State or Government in The Hague in December 1969 and the subsequent Luxembourg (or Davignon) report of the following year. The use of the word ‘process’ to describe EPC was significant since it was not an integral part of the Community but parallel and was, for the most part, insulated from the Community and its external relations competences. Hence, the EPC Secretariat was distinct
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from that of the Council and the working parties supported the Political Committee, which, in turn, set the agenda for the Foreign Ministers meeting in the EPC context.

Under the EPC arrangements the Foreign Ministers would meet formally twice a year with the possibility of more informal meetings (called Gymnich meetings after the location of the first such meeting in 1974). The ministers were supported by a Political Committee, or PoCo, which was composed of the Directors of Political Affairs of the Foreign Ministries of the Member States and a Commission representative and initially met four times per annum. The committee’s main tasks were to prepare discussions at the ministerial level, to establish and direct the work of the working groups, to appoint groups of experts relating to a specific issue and, according to Simon Nuttall (1992, p. 16), to frequently take decisions ‘on its own responsibility’. The working groups’ reports included a summary drawing the attention of the PoCo to points which would require decisions for future action, or those which the committee should concentrate on.

As Nuttall has pointed out, the Political Directors were ‘senior officials’, although the precise role and rank differed from one Member State to another and, in the case of the United Kingdom, the title even had to be created so that participation in the committee was possible. Nevertheless, the important point is that in each case the officials were sufficiently senior to have the authority and leverage to reach agreement with, of course, consultation with the relevant national capital. Given the relatively small number of officials involved, the committee soon developed a somewhat clubby atmosphere or, as it has been described, ‘the coordination reflex, which is one of the features most peculiar to the EPC’ (Pijpers et al., 1988, p. 56).

The Copenhagen Report, delivered by the Foreign Ministers at their meeting in July 1973, increased the number of meetings at the ministerial level to four per annum, while the restriction on the number of meetings at the PoCo level, specified at four in the 1971 Luxembourg Report, was lifted and they could be held ‘as frequently as the intensification of work required’. The Luxembourg Report had also made provision for each Member State to appoint one of its foreign affairs officials as a correspondent to his/her counterparts in other ministries. Under the Copenhagen Report the Group of Correspondents, as it became known, was entrusted with following the implementation of political cooperation and examining general or organisational issues. The group also prepared the work of the PoCo according to instructions from that committee. The correspondents’ main function is to ensure that EPC (now CFSP) activity is consonant with national contributions. The correspondents are also in constant touch with their counterparts.
A number of events in the international system, particularly the Soviet invasion of Afghanistan in late December 1979, led to demands to strengthen EPC. Following a number of national initiatives, notably by France and Germany, the political directors were mandated to examine ways in which EPC could be strengthened. After two informal meetings at foreign minister level, a number of suggestions to this end were made at the London Political Cooperation meeting of 13 October 1981. The London Report marked progress in some areas, but in others merely encapsulated what was happening anyway. As far as the PoCo was explicitly concerned, the main developments were the consensus on the Commission’s participation in PoCo meetings, as a device to enhance consistency in the various areas of Community external relations and political cooperation, and provision for the PoCo to meet at short notice (within 48 hours) for emergency contingencies.

In spite of the Commission’s association with EPC, which would become ‘full association’ under the Single European Act, it had no real powers or jurisdiction under EPC. The role of the Group of Correspondents also grew, since they were now entrusted with identifying those working group drafts ‘which are not likely to require substantive discussion in the Political Committee’ (Ifestos, 1987, p. 227). In addition to the correspondents, the London Report enhanced the scope of the working groups and special experts and encouraged the PoCo to adopt a longer-term perspective on a variety of issues.

The Single European Act, of February 1986, established a clear distinction between the EPC structures and those of the Community, thus opting for a ‘duopolistic procedure’ (Krenzler and Schneider, 1997, p. 137). The Act, while linking the European Communities and EPC, makes it clear that they remain legally separate. The preamble commits the Member States to ‘implement this European Union on the basis, firstly, of the Communities operating in accordance with their own rules, and secondly, of European Co-operation among the signatory states in the sphere of foreign policy’. On the EPC side the Act introduced a number of relevant modifications, including the addition of an EPC Secretariat to assist the Presidency in this area, in whose rooms the working groups were supposed to convene. The EPC Secretariat of five was tasked with assisting the Presidency, working with the European Correspondents, assisting chairs of the working groups and maintaining the EPC archives.

The PoCo resisted the demands to be tethered to Brussels and continued its preference for the ‘travelling circus’ that had typified EPC thus far (Regelsberger, 1997, p. 71). This proved cumbersome since the meetings involved coordinating the schedules not only of the Political Directors but of the staff who accompanied them as well. During the 1980s the Presidency
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had an average of around 60–80 meetings to organise during its period in office (six months), ranging from those scheduled by the rules of the Foreign Affairs ministers and the PoCo to the various working group meetings (Pijpers et al., 1988, p. 52).

The Single European Act codified many of the previous EPC developments into Article 30 of the Treaty, complete with the vagaries that had surrounded previous reports. Under the Act the parties undertook to ‘inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through co-ordination, the convergence of their positions and the implementation of joint action’ (Single European Act, Article 10, Para.2(a)).

As EPC developed, so too did the role of the PoCo. One of the initial functions of the committee was to set up and supervise working groups; however, the network of working groups not only became more specialised but more extensive as well. The parallel nature of EPC was also to complicate the task of the PoCo, since there was an inherent ambiguity as to where ‘political issues’ falling within EPC’s area and the more economic and trade related issues which were Community competences began and stopped. Nuttall (1992, p. 118) refers to a number of cases where the PoCo sought to exercise political guidance over COREPER when it perceived an item with mixed community and EPC implications was under discussion. This had two general implications: first, it led to occasional confusion if not friction between COREPER and the PoCo, although, as will be examined in more detail below, this was more the exception than the rule; and second, the Commission’s reluctance to involve the EPC mechanisms in what were seen as Community competences was a reflection of a more general debate about the communautaire and intergovernmental aspects of EU external relations and the balance between them.

CFSP AND BASIC DECISION-MAKING

The Treaty on European Union nominally ended the duopolistic ‘Community–EPC’ arrangement with the instigation of a single institutional framework. In practice, however, the merging of the parallel former EPC structures into the Council structures has often proven difficult and, indeed, still does. The former EPC/CFSP expert working parties were merged with those in the Community addressing external relations but, as we shall see, remnants of the EPC/Community separation remain. Relations between the PoCo and COREPER also had to be redefined under CFSP; this too has been far from smooth. The EPC legacy has contributed to a distinct CFSP committee structure in at least two ways. First, the EPC committee structures were
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Politically differentiated from those of the Council and the Community and this legacy has given the CFSP committees a quite distinct (and complicated) legacy; and second, the committee structures are not subject to the types of democratic scrutiny (by national parliaments, the European Parliament or public interest groups) that are encountered elsewhere in the EU. This is in part a result of the EPC legacy, but also due to the often sensitive nature of the material addressed in the committee structures.

Figure 6.1 Basic decision-making bodies in CFSP

Decisions are formally made by the Foreign Ministers sitting as the General Affairs and External Relations Council (see Figure 6.1). Consensus is sought at the lowest possible level, in the working parties (see following section), in order to avoid overloading the higher committees or the Council itself. Unlike the Community, where the Commission has exclusive right of initiative, this is shared in CFSP with the Member States and it is the latter which, in practice, initiate CFSP decisions. The role of the European Parliament is somewhat marginal to CFSP; although it has the right to be informed by the Presidency of developments in CFSP, this is often \textit{a posteriori} and not, as the Parliament would like, \textit{a priori}. Questions of transparency and oversight come to the fore particularly in ESDP-related topics where, perhaps inevitably, the balance between transparency and (national) security considerations is difficult to maintain. However, provision is made for \textit{in camera} briefings of the chairs of the Foreign Relations Committee (AFET) and its two sub-committees on defence and human rights.
The rotating Presidency chairs all of the CFSP structures and is supposed, insofar as is humanly possible, to act as a neutral broker and is the engine behind the legislative and decision-making process. The natural temptation to impress a national *imprimatur* onto the six-month Presidency is often strong. The Presidency is assisted by the Council Secretariat and, since Amsterdam, by the High Representative for CFSP. In terms of external representation the Commission, including its extensive network of 129 country and regional delegations, assumes responsibility for those areas where the Community has exclusive competence, while the representation function falls on the Presidency, operating through the local ambassador of the country holding the Presidency. The Commission is fully associated with the Presidency as part of the local ‘troika’ (comprising the Presidency, the Commission and, if need be, the future Presidency).

Let us now turn to the working parties which, although apparently unglamorous, are where much of the hard work in CFSP is accomplished. It should also be borne in mind that the working parties, steered by the Presidency, have as their goal to reach consensus amongst the 27 Member States.

**WORKING PARTIES AND CFSP**

The ever-broadening CFSP agenda means that the number of working parties has now grown to 36. The working parties generally consist of thematic parties (such as Law of the Sea, Human Rights, Non-proliferation, Global Disarmament and Arms Control, Trade Questions, Development and Commodities) and geographical parties (like Central and Southeast Europe, Eastern Europe and Central Asia, EFTA, the Western Balkans, Mashreq/Maghreb, Latin America and Africa). There are a few specialist parties, such as the Military Committee Working Group and the Nicolaidis Group, which support senior bodies. *Ad hoc* parties, such as that on the Middle East Peace Process, may also be created, if and when circumstances demand. CFSP working parties represent approximately 10 per cent of all working parties.

The working parties carry out the essential preparatory work, which includes drafting CFSP instruments ranging from declarations to joint actions, and are comprised of ‘merged’ external relations working parties (the former EPC groups and the Community-equivalent working party) and CFSP-specific working parties. But, in spite of the apparent merging of the working parties, the practice of dividing ‘CFSP’ from ‘Community’ aspects still persists. Many working parties will meet in their Brussels composition for *communautaire* matters and, for CFSP issues, in capital formation.
However, for urgent questions it is nearly always the Brussels formations which address such matters (they are, after all, representatives of Member States in situ) as well as CFSP and related Council conclusions. Both types of formation, whilst somewhat awkward, serve their purposes. In the case of the Brussels formations the personnel involved know each other well and meet on a regular basis and, as a consequence, the working atmosphere is informal and efficient. The capital formations serve to heighten awareness of particular issues and will often only meet once or twice per Presidency in director’s setting (i.e. at senior level). When they meet the purpose is often to hold a general policy debate rather than reach agreement on specific details.

The Brussels-based officials will not only negotiate with one another but they will also negotiate with their respective capitals on a compromise. The strength of the socialisation process that officials undergo in Brussels, also referred to in more general terms as the ‘co-ordination reflex’, can often lead to national officials in the Representations defending a European position, often through use of the simplified written procedure whereby a proposal is deemed to be adopted within a specified period laid down by the Presidency, except where a Member State objects.6

Two more recent adaptations deserve special mention. The first is the Working Party of Foreign Relations Counsellors (formerly known as CFSP Counsellors and, since the advent of the PSC, known as RELEX Counsellors). The Counsellors exercise primarily an intermediary function, meeting between the PoCo and COREPER’s meetings, prior to a General Affairs Council. The group comprises a representative from every Member State, as well as the Council General Secretariat (DG-E) and the Commission (DG RELEX). The Counsellors, who in essence work like a horizontal working group, meet at least weekly and have rapidly become an established part of the CFSP workings. Their role is important, if not always particularly easy – they will attempt to act as intermediaries between the Permanent Representatives and the national officials sitting in the PoCo. More specifically, they will examine the legal, financial and institutional aspects of horizontal CFSP and Community matters and ensure their coordination. The group will also deal with draft decisions that may lead to the imposition of Community economic sanctions.

More than in other working parties, the Commission is actively involved, owing to the frequent links with communautaire aspects of EU external relations and the shared responsibility (with the Council) for the overall coherence of EU external actions. The Counsellors may also coordinate the content of the agendas for COREPER and the PSC. They report to COREPER and prepare their work on joint actions (and, where there is a political dimension, to the PSC as well) and in this capacity they have
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a significant bridging function. They are also required, under Articles 60 and 301 TEC, to consider joint actions or common positions pertaining to economic sanctions.

The second of these recent adaptations is the network of European Correspondents in all Member States and the Commission. They coordinate daily CFSP business, prepare meetings of the PSC (examined in more detail below) and distribute in a timely manner any CFSP points of the Council. The Correspondents maintain day-to-day contact on CFSP issues by means of CORTESY (COReutral Tterminal SYstem), which replaced the old telex system COREU (CORrespondance EUropéenne) in January 1997. The CORTESY system links the capitals with the Council and the Commission, which may have over 25,000 communications per year. Each Member State will have one CORTESY terminal and the individual members are responsible for the dissemination of material. Each member may also choose the mode of communication (electronic, physical (printed documentation) or a mix). A number of permanent representations also have access to CORTESY in a receptor capacity. Most communications are of the ‘restreint’ (limited circulation) variety, with about one-fifth being urgent and most being normal. CORTESY communications in the CFSP area are always in either English or French and not the other official languages (this also applies in CFSP working groups).

The routine contacts between the Correspondents and the Political Counsellors in the permanent representations of the Member States in Brussels are of particular importance in shaping agendas and outcomes. Their role is also of note when it comes to written or silent procedures, both of which require especially close coordination with the capitals. According to these procedures the Council can adopt or implement decisions through a written vote, allowing it to speed up the decision-making process. Given the urgency of these decisions, the role of the administration and the potential scope for influence is again significant.

CFSP’S HIGHER COMMITTEES: POCO AND COREPER

Prior to the Treaty of Nice the Treaty on European Union referred to a Political Committee, or ‘PoCo’. The treaty gives this committee responsibility to ‘monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative’ (Treaty on European Union, Article 25). It may also contribute to the ‘definition of policies by delivering opinions to the Council
at the request of the Council or on its own initiative’, as well as monitoring the ‘implementation of agreed policies, without prejudice to the responsibility of the Presidency and the Commission’. As we have seen, under EPC Ministers met routinely to consider non-Community-related issues but under the new arrangements the EPC meetings were merged with the General Affairs Council, now the General Affairs and External Relations Council, consisting of the Foreign Ministers of the Member States.

In an important caveat, PoCo’s functions are to be executed ‘without prejudice’ to Article 207 of the Treaty establishing the European Community. This article refers to COREPER, which is ‘responsible for preparing the work of the Council and for carrying out tasks assigned to it by the Council’. Significantly the treaty also makes the Council responsible for ‘taking decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council’ (Treaty on European Union, Article 13, para.3). This implies that COREPER, ‘the central body in charge of preparing and implementing the Council work, entered the former exclusive domain of the political directors’ (Regelsberger, 1997, p. 76). The position of COREPER was also clarified in the Council’s internal Rules of Procedure, which state in Article 19(2) that ‘all items on the agenda for a Council meeting shall be examined in advance by COREPER, unless otherwise decided by COREPER (by simple majority) or by the Council (voting unanimously)’ (Council of the EU, General Secretariat, 2001, p. 20).

Potential friction between COREPER and the PoCo was present almost from the outset. Following Dublin I the formulation of the discussions on the agenda for political union were entrusted to COREPER and the PoCo. The role of the PoCo was however relatively short-lived, as it was assumed by personal representatives in May 1990 (Mazzucelli, 1997, p. 70). The question of the competences of the two organisations was therefore in the air during the pre-Maastricht intergovernmental conference (IGC) but, in spite of the discussion on this point, no agreement was forthcoming. As a consequence Declaration No. 28, appended to the treaty, states that the ‘division of work between the Political Committee and the Committee of Permanent Representatives will be examined at a later stage, as will the practical arrangements for merging the Political Cooperation Secretariat with the General Secretariat of the Council and for cooperation between the latter and the Commission’.

The failure to reach an agreement during the IGC left the question open as to which of the bodies should have the final say before an item was submitted to the Council for decision. The Maastricht treaty itself would also muddle the competences issue by introducing a variety of instruments in the CFSP area which, by their very nature, were of a mixed political,
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legal and financial effect. The confusion over competences was manifest in various practical ways, such as in the scheduling of meetings. It was further exacerbated by the incorporation into the EU’s single institutional framework of the working parties which, under EPC, had consisted of EPC-specific working groups and those groups dealing with other aspects of external relations. This led to rather predictable confusion and friction about to whom the working groups should report.

Quite aside from the introduction of the European Union with its single institutional framework, Elfriede Reglesberger noted that the PoCo suffered from the burdens of national responsibility which often ‘does not allow them to devote enough energy and time to CFSP’. Regelsberger also noted that ‘their professional background is traditionally outside the Community business – a factor that emphasizes the problem of the pillarization of the Union’s external relations instead of fostering consistency’ (Regelsberger, 1997, p. 76). Hence, the uncertain relations with COREPER II and concerns about professional preparedness were to hamper the early years of the PoCo’s adjustment to CFSP. The more general political questions regarding the desirable balance between the communautaire and intergovernmental aspects of the Union’s external relations would also contribute to the confusion regarding the PoCo’s role; more involvement of COREPER could lead to the seeping communautarisation of EU external relations, while any appreciable extension of the PoCo’s role would strengthen the role of the Member States (reinforce intergovernmentalism, in other words).

Nuttall (2000, p. 246) alludes to the same point when he observes that ‘the question was not just a battle over turf, although that counted; it also involved a debate on the style and culture of foreign policy making in the EU’. To him the PoCo typified the ‘old ways of the EPC’ which were highly flexible and pragmatic, ‘lightly burdened with precedent and neglectful of legal form, in which considerations of ‘high policy’ came foremost’ (ibid.). By way of contrast, COREPER concentrated on law and procedure as well as opinion ‘outside the charmed circle of diplomacy’ (ibid.).

An agreement between the two institutions was reached in May 1992, but it was not until 1995 that a practical modus vivendi was established between the two bodies. The 1992 agreement made it clear that the PoCo ‘formally has a subordinate role vis-à-vis the Permanent Representatives Committee’ (Zwaan, 1995, p. 178). Thus, although the PoCo is entitled to bring its opinions directly to the attention of the Council, COREPER may add comments of its own, and the general responsibility for the preparation of Council meetings lies unambiguously with the Permanent Representatives. In addition to the above-mentioned document the PoCo presented its own guidelines to enhance the functioning of CFSP. The documents confirmed that the PoCo provides the political analysis which the Council
requires prior to decision-making, and that the committee should prepare opinions for all CFSP agenda items of the General Affairs Council. The task for COREPER, then, was to decide on the preparation and presentation of matters for the Council’s meetings. Generally speaking COREPER is expected to refrain from editing or altering the PoCo’s opinion, unless it feels it to be imperative on legal, financial or institutional grounds. In turn, the PoCo is expected to leave the legal, financial and institutional issues to COREPER.

In spite of the apparent clarification of the respective roles of the PoCo and COREPER, the overall CFSP decision-making system was still seen as ponderous and thus subject to further discussion in the 1997 intergovernmental conference. The main change introduced by the Amsterdam Treaty, at least in so far as PoCo was concerned, was that, while the Maastricht Treaty stated that the committee was to comprise the ‘Political Directors’, the Amsterdam version did not stipulate this. Consequently, since the PoCo no longer had to be expressly the Political Directors, the possibility of holding meetings at the deputy Political Director level was opened. The frequency of meetings (normally monthly) at the full Political Director level was limited by the demanding schedules of those occupying these positions in the Member States. The possibility of holding more frequent meetings, at both director and deputy levels, was to prove useful as CFSP developed and, in particular, when the European Security and Defence Policy (ESDP) emerged in the late 1990s.

The treaty changes also introduced complications in terms of the institutional weight of the PoCo, especially vis-à-vis COREPER. The Political Directors were senior in status to the Permanent Representatives, while the Deputy Political Directors, of senior ambassadorial rank, were normally junior to the Permanent Representatives. However, whatever the potential structural complications of this arrangement, the increased frequency of meetings of the PoCo outweighed any potential drawbacks in the relationship between the two organisations.

If we set the treaty aside for the moment, the Council’s own internal rules of procedure following the Amsterdam treaty are of interest. According to the internal explanation of CFSP’s *modus operandi*, the PoCo is the ‘primary body for advice on and the conduct of CFSP’. But, since the General Affairs Council (GAC) features both Community and CFSP issues on its agenda, ‘COREPER has responsibility for integrating CFSP items into the GAC agenda and ensuring decisions are adequately prepared’. Traditionally, COREPER does not reopen ‘the substance of PoCo recommendations, except where necessary to ensure the coherence between first and second pillar aspects of a single dossier’ (Council of the EU, 1998, p.17).
It was however the assumption by the EU of a number of crisis management tasks in the Amsterdam Treaty that would have the largest impact on the PoCo. This was to lead to the evolution of the PoCo into its new guise, the Political and Security Committee.

SECURITY ENTERS THE EQUATION

Successive crises in the Western Balkans in the early 1990s, as well as more general changes in the international environment, led to a fundamental rethinking of how the Union should provide for its security and contribute to regional and international stability. An Anglo-French initiative at St Malo in December 1998 marked an important development for the EU, since it called for the Union to have ‘the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises’ (Duke, 2000, pp. 354–5). The declaration also called for ‘appropriate structures’ to be created for decision-making and implementation within this area. The legal parameters for the declaration were provided by the Amsterdam Treaty, which had provided for the Union, without prejudice to the role of NATO or the specific character and defence policy of the EU Member States, to take action in the context of the so-called ‘Petersberg tasks’, which comprise ‘humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’ (Treaty on European Union, Article 17 (2)).

The first Presidency which had to grapple with the practical implications of the St Malo declaration was the German Presidency in the first half of 1999. The Presidency circulated a paper in February in which it urged that ‘the prime focus of our debate should be on how Europe can possess appropriate structures and capabilities … to conduct crisis management in the sense of the Petersberg tasks’ (Rutten 2001, p. 14). The following month a second Presidency paper was discussed at an informal meeting of the EU foreign ministers at Eltville, which observed that, with regard to decision-making in the field of security and defence, ‘necessary arrangements have to be made which will also ensure political control and strategic direction of EU-led operations’ (Rutten, 2001, p. 18). By the conclusion of the German Presidency slightly more concrete proposals had taken shape, which advocated the creation of ‘a permanent body in Brussels consisting of representatives with pol/mil expertise’ (ibid., p. 44). The ‘pol’ part was to be modelled on the existing PoCo, while the ‘mil’ expertise was to be provided by the EU Military Committee ‘consisting of Military Representatives making recommendations to the Political and Security Committee’ (ibid.).
During the following Presidency President Chirac proposed, as an initial step, ‘Anfin de créer une dynamique, il est proposé, dans un premier temps, de mettre en place à Bruxelles le Comité politique et de sécurité et le Comité militaire dont nous avons retenu le principe à Cologne’ (Rutten, 2001, p. 48). The establishment of these bodies was also linked to the appointment of Javier Solana as the first High Representative for CFSP, who assumed his duties in October 1999. In an accompanying position paper, ‘Plan d’Action sur la défense Européenne’, it was suggested that the PoCo should become ‘le Comité politique et de Sécurité’ (COPS under its French acronym), composed of competent representatives in political-military affairs and charged with following CFSP-related issues, including those with defence implications. The paper suggested that, under the authority of the European Council and the Commission, the PSC ‘devrait pouvoir assurer le contrôle politique et la direction stratégique d’opérations conduites par l’Union’ (Rutten 2001, p. 51). It should be composed of permanent representatives, of ambassadorial rank, who should be different from the permanent representatives to the North Atlantic Council (in other words, no ‘double hatting’) and should be able to convene at the level of political directors.

Given the importance of France and the United Kingdom moving in tandem as a precondition for the success of the nascent ESDP, the British reaction to the French paper is worth noting. The PSC was seen by France as a senior body which, emphatically, was separate from NATO. The British differed on two points. First, ‘although open to persuasion that the level should be ambassadorial’, they saw the difficulties involved in convening the Political Directors with frequency as unrealistic (Howorth, 2000, p. 43). The preferred option was therefore to aim at deputy political director level with provision, if need be, for the PSC to convene at full political director level. The second difference concerned ‘dual hatting’, where the United Kingdom saw advantages in allowing such an arrangement, especially since it would facilitate any borrowing arrangements between the EU and NATO (the so-called ‘Berlin plus’ arrangements) and, perhaps more importantly, mitigate American concerns regarding the proposed new body.

Underpinning the respective French and British positions were of course some well-worn themes. It was therefore of little surprise when the first PSC ‘ambassadors’ were appointed that France made a senior appointment, presumably to underline France’s role in CFSP and, more particularly, ESDP. Conversely, the United Kingdom chose to appoint at a lower level (although still very able) than the COREPER and NATO ambassadors, presumably to clearly indicate its commitment to European as well as transatlantic security ties.

Significantly, mention of the committee was excluded from a joint declaration following an Anglo-French summit on defence in November
1999. The declaration merely noted the importance of setting out the ‘political and military structures to enable the Council to take decisions on EU-led military operations, to ensure the necessary political control and strategic direction’ of Petersberg operations (Rutten, 2001, p. 78). The question of who should chair the PSC was also unresolved in the face of opposition to the French suggestion that it should be the High Representative for CFSP, which, to many, represented a significant dilution of the normal duties of the Presidency in this area.

PINSTRIPE MEETS KHAKI

In spite of disagreement over the precise composition and structure of the PSC, there was firm agreement on the need to make progress in the ESDP area. With this in mind, the Finnish Presidency was able to secure agreement that a number of permanent political and military bodies ‘will be established within the Council’ (Rutten, 2001, pp. 86–7). The standing PSC will be composed of ‘national representatives of senior/ambassadorial level’ – thus leaving the issue of its precise composition open. The PSC will ‘deal with all aspects of the CFSP, including the ESDP’ and, in the case of a military crisis management operation, ‘the PSC will exercise, under the authority of the Council, the political and strategic direction of the operation’.14 Until such time as a ‘standing’ committee could be established, it was agreed that a number of interim bodies could be established within the Council – the interim EU Military Committee (iEUMC), the interim EU Military Body (iEUMB) and the interim PSC (iPSC).15

The iPSC did not come into official existence until February 2000 and first convened the following month.16 The task of the iPSC was, as with the PoCo of old, to deal with CFSP matters in close contact with the High Representative, but also to ‘prepare recommendations on the future functioning of the ESDP’, which included following up the Helsinki ‘Headline Goals’ (Rutten, 2001, p. 87).17 The presiding Portuguese Presidency had, as its general mandate in this area, to continue progress towards the ‘Headline Goals’ target and to strengthen ESDP. One of the background questions behind the interim bodies was whether their legal status, once permanent, would necessitate treaty amendment. The advice from the Council’s Legal Service was that ‘the conclusions of the Cologne and Helsinki European Councils regarding European security and defence can be implemented without it being legally necessary to amend the Treaty on European Union’ but that such amendments might be necessary, ‘if the intention is to transfer the Council’s decision-making powers to a body made up of officials, or to amend the Treaty’s provisions regarding the WEU’ (Rutten, 2001, p. 125). It
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thus fell to the French Presidency to conclude the institutional arrangements for ESDP on a permanent basis.

One of the issues under discussion as ESDP developed, both in institutional and general terms, was what kind of relations should be established between the EU and NATO. A significant practical step in this regard was the first meeting of the iPSC and the North Atlantic Council (NAC) in the EU Council headquarters on 19 September 2000. This was to be the first of a series of regular meetings between the two bodies. Javier Solana noted the importance of establishing close relations between the EU and other relevant security-related bodies, but also noted that, ‘while we have looked to NATO and the WEU for ideas, they do not provide all the answers’ (Rutten, 2001, p. 140). The NATO Handbook (2001, p. 103) comments that the regular meetings between the two organisations ‘are rapidly moving from the theory of ESDI/ESDP to consultation and cooperation on concrete and topical issues, such as the situation in the Western Balkans’. However, in spite of the growing importance attached to the NAC–PSC relationship, it remains limited by the different decision-making capacity of the two bodies and the joint meetings remain more symbolic than substantive.

NICE, THE PSC AND THE AFTERMATH

The conclusion of the French Presidency at the Nice European Council on 7–9 December 2000 saw mixed progress on ESDP generally. Some aspects of the conclusions, especially the enunciation of EU–NATO relations, were dismissed thus: ‘littered with ifs and buts and apparent contradictions, the text does little to clarify the EU’s new defence role’ (The Guardian, 2001). While that may be the case, the modifications to Article 25 TEU in the Nice treaty are nevertheless profound in that they attribute legal authority not only to the PSC but also to ESDP in general. The new article reads:

Without prejudice to Article 207 of the Treaty establishing the European Community, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the responsibility of the Presidency and the Commission.

Within the scope of this Title [CFSP], this Committee shall exercise, under the responsibility of the Council, political control and strategic direction of crisis management operations.

The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to
take the relevant decisions concerning the political and strategic direction of the operation, without prejudice to Article 47.

The significance of the Nice treaty amendments lies in the fact that the PSC is authorised, in crisis management scenarios, to take relevant decisions regarding the political and strategic direction of such operations. In essence, in these particular circumstances, the PSC assumes a function normally reserved for the Council and this serves as recognition that crisis scenarios may well necessitate some form of circumvented decision-making.

The PSC was established as a permanent institution by a Council decision of 22 January 2001, along with the EU Military Committee (EUMC) and the EU Military Staff (EUMS) (Official Journal of the European Communities, 2001, pp.1–3). The French Presidency conclusions noted (Rutten, 2001, pp.191–2) that the new permanent structures would enable the EU to:

- develop a consistent European approach to crisis management and conflict prevention;
- ensure synergy between the civilian and crisis management aspects of crisis management;
- cover the full range of Petersberg tasks.

In an annex attached to the report, the PSC was described as ‘the linchpin of European security and defence policy and of CFSP’ and, with this in mind, the PSC’s mandate, inherited from its interim ancestor, was to ‘deal with all aspects of the CFSP, including the ESDP’. Provision was also made for the Secretary-General/High Representative (SG/HR) to chair the PSC, after consulting with the Presidency, in crisis situations. This was a crucial, and welcome, concession by the French Presidency.

The specifics of the PSC’s mandate comprise an extensive range of responsibilities that indicate considerable autonomy and potential influence. Its responsibilities include:

- keeping track of the international situation in areas falling within the CFSP, helping to define policies by drawing up ‘opinions’ for the Council, either at the request of the Council or on its own initiative, and monitoring the implementation of agreed policies;
- examining the areas of the General Affairs Council (GAC) in which it is involved;
- providing guidelines for other committees on matters falling within the CFSP;
- maintaining a privileged link with the SG/HR and special representatives;
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- sending guidelines to the EUMC and receiving the opinions and recommendations of the EUMC and the chairman of the committee, who liaises with the EUMS and takes part, where necessary, in PSC meetings;
- receiving information, recommendations and opinions from the Committee for Civilian Aspects of Crisis Management and sending it guidelines on matters falling within the CFSP;
- coordinating, supervising and monitoring discussions on CFSP issues in various working parties.

Apart from its liaison with other CFSP bodies, the PSC provides a ‘privileged forum’ for dialogue on ESDP and, under the auspices of the Council, it takes responsibility for the ‘political direction of the development of military capabilities’, as part of which, the PSC shall ‘receive the opinion’ of the EUMC assisted by the EUMS. For work in the ESDP area, PSC is assisted by the Politico-Military Working Party.

The PSC is ‘the Council body which deals with crisis situations and examines all the options that might be considered as the Union’s response within the single institutional framework and without prejudice to the decision-making and implementation procedures of each pillar’. Since close coordination will be called for, the Presidency Report made provision for the participation, where necessary, of the chairperson of the PSC in COREPER meetings and of Foreign Relations Counsellors, who maintain ‘effective permanent coordination’ between the CFSP discussions and other areas of EU external relations.

When faced with a crisis, the PSC proposes to the Council the ‘political objectives to be pursued by the Union’ and recommends a ‘cohesive set of options’ with crisis settlement in mind. The PSC may draw up an opinion recommending to the Council the adoption of a joint action and, without prejudice to the Commission’s role, it may supervise the implementation of the measures adopted and assess their effectiveness. When military forces are involved, the PSC exercises ‘political control and strategic direction’ of the EU’s military response to the crisis, based upon the opinions and recommendations of the EUMC. Political and strategic direction of a military crisis management operation is handled as shown in Figure 6.2.

On the basis of the activities of the PSC, the SG/HR will also direct the activities of the Situation Centre, which, in turn, supports the PSC and provides it with ‘intelligence in conditions appropriate to crisis management’. In addition to the duties listed above, the PSC also exercises political direction over the EU Institute for Security Studies, in Paris, and the EU Satellite Centre, in Torrejón, Spain – both were formerly part of
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The former, in particular, has a significant and important crisis prevention and management role through its analysis of various types of space imagery.

THE PSC’S MODUS OPERANDI

The basic functions of the PSC with regard to CFSP have changed little from its previous duties as the PoCo. When the Political Directors are not present, which is the norm, the PSC is represented at ambassadorial or equivalent level. COREPER continues to process the preparatory work for the Council but the Chairman of PSC can participate, where necessary, in the work of COREPER. The PSC is assisted by European Correspondents, who work very closely with their respective Political Directors. CFSP working groups will also help to elaborate options and documents for the PSC’s consideration. The Commission representative and the Correspondents will examine any institutional, legal and financial aspects with special attention.

**Figure 6.2  Simplified crisis management procedures**

PSC sends to the Council a recommendation based on the opinions of the EUMC

Council decides to launch military operation within the framework of a joint action

Joint action determines role of the SG/HR, who shall act with the PSC’s assent

Council kept informed by PSC reports presented by SG/HR as chair of the PSC
The agendas for the PSC and the GAC are agreed by the Presidency and the Secretariat, while the operational conclusions of the working groups, which are examined regularly, are approved by the PSC. The agendas are not in the public domain since the content of the discussions is potentially sensitive, especially if a specific region or country is under discussion. The PSC normally meets twice per week, on Tuesdays and Fridays, and additional meetings may take place prior to Council meetings or when political dialogue with third parties demands their presence. The PSC consists not only of representatives of the Member States but also the Commission member to the PSC and four Council Secretariat members. But, the national ‘representatives’ can often comprise more than the PSC members, which means that on issues that are particularly emotive or complex the meetings can easily consist of over a hundred people. The only exceptions to this are the Tuesday working lunches, which are, by tradition, for the basic group referred to above. In the ESDP area, which is explored in detail below, PSC meetings can include the Politico-Military Group, national experts and representatives from relevant backgrounds or departments.

Within the Secretariat, CFSP Unit desk officers are responsible for preparing the briefs of the chairs of both the PSC and the GAC. Directorate-General E has principal responsibility for supporting the Presidency in this area, as well as the various working groups. The Director-General of DG-E, will attend the PSC meetings, as well as the Legal Secretariat and, where appropriate, officials from the various Directorates who have competence in the areas under discussion. In addition to the preparation of meetings, DG-E will follow meetings and draft reports on the meetings, as well as ensuring that other relevant organisations (such as NATO) are informed of proceedings. Briefs may also originate from the Commission and the myriad of working groups in the CFSP area.

The Commission is normally represented in the PSC by the head of Directorate A of the External Relations Directorate-General, or designate, with CFSP/ESDP responsibilities. The role of the Commission representative is of particular importance in the crisis management context when civilian aspects are under discussion and, more generally, to ensure consistency which should also include a longer-term perspective on crisis management issues. The presence of the Commission may also be critical in providing a more general context for the discussions. Similarly, the information at the Commission’s disposal, especially that provided through the External Service and the Commission’s own Crisis Management Centre, may prove of considerable importance for discussions in the PSC. The main preparatory work in terms of the coordination between the different RELEX DGs is the European Correspondent Unit.
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The PSC will therefore have a bird’s-eye view of the Commission’s position based on input from a number of DGs.

The Commission’s presence is also of importance in the crisis management context if a potential operation is being discussed and the funding basis has to be provided for or clarified. The funding aspects have already proven challenging, as was the case for the modest EU Police Mission to Bosnia-Herzegovina, which, since it did not have obvious ‘military or defence implications’ which would have clearly made it a matter for the Member States to address, became a matter of Community concern. Since the budget for CFSP is limited primarily to administrative and some operational expenditure and represents under 0.05 per cent of the overall external relations budget, this aspect of the Commission’s role is likely to increase in importance.

In addition to briefs that arise as a result of international developments, there are regular reports that may be built into CFSP joint actions. The sheer volume of briefs means that the PSC ambassadors spend a considerable amount of time reading, often at short notice. In addition, political dialogue and meetings with third parties (such as the North Atlantic Council, which is discussed below) make more demands on their agendas. Naturally, the recent enlargement to 25 Member States has provoked fresh concerns about time management and how to conduct meetings. The amount of material to be addressed and the time limitations imply that the Presidency has a particularly important job in organising and prioritising the agenda of the PSC meetings; however, the short term in office of the Presidency and the demands imposed by the rotating Presidency on national administrations also complicate the picture.

Although the Presidency does not have editorial control of the briefs, close coordination between the working group chairs and the CFSP Unit desk officers is the norm. The briefs for the PSC are transmitted to the Presidency via the internal cryptofax link between the CFSP Unit and the office of the Presidency’s European correspondent, normally two days or so before the meeting. The final version of the brief is approved by the Secretary-General (that is, the High Representative for CFSP) and the briefs for the GAC are then communicated to the Presidency via the Secretary-General’s private office. The briefs for the PSC and the GAC normally include draft conclusions. However, even if this deadline is observed (which is not always the case) this leaves little time for PSC members to actually read and digest the material.

The workload of the PSC is somewhat alleviated by the assistance of the Politico-Military Working Party and, more recently, the Nicolaidis Group. The former is charged with responsibility for ‘assisting the (interim) Political and Security Committee by carrying out preparatory work on the
European Security and Defence Policy’ (Council of the EU, 30 June 2000). The Politico-Military Working Party became permanent at the same time as the PSC lost its interim prefix and on 6 April 2001 the PSC agreed on the need to update the brief of the Working Party (Council of the EU, 12 April 2001). The Politico-Military party addresses the more diplomatic aspects of ESDP, along with CIVCOM for the civilian elements (see below), and it holds regular meetings (up to four times per week). Generally speaking the more technical work falls to the party, including work on the ‘Berlin Plus’ arrangements with NATO and operational details for CFSP operations. The ‘polito-military’ nature of the working party often demands a combination of officials from both the Foreign Ministries and the Defence Ministries of the Member States.

The agendas for PSC meetings were initially prepared by an informal group but the growing demands on the PSC led to demands for more formal assistance, which resulted in the creation of an Antici-like group called the Nicolaides Group, named after its first chairman (during the Greek Presidency). The group assists with the ‘organisation of meetings’ and this can include ‘going through the provisional agendas in advance, fixing the order in which items for discussion would be taken and dealing if necessary with the practical arrangements for the meeting’ (Council of the EU, 14 April 2003). The second task of the group is to ‘allow delegations to flag up in advance what the main issues of concern are to them, thereby enabling the members of the PSC to prepare more effectively for their discussions and possibly to dispose more easily of less important questions’ (ibid.). The group is also able to identify points of special interest or concern in reports submitted to the PSC by the working parties, as well as providing a ‘useful point of contact’ between the delegations and the General Secretariat.

The relevant CFSP desk officers, or their directors, will normally attend the PSC and the GAC when items fall within their particular areas of responsibility. In the meeting they will take notes and try to ensure accuracy and completeness in the ensuing reports. Reports from PSC meetings are, by convention, always in French (relevés de conclusions). The Presidency (which normally means the European correspondent and, in some cases, the CFSP counsellor) will clear the text of the relevés prior to their being released by the Secretariat as COREUs.25 Following a PSC meeting (or that of the GAC) the Presidency will decide on whether it is necessary to brief third countries on the outcome of the meeting. If the decision to do so is made, a member of the CFSP’s General Affairs Directorate will brief representatives of ‘like-minded’ countries.26

The principal differences between the PSC and its predecessor, the PoCo, are not so much in working methods (although the demands of the PSC have necessitated adjustment) as in their overall visibility and presence. It
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was argued earlier that the PoCo was an essential, but limited, aspect of the gradual growth of the ‘European reflex’ in the Community’s external relations. The senior level of the representation meant that meetings were infrequent and that the PoCo was therefore not a particularly visible committee. The PSC’s ability to meet at either Political Director or senior/ambassadorial level meant that it became, in effect, a permanent presence in the deliberations on CFSP. Its heightened profile, accompanied by the rapid development of CFSP, also meant heavier demands on the PSC members. These demands were to increase with the growth of the EU’s crisis management activities.

ESDP AND CRISIS MANAGEMENT

Although the political role of the PSC was well understood, based on the PoCo experience, the crisis management aspects remained less clear. Indeed, clarity would only emerge as the result of initial trials. The first crisis management exercise (CME 02) was held on 22–28 May 2002 in order to test the Union’s ability to take decisions on the use of its civilian and military capacities during a crisis scenario. The initial part of the exercise, deciding on an appropriate response, fell to the PSC. The exercise, which was limited to headquarter level, concluded when the PSC had evaluated all of the military strategic options, as well as the full range of civilian aspects. The exercise was limited not only in scope but also by the fact that involvement of other organisations (such as NATO in the event of a ‘Berlin Plus’ operation) was not specifically tested, nor were national ministers involved to the extent that they would be in a real crisis. In line with the conclusions of the French Presidency at Nice, the High Representative chaired the PSC after consultation with the Presidency.27

The outcome of CME 02 indicated that the ‘Union’s procedures, concepts and strategic planning capabilities were adequate and practical’ (Gourlay, 2002). The reviews of how the PSC specifically functioned were mixed. On the positive side, the PSC was seen as ‘adept at practical problem-solving’. However, on the negative side, some criticised the ‘lack of clear political leadership or guidance from the PSC and cited the process of selecting operational headquarters as problematic’ (Gourlay, 2002). More generally coordination problems were identified where there were areas of mixed competence (that is, both the Commission and the Council could claim competence), such as policing roles.

In the aftermath of the first crisis management exercise the European Council endorsed a ‘Draft European Union Exercise Concept’. The Concept charged the PSC with ‘overall responsibility for the programming,
Committees and working groups in the CFSP area

planning, conduct, evaluation and reporting of all EU exercises, including the preparation of the annual EU exercise programme and the development of the Exercise Specifications (EXSPEC) (Council of the European Union, 11 June 2001).

The procedures for crisis management were further specified in 2003. The Politico-Military Group forwarded ‘Suggestions for procedures for coherent, comprehensive EU crisis management’ which the PSC endorsed in March 2003, with a request for further advice from the EUMC and the Committee for the Civilian Aspects of Crisis Management (CIVCOM) (Council of the EU, 6 March 2003). The suggestions covered a variety of crisis management scenarios, including those with ‘the highest degree of complexity’ (ibid., p. iii). The document is ‘rather lengthy’ and is a ‘living document’ in the sense that it will need ‘to be continually revised in the light of experience’.28

The specific details are beyond the scope of this chapter but a brief summary of the main bodies involved may be appropriate (see Figure 6.3). The decision to launch an operation, be it military, police, civilian or rule of law, will be taken by the Council in the form of a joint action which must be adopted unanimously.

As has been explained above, the PSC will be responsible for overall strategic and political control of the crisis management operation and it is the body to which others report. We have also seen how provision is made for the High Representative for CFSP to chair the PSC in time of crisis. If there are believed to be military implications of the crisis at hand the EUMC, comprising the national Chiefs of Defence Staff or their deputies, will be asked to appraise the situation. The EUMC is commanded by a four-star general, appointed for a four-year term, as is his three-star equivalent heading the EUMS. If the EUMC believes that there are military implications involved, it may recommend that the EU Member States should release pre-designated national or multinational units to an EU operation, under either an EU or a European NATO commander (this depends on whether NATO assets are used or not). The EUMC is composed of 130 senior seconded military officers who serve in the Council Secretariat for a fixed period of time. The EUMS maintains and updates a ‘force catalogue’, which provides a detailed breakdown of all of the national and multinational forces and equipment which may be drawn upon from the EU Member States (except Denmark, which retains its opt-out on all defence-related provisions of the Treaty on European Union). Since July 2004 the crisis management apparatus has received the support of the European Defence Agency – about 80 personnel drawn from defence ministries as well as defence industries, whose primary task is to support defence–industrial
Note: Boxes in grey are the normal CFSP decision-making and support structures, while those in white are the newer crisis management oriented bodies.

*Figure 6.3 Principal bodies in crisis management decision-making*
integration, joint projects, common procurement and the necessary research and development to underpin the EU’s crisis management efforts.

It is quite possible that a crisis may present the EU with multiple demands, including the need for police and/or civilian operations. The police unit, comprising a dozen senior seconded police officers, is responsible for the support of the EU’s international police missions, as well as giving appropriate advice on the composition of any mission support. In a similar manner CIVCOM will support civilian operations, which could be civil administration, rule of law or civil protection in nature.

Intelligence and information support for the operation(s) will be provided through the Policy Unit and the Situation Centre (SITCEN), the latter pooling both civilian and military analysis. A crisis management centre would liaise, when appropriate, with its counterpart in DG RELEX. The latter aspect is especially important since the resolution of a crisis, and in some cases ‘nation building’, is likely to demand considerable support for non-military operations from the Community budget. A mechanism called the Rapid Reaction Mechanism, created in 2001, enables relatively modest amounts of money to be released from the Community budget for short-term humanitarian relief projects (up to six months). Finally, a committee of contributors may be created which comprises all states, not only the EU Member States, which are contributing to the operation. This committee is responsible primarily for the day-to-day management of the operation. It is an interesting feature of the dozen or so EU crisis management operations conducted since 2003 that appreciable numbers of non-EU states have contributed personnel to operations.

Finally, it should be noted that the PSC is involved in an ‘iterative’ process with the EUMC whereby ‘the necessary planning assumptions and scenarios preliminary to the definition of the military requirements necessary to fulfil the 2010 horizon’ are elaborated. Within the context of the European Capabilities Action Plan (ECAP), the PSC will also give ‘political guidance’ and, with the EUMC, set ‘the political and military priorities of the [military] shortfalls’ (Military Capability Commitment Conference, 2004). In a related development, the PSC also has duties regarding the European Defence Agency, whereby they may issue guidance and advice, along with other Council bodies, to the agency (Council Joint Action 2004/551/CFSP, Article 4(3)).

It should be noted in passing that most of the crisis management bodies described above are located in secure premises on Avenue Kortenberg and not in the Council Secretariat’s Justus Lipsius building. The ready understanding of the need for a ‘security culture’ is apparent among the seconded national diplomats as well as the military officials. There has been some reserve about sharing information beyond the fairly restricted ESDP civilian and
military bodies owing to concerns about the security of documentation and communication. Given the lack of autonomous intelligence assets within the EU, with the exception of the EU Satellite Centre in Torrejón, near Madrid, the appropriate handling of shared intelligence analysis from the Member States and elsewhere is an important factor.

REPORTING TO AND SUPPORTING THE HIGH REPRESENTATIVE FOR CFSP

The Secretary-General of the Council and High Representative for CFSP (SG/HR), mentioned briefly above, is of immense overall importance to CFSP and EU external relations. However, since Solana’s importance lies in his political influence and his close working relations with the Commissioner for External Relations and European Neighbourhood Policy, any extensive analysis is beyond the scope of this chapter.30

Of more interest to the themes of this volume are the support bodies such as the Policy Planning and Early Warning Unit (Policy Unit), created by a declaration attached to the Amsterdam Treaty. The Policy Unit delivers papers outlining policy options to the SG/HR but also shares them with the PSC. The unit is divided into seven task-forces addressing both thematic and geographic issues.31

The Policy Unit, and thus a significant part of CFSP’s conflict prevention effort, is dependent upon the willingness of Member States to share timely information with it. This willingness is partly conditioned by practical aspects (such as language and the limited resources and often time to translate documents, which makes English and French information more valued), but also by the composition of the Unit, which consists of seconded national diplomats, to whom the information may be disseminated. The information given to the Unit may be used to brief the SG/HR, less so the Council Secretariat and, on occasion, the PSC (Güssen, 2001). The quality of the Policy Unit’s briefings has produced mixed comment, described as exhibiting ‘great variation’ in terms of quality (ibid.), but also as producing ‘many well thought out and structured papers’ (Müller-Brandeb-Bocquet, 2002, p. 273). Friction between the Policy Unit and the Council Secretariat is evident since, according to one observer, the Policy Unit was ‘set up to circumvent the Secretariat’s CFSP Directorate’ and, by implication, to strengthen the SG/HR’s position (ibid.).

A complementary role to that of the Policy Unit is played by the Situation Centre (SITCEN) where information gathering is conducted from open sources as well as COREU telegrams, which are then forwarded to the relevant bodies. More recently seven national intelligence officials have been
Committees and working groups in the CFSP area

The Policy Unit is represented at PSC meetings in the initial exchange where, if relevant, the Unit's view on potential crises is discussed. The 'early warning' function of the Policy Unit therefore contributes to the PSC and the SG/HR alike.

The relationship between the PSC and the SG/HR is more complicated. The Nice Treaty makes provision, in time of crisis, for the SG/HR to chair the PSC but otherwise the chairing functions fall to the Presidency. The rotating Presidency system introduces problems of its own regarding consistency for the PSC and indeed in other areas of external relations. The possibility of a permanent chair for the PSC may alleviate some of the consistency related concerns but, given the hectic schedule of the SG/HR and his frequent absences from Brussels, the likelihood of it being him has to be questioned. The Nice provisions for the SG/HR to chair the PSC also have to be questioned on the simple grounds of logic that a crisis scenario, perhaps more than others, is likely to involve the SG/HR in extensive shuttle diplomacy.

A second issue, of more real concern, relates to the level at which defence ministries might be involved. Traditionally national foreign ministries have seen themselves as primus inter pares and it is easy to imagine that formal involvement of defence ministers and ministries might be regarded as intrusive by the foreign ministries. The need for a political dialogue at defence minister level has already been demonstrated in a number of informal meetings of the EU defence and foreign ministers from 1998 onwards.

At the level of the Permanent Representations in Brussels, the military advisers will assist the military representative (MILREP) sitting on the EUMC, as well as the PSC Ambassador. This triangular relationship is important since it acclimatizes the PSC Ambassador to the nuances of military crisis management, whilst assisting the MILREP, who may have primarily had NATO experience, to adjust to EU working methods and practices.

More generally the PSC's relations with the military crisis management bodies appear less than clear. The EUMC, comprising the Chiefs of Defence Staff (CHODS) of the Member States or their deputies, is the senior military body in the EU. The seniority of the CHODS in their respective national administrations raises the question of the extent to which they favour direct contacts with their governments over discussions with the PSC. The EUMC will, at the PSC's request, give military advice on any potential or actual military ramifications of a given crisis. However, the advice is of indeterminate legal status and is therefore best considered as...
primarily political in nature. It may also serve as a first sign that a Member State disagrees about the wisdom of applying military options. This may be especially important if there is perceived to be an ambiguous legal mandate for military crisis management, such as the absence of a clear UN Security Council mandate.

CONCLUSIONS

Any conclusions regarding committees and their various roles in the CFSP area must be tentative since this chapter is essentially a snapshot of a dynamic process that is changing as rapidly as the policy area is developing. A few general remarks are however appropriate.

First, the practice of working in committees, initially in the EPC context and now in the CFSP context, has made a dramatic change to the actors involved. Although the point should not be exaggerated, the process of explaining, meeting and seeking consensus means that the individuals involved are aware of both the national dimensions to issues but also the European dimensions within them. The complex relation between the national capitals and CFSP leads in some cases to wider margins of manoeuvre than in others, but the need for consensus, particularly given the opprobrium attached to blocking or stalling, will also tend to reflect the constraints of national positions. Nevertheless, it is clearly not in the interests of the fonctionnaires in the Council Secretariat, or the diplomats in the Permanent Representations or the Policy Unit, to allow an overtly national agenda to be pushed or a ‘European’ agenda that stands little likelihood of support in the capitals. Hence, the committees in the CFSP area are less about strategic bargaining, which in some ways is frowned upon, and more about actively looking for consensus.

The flow of information is also very much two-way, with advice and instructions being sent to the Permanent Representations but also extensive de-briefing for the national administrations. It is also worth noting that the exchange of information occurs at different levels but it is ultimately between the political directors of the respective Foreign Ministries and the PSC Ambassadors; since the PSC can meet in the ‘old’ PoCo format (that is, political directors) as well as at the ‘deputy’ level (the PSC Ambassadors), there is a vested interest in a regular exchange of information, as there is in making sure that the PSC remains an effective actor.

Second, the committee structures that have evolved in the CFSP field are generally small and thus are able to adapt reasonably quickly. But, given the relatively modest size of the CFSP administrative and operational budget, there is the problem of overstretch. One response to this has been the growing
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The number of national officials who are seconded in the CFSP area, which has provoked occasional tensions with the Secretariat officials – notably when it comes to issues of ‘high politics’ where the Member States often assume that they have a monopoly of real diplomatic expertise. It is too soon to speak of growing informality or formalisation of committees in the CFSP area. Instead, it may be more helpful to think of ‘embedding’ as the national diplomats increasingly become involved in the Council Secretariat (as is the case with Policy Unit officials and their DG-E counterparts in specific geographical areas). It is also worth noting that attempts to establish formal political structures in the CFSP area are inherently sensitive since they will inevitably be met with close scrutiny about whose hand (intergovernmental or communautaire) is reinforced.

Third, the criterion of legitimacy is a particularly difficult one for CFSP owing to its intergovernmental nature. Certainly the measures of legitimacy that apply in many Community areas cannot be applied to CFSP committees. It would however be a mistake to assume a consequent lack of legitimacy, since not only is CFSP closely scrutinised in the national parliaments (and to a far lesser extent the European Parliament) but also it relies on the support of the Member States. The strong pressure being exerted on CFSP bodies by the European Parliament to share more information in a timely, a priori manner may also bear fruit and give the Parliament a greater role in shaping the general aspects of CFSP. If there is a concern regarding legitimacy, it lies more in the relationship between CFSP and ‘effective multilateralism’ and what this implies in concrete terms for EU–UN relations or the rule of law.

Finally, the committees are evolving rapidly and, as they do so, the linkages between them and other institutions are not always as apparent as they should be. This is the case particularly with the PSC and COREPER. The rapid growth of CFSP has also seen a specialised set of committees take shape that address the specifics of crisis management. The potential pitfalls of the reactive creation, or adaptation, of committee structures in the CFSP area are twofold: first, there is the danger of internal incoherence within the EU between the CFSP structures and ways of working and those of the Community in external relations; and second, there is a similar challenge when it comes to coherence in the Union’s approach to external partners where CFSP may be able to react more quickly and prioritise short-term solutions. Both are serious challenges when all of the contemporary security threats to the EU are inherently inter-pillar and the division between intergovernmental and communautaire aspects of external relations becomes increasingly artificial. Fortunately, or unfortunately, communitarisation of CFSP is not on the cards but fostering and strengthening a common foreign and security culture in the committees and beyond most definitely is.
NOTES

1. At the time of writing three crisis management operations have been successfully concluded and, at the end of 2005, a further ten are underway.

2. The Political Committee had already exceeded the limit, having met nine times in the previous year.

3. The EPC Secretariat consisted of a seconded official from the residing Presidency and one each from the two preceding and two following Presidencies. All were appointed for the period covering the five Presidencies.

4. Although it is customary to refer to working parties, there are instances where ‘groups’ are expressly referred to (such as the EU Military Committee’s Working Group).


9. Mention is also made in Article J.15 (now Article 25) as well as in Article J.18 (now Article 28) which specifically applies Article 151 (now Article 207) to Title V.

10. COREPER II, composed of the permanent representatives (COREPER I being the deputy permanent representatives), addresses all issues covered by the European Council and in the General Affairs, Budget, Development, ECOFIN, and Justice and Home Affairs Councils.


13. The tasks had originally been adopted by the Western European Union in 1992 and were incorporated into the Amsterdam revisions to the Treaty on European Union.

14. The term ‘CESDP’ was widely used until the initial ‘C’ was quietly dropped since it was felt to be redundant. To avoid confusion, the term ‘ESDP’ will be used throughout.

15. The Interim Military Body would later become the EU Military Staff.


17. The Headline Goals were designed to enable the EU, by 2003, to deploy within 60 days and sustain for at least one year military forces of up to 60 000 persons capable of the full range of Petersberg tasks.

18. The idea of the PSC as a ‘lighthouse’ was reinforced in a separate contribution by the SG/HR to the Nice European Council. Solana wrote that ‘it is essential that a single body should have access to all the information, proposals and initiatives relating to the crisis involved in order to make a global assessment’ and that, following the Helsinki European Council, ‘this role would fall to the Political and Security Committee’ (contribution by the Secretary-General/High Representative, Procedures for Comprehensive, Coherent Crisis Management: Reference Framework, 4 December 2000, Para. 2(3)).

19. The EU+15 referred, at this time, to the non-EU European NATO members (the ‘Six’) plus the candidates for EU accession (minus the Republic of Cyprus). Most are now
members of the EU and NATO respectively. The EU now has 25 members of which 19 are also NATO members.

20. DG-E is divided into nine directorates and three groups addressing relations with other organisations; for full details see http://europa.eu.int/idea/bin/dispent.pl?lang=en&entity_id=7434.

21. In the CFSP/ESDP area alone there are over thirty working groups. See http://register.consilium.eu.int for a full list.

22. For more information see http://europa.eu.int/comm/external_relations/cfsp/intro/#3.


24. It should be recalled that Article 25 of the Treaty on European Union states that the committee ‘shall monitor the implementation of agreed policies, without prejudice to the responsibility of the Presidency and the Commission’.

25. COREU (CORrespondance EUropéenne) is an EU communications network between the EU Member States, the Commission and the Council.

26. These countries, excluding the EU candidates who are automatically briefed, include Australia, Canada, Iceland, Japan, Liechtenstein, New Zealand, Norway, Switzerland and the USA.

27. Presidency Conclusions, European Council, Nice 7–9 December 2000, Annex III to Annex VI reads, ‘After consulting the Presidency and without prejudice to Article 18 of the TEU, the Secretary-General/High Representative for the CFSP may chair the PSC, especially in the event of a crisis.’


30. For a fascinating overview of this aspect of EU external relations see Chris Patten, Not Quite the Diplomat (London: Allen Lane, 2005), pp. 150–65.

31. These are: ESDP; the Western Balkans; the Situation Centre/Crisis Cell; Russia, Ukraine, Transatlantic, Baltics and Asia; Mediterranean/Barcelona process, Middle East and Africa; Horizontal questions and Latin America; Administration and Security. The precise allocation of duties amongst the 25 or so seconded officials varies according to priorities at any given time.

32. The EU Military Committee Working Group has a permanent elected chair, currently Major General Bernd S. Lubenik.
7. The role of European Parliament committees in the EU policy-making process

Christine Neuhold and Pierpaolo Settembri

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. The increase in the EP’s powers witnessed in the last twenty years has been 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: Westlake (1994, p. 191) effectively described them as the ‘legislative backbone’ of the EP. In particular, the introduction of the co-operation and, shortly afterwards, the co-decision procedure has turned committee chairs and rapporteurs into real legislative entrepreneurs, with an external relevance vis-à-vis the other European institutions engaged in lawmaking (Benedetto, 2005, p. 67).

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. From a theoretical point of view, interest in these structures is based on the belief that parliamentary procedures may affect political outcomes and that it is therefore desirable to shed light on the organisation and functioning rules of legislatures. As Shepsle and Weingast (1994, p. 151) point out, this assumption used not to be obvious: ‘such features of legislative structure and process as the committee system … figured hardly at all in the first-generation formal models’.

A preliminary word of caution is nevertheless necessary. With regard to the contribution of the vast existing literature that looks at standing
The role of EP committees in the EU policy-making process

committees in national legislatures, the analytical tools elaborated in this context cannot be applied *sic et simpliciter* to their European counterparts. In other words, the significant resemblances between EP committees and their equivalents at the national level from a nominal point of view should not overshadow the major constraints that the specifics of the EU institutional architecture impose on the former from a substantial point of view. When attempting to develop a definition of legislature that could be valid for any parliament in the world, Norton (1990, p. 1) concluded that the only common element is that they are all ‘constitutionally designated institutions for giving assent to binding measures of public policy’. It will suffice to recall that the EP, at least in the terms it was conceived at the outset of European integration, did not fulfil this basic requirement (and still today only partially does) to prove that straightforward parallels and generalisations should be handled with great care. *A fortiori*, the same caveats apply to the EP’s legislative committees.

Against this background we would like to answer the following question: what institutional features and operative strategies shape highly heterogeneous committees into consensual deliberative arenas? In this quest we will resort to both quantitative and qualitative data. On the one hand we have analysed all legislative reports adopted in the 1999–2004 legislature, in order to illustrate the actual levels of consensus achieved by committees and detect the conditions (involvement of the EP, policy domain or inter-institutional constraints) that favoured or inhibited agreement. Furthermore we have carried out a study of a number of legislative acts in order to examine the question of achieving consensus within committees. In this context we have conducted more than 30 interviews with both Members of the European Parliament (MEPs) and administrators working within the EP committee secretariats, the Conciliation Secretariat and the General Secretariat of the EP, where a majority of the interview partners were involved in the negotiation or preparation of the directives under scrutiny.

The presentation of our findings is divided into three parts. The first section provides a short overview of EP committees in the peculiar European architecture and describes their historical evolution, their formally attributed powers and the key actors dominating their configuration. The following part depicts the dynamics of committees within the EP’s party system, with a special focus on the role of political groups, the interactions with organised interests and the consensual environment dominating committees’ politics. The third section is dedicated to the external role increasingly played by committees, with regard to both their direct involvement in the co-decision procedure and their acquired centrality as deliberative arenas.
The role of committees in the policy-process of the EU

COMMITTEES’ FORMAT

In line with the tradition of most countries, where constitutions usually do not dictate the rules for committees or even mention these fora, the EC treaties do not refer to a committee system either. Apart from a few recent and circumstantiated references, only two peculiar types of committees are duly described in the founding texts: on the one hand, the temporary committees of inquiry, set up by the EP to investigate alleged contraventions or maladministration in the implementation of Community law; on the other hand, the conciliation committee of the co-decision procedure, designed to reach agreement on a joint text and composed of an equal number of members of the Council and EP representatives.

Yet, despite these parsimonious indications, the committee system of the EP has quickly evolved and displays today an articulated configuration. Following the typology proposed by Mattson and Strøm (1995, p. 259), the EP structure comprises samples of all the five committee variants identified by the authors. There are, for example, cases of (1) ad hoc committees, such as, in the 2004–09 EP, the temporary committee on policy challenges and budgetary means of the enlarged Union 2007–13. Amongst the permanent committees, one can recognise examples of (2) law-making committees by function, like the prestigious committees on constitutional affairs and on budgets, (3) specialised committees, which are the vast majority, and (4) non-law-making committees, like the one on petitions. Finally, since the introduction of the co-decision procedure, the system also includes an illustration of (5) a joint committee, namely the conciliation committee.

Historical Development

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, which is also their current number. 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 (Corbett et al., 2000, p. 105). 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. Owing to the fact that the committee had built up such strong external links and in response to the intense protest of women’s organisations, however, the mandate of the
The role of EP committees in the EU policy-making process

In the quest to streamline the EP's committees, the number of standing committees was reduced from 20 to 17 after the June 1999 elections. After the enlargement by 10 new member states on May 2004 and the corresponding rise to 732 deputies, however, the new EP went back to 20 committees. They cover a particular area or policy of the EC’s activities and have been reshuffled for the purpose of vaguely paralleling the division of portfolios among the members of the Commission or making sure that there are sufficient places for deputies to serve as full member on one committee and as a substitute on another (Corbett et al. 2000, p. 107). In June 2004, the committee on Regional Policy, Transport and Tourism (RETT) was split into two separate committees responsible for Transport and Tourism (TRAN) and Regional Development (REGI) respectively. Two new committees on International Trade (INTA) and Industry, Research and Energy (ITRE) have replaced a pre-existing committee which encompassed the responsibilities of both. Finally, the responsibilities of two committees have been differently combined to create three new structures, now specialised on Legal Affairs (JURI), Internal Market and Consumer Protection (IMCO) and Environment, Public Health and Food Safety (ENVI). (See Table 7.1)

Table 7.1  The 20 standing committees of the European Parliament (2004–09)

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<th>AFCO</th>
<th>Committee on Constitutional Affairs</th>
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<td>AFET</td>
<td>Committee on Foreign Affairs</td>
</tr>
<tr>
<td>AGRI</td>
<td>Committee on Agriculture and Rural Development</td>
</tr>
<tr>
<td>BUDG</td>
<td>Committee on Budgets</td>
</tr>
<tr>
<td>CONT</td>
<td>Committee on Budgetary Control</td>
</tr>
<tr>
<td>CULT</td>
<td>Committee on Culture and Education</td>
</tr>
<tr>
<td>DEVE</td>
<td>Committee on Development</td>
</tr>
<tr>
<td>ECON</td>
<td>Committee on Economic and Monetary Affairs</td>
</tr>
<tr>
<td>EMPL</td>
<td>Committee on Employment and Social Affairs</td>
</tr>
<tr>
<td>ENVI</td>
<td>Committee on the Environment, Public Health and Food Safety</td>
</tr>
<tr>
<td>FEMM</td>
<td>Committee on Women's Rights and Gender Equality</td>
</tr>
<tr>
<td>IMCO</td>
<td>Committee on Internal Market and Consumer Protection</td>
</tr>
<tr>
<td>INTA</td>
<td>Committee on International Trade</td>
</tr>
<tr>
<td>ITRE</td>
<td>Committee on Industry, Research and Energy</td>
</tr>
<tr>
<td>JURI</td>
<td>Committee on Legal Affairs</td>
</tr>
<tr>
<td>LIBE</td>
<td>Committee on Civil Liberties, Justice and Home Affairs</td>
</tr>
<tr>
<td>PECH</td>
<td>Committee on Fisheries</td>
</tr>
<tr>
<td>PETI</td>
<td>Committee on Petitions</td>
</tr>
<tr>
<td>REGI</td>
<td>Committee on Regional Development</td>
</tr>
<tr>
<td>TRAN</td>
<td>Committee on Transport and Tourism</td>
</tr>
</tbody>
</table>
The role of committees in the policy-process of the EU

The number, portfolios and size of committees are laid down in the first session of a newly elected Parliament and then again after 2½ years. In 2004 the largest committee set up was the Committee on Foreign Affairs (78 members), followed by the Environment Committee (with 63 members). The Petitions and Legal Affairs Committees are the smallest ones with 25 and 26 members respectively. The current Foreign Affairs Committee also has two subcommittees of 32 members each, specialised on Human Rights and Security and Defence.9

The EP's committee structure does not correspond to any particular model. The Foreign Affairs Committee is, according to Westlake (1994, p. 135), clearly modelled on its equivalent in the United States Senate, but has far fewer powers (which can be attributed to the fact that the EP has a comparatively small role to play in external relations). Its Committee on Economic and Monetary Affairs corresponds much more closely to the German Arbeitsparlament model. Owing to the fact that the EP is – as the only directly elected transnational parliament – a sui generis institution, the EP committees have their own distinctive characters and styles, determined by their functions, active members and chairs.

Formal Powers

If one is to search for a clear situation where the specifics of the EP impose a distinctive role on its standing committees, the powers they have been given certainly provide such an example. In their comparative evaluation of legislative committees' powers, for instance, Mattson and Strøm (1995, p. 285) consider four formal rights10 that are taken as the core of the committees' purpose. Yet, in the case of the EP committees, these categories either cannot be applied at all or only at the cost of a substantial adaptation. First of all, in the context of an institutional setting that does not grant the Parliament the right to propose legislation, the place of committees in initiating the legislative process is simply not at stake. Secondly, the committees' authority to rewrite bills is heavily constrained by the procedure followed in the specific case: consultation as well as assent procedures, for example, prevent any margin of manoeuvre in amending legislation. Similar limits, again dependant upon the procedure, affect committees' ability to control their timetable (see, for examples, the strict deadlines imposed by the co-decision or budgetary procedures). Finally, the acquisition of information is still a matter of recurrent institutional disputes, mainly with the Council, notably in the fields of comitology and foreign policy.

Within this highly peculiar framework, the role of committees is nevertheless important and relevant. When they meet in the two weeks following the plenary session, they prepare the work of the EP. Combining
The role of EP committees in the EU policy-making process

practical and theoretical expertise, they enjoy the formal powers to pose oral questions to the Council and the Commission or to external experts. Yet, the most important political powers of the EP committees are connected to their role in the legislative process. In this respect, first of all, the EP can put requests to the Commission for legislative proposals, which must be based on reports initiated by an EP committee. Secondly, all legislative proposals and other legislative documents must be considered in committee. Thirdly, 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 20 standing committees are laid down in an annex of the EP Rules of Procedure. These stipulations are extremely vague, giving rise to competence disputes, that is, conflicts over which committee should be declared responsible. Notable committees involved in such disputes used to be, for example, the Committee on the Environment, Public Health and Consumer Policy and the Committee for Agriculture and Rural Development, a striking example being their dispute over the allocation of proposals on food safety. The occasional reshuffle of responsibilities among committees, as in 2004, aims to reduce the possibilities of conflict as well as to better distribute the workload according to past statistics.

Individual committees are not necessarily equal in prestige or strength. Though, as mentioned above, committees such as the one on Foreign Affairs might not possess strong formal powers, their seats are highly sought after by Members of the EP (MEPs). In this context one must add, 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. The Budgets Committee, which deals with an area where the EP has been allocated formal powers since the 1970s, has a similarly high amount of prestige (Corbett et al., 2000, pp. 106, 113). The committees’ size and importance also depend 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 and Transport Committees important actors in the adoption of EU legislation.

Key Players in Committees

Committee proceedings are to a great extent shaped by key players in the committee: committee chairs, vice-chairs and rapporteurs, whose role is
generally well known, but also draftsmen of opinion, shadow rapporteurs and committee 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 when discussions preceding sensitive votes are held 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 (Corbett et al., 2000, pp. 106, 113). Apart from the official officeholders, the group co-ordinators play an important role. Each political group (s)elects a co-ordinator who is responsible for allocating tasks to the group members and acts as its main spokesperson. The so-called shadow rapporteurs are appointed by opposing political group(s), mainly to monitor the work of the rapporteur.

EP committees are selected 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.17 The individual assignment of positions – such as chair and vice-chair – is then part of a bargaining process, which is somewhat ‘mysterious’.18 This method ‘has its deficiencies: it provides a mechanism for sharing out posts that takes no account of people’s experience and abilities’; yet, there seems not to be a valid alternative to it: ‘it would be the war all against all’. In the end, the d’Hondt method succeeds in containing conflicts at the expense, perhaps, of ‘taking the best people for the job’.19

The chairs’ and vice-chairs’ terms of office are 2½ 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’ (Hix, 1999, p. 79) – can be illustrated by the 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 case, in the cultural sector, the committee chair was unable to present a coherent case owing to the external influence and the committee ‘rocked back and forth’.20 In the second case the chair was also the target of intense lobbying (as here the issue of advertising for tobacco was at stake),
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.’21

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 (Corbett et al. 2000, p. 117). This means that small groups can ‘save up points’ for a dossier to improve their chances of being assigned a prestigious topic.22

Once a committee has been declared responsible for drawing up a report or giving 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 the majority of the cases studied, the MEPs in question had been working in the respective policy sector and outside the EP for a number of years, gaining profound specialised knowledge, to contribute effectively and efficiently to (legislative) problem-solving (‘output legitimacy’), as laid down by Scharpf (1998). The enhanced 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 non-committee members (MacCárthaigh, 2001).

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 such as the Commission. This leads to a somewhat one-sided view with little exchange of information among the different committees.23 The position of draftsmen 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.24 One way to maximise one’s influence as a draftsman is to combine posts, that is, to be a member of the committee which provides the opinion, the responsible committee and the conciliation committee with Council.25 This combination provides MEPs with an opportunity to obtain comprehensive insight into all the debates concerning the directive.
COMMITTEES’ DYNAMICS

Explaining how committees operate is the objective of a fructuous literature concerned with legislative organisation and developed around the US Congress. Over time, three main competing models have been proposed to analyse committees. According to the distributive perspective (Baron 1991; Weingast and Marshall 1988), members decide the committee to join, which results in committees dominated by ‘high demanders’ who generate constituency-specific benefits to secure their re-election (Whitaker, 2005, p. 6). Contrarily, Cox and McCubbins (1993) suggest that committees are instruments of the majority party: as a consequence, committee chairs exercise power on behalf of their respective parties (Mattson and Strom, 1995, p. 255). Whilst in the first case the powers of parties and committees are considered as inversely related, the second perspective clearly challenges this connection (ibid.). Finally, other scholars regard committees whose members are considered specialised but not necessarily high demanders as efficient generators of information (Gilligan and Krehbiel, 1989). As far as the EP committees are concerned, the picture is very blurred, with no model showing a clear supremacy over the others. Nevertheless, intuitions from each approach are in many cases very relevant and they will be recalled at the appropriate moment.

Political Groups and Committees

Political groups play a pivotal role within the EP in general and particularly in committees. They recurrently and intensively make use of all the three instruments (Damgaard, 1995, p. 312) at their disposal to exert influence on committees. They dominate the procedure of MEPs’ appointment to committees; they develop over time skilful strategies to constrain members’ behaviour within the committee; finally, they apply more or less severe sanctions to members who do not comply with the party lines. If committees are the ‘legislative backbone’ of the EP, the political parties are its ‘lifeblood’ or the ‘institutional cement pasting together the different units of the Parliament’ (Williams, 1995, p. 395).

Each party group in the EP represents a very ‘heterogeneous collection of established groups and temporary alliances’ (Raunio, 2000, p. 242). As in the previous legislature, seven political groups are represented in the EP (and a number of non-aligned members) for the legislative period of 2004–09. The EPP–ED by far remains the largest group (268 MEPs, 36 per cent), followed by the PES with 202 (27 per cent). In contrast to the elections of 1999, fought in 15 member states for a total of 626 seats, the elections of June 2004 took place in 25 member states and led to the election
The role of EP committees in the EU policy-making process

of 732 MEPs. The extra seats mainly benefited the EPP–ED and ALDE groups, which gained 36 deputies each. The PES ‘only’ gained 21 seats: as a result, the EPP–ED now holds a 67-seat majority over the PES. It must be pointed out, however, that these two large political groups together hold 63 per cent of all EP seats (roughly 66 per cent in the previous legislature). The major difference from the previous EP is the creation of a partially new group, ALDE, on the basis of the pre-existing liberal formation ELDR.27 (See Table 7.2).

Table 7.2  Political groups in the EP (2004–09) – situation as of May 2005

<table>
<thead>
<tr>
<th>Group</th>
<th>Abbr.</th>
<th>Seats</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group of the European People’s Party</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Christian Democrats) &amp; European Democrats</td>
<td>EPP-ED</td>
<td>268</td>
<td>36.6</td>
</tr>
<tr>
<td>Socialist Group in the European Parliament</td>
<td>PES</td>
<td>202</td>
<td>27.6</td>
</tr>
<tr>
<td>Group of the Alliance of Liberals and Democrats for Europe</td>
<td>ALDE</td>
<td>88</td>
<td>12.0</td>
</tr>
<tr>
<td>Group of the Greens/European Free Alliance</td>
<td>Verts/ALE</td>
<td>42</td>
<td>5.7</td>
</tr>
<tr>
<td>European United Left/ Nordic Green Left</td>
<td>GUE/NGL</td>
<td>41</td>
<td>5.6</td>
</tr>
<tr>
<td>Union for Europe of the Nations Group</td>
<td>UEN</td>
<td>36</td>
<td>4.9</td>
</tr>
<tr>
<td>Independence and Democracy Group</td>
<td>IND-DEM</td>
<td>27</td>
<td>3.7</td>
</tr>
<tr>
<td>Non-attached</td>
<td>NI</td>
<td>28</td>
<td>3.8</td>
</tr>
</tbody>
</table>

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 do 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 EP’s opinion on the draft Treaty establishing a Constitution for Europe, it is also interesting to note that two rapporteurs (so called co-rapporteurs) – usually from two different political groups – are appointed.28 A similar double appointment
The role of committees in the policy-process of the EU

has also taken place on the occasion of the EP’s report\(^{20}\) (own-initiative) on the (final) Treaty establishing a Constitution for Europe, with Richard Corbett (PES) and Íñigo Méndez de Vigo (EPP-ED) being appointed co-rapporteurs. Co-rapporteurs 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.\(^{30}\) As mentioned, each political group chooses its own co-ordinator, who is in most cases formally elected. Once a report has been allocated to a group, it is often the co-ordinator who 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:

\[\text{We have to ensure that the political group is moving along the same track, so that we get a majority in plenary, because some rapporteurs just write a report the way they like. Of course as a co-ordinator one also has to step back, but we have the responsibility for the group’s behaviour and always have to be ready to step in.}\]^{31}

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.\(^{32}\) 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 two or 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 (Raunio, 2000, p. 235). The staff perform a variety of functions within the groups. In particular,
they monitor and prepare committee proceedings as well as supporting the rapporteur or the shadow rapporteur in managing his/her political tasks. The concrete steps this might involve vary 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.

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, with differing (personal and material) resources. Through the appointment of personnel to 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. According to recent findings based on an analysis of the voting behaviour in plenary (Whitaker, 2005, p. 24), national parties play an important role in ensuring that all views (and not just those of ‘high demanders’) are voiced in committees, which gives credit to the party-centred model of Cox and McCubbins (1993).

**Expertise and Lobbying**

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 his/her tasks. By assisting the individual MEPs and the committees, the officials can help to increase the functional capacity of the EP. The committee staff not only provide scientific and technical information but also give advice on ‘political’ issues. The extent to which the political actors themselves rely on the Secretariat’s input is at their discretion.

At the same time, however, MEPs increasingly turn to interest groups as another valuable source of information. Their input does not have to be requested: ‘They stand on your doormat all the time anyhow; you cannot imagine the amount of paper sent by the lobbyists, it makes you want to hide.’ 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 (Benz, 2001, p. 7). As Rometsch and Wessels report (1996, p. 109), 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. Lobbyism is seen 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, for example. According to a specific survey, nearly two-thirds of MEPs rated lobbying by industry as effective, whereas 96 per cent of MEPs regard new scientific evidence (brought by lobbyists) as important and relevant when issues are debated by the EP. Also national governments and (in some cases regional governments) contact ‘their’ MEPs and provide them with position papers intended to influence the identification of preferences. Here again the extent to which each opinion is taken into account is at the discretion of the individual parliamentary representative.

A striking development in the EP’s activities is the great increase in the organisation of public hearings by committees. During the 1999–2004 EP, the number of hearings increased substantially over the years, and the trend in the first months of the new legislature seems to suggest an even stronger rise. 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 with regard to the revision of this directive. Within this hearing specific deficits and problems with the existing series of directives and decisions on water quality were identified and methods for reform proposed. More recently (November 2004), a landmark hearing, with 20 written contributions from highly qualified specialists, has been organised on the controversial proposal to liberalise the cross-border trade of services within the internal market.

In contrast to their traditional openness and transparency, EP committee meetings are open to representatives of other institutions but no longer to the general public. A decision of the Bureau of October 2001 suspended the possibility for uninvited visitors to access the EP and attend its activities. Since then, citizens are not allowed into the premises of the Parliament (including committees) unless they are invited by an MEP, a member of staff or certain parliamentary bodies (such as committees and political groups). Instead, the EP issues ‘long-term visitors’ access passes’ (lasting
The role of EP committees in the EU policy-making process

up to one year) that are designed for lobbyists who intend to operate within the EP. According to several interviewees the ‘usual suspects’ attending committee meetings are members of interest groups and NGOs, especially those who are based in Brussels and have a special interest in a certain topic. Also, before these new measures entered into force, the presence of ‘normal citizens’ was a rather accidental affair, for example in the form of visitor groups. Finally, committee documents are freely available, and even draft reports can be easily obtained.

At the same time, 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 process.44 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 those of the Commission, to a greater extent than is the case with the other institutions.

Conflict ...

Obviously, owing 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 rather than permanent. Therefore we often find that disagreements are very issuespecific. There are, however, two main factors causing conflict in committee: differing national interests or traditions and conflicting opinions of the political parties. In addition, conflict often is not caused in committee itself but is based on inter-institutional cleavages. The necessarily limited evidence collected in our study of 17 directives45 only enables us to draw tentative conclusions about the factors causing conflict within committee (see Table 7.3). Inter-institutional conflict played a major role in the cases under examination. This can be explained by the fact that the 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.
It results from this analysis that re-distributive questions are 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 whether the stance of the EP would be different had it to raise the resources itself, that is, to impose taxes.

Table 7.3 Lines of conflict within committees in the adoption of 17 directives

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

Notes:
1. Dark shading indicates strong lines of conflict. Light shading indicates weak lines of conflict.
2. Directive 3 is an example of a very smooth and efficient decision-making process, as the EP backed the Council. Directive 4 is a case in which the EP sided very much with the Commission. In directive 17 the conflict was between the GREENS–EFA and the EPP–ED. In all the other cases the main lines of conflict were identified between the EPP–ED and the PSE.

In the field of environment, the main lines of conflict appeared to be 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 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 into two camps: 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. Apparently these differences were influenced by differing national perspectives and traditions.

Another interesting example is the dossier on racial and ethnic discrimination: the committee was divided owing 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 the smaller party groups. 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).

… and Consensus

In several other cases this study revealed very little controversy within the committee. One example is the Community action programme in the field of education, SOCRATES; another is the directive on open network provisions on voice telephony in 1994, when the decision to block the text found an overwhelming majority also in plenary.

But is there, in general terms, a predominant pattern of coalition (contributing to consensus) or a recurrently emerging cleavage in EP committees? To answer this question we analysed all 1402 legislative reports adopted during the 1999–2004 legislature with respect to the number of deputies supporting and opposing each text (or abstaining), the majority requirements in the Council and the applied procedure. Results are astonishing: the average majority endorsing legislative reports in committees is equal to 93.7 per cent, which means that almost all deputies are always in favour of any EP decision! Paradoxically, the EP is less consensual when its involvement in the decision-making is limited (‘weak’) than when its position is ‘strong’. Only 37 in 1335 reports are adopted by a majority below 60 per cent. Of these 37, which are less than 3 per cent of total reports, almost a half (16) are passed under consultation procedure and only 13 when the EP is considered ‘strong’. 
The role of committees in the policy-process of the EU

Table 7.4 Average majority adopting legislative reports in the 1999–2004 EP (divided by type of procedure and majority requirements in the Council)

<table>
<thead>
<tr>
<th>EP procedure</th>
<th>Average majority (%)</th>
<th>Majority requirements in the Council (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>UNAN</td>
</tr>
<tr>
<td>*</td>
<td>94.1</td>
<td>94.2</td>
</tr>
<tr>
<td>***</td>
<td>98.1</td>
<td>96.7</td>
</tr>
<tr>
<td>***I</td>
<td>92.3</td>
<td>82.5</td>
</tr>
<tr>
<td>***II</td>
<td>92.4</td>
<td>/</td>
</tr>
<tr>
<td>***III</td>
<td>92.9</td>
<td>/</td>
</tr>
<tr>
<td>BDG</td>
<td>98.5</td>
<td>/</td>
</tr>
<tr>
<td>INT</td>
<td>97.3</td>
<td>97.3</td>
</tr>
<tr>
<td></td>
<td>93.7</td>
<td>94.1</td>
</tr>
</tbody>
</table>

Table 7.5 Average adopting majority per year

<table>
<thead>
<tr>
<th>Year</th>
<th>Average majority</th>
<th>No. of reports</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999/2000</td>
<td>95.6</td>
<td>186</td>
</tr>
<tr>
<td>2000/2001</td>
<td>95.6</td>
<td>275</td>
</tr>
<tr>
<td>2001/2002</td>
<td>93.8</td>
<td>272</td>
</tr>
<tr>
<td>2002/2003</td>
<td>91.3</td>
<td>271</td>
</tr>
<tr>
<td>2003/2004</td>
<td>92.8</td>
<td>331</td>
</tr>
</tbody>
</table>

Note: Years go from July to June.

As a general rule, findings show that a ‘giant coalition’ dominates the politics of the EP. This unanimous bloc is equally present under every legislative procedure, regardless of the majority requirements in the Council (Table 7.4). For example, the EP is more consensual when it is only required to deliver an opinion than in cases where its assent is necessary to adopt legislation. On average, a majority constantly above 90 per cent endorses reports voted under co-decision. In particular, the size of the consensual bloc does not decrease (or increase) as co-decision procedure moves from the non-binding first reading to a final vote on the compromise reached in the conciliation committee. The size of this majority does not vary significantly over time (Table 7.5) or across parliamentary committees (Table 7.6) either. One could note that the votes selected for this study are only final votes on a report as a whole and not on interim amendments. With the focus
placed exclusively on final compromises, these data do not consider the divisions that might have materialised on single amendments. They only select those situations where the final compromise was interpreted as an acceptable outcome, eventually supported also by those groups originally opposed but then satisfied with the inclusion of some of their concerns in the final text.

Table 7.6  Average adopting majority and number of adopted reports per responsible committee

<table>
<thead>
<tr>
<th>Committee</th>
<th>Average majority (%)</th>
<th>No. of reports</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. AFET</td>
<td>95.8</td>
<td>36</td>
</tr>
<tr>
<td>2. BUDG</td>
<td>98.4</td>
<td>124</td>
</tr>
<tr>
<td>4. LIBE</td>
<td>89.8</td>
<td>163</td>
</tr>
<tr>
<td>5. ECON</td>
<td>95.6</td>
<td>99</td>
</tr>
<tr>
<td>6. JURI</td>
<td>94.8</td>
<td>96</td>
</tr>
<tr>
<td>7. ITRE</td>
<td>95.0</td>
<td>121</td>
</tr>
<tr>
<td>8. EMPL</td>
<td>91.3</td>
<td>47</td>
</tr>
<tr>
<td>9. ENVI</td>
<td>90.9</td>
<td>246</td>
</tr>
<tr>
<td>10. AGRI</td>
<td>96.5</td>
<td>87</td>
</tr>
<tr>
<td>11. PECH</td>
<td>93.5</td>
<td>85</td>
</tr>
<tr>
<td>12. RETT</td>
<td>92.5</td>
<td>144</td>
</tr>
<tr>
<td>13. CULT</td>
<td>97.2</td>
<td>33</td>
</tr>
<tr>
<td>14. DEVE</td>
<td>99.5</td>
<td>24</td>
</tr>
<tr>
<td>15. AFCO</td>
<td>91.5</td>
<td>18</td>
</tr>
<tr>
<td>16. FEMM</td>
<td>94.9</td>
<td>12</td>
</tr>
</tbody>
</table>

Above all, this overview illustrates an extraordinary capacity of committees to resolve conflicts and reach compromises. On how this happens we can only put forward some tentative indications based on our qualitative case study of 17 directives. Often it is the committee chair who 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 the 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 increasingly plays a role. However, in some exceptional cases it is the national
The role of committees in the policy-process of the EU

degagements that dominate the agenda within committee and plenary. In these cases where national divisions and interests are very pronounced, the role of the co-ordinator is circumscribed and comparatively weak.

In this context as well, the specifics of the EP play an important role: the fact that this Parliament is one player in the institutional 'triangle' with the Commission and the Council creates a very different environment for MEPs from 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. 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. 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 joint experiences independent of 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.

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 (Lambert and Hoskyns, 2000, p. 110). These findings are in line with Sartori's (1987, p. 229) assumption that committees generally come to 'unanimous agreement because each component of the group expects that what he concedes on one issue will be given back, or reciprocated, on some other issue'.

COMMITTEES IN A BROADER CONTEXT

Many developments, due to treaty reforms or changed attitudes towards the process of European integration, have militated to confer a greater external role to EP committees. This is particularly apparent at least in two respects: on the one hand, the enhanced legislative responsibilities of the EP have resulted in a significant institutional empowerment of its
The role of EP committees in the EU policy-making process

committees; on the other hand, the mounting concerns about the democratic deficiencies of the European project have not spared the EP committees and have led to profound evaluation of their specific contribution towards a democratised EU.

Committees in the Institutional Triangle

The relationship between the EP and other institutions on the European level has changed fundamentally with the introduction of first the co-operation and later the co-decision procedure. Given the declining salience of the co-operation procedure, the focus will be on co-decision after Amsterdam. The Treaty of Amsterdam brought not only a large quantitative extension of the applicability of co-decision but also significant procedural innovations with important implications for the interaction between the EP and the Council. The Treaty of Nice, in force since February 2003, timidly extended the application of co-decision, leaving many important fields still subject to other procedures with minimal EP involvement (such as in agricultural and trade policies). The Treaty establishing a Constitution for Europe, signed but not yet ratified, lays down the principle of the general application of the existing co-decision procedure, which becomes the ordinary legislative procedure of the EU. Also thanks to these changes, the volume of dossiers adopted under co-decision has significantly grown since its inception: from 68 dossiers concluded during the first year of the 1999–2004 EP, for example, to a peak of 105 dossiers in the last year of the same parliamentary term (EP, 2004, p. 10).

The introduction of the co-decision procedure 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. The EP maintains that ‘the parliamentary committee is the proper forum inside Parliament for interinstitutional debates relating to legislative proposals’ (EP, 2004, p. 24). Both the EP and the Council have paid close attention to the ‘Joint declaration on the practical arrangements for the new co-decision procedure’ of May 1999, which encourages appropriate contacts with the aim of ‘bringing the legislative procedure to a conclusion as quickly as possible’.52 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 its term and its achievements at the end. Prior to 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. Given the limited procedural guidelines for first reading of the procedures (beyond the joint declaration), the EP has been able to create its own conventions. The three vice-presidents delegated to the conciliation committee have openly stressed (EP, 2001, p. 28) the importance of committees as ‘representative bodies’ that best preserve the political make-up of Parliament during first (and also second) reading. 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. 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. Empirical evidence shows that over the years there has been a trend toward conclusion at an earlier stage in the co-decision procedure (EP, 2004, p. 13): between 1999 and 2004, the share of dossiers concluded at first reading rose from 19 to 39 per cent. Simultaneously, the number of dossiers concluded at third reading fell from 28 to 15 per cent of the total. Conclusion at second reading remained relatively stable.

If no solution is found at first reading the Council adopts a common position, which is forwarded to the EP for second reading. At this stage the EP may adopt the Council’s common position as it is, choose not to act, reject it outright or adopt amendments with an absolute majority. In the latter cases, particularly when amendments are discussed, the pivotal role of the rapporteur and the committee chair again becomes 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 difficulty in finding 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 more radical changes. 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. In the best case scenario the Council will accept all EP amendments and the act is adopted as thus amended. 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 (25 each, at present). 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
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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 (Shackleton, 1999, p. 331). 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’. 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 by being highly efficient but ‘not glorious’. The negotiators 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 three proposals failed in plenary: the 1998 directive on biotechnology patents, the takeover directive in 2001 and the port services directive in 2003.

The Treaty 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 did the concerned actors come to the conclusion that this was not an efficient forum for institutional dialogue and that conciliation needed to be prepared by a smaller group (Shackleton, 1999, p. 333). 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. These sessions, which are mentioned neither in the Treaty nor in the EP Rules of Procedure, have been created according to the motto ‘necessity is the mother of invention’. Today, 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 main actors are, on the side of the EP, the vice-president responsible for the respective conciliation procedure, the chairman of the responsible EP committee, the rapporteur and a few members of the EP’s conciliation secretariat. On the side of the Council, for the Member State holding the
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presidency are present the permanent representative or deputy permanent representative and a representative from the Antici or Mertens group, in addition to some members of the Council Secretariat. Finally, the Commission is represented by the director or head of unit of the respective DG, the official responsible for drafting the proposal and various members of the General Secretariat. As Council, EP and Commission delegate at the most 30 persons63 to this forum, arranging for this kind of meeting normally poses fewer problems, at lower costs, than the meetings of the conciliation committee. There has been over time recognition that trialogues could only function with a very restricted number of participants, so that each institution now seeks to limit its participation to ten people (EP, 2004, p. 25). The inclusion of three EP vice-presidents64 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 in the Council. The trialogue is normally held in English without interpreters.

Table 7.7 Co-decision procedures per responsible committee
(1 May 1999 – 30 April 2004)

<table>
<thead>
<tr>
<th>Committee</th>
<th>Procedures</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFCO</td>
<td>2</td>
<td>0.5</td>
</tr>
<tr>
<td>AFET</td>
<td>2</td>
<td>0.5</td>
</tr>
<tr>
<td>AGRI</td>
<td>13</td>
<td>3.2</td>
</tr>
<tr>
<td>BUDG</td>
<td>10</td>
<td>2.5</td>
</tr>
<tr>
<td>CONT</td>
<td>2</td>
<td>0.5</td>
</tr>
<tr>
<td>CULT</td>
<td>21</td>
<td>5.2</td>
</tr>
<tr>
<td>DEVE</td>
<td>12</td>
<td>3.0</td>
</tr>
<tr>
<td>ECON</td>
<td>32</td>
<td>7.9</td>
</tr>
<tr>
<td>EMPL</td>
<td>20</td>
<td>5.0</td>
</tr>
<tr>
<td>ENVI</td>
<td>117</td>
<td>29.0</td>
</tr>
<tr>
<td>FEMM</td>
<td>5</td>
<td>1.2</td>
</tr>
<tr>
<td>ITRE</td>
<td>39</td>
<td>9.7</td>
</tr>
<tr>
<td>JURI</td>
<td>48</td>
<td>11.9</td>
</tr>
<tr>
<td>LIBE</td>
<td>8</td>
<td>2.0</td>
</tr>
<tr>
<td>RETT</td>
<td>72</td>
<td>17.9</td>
</tr>
<tr>
<td>Total</td>
<td>403</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: European Parliament (2004, p. 93)

As illustrated by Table 7.7, the bulk of the workload (more than three-fourths) of co-decision procedures has been carried out by only three out
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of 17 permanent committees in the period from the entry into force of the Amsterdam Treaty until the end of the EP 5th legislature. Inevitably this proves to be very time-consuming for members of these committees. These figures are confirmed by the fact that the most commonly used legal bases (EP, 2004, p. 11) were Articles 95 (harmonisation of the internal market), 175 (environment), 80 (maritime and air transport), 152 (public health) and 47 (right of establishment). 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 (Maurer, 1999, p. 29).

CONCLUSION

The real power of the EP is to a large extent based on the work of its committees. Our findings support the generalisation whereby, although within a very peculiar power structure, they fulfil most of the functions traditionally attributed to parliamentary committees at the national level (MacCárthaigh, 2001). In particular, they play such a vital role in the EP’s quest to cope with its increasing legislative workload that the greater burden for (selected) committees has not led to a slowing down of the decision-making process. In addition, the increased familiarity of committee members with particular issues has resulted in enhanced specialisation, thereby strengthening the confidence of non-committee members in the work of the committee.

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 interest groups or NGOs on the other. Committees are also the battlefield for political groups, which have found various means to maximise their influence within committees, for example by appointing shadow rapporteurs and group coordinators. At the same time, committees provide an arena for the political actors to deliberate in order to find the necessary majorities. The deeply rooted patterns of consensual politics highlighted throughout this study prove that the committee structure contributes to consensus-building, in particular by offering a more intimate forum for detailed deliberation, which is not possible in plenary.

With our analysis of voting behaviour in committees we precisely intended to outline the conditions and factors that could account for such a consensus.
By studying the final votes on legislative reports we selected situations where
the main and most recurrent alignments should have emerged. However, the
consistently very high level of consensus registered under all circumstances
suggests that other reasons should also be taken into account. At the macro
level, for example, Westlake (1994) detected a so-called ‘do good’ factor,
whereby the Parliament is compelled to act very conscientiously in order to
gain allegiance from the voters and legitimacy vis-à-vis the other institutions.
This in turn would affect the strategies pursued by groups, leading to
consensual solutions. At the micro level, MEPs are exposed to a similar
pressure, in that the EP institutional context makes a proactive participation
much more remunerative than a continuous opposition. The system provides
deputies with great incentives (for example, policy and career goals) to come
to an agreement and equally great disincentives to be against, especially on
a permanent basis. Sustained opposition in the EP has no better prospect
than scarce resources, limited visibility and permanent marginalisation.

In the process of interaction of the EP with other EU institutions, notably
the Council and the Commission, the EP committees also play a vital role.
Committee-based division of labour brings order and structure into the
work of the EP as a 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 also play a key
role in finding acceptable solutions to problems, thus not only increasing the
committee’s output substantially but also contributing to achievement of
consensus. We have found that key players are often appointed because of
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 documents such as draft reports are quite freely available. Committee
members also try to strengthen the link to EU citizens 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. Regrettably, committee meetings are
no longer open to the (uninvited) public and their voting system prevents
the detailed scrutiny of the decisions of individual members. Also, because of these shortcomings, 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.

In contrast with the Council’s working groups and COREPER, which meet behind closed doors, EP committees certainly play a greater role in opening up the legislative process of the EU. In this respect, they are also characterised by a deliberative element, if by ‘deliberation’ is intended a ‘change of views, by the way the discussion helps to mould preferences and to move standpoints’ (Eriksen and Fossum, 2000, p. 18). What these authors see as the main factor for the change of position of ‘strategic rational actors’ is not just the force of the better argument but the prospect 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. The evidence presented in this chapter supports this interpretation: EP committees do indeed provide an arena for the preparation of decisions in relatively small face-to-face groups that allow for persuasion, argument and further discursive processes not only between their members but also with representatives of other EU institutions as well as private and public sector interests.

It cannot be ignored that this deliberative process takes place at an elite level, where the general public is scarcely involved. This raises fundamental questions about democracy and accountability within the EU (and is not just limited to EP committees). Lord (1998, p. 129) 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’. In addition, one should really wonder whether the described arrangements put citizens in a position to call MEPs to answer questions about their actions and decisions: contrary to the practice in the Council, neither in plenary nor in committee are their votes recorded, unless a political group of a number of deputies decide otherwise (which surprisingly only occurs in a minority of cases). Finally, the public entirely lacks the ability to substitute one set of rulers for another, or even to comprehensively ‘spring-clean’ the Union’s political leadership.

NOTES
1. All texts adopted in the framework of legislative (1305) and budgetary (76) procedures as well as inter-institutional agreements (21) were considered legislative reports. Out of these reports, however, 67 could not be used: 8 because of missing information; 59
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because the report was adopted according to a simplified procedure (Article 158.1 and 158.2, Rules of Procedure, 14th edition) that allows a report to be regarded as approved if 1/5 of the committee does not show opposition.

2. The results are presented by responsible committee, year of adoption and type of procedure.

3. See Annex 7.1 for an overview of the legislative acts under scrutiny. The legislative acts were selected according to the following criteria: saliency of the issues at stake and being in policy fields such as social affairs and the environment that are deemed to have an impact on the ‘European citizens’.

4. The only general allusion to a committee system is somehow accidental and has been laid down in a protocol annexed to the Amsterdam treaty with regard to the seats of the EU institutions: ‘The committees of the European Parliament shall meet in Brussels.’ Other mentions are just occasional: in the context of the EU economic policy, Article 99(4) envisages the possibility for the EP to invite the President of the Council to appear before the EP’s competent committee, whereas, in the field of monetary policy, Article 113(3) establishes that members of the ECB executive board can be heard by the competent committee of the EP.

5. To be distinguished from permanent committees.

6. These permanent committees not only prepare legislation but also differentiate their law-making functions by preparing, for instance, all legislation of a particular type (such as constitutional law) or for one geographical region (259).

7. They are dedicated to specific policy areas such as agriculture, transport and tourism, economic and monetary affairs, regional development, and so on.

8. During the hearings of commissioners designate in autumn 2004, 11 committees were exclusively (or primarily) responsible for one commissioner designate. Cases of committees with multiple responsibilities were nevertheless very common: the ITRE and ECON committees, in particular, scrutinised four commissioners each.

9. In 1999 the largest committee set up was again the Committee on Foreign Affairs (65 members), closely followed by the Industry and Environment Committees (both with 60 members). The Fisheries and the Budgetary Control Committees were the smallest committees with 20 and 21 members respectively.

10. They select (1) the committee’s right to initiate legislation, (2) its authority to rewrite bills, (3) the control of its timetable and (4) its right to summon witnesses and documents (in order to obtain information).

11. Any standing committee or subcommittee 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 (Rules of Procedure, 151). Such hearings may be held in public or in camera.

12. Article 192 TEC.


14. If no solution is found, the issue is passed to the Conference of Committee Chairs, where its chair will try to mediate, then it will 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).

15. Art. 49 TEU.

16. Each committee has three vice-chairs.

17. For an overview of how the d’Hondt system works, see Bainbridge (1998, p. 125)


20. Interview with MEP, November 2000.


24. Interview with MEP, November 2000.
25. Art. 251 TEC.
26. For an insight into the role of political groups within the EP, see Raunio (2000).
27. In addition to the MEPs of the former ELDR, deputies from French UDF and Italian ‘La Margherita’, which previously formed part of the EPP–ED, joined this new formation, together with two Italian radicals and some other deputies, also from the new member states.
28. In this specific case, as for the IGC 2000, the co-rapporteurs were delegated by the EPP–ED and the PSE (José María Gil-Robles Gil-Delgado and Dimitris Tsatsos, respectively); they were appointed by the Committee on Constitutional Affairs on 19 June 2003 in the framework of the consultation of the EP on the draft Treaty establishing a Constitution for Europe and on the convening of the subsequent IGC, pursuant article 48(2) of the EC Treaty. Another example of co-rapporteurship would be the rather unusual appointment of two rapporteurs from the same political group on the broadcasting directive.
30. Interview with MEP, November 2000.
31. Interview with MEP, November 2000.
32. Corbett et al. (2000, p.111) and interview with MEP, November 2000.
34. Corroborated by various interviews with MEPs in November 2000.
35. Interview with member of EP Committee Secretariat and MEP, November 2000.
38. See on this issue, for example, Benz (2001, p. 7).
39. Between 2000 and 2003, the number of hearings per year has been 18, 25, 36 and 54 respectively. In the first four months of 2005, 33 hearings had already been organised.
40. Revision of Directive 80/778/EEC.
41. The so-called Bolkestein Directive.
42. PE 308.918/BUR.
43. Already before this provision, however, the rule of openness remained subject to an exception: committees may indeed decide to divide the agenda for a particular meeting into items which are open and those which are closed to the public (Rule 96). For further details on these aspects, see Settembri (2005).
45. See Annex 7.1 for a complete list of the directives studied.
47. To determine the majority for the adoption of each report, we have considered ‘yes’ votes as opposed to ‘no’ votes. However, abstentions were added to ‘no’ votes when an absolute majority of Members of Parliament was required by the procedure.
48. To determine whether the EP’s position is weak or strong in a given procedure, we relied on the choice made by Carrubba et al. (2003) to consider the Parliament as ‘strong’ in the cases of cooperation (2nd reading), co-decision (2nd and 3rd reading) and assent procedures, and ‘weak’ when consultation, concertation, cooperation (1st reading) and co-decision (1st reading) procedures apply. In addition to their model, we considered the EP as ‘strong’ in the framework of the budgetary procedure and when it voted on inter-institutional agreements.
49. A good example in this context is the directive on mobile workers.
50. 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.
51. Interview with member of EP Committee Secretariat, November 2000.
55. 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).
56. Art. 251, para 2, lit. a, b, c. TEC.
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57. Within the time-span of three months (extendable to four).
58. The Council has to decide with unanimity on amendments where the Commission has given a negative opinion. Otherwise it decides with qualified majority.
59. Art. 251, para 4 TEC.
60. Interview with MEP, February 2001.
62. Art. 251 TEC.
63. The three vice-presidents of the EP involved in conciliation have asked all three parties (Commission, Council and EP) to limit their delegations to 10 persons (EP, 2000).
64. Three vice-presidents take turns in attending the meetings.
65. Before October 2001, individuals had access to the premises of the EP if they specified which committee meeting they wished to attend.
ANNEX 7.1: DIRECTIVES SELECTED FOR CASE STUDIES

I TELECOMMUNICATIONS

- Open network provision (ONP) to voice telephony. Universal service for telecommunications (Directive 98/10); (Directive on the application of open network provision to voice telephony 95/62); (Open network provision to voice telephony C4 – 0056/94; OJ 19-Sept-94)
- Third-generation mobile communications systems (Decision 99/128)

II ENVIRONMENT

- Waste management: landfill (Directive 99/31)
- Quality of water intended for human consumption (Drinking water directive) (Directive 98/83)
- End of life vehicles directive (2000/53)

III RESEARCH AND DEVELOPMENT


IV CULTURE

- Pursuit of television broadcasting activities (Directive 97/36)

V SOCIAL AFFAIRS

- Working time for seafarers (Directive 99/95)
- Working time of mobile workers (2000/34)
- Safety and health at work (currently being processed, modifies Directive 89/655)
- Employment and social sector: equal treatment without racial discrimination (Directive 00/43)
8. The role of implementing committees

Guenther F. Schaefer and Alexander Türk

INTRODUCTION

The vast majority of legal acts in the European Community are not adopted in a procedure provided for in the EC Treaty, but by the European Commission in the exercise of implementation powers conferred on it by the Community's legislator. Most of these implementing acts are adopted by the Commission after a so-called 'comitology' committee, composed of civil servants of the Member States, has given its opinion on a draft presented by the Commission. Comitology committees deal with a wide variety of activities which qualify as implementation – they range from single case decisions and preparatory acts thereof at one end of the spectrum to the amendment of basic acts at the other end. Implementing measures can be divided into various categories (Schaefer and Türk, 2002): rule interpretation, rule application, rule-setting/rule-evaluation, approval of funds, the extension/new specification of funding programmes and information management. It is therefore not surprising that policy implementation covers a wide range of activities and deals with important policy issues that go beyond the merely technical regulation of the internal market.

The practical and theoretical relevance of implementing committees in the EU’s policy process has raised considerable interest in the operation of the comitology system. This chapter gives an account of the important aspects of that debate. The next section will set out the constitutional framework in which comitology committees operate. These legal rules constitute, however, only a partial aspect of the working of implementing committees. The following section will therefore discuss how comitology committees operate in practice. The final section will then address issues of legitimacy and accountability.

CONSTITUTIONAL FRAMEWORK

The current constitutional framework in the EU and EC treaties only partially reflects the evolutionary development of EU policy implementa-
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...tion, which has been driven by practical necessity and political arrangements rather than having been designed around any preconceived constitutional model (Hofmann and Türk, 2006). Already in the 1960s, when the first comitology procedures were set up, in particular in the area of agriculture, a gap emerged between the existing constitutional settings and the reality which had developed in implementing structures in many policy areas. The original Article 211 EC appeared inadequate to serve as legal basis for the more complex legal and practical arrangements for the implementation of EC legislation at EC level. Scientific and technical uncertainty in many areas, and the need to deal quickly with unexpected circumstances, made it necessary for the Council to confer implementing powers on the Commission on a large scale. At the same time the Member States wanted to retain some influence over the exercise of implementing powers by the Commission. Legislative acts delegating implementing powers to the Commission therefore provided that the Commission had to consult committees comprised of representatives of the Member States before adopting the necessary implementing rules. This system was soon referred to as ‘comitology’.

With the advent of the Internal Market and an increased role for EC implementation, the Member States attempted to reduce the gap between constitutional provisions and practical reality by adding, through the Single European Act of 1986, a new third indent to Article 202 EC. This provision constitutes the currently applicable legal basis for implementation under the EC Treaty. It states that implementing powers can only be exercised where they are conferred in a basic act, in which the Council shall confer implementing powers on the Commission, but which allows the Council in specific cases to retain (that is, to delegate to itself) implementing powers. Article 202 third indent EC also makes it clear that the Council can impose certain requirements on the Commission for the exercise of such implementing powers in the form of rules and principles laid down in advance by a Council decision.

Despite its potential for a comprehensive regulation of the implementation process, Article 202 third indent EC has mainly been used by the Council to lay down rules which would generally confirm implementation structures that had developed organically over time. In its first Comitology Decision 1987 (Council, 1987) the Council merely constitutionalised the existing position of the Member States. Only cautious amendments were undertaken in the second Comitology Decision 1999 (Council, 1999) in an attempt *inter alia* to pacify, albeit in a limited way, the EP. Under pressure from the EP the Council had, however, to go further and by an amendment to the 1999 Comitology Decision (Council, 2006) it conceded greater control...
powers to the European Parliament for ‘quasi-legislative’ implementing acts based on legislative acts adopted under the co-decision procedure.\(^{11}\)

The legal status of the Comitology Decision 1999 is unique: it occupies a hierarchical position below the EC Treaty, but above ordinary legislation, that is, acts based on treaty provisions.\(^{12}\) The Comitology Decision can therefore be considered part of the constitutional framework for the EC implementation process. The Decision is binding on legislative acts that confer implementing powers.\(^{13}\) Also, it provides for the participation of the Member States in the adoption of delegated measures by establishing four different procedures which offer a varying degree of Member State participation. In addition, the Decision lays down criteria for the choice of procedure in the legislative act. Further, it codifies the increased involvement of the EP in the implementation process by entrusting it with certain information rights, a strong right of control over ‘quasi-legislative’ implementing acts based on legislative acts adopted in the co-decision procedure and a limited right of participation in the adoption of other implementing measures. Finally, it enhances the transparency of EC implementation by providing the public with avenues for information.\(^{14}\)

Nevertheless, despite the detailed rules on Member State participation, the greater role of the EP and the quest for more transparency, the Second Comitology Decision is still considered incomplete, even after its most recent amendment. There are basically two reasons for this.

Firstly, the 1999 Comitology Decision does not address participation rights of organised interests or individuals. The request for greater involvement of ‘civil society’ is a topic which is highly relevant for legitimisation of implementation activity. After all, implementing acts often affect individual interests more directly than legislative activity. Despite concerns about the impact on the efficiency of the process, consideration is necessary on how such participation can be regulated, especially in the light of more powerful economic interests being already able to exert some influence.

Secondly, the recent case-law of the Community courts has highlighted the importance of scientific expertise in the implementation process.\(^{15}\) This importance is not yet reflected in the text of the Comitology Decision. In reality, questions arise as to the interface between scientific expertise and implementing decisions, in particular in relation to the selection of scientific experts, the timing and extent of their involvement in decision-making procedures and who formulates the relevant questions to be addressed by scientific expertise (Töller and Hofmann, 2000, pp. 25–50).

The Comitology Decision 1999 provides four different implementing procedures\(^{16}\) that can be imposed in the basic act. All four procedures have in common that the Commission must consult a committee comprised of representatives of the Member States before adopting any implementing
measure. The powers of the committee vary in accordance with the different procedures. The Advisory Procedure requires the Commission to take utmost account of any opinion delivered by the committee. The Management Procedure provides that the Commission adopts the measures on which it has consulted the committee. Only in the case of a negative opinion must it refer the measures to the Council, which by qualified majority can take a different decision, but only within a certain period of time. Under the Regulatory Procedure the Commission shall adopt its draft measures if the committee approves them with a qualified majority. If such approval is not forthcoming the Commission must present a proposal to the Council, which can, within a specified time period, adopt the proposal by qualified majority or amend it by unanimity. The Council may also oppose the draft with qualified majority, in which case the Commission can submit an amended proposal to the Council, resubmit the same proposal or present a ‘legislative’ proposal in accordance with the procedure provided for in the EC Treaty. If the Council fails to adopt any of the above options within the specified time-limit, the Commission will adopt the measures proposed to the Council.

The ‘regulatory procedure with scrutiny’ has been added in the 2006 Decision (Council 2006) to provide not only the Council but for the first time also the EP with extensive rights of control over implementing acts which affect both institutions as co-legislators. Under this procedure, the Commission can, where it obtains the approval of its draft measures by the committee by qualified majority, adopt the measures only if neither the Council, by qualified majority, nor the European Parliament, acting by a majority of its component members, has opposed the measures within a period of three months. However, the European Parliament and the Council have to justify their opposition on the limited grounds that the Commission has exceeded its implementing powers or has adopted an act which is ‘not compatible with the aim of the content of the basis instrument’ or which violates the principle of subsidiarity or proportionality. The Commission must not adopt an act which has been opposed on these grounds by either the European Parliament or the Council. Where the committee does not approve the Commission’s draft implementing measures, the Commission must submit to the Council a proposal, which is also forwarded to the European Parliament (initial submission). The Council can, within a period of two months, oppose the proposal with qualified majority. In this case the measures proposed cannot be adopted. Where the Council intends to adopt the proposal by qualified majority or does not act within the two-month period, the measures will be submitted to the European Parliament. The latter can within four months, counted from the date of the initial submission of the proposal, oppose the measures, however only
on the same limited grounds as in the case of opposition to a measure which has received the approval of the committee. In this case the measures cannot be adopted. If the measures have not been opposed within the four-month period, they shall be adopted. It should be noted that the basic act can provide for a modification of the time-limits. The basic act may also provide that the emergency procedure set out in Article 5a(6) of the amended Comitology Decision 1999 shall apply where the time-limits cannot be complied with on imperative grounds of urgency.

Article 2(1) of the amended Comitology Decision 1999 provides statutory guidance on the choice of procedure to be imposed in the basic act for three of the four procedures. The Management Procedure should be used for the application of the common agricultural and common fisheries policies and the implementation of programmes with substantial budgetary implications. The Regulatory Procedure should be employed for measures of general scope designed to apply essential provisions of basic instruments and also where the basic act provides that certain of its non-essential provisions should be adapted or updated by way of implementing procedures. Subject to the application of the other two procedures, the Advisory Procedure shall apply where it is considered most appropriate. The European Court of Justice (ECJ) has held that these criteria for the choice of procedure are not legally binding but have legal effect insofar as the legislative authority must provide reason should it decide to deviate from these criteria. On the other hand, Article 2(2) of the amended Comitology Decision 1999 stipulates that the use of the new regulatory procedure with scrutiny is mandatory where the legislative act adopted in accordance with the co-decision procedure in Article 251 provides for the adoption of acts of general scope designed to amend non-essential elements of the legislative act.

The new regulatory procedure with scrutiny comes in addition to rights already granted to the European Parliament under the Comitology Decision 1999 before its amendment. The 1999 Decision consolidated the EP’s information rights in Article 7(3), hitherto laid down in various inter-institutional agreements (European Parliament and Commission, 2000). In addition, the EP has a right of scrutiny under Article 8. This provision grants the EP the right to pass a resolution on whether, in its view, the Commission has exceeded its implementing powers conferred by the basic act.

**HOW DO COMITOLOGY COMMITTEES WORK?**

Before we turn to more fundamental aspects of the legitimacy of the comitology system, the following section will discuss how comitology
committees operate in practice (see also Trondal and Veggeland, 2003; Töller, 2002; Joerges and Falke, 2000).

General and Practical Aspects of Committee Work

The Commission stated in its 2003 Report that the number of comitology committees was 256 (Commission, 2005, pp. 6–8). It is, however, not clear whether this list includes all comitology committees and not just those operating under the Comitology Decision 1999, which excludes the committees which are established in the common commercial policy and competition rules from its scope.43

Great differences exist between committees on a number of practical issues, such as the frequency and duration of meetings, the number of measures adopted, the volume and mailing of preparatory documentation, and language facilities:

The frequency and duration of the meetings Some committees meet only once or twice a year; others meet every two or three weeks (for the number of meetings in 2003, see Commission, 2005, pp. 9–10). This depends entirely on the workload and the issues they are confronted with. About 90 per cent 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 two-weekly 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. The trend seems to move to one-day meetings where Member State representatives arrive in Brussels in the morning and leave in the evening. This is partially or perhaps mainly the result of budgetary restrictions in the Member States.44

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 (for the number of opinions delivered and instruments adopted for 2003, see Commission, 2005, pp. 10–11). There are some cases where it is rather more – eight to ten – but these are exceptions.45 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 may be 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 a rather indifferent attitude can be found, as one chair put it: ‘We send out when we send out.’ This relaxed attitude on the part of the Commission is not appreciated by Member State 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 other ministries in their own government. Distribution of documentation is done generally by e-mail or on special Internet pages. In most cases three languages – English, French and German – are 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. Only in one committee were all documents 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 six to nine languages can be spoken and are being translated into English, French, German and sometimes Spanish and Italian; translation into other languages is ‘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 the 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 State representatives as an opportunity to put pressure on the Commission or to use formal arguments to delay or block agreement on 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
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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 difficult but 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.47 In one instance a representative from a medium-sized Member State stated, that although their country had made concrete proposals for the next meeting, they were unable to attend because of budgetary constraints, and since the next meeting was a two-day meeting 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 sending more than one expert, because the topics to be discussed cannot be covered competently by one person alone, is becoming more and more limited. The countries which usually have the largest delegations are Austria, Belgium, Germany and the United Kingdom. The trend toward 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 an esprit de corps: 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 a kind of club.’

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.48
All legal acts establishing comitology committees stipulate that the committees should adopt their own rules of procedure. In reality, there was great uncertainty (on both the Commission and the Member State sides) as to whether the committee had in fact adopted 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 over time; 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 procedure for all committees, to be subsequently adopted by each committee, filling in such details as time frames for sending out documents, and so on. The standard rules of procedure were published in early February 2001. At the time of the interviews, in September/October of 2001, only 4 of the 18 committees had adopted new rules of procedure. The impression could not be avoided that Commission officials particularly 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 all 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 summarises 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 will 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 a year and a half before the draft is finally ready to be 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.’

The Role of the Chair

Chairs are important for the success of committee work. All comitology committees are chaired by a Commission official, usually a director or a
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head of a unit. Most of the respondents had chaired meetings for many years, at least three or four. In some cases chairpersons were experts in the subject matter the committee deals with; in others, they were 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. Of the 18 chairs interviewed, about half 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 having good diplomatic skills and excellent chairing skills, being able to keep the meeting together, delivering good summaries and being capable of leading the group towards a consensus or compromise. In the eyes of Commission respondents it is to get the measures approved with a minimum of changes and adjustments and to avoid having to send a measure to Council. The most important explanations for Commission officials’ efforts to avoid at all costs the necessity to refer proposed measures to the Council are:

- the adoption of the measure would inevitably be delayed;
- 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. 51

In order to reach a 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/her colleagues who are experts on the subject matter. The latter are responsible for carrying out detailed discussions upfront, trying to find a compromise or convince sceptical Member State representatives of the necessity of a specific solution. Only when things get stuck and when perhaps a more senior Commission official could resolve the matter does the chair intervene.

Every committee has a secretary, a Commission staff member, who plays a crucial role: he/she keeps the minutes and 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.

The chair’s 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
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a policy that is not necessarily in the interests of the Member States or a group of Member States. 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.

The Functioning of Comitology Committees

It was common practice in the committees selected that the comitology meeting was preceded by a more informal discussion generally referred to as an ‘expert committee’. In these ‘expert’ meetings, the issues on the agenda are discussed informally and 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 the Commission as an expert committee. The informal character of these meetings contributes to the development of the esprit de corps.

Member State representatives do reflect national interests in both types of meetings. They cannot go against instructions they have received before coming to the meeting, particularly in the case of difficult implementing measures where highly divergent national interests confront each other, as for instance in the area of environmental policy. Instructions in other cases are sufficiently vague to allow Member State representatives to agree on a common position. Difficulties arise when some Member State representatives consider their own position 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 which take this position.

Third parties, interest groups, industry and NGOs are always trying to influence the work of committees, by contacting both the Commission and the Member State governments. 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 seek to gain expert know-how from interest groups, industry and NGOs. 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 was abandoned when a new chair took over.
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The general rule is that only Member State representatives and in some cases representatives of EEA (European Economic Area) 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, and 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. The Commission has carefully prepared its proposed measures and the Member State officials often do not have the time to check them carefully. Commission respondents saw this somewhat differently: Member State 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 the 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 and have better expert knowledge than the Commission staff. In the end, all agree that the process of discussion will lead to an acceptable solution, usually in the form of a compromise.

All chairs are aware of their obligations to provide information to the European Parliament under the Comitology Decision 1999. 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.’ Feedback 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, often not with MEPs but with staff members of the parliamentary committee. These contacts often are the result of personal good relationships, either with MEPs or with staff members. There also seemed to be occasionally attempts by individual MEPs to influence committee work, usually in the case of a politically important decision.

Some Commission respondents expressed concern that the new rules on transparency, laid down in Article 7 of the Comitology Decision 1999, may negatively affect the way their committee was doing business. Almost 75 per cent of the chairs felt, however, that Member State representatives will not become more careful, rather that matters will proceed as they have done in
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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 another 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 the opaque nature which characterised it in the past (Türk, 2003).

Conclusion

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 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 – from both the Member States and the 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 NGOs succeed in having 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 loses.

Successful committee work means discussing, negotiating and compromising until a consensus is reached, perhaps not the best one, but one which most Member States and the 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.

LEGITIMACY AND ACCOUNTABILITY OF COMITOLGY COMMITTEES

The possibility of the conferral of wide implementing powers on the Commission makes the argument unsustainable that EC implementation
only deals with purely technical and well-defined matters for the solution of which only expert knowledge is required. Similarly unfounded is the claim that the implementing measure will be merely a transmission of the provisions of the basic act. Nor would it be accurate to describe the implementation phase as entirely political, as some implementing measures are purely technical in nature. Any model of governance has to come to terms with the diversity of formal and informal activities that comprise the implementation phase. The complexity and unique structure of implementation activities have created analytical difficulties in capturing the nature of this system and therefore left uncertainty over the normative requirements that ought to be imposed to make it legitimate and accountable (Töller, 2002). The widespread critique of comitology as being an opaque and intransparent mode of decision-making between civil servants from the European and national levels has been instrumentalised by the EP to promote a more traditional form of government, in which the EP ensures democratic legitimacy by holding the Commission to account. In contrast, most academic writings are concerned with EU policy implementation as the exercise of regulatory activity beyond the state. Even though most would reject the idea that EU policy implementation deals with technical matters that, if clearly defined, should best be decided by experts and should be shielded from political interference, some have cast this multilevel administrative co-operation in a more positive light by highlighting the deliberative nature of the discussions in comitology. Others require stronger participatory opportunities for organised interests, thereby favouring a more pluralist approach.

The Commission occupies a central role in the implementation phase in the framework of an institutional arrangement which has been relatively stable since its inception in the 1960s. The Commission’s legal position in Article 202 third indent EC as presumed implementation authority is the expression of its functional role as Community executive (Lenaerts and Verhoeven, 2002, p. 76; Lenaerts and Verhoeven, 2000, p. 653). This capacity allows the Commission to exercise a degree of political judgment as to how to promote the Community interest. The Commission’s margin of manoeuvre is of course limited by the involvement of comitology committees in the implementation process. The interaction between the Commission and national representatives is mainly characterised by a consensual approach in which the Commission attempts to accommodate Member States’ interests as far as possible. The co-operation is therefore conducted mainly in the form of deliberation (Joerges and Neyer, 1997b), although interest bargaining is not excluded. The Commission’s margin of discretion in the adoption of European implementation acts is further reduced by its obligation, in certain cases, to secure the participation of
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affected third parties and take account of their opinions. Further, the Commission must increasingly ensure that scientific expertise is integrated in the adoption of implementing measures. In reality, the Commission has to act not only as decision-maker but also as manager of formal and informal networks (Harlow, 2002, p. 182).

In a multi-layered system of governance, 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 1999 Comitology Decision allow Member States a variable influence over the decision-making process. The participation of the Member States in the committees depends hereby on the importance of the implementing measure.

The Commission’s view, expressed in its White Paper on Governance, calling into question the ‘need to maintain existing committees, notably regulatory and management committees’ (Commission, 2001, p. 31), therefore needs to be questioned seriously. All the same, 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 have considerable influence on the final content of an implementing act. 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.

Comitology has thus created an efficient linkage between the European and the national administrations, mainly at the expense of the participation of the European Parliament and interest groups. Various attempts have, therefore, been made to underpin the traditional comitology arrangement with normative considerations. The regulatory model (Majone 1996, 2000) claims that independent regulatory authorities can efficiently carry out functionally limited regulatory tasks provided they are shielded from political pressure. The model would favour a strong Commission as implementing authority. The co-operation with comitology committees would presumably not be seen as political interference, as the committees are comprised of national civil servants, whose participation is more guided by their expertise than political considerations. The model of deliberative supranationalism (Joerges and Neyer, 1997), on the other hand, would stress the deliberative nature of the traditional model, which provides a ‘supranational process by which political considerations are balanced against expert (rationalising) advice’ (Everson, 1999, p. 303). Both models have difficulties with the
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intervention of the EP in the implementation process. Whereas the regulatory model suspects political interference with the exercise of regulatory tasks, deliberative supranationalism would doubt the legitimacy of the EP. In contrast, the traditional government model\textsuperscript{56} would insist on parliamentary scrutiny as the cornerstone of democratic accountability. The EP has, quite successfully, pursued its criticism of comitology on the basis of this model, insisting on its power to hold the executive to account (Bradley, 1997). Given its limited resources, the EP might exercise its supervisory function most effectively by monitoring the implementation process and examining the functioning of the process by investigating \textit{ex post} implementing decisions, thereby holding the implementing institutions to account and strengthening the legitimacy of the process (Commission, 2001, p. 30). 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 has to be ensured in the basic act.

The limitations on the participation of the EP in the implementing process have increased demands for a greater involvement of organised interests in that process (Vos, 1999, pp. 40–42; Dehousse, 1999, pp. 120–26). Pluralist representation models (Everson, 1999, pp. 290–93) argue that giving interest groups greater access to the implementation process would enhance its legitimacy. Modern administrations enjoy considerable discretion in implementing legislative acts. Traditional means of accountability have proven weak, as the legislative authority for implementation is often vague and parliamentary scrutiny less than effective. Similarly, in the European Community, as seen above, basic acts may confer considerable powers on the Commission. Moreover, the traditional accountability model through parliamentary scrutiny is limited by the EP's resources and hampered by the co-operative nature of the comitology process. Where the Commission enjoys wide discretionary powers in the implementation phase, allowing it to exercise political judgment, the alternative pluralist model could ensure a 'surrogate political process' (Stewart, 1975, p. 1760) adequate for political administration (Everson, 1998). At present there is no general legal obligation on the part of the Commission to consult organised interests or the wider public before the adoption of an implementing act.\textsuperscript{57} All the same, the Commission has set up Advisory Committees, comprised of representatives of interest groups. However, the Commission is free to establish and to decide whether and when to consult such committees. An institutional or judicially driven attempt to open the implementation process to the wider public would not eliminate the unequal nature of access to the process by interests groups which exists at the moment, but it might be able 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 such groups within it (Commission, 2001, pp. 17, 20). This balance is also an issue in the case of access to documents of comitology committee meetings. 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 endanger the efficiency of the process (Türk, 2003). This tension will ultimately have to be resolved by the ECJ highlighting its important function in the implementation process.

NOTES

1. For a detailed analysis of the relevant facts and figures, see Bergström (2005, pp. 10–20).
2. Even though the interpretation of basic acts is ultimately for the Community Courts, practical necessity requires the Commission to provide guidance on the interpretation of Community law. Such interpretation issues from a large part of the business of comitology committees to avoid legal uncertainty.
3. The application of Community law is in principle a matter for the Member States. However, in certain areas the Commission is entrusted in a basic act to apply provisions of Community law. Such measures cover the application of EC competition rules, but also the adoption of emergency measures under the CAP regimes and the granting of marketing authorisation for veterinary or medicinal products.
4. This category refers to measures where, within a general framework of a basic act, particularly a directive, more specific rules are adopted (e.g. the setting of limit values in environmental law or adjusting safety requirements owing to technological change).
5. This category covers funding decisions within a specific, well-defined framework laid down by legislative authority (e.g. management of specific R&D programmes and economic aid to third world countries).
6. This category refers to measures in which existing programmes are either extended or modified (e.g. modification or revision of an expenditure programme in R&D or foreign aid).
7. This category, which could be described as ‘administration by information’, was first used in the ‘sunshine’ agencies in the US. Their duty was to steer private behaviour and create the basis for public action by providing information on complex situations. A European example of this approach is the European environmental information network ‘Eionet’, which is coordinated by the European Environment Agency (EEA).
8. See, for example, the dispute which led to one of the first landmark comitology judgements of the ECJ: Case 25/70 Einfuhr- und Vorratsstelle für Getreide v Köster [1970] ECR 1161.
13. Ibid., para. 40.
14. The Commission has published a list of all comitology committees, [2002] OJ C 225/2. The Commission has also set up a register which provides references to documents sent to the European Parliament, see http://europa.eu.int/comm/secretariat_general/regcomito/
The role of implementing committees


16. It should be noted that the Comitology Decision 1987 provided for five different procedures. The 1999 Comitology Decision was adopted, in particular, to provide a simplification in the procedures; see its recital 9. With now four procedures, and some fairly complex ones, it is doubtful that this aim has been achieved.

17. See Article 3 of the Comitology Decision 1999.

18. The committee’s opinion is not legally binding, but the Commission should give reasons for departing from the committee’s opinion.


20. Such an opinion against the Commission’s draft measures requires a qualified majority calculated in accordance with Article 205(2) of the EC Treaty in its current version.

21. This seems to exclude a rejection of the measure by the Council.

22. The basic act will specify the time-limit, which must not exceed three months.


24. This variant cannot be found in the Comitology Decision 1999, but results from an interpretation of the Council’s (!) legal service. The argument is that the term proposal is synonymous with that in Article 250 EC, which provides that a Commission proposal can only be amended by unanimity. It is submitted that this opinion is questionable as Article 250 only relates to ‘legislative’ proposals whereas the proposal under Article 5 of the Comitology Decision 1999 leads to the adoption of an implementing act.

25. See Article 5a of the Comitology Decision 1999, as amended.

26. See Article 5a(3)(b) of the Comitology Decision 1999, as amended.

27. See Article 5a(3)(c) of the Comitology Decision 1999, as amended. The Commission is however free to submit an amended draft to the comitology committee or to present a legislative proposal on the basis of the Treaty.

28. See Article 5a(4) of the Comitology Decision 1999, as amended.

29. See Article 5a(4)(c) of the Comitology Decision 1999, as amended. The Commission is again free to submit an amended draft to the comitology committee or to present a legislative proposal on the basis of the Treaty.

30. This option is clear from Article 5a(4)(d) in combination with Article 5a(4)(b) of the Comitology Decision 1999, as amended. However, even though it is not expressly mentioned in the provision, the Council should be able to amend the proposal by unanimity.

31. See Article 5a(4)(e) of the Comitology Decision 1999, as amended.

32. Article 5a(4)(g) of the Comitology Decision 1999, as amended, states that in this case the measures shall be adopted by the Council or by the Commission, as the case may be. This can mean that the Council adopts the measures which it had earlier envisaged adopting, whereas the Commission will adopt them if the Council has not acted.

33. See Article 5a(5) of the Comitology Decision 1999, as amended. However, the basic act has to state reasons for doing so.

34. This shall include measures concerning the protection of the health or safety of humans, animals or plants.

35. See Article 5a(5) of the Comitology Decision 1999.


37. The provision gives a non-exhaustive (inter alia) list of examples: the deletion or addition of non-essential elements in the legislative act. It is submitted that the wording in Article 2(2) of the Comitology Decision 1999, as amended, is narrower than that in Article I-36(1)(1) of the Constitutional Treaty, which seems to have served as basis in this respect. This seems to have sprung from a legal concern not to extend the European Parliament’s control beyond quasi-legislative to executive measures.
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38. For an in-depth discussion of the EP’s involvement in comitology, see Chapter 9.
39. Recital 10 of the Comitology Decision 1999 has been amended to emphasise that particular attention will be paid to providing the European Parliament with information under the regulatory procedure with scrutiny.
40. The same right exists vis-à-vis the Council in Article 5(5) and (6) of the Comitology Decision 1999 where the commission has made a proposal to Council under the regulatory procedure.
41. The ultra vires procedure in Article 8 applies, however, only where the basic act has been adopted in the co-decision procedure.
42. This section is based on an earlier study by Flatz et al. (2002). The study was based on interviews with Member State representatives and Commission officials participating in 18 comitology committees from various policy areas. The study preceded the accession of the ten new Member States.
43. See recital 12 of the Comitology Decision 1999. Table I of the 2003 report does not include committees established in the field of competition.
44. 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.
45. This would certainly be different in an area where there are a large number of routine measures adopted as implementing acts, as in agriculture. In 1998 the Commission adopted 2622 regulations, of which 90 per cent were in agriculture and of which again 78 per cent were routine implementing measures. See Falke in Joerges and Falke (2000, p. 47).
47. The Commission Report (2005, p. 6), states that the ten accession states were represented in 186 of 256 committees.
51. The sparse empirical evidence available suggests that the Commission is indeed very successful in avoiding a referral to the Council. The Commission Report (2005, p. 5), states that in 2003 no case of referrals was reported.
52. This is most likely to occur in the areas of trade, enterprise and environment.
55. See Chapter 10.
56. This model is characterised by a horizontal and institutional separation of powers, allocating certain government functions to institutions.
57. However, see Article 33 of Regulation 1/2003 [2004] OJ L1/1, which obliges the Commission to publish certain draft implementing acts and to invite all interested parties to submit their comments.
58. See Chapter 10.
59. See Chapter 10.
9. Comitology and the EP’s scrutiny of Commission implementing acts: real parliamentary control?

Pamela Lintner and Beatrice Vaccari

INTRODUCTION

The idea that committees made up of unelected national officials – bureaucratic bodies – decide or at least influence the bulk of European decisions raises democratic concerns. In the EU’s unique institutional setup the power to adopt implementing acts upon delegation by the Council, and the EP in case of co-decision, lies with the European Commission. In this context, it is assisted and controlled by so-called ‘comitology committees’ composed of national representatives. Under the system governed by the 1999 Comitology Decision it is up to the Council to decide on the implementing measure proposed by the Commission in the case of disagreement between a comitology committee and the Commission. The European Parliament, on the other hand, from 1999, could only intervene in the process by adopting a Resolution stating its [political and] legal concerns via the so-called ‘right of scrutiny’. Its role has been reinforced recently with the modification of the 1999 Decision adopted in 2006 (Council Decision 2006/512/CE of 17 July).

Neither Parliament nor the Commission disputed the establishment of committees with purely advisory functions but both have – for different reasons – claimed that committee procedures with a possible direct impact on the policy outcome would influence the institutional balance set up in the Treaty. Even though the legitimacy of the committees itself was already confirmed by the European Court of Justice in the 1970s, the legitimacy of the ‘outcome’ of comitology procedures and the extent of influence and control exercised by the Council and the EP over Commission implementing acts still remain crucial issues.

This chapter will concentrate on the issue on accountability and democratic control of the comitology system under the EP ‘right of scrutiny’ under the
The role of committees in the policy-process of the EU

1999 Comitology Decision. Several questions will be analysed in this regard. Do (deliberative) comitology procedures produce normatively acceptable democratically legitimate decisions? Is there a case for a more substantive role of the EP? Is the European Parliament’s current right of (legal) scrutiny under the Comitology Decision an adequate way of controlling delegated rule-making? How is it applied in practice? Is it designed to be used in an efficient and effective way?

An analysis of the tensions in the institutional triangle of Commission, Parliament and Council and of Parliament’s claims for enhanced powers in administrative rule-making will be given in the following section. Then, before explaining in more detail how the right of scrutiny works in practice, we explore the development of Parliament’s struggle to get some say and information rights in the comitology system. The main part of the chapter is then devoted to an analysis of the six Resolutions that Parliament has adopted so far. Conclusions will be drawn as to whether this ‘right of scrutiny’ is an effective ‘parliamentary control’. Finally we discuss its possible impact on democratization and formalization of the process, including the conditions of the committees’ negotiating culture in terms of strengthening a more deliberative approach or more bargaining in the discussions.

INSTITUTIONAL TENSIONS IN THE ‘DECISION-MAKING TRIANGLE’: LEGITIMACY CONCERNS AND PARLIAMENT’S CLAIMS FOR ENHANCED POWERS IN COMITOLGY

The Union’s legitimacy in terms of representative democratic legitimacy is based on a ‘dual principle of representation’: the Union of states based on the indirectly elected representatives of the Member States in the Council and the Union of the European citizens, based on directly elected MEPs (Eriksen and Fossum, 2001) The Union’s sui generis model of governance can be seen as a mixture of elements from a supranational state and those of a traditional international organization. This is also reflected in the mix of supranational and intergovernmental modes of decision-making in the Union. The fact that the Council maintains its more prominent role in the legislative and implementing decision-making process generally indicates that the ‘European sovereign’ is essentially still to be found in the Member States rather than in the ‘people’ of the Union, that is, the citizens and their representatives. In our opinion this dual representation also entails and justifies a different role for the two legislators in institutional terms. Within that framework the core question here is to analyse whether
The EP’s scrutiny of Commission implementing acts

This different institutional role also leads to a different participation and supervisory role for delegated rule-making, in particular for those areas where Parliament is already on equal footing with the Council in the legislative procedure.

With the introduction of co-decision in the Treaty of Maastricht, Parliament became a full co-legislator in the legislative procedure and hence in the adoption of essential elements, including the empowering provision for the Commission’s implementing tasks. But as soon as certain powers are delegated to the Commission, it is up to the Member States to exercise (in)direct influence and control in the process of drafting and adopting the measure. In the management and the regulatory procedure, in the absence of approval by the committee, the Council may even adopt the implementing act itself. Consequently, even when the powers are delegated by Parliament and the Council together, they revert to the Council alone. The main argument put forward in favour of these different roles for Council and EP is that the Council itself delegates to the Commission not only in the name of its legislative powers but also, and mainly, on the basis of its executive powers: ‘Due to its executive powers, Article 202 grants it [the Council] a specific role in drawing up implementing measures. The same does not apply to the European Parliament, which has only a legislative role in applying the Treaties, and must not therefore be involved in everything.’

This point of view might have been valid when comitology was first established in the 1960s and the EP was merely a forum of discussion which possessed hardly any legislative functions. But in the meantime, owing to the dynamic process of institutional evolution, a variation in the standing of Parliament and the Council in controlling the Commission’s executive tasks is clearly incompatible with Parliament’s role as a co-legislator. Also the fact that the Treaty entitles the Council to reserve the right to exercise implementing powers directly in specific and exceptional cases cannot change this assessment for matters governed by co-decision. The dual executive system at European level explains and legitimates the committees’ existence and involvement in administrative rule-making, but not the Council’s direct intervention in the process, thereby bypassing the EP in its monitoring duties.

Some authors even argue that the Commission is less of a government and more of a ‘regulatory institution’ that ought to be completely independent in the performance of its (executive) duties. Against this background they find that the democratic legitimacy of executive action on the part of the Commission can not be sought exclusively in a system of checks by the two legislative chambers, since ... the legislative initiative is not vested in the Community legislature itself.
but in the Commission. And therefore the channels as well as the underlying philosophy for such checks are lacking. (Lenaerts and Verhoeven, 2000)

Moreover the Commission is held accountable via motion of censure.

The core problem of the current system lies in the fact that the Treaty does not distinguish between delegation of legislative powers and exercise of executive power. It is for this reason that the Commission cannot be given full responsibility in its executive tasks and the Council and the EP legitimately claim to have direct influence in some areas of the implementing system. The need for supervision by the legislature arises mainly when executive measures to be adopted by the Commission have a legislative substance, implementing essential aspects of basic instruments or adapting others, such as when directives are brought into line with scientific and technical progress or their annexes are amended. In such cases the legislature has an interest to ensure that the political interests that backed the legislative act are secured/followed as well in the implementing act. However, the line between legislative and mere executive measure is difficult to draw in abstract terms and the ECT gives no guidance on that. Also courts normally review administrative rules only with a view to ensuring that the executive does not exceed the powers delegated (the so-called ultra vires control) and are reluctant to intervene on policy issues. In this respect the ECJ initially only made clear that ‘essential elements’ have to be provided for in the basic legislative act; it did not say what is to be understood by ‘essential’ but left this to be decided on a case-by-case basis. Over the last few decades, the ECJ filled this gap as it had to rule in a multitude of cases also on the specificity, reasonability and content of delegation, thereby defining and setting (broad) substantive limits on the Commission’s implementing powers. (see Chapter 10).

Having said this, we can make the following interim summary. In the light of the changing role and socialization that have taken place over the last decades, comitology committees originally set up to control the Commission can hardly be seen as ‘agents’ of the Council any more (Dehousse, 2003; Ballmann et al., 2002) We would argue that the legitimacy of their involvement in European executive decision-making arises mainly from ‘their performance’ (Hix, 2000) and their deliberative approach (Joerges and Neyer 1997, 2004). In this perspective, comitology committees can be seen as contributing to enhanced output legitimacy and the production of normatively acceptable substantive decisions insofar as they provide invaluable expertise and facilitate subsequent implementation of executive measures at national level. In order to fully appreciate this development, a brief look at the historical evolution of the comitology system is necessary and this will be provided below.
THE DEVELOPMENT OF PARLIAMENT’S INVOLVEMENT IN THE ‘COMITOLgy’ SYSTEM

Parliament was from the outset sceptical towards comitology but it did not generally oppose the emergence of the system. When the first committees were set up in the 1960s, Parliament recognized in a Resolution the added value that these committees would bring to executive decision-making. But it expressed concerns regarding the lack of transparency of these committees and the impossibility of carrying out democratic supervision. These complaints were not heeded, however, until Parliament exercised in the early 1980s and again in the 1990s its budgetary veto powers and refused to release part of the funds intended to finance committee meetings. Thanks to this rather unorthodox but effective use of its financial powers, Parliament was granted in subsequent years information rights through a series of inter-institutional agreements. (Kietz and Maurer, 2005; Bradley, 1997).

It was only with the second Comitology Decision, in 1999, that the ‘underground work’ of the committees became more transparent and open to supervision on a legally-binding basis. Since then, Article 7(3) of the Comitology Decision entitles Parliament in the areas governed by co-decision to receive all the documents related to each committee meeting at the same time as the Member State delegations. Parallel to Parliament’s information rights, the Commission had to draw up a public register containing the references of all documents communicated to the EP.

Despite the fact that Parliament’s rights for oversight and information have been extended with the adoption of the 1999 Decision, it is still not on equal footing with the Council in the implementing process. Parliament therefore continues to struggle for its place in an already established system of delegated legislative powers in which the agent (the Commission) is primarily accountable to only one of the principals (the Council). We will analyse below to what extent the introduction of the right of scrutiny under Article 8 of the Comitology Decision facilitates Parliament’s objective of influencing the comitology procedures and thereby exercising an effective control over the Commission’s adoption of implementing acts.

GENERAL OBSERVATIONS ON PARLIAMENT’S RIGHT OF SCRUTINY

The so-called right of scrutiny stipulated in Article 8 of the Comitology Decision allows Parliament to indicate in a formal Resolution that it considers the Commission would exceed the powers conferred on it if it went ahead with the adoption of the implementing act. This supervisory right
is limited to measures drafted pursuant to a legislative act adopted under co-decision and only obliges the Commission to re-examine the draft before it officially adopts it. After receiving such a Resolution from Parliament, the Commission has to take the Resolution ‘into account’ and is obliged to inform Parliament on the ‘action it intends to take thereon’. Hence, the Commission is permitted to continue with the adoption of the measure without taking Parliament’s amendments and proposals on board. That is to say, the Commission may, within the time-limits of the procedure, submit a new draft measure to the committee, continue with the procedure or submit a new legislative proposal to the European Parliament and the Council on the basis of the Treaty. An inter-institutional agreement implementing the Comitology Decision lays down a period of one month for Parliament, in which the plenary has to adopt such a resolution, beginning on the date of receipt of the final draft of the implementing measure.

Furthermore, Parliament has been given an ‘additional ultra vires right’ under the regulatory procedure. Article 5 of the Comitology Decision stipulates that Parliament shall inform the Council if it considers the Commission to exceed its implementing powers when the Commission submits a proposal to it. This is the case when the proposed measure does not get a majority vote in favour from the committee and therefore has to be submitted to the Council. Parliament can exercise this right in addition to its ultra vires right under Article 8 exercised in an earlier stage of the implementing process.

Simultaneously with the introduction of this ultra vires right in the Comitology Decision, Parliament changed its own Rules of Procedure in June 1999. In contrast to the Comitology Decision, Rule 81 provides for an objection to draft implementing measures also on grounds other than the Commission’s exceeding its implementing powers (see Table 9.1). Parliament even adopted a Resolution explaining that it will not refrain from objecting to the Commission’s (draft) implementing measures based on Rule 88 (now Rule 81) because of the newly acquired ultra vires right. This expressive statement not to restrain from the adoption of general resolutions however appears to be somewhat superfluous because such a Resolution based only on Parliament’s internal Rules of Procedure is a simple political statement that could be given without any formal requirements anyway. But it expresses very well Parliament’s concern not to lose any of the possibilities it has at hand, to give its opinion and intervene in the comitology procedures. Such a Resolution requesting the Commission to react in a certain way does not entail any obligation for the Commission, not even an obligation to re-examine the draft measure in the light of the Resolution. Conversely, this lack of any legally binding effect does not mean that Parliament’s opinion may not have an impact on the Commission.
Table 9.1  Comparison of Resolutions based on the right of scrutiny under the Comitology Decision and on the EP’s internal Rules of Procedure

<table>
<thead>
<tr>
<th></th>
<th>Article 8 of the Comitology Decision</th>
<th>Article 5 of the Comitology Decision</th>
<th>Rule 81 of the EP’s Rules of Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scope of application</strong></td>
<td>draft implementing measures submitted pursuant to a basic act adopted under co-decision</td>
<td>draft implementing measures submitted pursuant to a basic act adopted under co-decision if the Committee could not agree on a majority vote in favour under the regulatory procedure</td>
<td>all draft implementing measures</td>
</tr>
<tr>
<td><strong>Time-frame</strong></td>
<td>within 1 month after submission of the final draft measure to the EP: only then is the Commission allowed to adopt the implementing measure</td>
<td>no time-frame, but Council has to act within 3 months</td>
<td>whenever: it is in the EP’s own interest to adopt it as soon as possible without prejudice to the time of adoption of the implementing measure</td>
</tr>
<tr>
<td><strong>Content</strong></td>
<td>‘ultra vires indication’: the Commission exceeding its implementing powers, as provided for in the basic act</td>
<td>‘ultra vires indication’: the Commission exceeding its implementing powers, as provided for in the basic act</td>
<td>general objection to the draft implementing measure, including content</td>
</tr>
<tr>
<td><strong>Effect</strong></td>
<td>Commission has to re-examine the draft measure ‘taking the Resolution into account’ and inform Parliament accordingly</td>
<td></td>
<td>request to the Commission, no legally binding effect</td>
</tr>
</tbody>
</table>
THE EP’S EXERCISE OF ITS RIGHT OF SCRUTINY
IN PRACTICE

Within the first five years of this right of scrutiny coming into effect – that is, in the period from 1999 to 2005 – the EP made use of its new powers several times. Below we briefly provide some details of the six cases that are relevant, before analysing the wider significance that the use of the right of scrutiny has in terms of the EP’s role in comitology.

Safe Harbour Privacy Principles

The Commission following a management procedure adopted the so-called ‘Safe Harbour Decision’ based on the EU’s Data Protection Directive, in which it sets out a number of principles with which US organizations must comply if they want to receive personal data from the EU. Parliament used its power of scrutiny under the 1999 Decision for the first time in its Safe Harbour Resolution in July 2000, contesting the adequacy of the level of protection given to personal data in the US, even if the safe harbour privacy principles were/are implemented by the receiving US organization. The Commission actually adopted its Decision despite Parliament’s objections and without further commenting on it. It was only a year later that the Commission introduced a new recital where it said that it had re-examined the Decision in the light of Parliament’s Resolution but justified its position with the argument that Parliament did not establish that the Commission would exceed its powers in adopting the decision.

Cosmetics Tested on Animals

The Council Directive relating to the marketing and sale of cosmetic products provided for a ban on the marketing of cosmetics containing ingredients tested on animals, but empowered the Commission to postpone the date of implementation for the Member States. Pursuant to this provision, the Commission replaced the date of the ban in the basic act with two times, the later one after 30 June 2002. Parliament in its Resolution argued that the Commission had exhausted the implementing powers conferred by postponing the ban for the second time and therefore called on the Commission to withdraw its draft implementing Decision and on the Member States not to vote in favour of the draft measure in the regulatory committee. As the directive was originally adopted under the consultation procedure, Parliament could base its resolution only on Rule 81 of its Rules of Procedure (RoP). This meant that the Commission was under no obligation to react at all to this resolution, not even to re-examine the draft.
measure or to address the Parliament with a formal answer. However the Resolution was taken into account in its substance and the Commission refrained from adopting the implementing measure.

**Passenger Name Records (PNR)**

The adoption of the Commission Decision on PNR\(^{26}\) in May 2004, based on the Data Protection Directive, was a response to the unilateral US decision on Aviation and Transportation Security adopted in the aftermath of the events of 11 September 2001. This US decision requires airline companies to provide certain public US institutions with direct access to or transfer of data concerning passengers and crew flying to, from or in the US. Even though these US requirements potentially conflict with Community and Member State legislation, the Commission finally gave the ‘green light’ to the transfer of PNR files in its Adequacy Finding Decision.\(^{27}\) In its Resolution\(^{28}\) based on Article 8 of the Comitology Decision, Parliament argued that the Commission was acting without a legal basis when permitting the use of PNR commercial data for public purposes, and stated on the other hand that the level of data protection in the US was not adequate. Because the Commission Decision entered into force despite its appeal to withdraw the draft implementing measure, Parliament decided to take the matter to court and brought in an action for annulment under Article 230 ECT.\(^{29}\) On 22 November 2005 the Court delivered an Opinion on this case, stating that such a matter does not fall within the scope of Community law but within the public security and criminal law. Consequently the Advocate General found that such activity falls outside the scope of the EU Data Protection Directive and proposed that the Court annul the Commission’s implementing decision.

**Fishmeal in Animal Nutrition**

Another case that prompted Parliament to react concerned the European Parliament and Council Regulation on animal nutrition,\(^{30}\) according to which the Commission is empowered to ‘modify or complete annexes to introduce any transitional measures’. On the basis of this provision the Commission, following a regulatory procedure,\(^{31}\) presented a draft implementing measure to allow for feeding of fishmeal to ruminants, after consultation with the Scientific Steering Committee, which issued several opinions confirming the absence of risks in using certain products in feeding stuff including animal proteins. The European Parliament in a Resolution,\(^{32}\) underlined its strong objection to any feeding of ruminants with animal proteins and asked for further scientific analyses. Parliament in this Resolution did not
accuse the Commission of exceeding the scope of powers delegated to it and consequently did not refer to Article 8 of the Comitology Decision but only to Rule 81 of its RoP. Despite the legally absolute unbinding effect of such a Resolution, the Commission actually did revise its draft proposal, integrating the remarks of the EP, and submitted it again to the Comitology Committee, which expressed a favourable opinion.

Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (Exemptions to the Phase-out of Lead and Cadmium)

According to the Council and EP Directive 2002/95 Member States must ensure that from 1 July 2006 new electrical and electronic equipment put on the market does not contain certain hazardous substances listed in this Directive, unless exempted under the Annex thereto. Following a regulatory procedure the Commission submitted an implementing measure to update the Annex of this Directive owing to technical progress. The European Parliament, however, did not receive any documents during this procedure, despite the provisions of Article 7 of the 1999 Decision. Therefore the Commission had to submit a new draft decision to the Committee, which was actually identical to the one which was already proposed. The European Parliament then adopted a Resolution based on Article 8 of the Comitology Decision on this (second) Commission draft implementing measure, claiming that the Commission did not act in accordance with the criteria established in the basic Directive when adding new exemptions and modifying existing ones in the Annex. It furthermore contended that the consultation process with the stakeholders which the Commission is obliged to undergo before amending the Annex was not transparent and exceeded the provisions expressed in the basic act (that is, there were some considerations of cost, not foreseen in the legislative act). The Commission therefore launched a new consultation process with the Scientific Committee, providing for a new risks assessment, and finally adopted the implementing measure.

Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (inclusion of the Brominated Flame Retardant DecaBDE)

Only three month after Parliament’s first Resolution with regard to the Commission’s power to adapt the Annex of Directive 2002/95 on the use of hazardous substances in electrical and electronic equipment, the proposal to exclude DecaBDE from the ban prompted Parliament to
adopt another Resolution in July 2005. The Commission proposed a draft implementing measure to allow the use of DecaBDE, despite the negative risk assessment of the Commission’s own Scientific Committee on Health and Environmental Risks. As the Comitology Committee adopted a negative opinion under the regulatory procedure the measure had to be referred ‘back’ to the Council. The EP in its Resolution based on Article 5(5) of the 1999 Decision contested the substance of the assessment, as ‘several studies’ have shown that safer alternatives to DecaBDE are available. Moreover Parliament claimed that the Commission went against the expressed will of the co-legislators insofar as Parliament and Council explicitly demanded further risk reduction measures on DecaBDE in a related legislative measure. The EP therefore called on the Council to oppose the proposal in order to prevent the exemption for DecaBDE. As the Council after expiration of three months could not find a majority vote in favour of or against the proposal, the Commission finally adopted the implementing act in October 2005. Following this decision, the EP took the course of seeking legal remedy at the Court of Justice, initiating annulment proceedings against the Commission’s implementing act.

ANALYSING THE EXERCISE OF THE RIGHT OF SCRUTINY OF THE EUROPEAN PARLIAMENT

In order to assess the efficacy of the ‘right of scrutiny’ as it stands in the 1999 Comitology Decision and to understand the EP’s behaviour in this framework, we will analyse the six Resolutions mentioned above from a legal, political and institutional point of view on the basis of the following horizontal issues: level of transparency and formalization of the implementing process, democratic control and accountability of the comitology system and Parliament’s use of the right of scrutiny to exercise ‘political pressure’ (for a summary see Table 9.2).

Table 9.2 Horizontal analysis of the EP’s right of scrutiny

<table>
<thead>
<tr>
<th>Democratic control/accountability</th>
<th>Safe Harbour</th>
<th>Cosmetics</th>
<th>PNR</th>
<th>Fishmeal</th>
<th>Electric Equipment</th>
<th>DecaBDE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transparency</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Political pressure</td>
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<td>X</td>
<td>X</td>
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The role of committees in the policy-process of the EU

Level of Transparency and Formalization of the Implementing Process

One of the main concerns of the EP in the European rule-making process has always been the level of transparency assured by the deciding institutions. In the framework of delegated powers, the issue is of special sensitivity insofar as implementing measures are discussed and approved in arenas where only representatives of European and national administrations are present, without inclusion of democratic directly accountable bodies. At present the EP as well as representatives of civil society are largely excluded from these discussions. Though comitology still has to struggle against the reproach/accusation/criticism of negotiating behind closed doors, in recent years information and reporting rights including the right to access to documents have been considerably improved by the Comitology Decision, inter-institutional agreements and also court decisions. The introduction of the register of comitology documents deserves special mention. This became operational from the end of 2003 and provides public access to (all) documents submitted to the EP. However, as seen in the case of hazardous substances, this transmission does not always work in practice. Despite its legal obligation, the Commission is still reluctant to forward all the draft proposals submitted to the committees members also to the EP (see also Chapter 8).

Though Parliament’s right of scrutiny is not a direct means to request documents and information from the Commission, it appears to be of crucial importance for transparency reasons (see Table 9.2). First of all, the six Resolutions did raise public awareness of the issue, thereby putting the Commission under pressure to open its reasoning and arguments for public discussion. Especially in the safe harbour and PNR cases, the EP stressed the importance of the right of information for citizens (enterprises and users of the airline companies) on administrative decisions taken at the European and the national level. In this regard, the EP position helped, particularly in the PNR case, to keep the attention of the European press on the issue. Also the Commission’s report on the non-respect of the right of information, triggered by the hazardous substances case, got a lot of space in European newspapers and brought some interesting facts and figures of the Commission’s handling of transparency into the spotlight. Though the Commission in the end did receive the draft proposal in the case in question, the EP used the right of scrutiny to publicly call on the Commission to submit a list of all cases of non-compliance with the transmission of documents. Following this request, the Commission issued a report in July 2005 in which it listed 50 cases of non-compliance within a period of 19 months. These 50 cases represented 2.5 per cent of the measures transmitted to the EP in 2005, a great majority of them concerning the
environmental domain. The Commission consequently committed itself to repeal any of these measures if the EP estimated (ex post) that it had exceeded its implementing powers.

Secondly, the right of scrutiny might be used to request more information from the Commission on the (scientific) data, reasons and motivations that lead to a certain decision of the Commission. Even though the Comitology Decision does not oblige the Commission to send background documents to the EP, the latter claims that the lack of access to such motivating documents might jeopardize its ability to exercise effective scrutiny. In this regard the hazardous substances (1) case is of special interest insofar as it includes an explicit statement by the EP that it considers the Commission to have exceeded its implementing powers ‘on the basis of the limited information available’. In this case the Commission affirmed in its Recitals that the use of the substances to be excluded from the ban was ‘unavoidable’, whereas the basic act mentions the lack of ‘technically or scientifically impracticable’ substitutions. In view of the fact that the basic act does not directly foresee justifications of the Commission on the reasoning of its decisions and insofar as the difference between ‘unavoidable’ and ‘impracticable’ can be hardly used to motivate an ultra vires act of the Commission, Parliament’s claims might appear exaggerated at first glance. However we take the view that Parliament legitimately claimed access to additional information, even though the decision as to whether a certain substance is unavoidable or not has been given into the hands of the Commission assisted by the Comitology Committee – which, if the legislators decide so to do, has to take into account or might even be bound by scientific expertise (Türk, Chapter 10; Vos, 1999). Parliament itself needs such information in order to assess whether the Commission actually did take into account scientific expertise or whether it took a decision contrary to scientific advice, as was actually the case in hazardous substances (2) (DecaBDE). Furthermore such transparency is crucial to allow for public discussion on the justification of the Commission’s motivations and lack of formal requirements in the decision finding, and also with a view to the possibility of claiming juridical review for private parties and stakeholders. Parliament’s right of scrutiny is thus of essential importance in monitoring the Commission’s duty to respect information and transparency rights and, if foreseen, consultation obligations. Final assessment on the substance of whether a certain measure is justified in the light of the general guidelines and principles set out in the basic act or the treaty itself should, however, be up to the ECJ and not in the hands of the legislator itself.

The analysis of Parliament’s claim with regard to the lack of transparency in the consultation process in the case of the hazardous substances (1) leads to the same conclusion. Undue consultation about costs led Parliament to
raise doubts about the basis of the draft decision – insofar as consultation about costs was not directly foreseen but could have influenced the stakeholders’ opinion. As the basic act does not give any indication of how this consultation has to be carried out, final assessment of whether the Commission acted within the powers conferred on it or not would be up to the ECJ. Parliament’s claims for increased transparency of this process, however, appear to be of utmost importance to make information available also to the public, in the name of democratic accountability and as a prerequisite of possible legal action.

Thirdly, the requirement of Article 8 for the Commission to inform the EP of its intention to take on the EP’s resolution does contribute to a formalization of the process and ‘politically obliges’ the Commission to put forward reasons and justification for its decision. In the PNR case, the Commission informed Parliament of its intentions by Commissioner Bolkenstein providing oral explanations to the plenary of the EP. Written explanations were further given in a letter from the President of the Commission to the President of the EP.”44 Also, in the safe harbour case, the Commission subsequently fulfilled its obligations under the right of scrutiny by introducing a new Recital 12 in its Safe Harbour Directive stating that it did actually adopt the measure, as Parliament did not establish that it would exceed its powers. As this amendment was included almost a year after the Directive was adopted, the added value and interpretative guideline of the recital is rather questionable and can hardly be explained with transparency reasons, but it still shows the Commission’s commitment to react formally to Parliament’s positions and thereby to contribute to the formalization of administrative rule-making.

**Democratic Control and Accountability of the Comitology System**

Parliamentary control usually means political control, but Article 8 of the Comitology Decision provides for legal control. It is designed to make the Commission aware of a possible exceeding of its powers in the adoption of a particular implementing act, but the EP, reflecting its political nature, has used it as a means to make political statements. Against this background we want to show in what way the EP has evaluated the political opportunity of the Commission’s choices, beyond the strict legal control on Commission powers. In this framework the scope and the nature of the implementing measures are important. The EP had and still has concerns mainly for those measures that, even if classified as ‘technical’, have a sufficient real or a potential legislative impact on the matter to be ruled of a quasi-legislative nature.
As indicated in Table 9.2, in all six cases that we looked at, the scope and the nature of the measures directly affect the rights of citizens, notably in the safe harbour and PNR cases. In these two cases, the EP was perfectly entitled to exercise its parliamentary control, even if in both cases the Commission rejected the EP position and even if, legally speaking, the EP acted beyond its right of scrutiny. The two implementing measures were of a quasi-legislative nature or at least had a strong legislative impact. In the PNR case, in particular, the EP was perfectly entitled as an institution representing citizens to point out that dealing with this issue through an implementing measure could not guarantee an adequate level of protection for the rights of EU citizens. Parliament contested the political balance found by the Commission between citizens’ fundamental right of privacy and the need to exchange personal data in order to fight terrorism.45 In this specific case the reason to act was to respond to the request of the US authorities to reinforce the level of national security, an action which falls more in the domains of justice and security. This line of reasoning has been accepted in the opinion of the Advocate General in charge of the case at the Court of Justice.

In the case of DecaBDE, the EP supported those Member States represented in the committee and the scientific experts who expressed a negative opinion on the inclusion of this substance. Despite the inability of the Council of Ministers to find a majority to oppose the implementing measure, it seems clear that this case raises some doubts in terms of accountability and democratic control, even if the Commission was empowered to adopt the implementing measure, according to Article 5 of the 1999 Comitology Decision.

In the other cases, the nature and the scope of the implementing measures deal mainly with levels of consumer protection. The cosmetics case concerned consumers’ protection but also animal rights and health. Also in fishmeal the EPs concerns were very clearly and exclusively about the protection of consumers’ health, motivated by the political sensitivity of the measure. The EP saw a need to intervene, knowing that the Commission did not formally exceed its implementing powers but doubting the Commission’s motivations with regard to the scientific expertise undertaken and the practical availability of new technology.

On the basis of the individual analyses of the EP resolutions it can be argued that this ultra vires control is actually not designed to be used effectively because it conflicts with Parliament’s political nature. All the cases where the EP adopted a resolution so far were in the sensitive field of consumer protection, fundamental rights, environmental policy and public health, areas that are per se considered to be more of a political nature, where the regulation of mere technical details very often has broader political
effects. Expressing itself on the content, going beyond the formal limits of the ‘right of scrutiny’, the EP has fully fulfilled its role of a democratic institution representing European citizens.

Parliament’s Use of the Right of Scrutiny to Exercise ‘Political Pressure’

Using the right of scrutiny as a way to exercise a sort of ‘political pressure’ on the Commission and on the Council of Ministers to protect or to extend the EP institutional prerogatives is a ‘modus operandi’ quite often used by the EP to strengthen its role in the domains where the other institutions have a tendency to neglect it, or in those cases where it is potentially marginalized (see Table 9.2). The domain treated by the measure could be used by the EP to express its position on a specific area in more general terms, as the EP still needs to ‘gain some ground’ considering that in some areas (international agreements, commercial policy, and so on) its role is still limited.

The PNR case shows clearly that the EP used this issue to express its position more generally on relations with a third country and in an area (international agreements) where it has limited powers – according to the EC treaty, the EP is simply consulted by the Council on the content of the agreement and the Commission has the power to negotiate any kind of agreement. This wider political goal explains why the EP disputed the choice of legal basis for the international agreement with the USA. Moreover, it brought attention to the importance of the matter dealt with by the implementing measure, directly linked to fundamental rights, an area in which the EP recently received new competences.

In the same way the case of fishmeal in animal nutrition shows that the Resolution of the EP on the question of risk assessment exercised a strong pressure on the Commission, which in the end partly supported the EP position, even if scientific evidence did not point to any risk in using fishmeal. The Commission’s main objective was to prevent a ‘new BSE case’ and, even if it did not totally exclude the use of this nutritional substance, it limited the use under some conditions, taking into account the EP’s concerns. In this specific case, the Commission’s behaviour was clearly determined by the sensitivity of the issue. The Commission decided to follow the European Parliament’s opinion, even though its Resolution was not based on a ‘proper’ right of scrutiny under Article 8 of the Comitology Decision, because of political considerations and pressure put on the Commission.

The case of the exemption of certain hazardous substances in electrical and electronic equipment shows how the EP used the non-respect of the transmission of documents as a means to put the Commission under pressure and to show how the ‘European government’ takes decision without informing citizens. The EP managed to oblige the Commission to
communicate all other cases of non-respect of the right of information. This affair got a lot of space in the newspapers. So the Commission, under this pressure, committed itself to modify its internal rules of procedure in order to improve the control of the respect of this obligation to the benefit of the EP. This case shows need for transparency and procedural compliance to allow for effective scrutiny.

In the DecaBDE case, it is very difficult to understand the Commission’s behaviour. Despite the opposition of the Member States in the committee, which showed at least a majority of Members States against the use of this substance, despite the negative opinion of the scientific experts, despite the EP resolution and in the face of the inability of the Council to take a decision, the Commission did not modify its position. The inability of the Council to express a position, owing to a blocking majority, showed that even the other branch of the legislative authority was not totally convinced of the case to allow this substance. Even if legally speaking the Commission was authorized to adopt this implementing measure, politically it seems a very dangerous choice because scientific evidence proved that this substance could be dangerous, and Member States which opposed the proposal in the committee and in the Council will find it politically difficult to comply with this measure.

In fact the Resolution on cosmetics is the only Resolution to date which states clearly, simply and without objecting to the political content of the draft implementing measure that the Commission exceeded its powers under the basic act. In this particular case of proposing an implementing measure as a ‘quick-fix short-term solution’ for having an interim regulation until the Conciliation Committee found a compromise on the adoption of the legislative proposal to amend the same basic act on which the implementing measure is based, it is questionable whether it was useful for the Commission to present an implementing act, even only for an interim period, as the issue was in the hands of the legislators anyway. That the Commission still submitted a proposal after the time of empowerment might be seen as an attempt to see whether Parliament would finally tolerate this third postponement – obviously without any legal basis – only for this interim period. The fact that Parliament adopted a resolution even though it was not legally binding at all showed the Commission that Parliament took the issue quite ‘seriously’. Also the explicit reservation ‘to take the necessary measures to protect its prerogatives in the Court of Justice’ might have influenced the Commission’s decision not to proceed with the implementing measure. As we have seen, this ‘early warning’ to take further and more rigorous legal action is not just a ‘theoretical threat’ but Parliament did actually do so in the case of PNR and hazardous substances/II by bringing an action for annulment. Also, this early warning does put pressure on the
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Commission but is, as we have seen, not always sufficient to hinder it from actually adopting the measure. Notably the EP in its last three resolutions refrained from making a formal reservation to take further legal action, which in fact does not mean that it would take the measure less seriously, as it actually did go to court also in the DecaBDE case.

CONCLUSIONS

On the basis of the empirical analysis presented above, we can draw a number of conclusions about the involvement of the EP in the area of comitology. The first point to be made is that the fact that not more than six resolutions were adopted in the first six years (1999–2005) of the new procedure coming into force demonstrates that the implementing system appears to work quite smoothly at European level. Looking at the overall figures it is also evident that the EP is ‘overloaded’ by a lot of information on implementing measures which do not need a ‘parliamentary control’. However an inference that all the other implementing acts to which the EP did not react would be of a mere technical nature is not admissible either. Owing to an enormous overload of information and the lack of filtering mechanisms, the EP can hardly get hold of ‘hot issues’ at implementing level. The cases of safe harbour, PNR and cosmetics are examples of the EP reacting to external pressures. Generally speaking, we can see that lobbies use the channel of the EP to influence, or at least to have a voice in, some areas where decisions are taken in an arena such as the comitology committees in which their influence is otherwise limited or marginal.

Under Article 8 of the Comitology Decision the EP is constrained to exercise a kind of control which does not correspond with its vocation and its role as a legislator and political institution. Comparing the Parliament’s ultra vires control given to it by the Comitology Decision with the possibility of adopting a Resolution on implementing acts under its own rules of procedure, we note that no crucial difference in its effects or its substance can be established. Out of the six Resolutions only two were taken into account by the Commission, surprisingly those two based on Article 81 of the EP’s internal Rules of Procedure. Though not designed to be a tool for political control, the EP in fact and rightly also uses the right of scrutiny, legally limited to an ultra vires assessment under Article 8, as such in practice. Hence, both can be seen as a ‘institutionalized threat’ to put political pressure on the EP, including the announcement to bring an action for annulment, as a Resolution adopted under the Comitology Decision does not prevent the Commission from going ahead either.
The right of scrutiny does contribute to more formalization and with that to greater transparency, fairness and efficiency of the process. Though the right of scrutiny is not a direct means/tool to request documents, the EP in practice claimed that it could not exercise its supervisory duties owing to limited information given by the Commission. Not only was this the case where Article 7 (1999/468 Decision) gives concrete information rights or where Article 8 (1999/468 Decision) provides for a reaction of the Commission, but also in more general terms all the EP’s resolutions raised public awareness and obliged the Commission to put forward information on data and reasons that led to a certain implementing act, thereby enabling the EP itself as well as private parties and interest groups to exercise democratic control and enhance accountability of executive acts.

The impact of the EP’s right of scrutiny of Commission behaviour in managing the committees is difficult to assess without empirical analyses but in any case has to be linked to the nature of the implementing act. For measures with more legislative impact we could expect a different approach by the Commission on negotiations with the Committee because Parliament’s position might lead the Commission to reopen the negotiations with the Member States (MS), and MS supported by the EP’s approach could be motivated to use this to put political pressure on the Commission and thereby enhance bargaining in the committee’s discussions. On the other hand technical measures that need a very high level of expertise are less likely to come under the control of EP scrutiny and in this case the Commission would have more legitimacy to contra argue the EP position based on scientific analysis/reports. This would self-evidently enhance deliberative arguments in the Committee’s negotiations. The EP did not provide additional arguments or scientific expertise in its Resolutions. Even in the case of fishmeal it only expressed concerns about the Commission’s choices and called for further scientific assessment.

Parliament’s right of scrutiny appears to have considerably different implications under each of the three comitology procedures. Matters dealt with under the management procedure are normally those with budgetary implications or of a more technical administrative nature (such as research, education and cultural programmes) with less leeway for the Commission. They are therefore generally of less interest to Parliament for control purposes. All the cases where the EP saw a need to intervene were under the regulatory procedure, with the exception of the two cases based on the Data Protection Directive (management procedure).

The current implementing system at the European level does not allow for effective scrutiny. The main problem is the lack of a systematic distinction between implementing acts with a possible political impact and those of a mere executive nature. For the latter, the right of scrutiny as it stands, with
only an *ex post* juridical control, should be enough. Since Parliament has *locus standi* as a fully privileged actor under the Article 230 procedure, and can thus bring an action not only to defend its own prerogatives but also in the name of the citizens, judicial review can be regarded as sufficient for mere technical measures.

In order to remedy the institutional imbalance under the current Comitology Decision the Commission has presented a new proposal\(^4^6\) to modify the 1999 Decision. The new proposal would give Parliament full equality with the Council in the supervision of measures to implement acts adopted by co-decision. Both the Council and the European Parliament would, regardless of a positive or a negative opinion of the Committee, be given an extended right of oversight going beyond *ultra vires* issues. For an overview on which way of cooperation was agreed upon under the 2006 reform by introducing a new regulatory procedure with scrutiny, see below. However, in this proposal both supervisory bodies could ultimately be overridden by the Commission. Following the rejection by two MS of the Constitution which would have introduced a hierarchy of legal acts and a new system of implementing acts, discussions on the new Commission proposal have been relaunched.

In our view the approach proposed by the Commission is perfectly coherent with the notion of a separation of powers and a functional understanding of the institutional checks and balances at European level inasmuch as the legislative power should not participate in, but only supervise, executive rule-making. The tenuous supervision granted to the legislators would also be democratically and politically acceptable as long as only executive tasks are delegated and they do not entail any political impact, thus guaranteeing the predictability and accountability of the executive (the principle of legality). In this perspective, indeed, it would appear that the ‘problem’ of the current 1999 Decision is not so much that Parliament is granted too few supervisory powers as that the Council is granted excessive participation in the adoption of merely technical implementing acts.

This does not of course mean that there would be no need to further increase recent improvements to rationalize and democratize comitology or modify not only parliamentary but also Council involvement and mode of delegation for certain areas of legislation by establishing a distinction between ‘quasi-legislative’ implementing acts with political impact and those of a mere executive nature. For Commission acts adopted under ‘political discretionary power’, a new way of control by the legislators and a system of cooperation and coordination within the two legislative branches has to be found. Though politically hardly possible to realize, from a legal institutional point of view only the EP and the Council acting together
The EP’s scrutiny of Commission implementing acts

should have the ability to call back a measure as an expression of the ‘co-legislative union’.

Only such a distinction between technical and ‘quasi-legislative’ measures would allow for a fair balance between the supranational elements of the Union, suggesting a more independent role for the Commission’s executive tasks on the one hand and the legislative branch’s interest in maintaining control over the political content of implementing acts on the other. In the same line Parliament itself stated in its 1984 Report that it is not interested in regulating or calling back issues on mere technicalities: ‘The technical adaptation committee system is contrary to the spirit of this provision to the Treaty system and to the general principle common to the laws of the Member States that the legislator must not interfere with the exercise of delegated power.’ This issue was of crucial importance for reaching a compromise in the negotiations of the 2006 reform where a definition of ‘quasi-legal acts’ was introduced by adding a new paragraph 2 to Article 2 of the Comitology Decision. The Reform however limited itself to a definition of quasi-legislative acts only for the application of the newly introduced regulatory procedure with scrutiny, and does not amend the currently existing procedures. It thereby defines as quasi legislative acts those that amend non essential elements but leaves the application of essential elements outside its scope (see below).

Apart from having to find a new system for implementing measures with ‘legislative content’ based on co-decided acts, in view of increasing scientification and technocratization of implementing rule-making, new mechanisms will be needed to further enhance and ensure the democratic accountability and legitimacy of the implementing system as a whole:

- political control mechanisms of the EP could be enhanced by providing better ex ante information to the EP by giving it the right to put questions and right of inquiry
- if the EP and the Council see a need – for more politically controversial measures – to ensure that the executive acts within the political will of the legislators, they could make greater use of sunset clauses, that is, to delegate powers only for a limited period.

For all that the prerequisite is information and transparency. But to guarantee the institutional balance and also a certain level of separation of powers at the European level the call for a certain independency of the Commission should be taken heed of, as ‘it’s not in the long term interest of EU citizens that the EP be involved in the day to day adoption of regulations’ (Hix, 2000). Specialized technical expertise, knowledge of the market conditions and other national circumstances and traditions within the Member States
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as well as independent long-term planning outside political (party) thinking are crucial for the proper functioning of the European integration process, ensuring good governance and an adequate level of regulation for citizens and industry.

To some extent, the issues have been addressed by the 2006 reform of comitology. The new decision\(^7\) seems to ensure better accountability of the system through increased parliamentary control. The reform had been adopted following the failure of ratification of the Constitutional Treaty, which would have created a more balanced system for both the EP and the Council to control the Commission’s delegated powers. Another development that influenced the reform of comitology was the Lamfalussy process in the area of financial services regulation. A crucial innovation brought about through the Lamfalussy process was the introduction of ‘sunset clauses’ in the legislation, putting a four-year time-limit on the duration of the delegation of implementing powers to the Commission. At the end of 2005 the EP managed to exercise a great pressure on the Council because of its resistance to extending the time-limit clause for the financial service legislation.

Going through the detailed procedures contained in the new Decision is beyond the limits of this chapter. What we can provide here, rather, is a summary of the key aspects of the reform in respect of the reinforced role of the EP.

- the addition of a new regulatory procedure with scrutiny for quasi-legislative acts arising from co-decided basic acts
- the submission of draft implementing measures to both Council and EP after a positive opinion has been received from the comitology committee
- the submission of draft implementing measures to the Council after a negative opinion or no opinion has been received from the comitology committee
- the submission of draft implementing measures to the EP if the Council intends to permit the adoption of the measure after a negative or no opinion has been received from the comitology committee
- the power of the EP, limited to the legal grounds of the measure, to scrutinize their substance, rather than (as in the normal regulatory procedure) only the scope
- the right of the EP to veto the adoption of those measures that are submitted to it under the new procedure
- an undertaking from the EP to refrain from requiring new legislation to feature a time-limit on the duration of the delegation of implementing powers to the Commission
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- the need for a new inter-institutional agreement between Commission and EP to provide new provisions on transparency, transmission of documents to the EP and introducing a linguistic regime.

At first glance this reform could efficiently guarantee a parliamentary control because the EP has a sort of right of veto instead of a simple legalistic control. Even though, at the time of writing, the new procedure had not yet been tested, several questions could be raised about the impact the new system is going to have on the role of Parliament in comitology. First of all, one needs to recognize that the 2006 reform not only leads to a more lengthy process of adopting implementing measures, but may indeed also prolong the legislative procedure as the institutions wrangle over the choice of right procedure in cases where the law does not provide a clear-cut answer. And even after both legislative act and implementing measures based on it have been adopted, the possible argument about the choice of the correct procedure may not be settled, as the party feeling aggrieved may seek a ruling from the ECJ to overturn the decision.

The discussion of the potentially contested nature of the new category of quasi-legislative measures brings us to the wider question of the ‘winners’ and ‘losers’ of this reform. The immediate response to this question might be to regard the EP as a winner: it was the EP that forced the issue on to the agenda and that achieved its aim of a right to scrutinize also the substance of those implementing measures having a legislative impact. Through a sustained and fairly well-coordinated campaign the EP managed to receive a considerable increase in its oversight over the Commission’s delegated powers. However, at second sight there also appear some weaknesses in the EP’s position. First of all, it only received the demanded equality with the Council in that part of the procedure that follows a positive opinion from the comitology committee. If and when a comitology issues either a negative or no opinion, the EP is a distinct ‘second class’ citizen to the Council: if the Council follows the comitology committee in objecting to the draft measure, the EP is not consulted at all: if the council considers adopting the measure, the EP is only consulted after the Council. Both symbolically and practically this falls some way short of having the same role as the Council, which had been the ultimate objective of Parliament.

Parliament also paid a potentially high price in order to achieve this reform, having given up the instrument of sunset clauses for the delegation of implementing powers. As we have seen from the way in which the EP used its veto over the extension of the delegation to the Commission in the area of Lamfalussy, the sunset clauses proved to be a powerful tool to generate leverage in the inter-institutional relations with Council and Commission. Having now undertaken to give up the use of this instrument, the EP has
lost an important weapon in its armoury. The combined effect of these developments – legal uncertainty over the use of the right procedure and less control over the Commission through sunset clauses – may be a greater hesitation by the EP to agree to the delegation of implementing powers in the first place.

In sum we can conclude that the 2006 reform of the comitology procedures is more than just an amendment of the 1999 Decision. It promises huge changes to the way in which the delegation of implementing powers to the Commission is controlled by Council and Parliament. In particular, it puts the EP on the map of scrutiny of how the Commission is using such delegated powers in a big way, and therefore promises not just significant legal changes but possibly also a degree of culture change when it comes to the way in which comitology works. But just as it accommodates the demands of Parliament to a large extent, it also raises many questions concerning the operation of the new procedure. As with previous instances of reforms of comitology, while some long-standing problems are being addressed by the new reform, new questions are being posed at the same time – questions that will only be answered once the new regulatory procedure is put into practice. Time will tell whether this reform of comitology has solved the problems or whether the inter-institutional dispute over the legislative control of delegated implementation has only been postponed.

NOTES

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1. Based on some 300 legislative acts adopted by the Council and the EP a year; around 3000 implementing acts are created by the Commission.
2. Case 25–70, Einfuhrstelle v Köster.
3. For an overview of the academic discussion on the question of the legitimacy of delegated rule-making via Comitology committees see Savino (2005).
6. Ibid.
7. Also see, for example, Commission proposals of 5 June 2002 (COM (2002) 275final) on better law-making.
The EP’s scrutiny of Commission implementing acts


15. See note 9.
25. Only the last 7th amendment has been adopted pursuant to Article 95 ECT and thus under the co-decision procedure.
27. As European airlines do not fall under the jurisdiction of the US bodies referred to in the Safe Harbour Decision (see above: first case), a special adequacy finding for PNR had to be adopted. See Pérez Asinari and Pouillet (2003).
29. Case C-317/04 and C-318/04. See also Note from the Council legal service 11876/04 dated 6 August 2004. In view of this appeal under Article 230 the request for the Court’s opinion under Article 300 (6) from 21 April became null and void.
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35. Ibid.
41. This is different in the area of financial services, where contributions from public consultation with stakeholders and from national regulatory bodies and main actors are provided to the Commission prior to the submission of the implementing measure to the ‘comitology committee’, with a very high level of transparency. This refers to the so-called ‘Lamfalussy procedure’. See, for example, Vaccari (2005).
42. Case T-188/97 Rothmans International BV v Commission; Case T-111/00 BAT v Commission.
44. Letter from President Prodi to President Cox on the draft agreement between the EC and the USA on the transfer of passenger data, D (2004)3398.
45. The Commission thereby considered ‘that adoption of the decision and consequent signing of the agreement with the US was for passengers and for the protection of their data much better than leaving the question in a complete legal void which was the only alternative’ (answer to a written information request from the Commission).
INTRODUCTION

The evolutionary development of EC policy implementation has been driven by practical necessity and political arrangements rather than designed around any preconceived constitutional model (Hofmann and Türk, 2006). The huge volume of legal acts to be adopted, scientific and technical uncertainty in many areas and the need to deal quickly with unexpected circumstances made it necessary for the Council to confer implementing powers on the Commission on a large scale. At the same time the Member States wanted to retain some influence over the exercise of implementing powers by the Commission. Community acts delegating implementing powers to the Commission therefore provided that the Commission had to consult committees comprised of representatives of the Member States before adopting the necessary implementing rules.¹ This system was soon referred to as ‘comitology’.²

The prominent role which comitology occupies in the implementation phase has confronted the Court of Justice with a multitude of legal problems, such as the definition and scope of implementing powers and the legitimacy of comitology committees to name just two. The answers to these questions were often not contained in the provisions of the E(E)C Treaty, but had to be developed by the Court of Justice. This chapter will discuss the case-law of the Court of Justice in the area of comitology in order to elucidate how the Court has regulated comitology and thus influenced the potential of comitology committees as arenas for interplay between formal and informal implementation procedures. It will therefore start by setting out how the Court of Justice helped to develop the constitutional framework for comitology, now contained in Article 202 third indent EC. The following section will consider the case-law of the Court on the exercise of implementing powers by looking at the substantive limits set by the Court
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on implementing powers, the procedural requirements for their exercise and
the Court’s treatment of transparency.

CONSTITUTIONAL FRAMEWORK

Article 211 EC and Köster

In the 1960s, when the first comitology committees and procedures were set
up, a gap had emerged between the existing constitutional setting and the
practice which had developed in many policy areas, particularly agriculture.
The original Article 211 EC appeared inadequate to serve as legal basis for
the more complex legal and practical arrangements for the implementation
of EC legislation at EC level. The Court of Justice sanctioned the existing
comitology regime in its famous Köster ruling. The Court held that

both the legislative scheme of the Treaty, reflected in particular by the last indent
of Article 155 [now Article 211], and the consistent practice of the Community
institutions establish a distinction, according to the legal concepts recognized in
all the Member States, between measures directly based on the Treaty itself and
derived law intended to ensure their implementation.

On this basis, the Court ruled that only the essential elements had to
be laid down in the legislative act in accordance with the procedure laid
down in the Treaty; the implementation measures were not subject to this
procedure. They could be adopted either by the Council itself or by the
Commission, if the Council delegated it the power to do so. The Council
could make the powers it delegated in the legislative act to the Commission
subject to certain requirements. The Court also considered the management
committee procedure legitimate since the committee had no decision-

making power. The Court did not merely endorse the existing practice
born out of necessity, but elevated it to constitutional status by comparing
it to the distinction in the Member States between legislation and imple-
mentation, usually a crucial constitutional element in the balance between
government’s and parliament’s power. Köster thereby helped to pave the
way for and foreshadowed the introduction of Article 202 3rd indent ECT
as legal basis for the comitology regime.

Article 202 Third Indent ECT

With the advent of the Internal Market and the substantial increase in EC
legislation, which in turn would lead to a considerable expansion of EC
implementation under comitology procedures, the Member States attempted to reduce the gap between constitutional provisions and practical reality by adding through the Single European Act of 1986 a new third indent to Article 202 ECT. This provision constitutes the currently applicable legal basis for implementation under the EC Treaty. It states that implementing powers can only be exercised where they are conferred in a basic act, in which the Council shall confer implementing powers on the Commission, but allows the Council in specific cases to retain (that is, to delegate to itself) implementing powers. Article 202 third indent ECT also makes it clear that the Council can impose certain requirements on the Commission for the exercise of such implementing powers in the form of rules and principles laid down in advance by a Council decision. This means that the Council can impose on the Commission the obligation to consult comitology committees before adopting any implementing measures.

Despite its potential for a comprehensive regulation of the implementation process, Article 202 third indent ECT has only been used by the Council to lay down rules that would generally confirm the implementation structures which had developed organically over time and were mainly designed to protect the interests of Member States in comitology. It has therefore fallen to the Court of Justice to interpret those provisions and, where necessary, fill the gaps.

**Basic act as authorization**

Article 202 third indent ECT provides that ‘the Council … shall confer on the Commission in the acts which the Council adopts, powers of the implementation of the rules which the Council lays down’. The exercise of implementing powers for the adoption of legal acts requires therefore an authorization in a basic act. The Court has made it clear that appropriations made available in the budget for a particular course of action are not sufficient as basis for the adoption of implementing acts by the Commission, even though Article 205 ECT grants the Commission the power to implement the budget on its own responsibility.

As Article 202 third indent ECT only refers to the conferral of implementing powers in acts which the Council adopts, it is less clear whether this provision also applies to acts adopted in the co-decision procedure by the EP and the Council. This has been put beyond doubt by the recent judgment of the Court in *Commission v EP and Council*. The Court found that ‘Article 202 EC must be held to refer both to measures adopted by the Council alone and to measures adopted by the Council together with the Parliament under the co-decision procedure.’ Even though the argumentation leaves a lot to be desired, the opposite result would have led to unwelcome practical consequences. Had the Court decided that the term ‘Council’ in Article
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202 ECT did not include acts adopted by the EP and the Council in co-decision, the Council and the EP would lack a legal basis for the conferral of implementing powers to the Commission.

Concept of implementing powers
The Köster case established the rule that the basic act must lay down the essential elements. Only the establishment of these elements should be adopted in accordance with the procedure laid down in the respective Treaty article. The provisions implementing the basic regulations ‘may be adopted according to a procedure different from Art. 43 [now Article 37]’, which was the legal basis for the adoption of the basic act in question. The judgment did not specify the essential elements that were to be laid down in the basic act. In Germany v Commission the Commission had adopted implementing measures which obliged Member States to impose sanctions on persons who had committed irregularities while applying for financial assistance available under EC law. The Court held that such rules could not be characterized as essential for the common organization of the market established by the basic regulations, as ‘[s]uch classification must be reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy’. This was not the case for sanctions which only supported such basic rules insofar as they ensured the proper administration of the funds. A similar example of the Court’s generous approach to the conferral of implementing powers can be seen in the case European Parliament v Commission. In this instance, the Council’s basic regulation laid down rules on production, labelling and inspection for the protection of organic farming. The Council empowered the Commission to add an annex comprising an exhaustive list of substances which organic products could contain. Although the Court ruled that the Commission had actually not included genetically modified micro-organisms in the list, it did indicate in an obiter dictum that, since such items could not be characterized as essential elements, the Commission could include them by means of implementing measures. This creates the impression that the Court leaves it to the Council to determine what might be essential, since this includes a political evaluation, which the Court is reluctant to make. Consequently, the Court has given the concept of implementation a wide scope and defined it as measures ‘however important they may be’ which implement those essential elements laid down in the basic act. The Court defended this approach by holding in France v Ireland that ‘wide powers of implementation are all the more justified in the present case in that they must be exercised in accordance with the “Management Committee” procedure, which allows the Council to reserve its right to intervene’.
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This generous approach to the definition of implementing powers, allowing the Council to confer wide powers to the Commission subject to the control of Member State representatives in comitology committees, has, however, operated to the detriment of the EP, which despite a considerable increase in its legislative powers was, at least until the Comitology Decision of 1999, not given any powers in the comitology process. The Court sanctioned this trend by holding in European Parliament v Council\(^\text{22}\) that a basic act could contain not only the essential elements of a subject matter but also at the same time provisions which are implementing in nature. Consequently, as the provision, although part of the basic act, was classified as implementing in nature, it could be modified according to a procedure different from the one followed for the adoption of the basic act\(^\text{23}\) and could exclude the EP. The European Parliament also complained that the Council had changed the Commission’s proposal for a IIb committee procedure in the sense of the First Comitology Decision\(^\text{24}\) by adopting a IIIa committee procedure for the implementation by the Commission of the TACIS programme without again consulting the European Parliament. The Court approved the Council’s approach by taking the view that ‘the overall balance of the powers allocated to the Commission and the Council is not decisively affected by the choice between the two types of committee at issue so that the amendment to the Commission’s proposal is not substantial’\(^\text{25}\). A fresh consultation of the EP was therefore not necessary. This demonstrates some willingness by the Court to go along with the practice of the Council, which aims to considerably reduce the participation of the EP.

**How specific must the authorization be?**

Even wide implementing powers can only be conferred by virtue of a provision in the basic act delegating such powers to the Commission. Here the question arises as to what kind of rules apply to such conferral, in particular how specific the enabling provision needs to be. The possibility of conferring wide powers of discretion and action seems to allow for a fairly abstract and general enabling provision. This was precisely the approach taken by the Court in Germany v Commission\(^\text{26}\). The enabling provision did not mention the possibility of imposing sanctions. Therefore the German government was of the opinion that, even if the Commission could be empowered to require that sanctions be imposed, the enabling provision was too general and did not have the effect of conferring the power to adopt sanctions. The Court rejected that argument and held that

since the Council has laid down in its basic regulation the essential rules governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power;
for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act.27

One must however acknowledge that this ruling is consistent with the Köster case, where the implementing measure also went beyond the actual wording of the enabling provision, which was nevertheless held to provide a sufficient legal basis for the implementing measures adopted by the Commission.28

The dictum in Germany v Commission is difficult to reconcile with the Court’s earlier ruling in Central-Import Münster, where it took a more restrictive approach by stating that that ‘for such an enabling provision to be valid, it must be sufficiently specific – that is to say, the Council must clearly specify the bounds of the power conferred on the Commission.’29 The Court held the enabling provision to be sufficiently precise since ‘those provisions thus determine the situations in which protective measures may be taken, the criteria for assessing whether such a situation exists, the kind of measures to be adopted and the period of their validity.’30 It might well be that these four matters constituted the ‘essential rules governing the matter in question’;31 it is, however, apparent that the rules governing the enabling provision differ in the two cases. While it accepted in Germany v Commission that ‘a provision drafted in general terms’ was sufficient as authorization, in Central-Import Münster the Court demanded a sufficiently specific enabling provision, which the Court defined as one that clearly specified ‘the bounds of the power conferred’. This was precisely the argument put forward by the German government in Germany v Commission, which was rejected by the Court.

Most recently, the Court32 has imposed more rigorous requirements in a case which concerned the delegation of implementing powers to the Commission to modify the list of vitamins and minerals which can be used in food supplements set out in Annex I of Directive 2002/46.33 The Court pointed out that

when the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria … because otherwise it may confer on the delegate a discretion which, in the case of legislation concerning the functioning of the internal market in goods, would be capable of impeding, excessively and without transparency, the free movement of the goods in question.34

It is submitted that this dictum does not apply in the area of the agricultural market regimes, but concerns instances where the Commission is given power to modify the legislative act by way of implementing measures.
To the Commission or the Council itself

Article 202 third indent ECT makes it clear that implementing powers shall be conferred to the Commission and only in specific cases may the Council reserve such implementing powers to itself. In Council v Commission the Court held, however, that when the Council reserves the right to exercise implementing powers directly it ‘must state in detail the grounds for such a decision’. As Commission v Council demonstrates, the demands by the Court to comply with this requirement are not too strenuous. The Court found the considerations for conferring implementing powers to amend measures relating to border checks and visa applications, which had been incorporated under Title IV EC as part of the Schengen acquis, ‘general and laconic’. All the same, the Court held that ‘assessed in their proper context, they are such as to show clearly the grounds justifying the reservation of powers to the Council and to allow the Court to exercise its power of review.’ The Court took into account that during a transitional period Title IV EC provided the Council with a stronger role reflecting the specific nature of the area. Moreover, both regulations entrusted the Council with the implementation of ‘clearly circumscribed matters’ and contained a review clause, in accordance with which a conferral of such implementing powers to the Commission will be considered after three years.

Choice of comitology procedure

The Comitology Decision 1999 (Council, 1999) set out in Article 2 criteria for the choice of comitology procedure in the legislative act conferring implementing powers. The Court found in the LIFE case that, even though legislative acts conferring implementing powers are bound by the principles and rules contained in the Comitology Decision 1999, the criteria laid down in Article 2 of that decision were not intended to be binding. Therefore, when they adopted Regulation 1655/2000 and conferred powers on the Commission to grant financial assistance for certain types of environmental projects, the EP and the Council were not required to stipulate that the Commission follow the management procedure, as foreseen in Article 2 of the second Comitology Decision, but could instead opt to impose the regulatory procedure. Nevertheless, the Court found that the criteria laid down in Article 2 of the second Comitology Decision were not without legal effects, in that they subject the Community legislature, when it departs from those criteria, ‘to the obligation to state reasons on that point in the basic instrument adopted by it’. The Court was not convinced that Regulation 1655/2000 contained an adequate justification for the imposition of the regulatory procedure. It should be noted that with the amendment of the Comitology Decision 1999 (Council, 2006) this ruling only applies now to
Article 2(1) of the Comitology Decision 1999, as amended, as Article 2(2) is drafted in mandatory terms and is therefore binding on the legislator.44

Most recently the Court has shed more light on the distinction between the application of the management procedure and that of the regulatory procedure in what is now Article 2(1) of the Comitology Decision 1999, as amended. In the Forest Focus case45 the Court pointed out that the scope of the management procedure was limited to ‘first, measures of individual application adopted for that purpose … and, second, measures of general application closely linked to them and part of a framework sufficiently developed by the basic instrument itself’.46 The Court found that while the Community legislator in the LIFE case ‘defined very precisely the principles under which the Commission … could approve projects to receive aid, when it adopted the Forest Focus regulation it merely created a wide and general framework for the scheme’.47 Consequently, even though the Forest Focus regulation constituted a Community programme, the measures for its implementation came within the scope of the regulatory procedure, as the Commission was entrusted more with developing a specific scheme than with implementing already clearly defined aspects.

EXERCISE OF IMPLEMENTING POWERS

Determining the Limits of the Powers Conferred

Given the wide interpretation of implementation, allowing the Council to confer considerable power on the Commission and to phrase the enabling provision in general terms, it should not be surprising that the Court has also interpreted the limits of the powers conferred on the Commission widely. This was made clear by the Court in Rey Soda, where the Court held that

[when the Council has thus conferred extensive power on the Commission the limits of this power must be judged with regard to the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling word.48

A literal interpretation seems all the more difficult where the Court allows for the enabling provision to be drafted in general terms. It seems, however, that such a wide interpretation of the Commission’s implementing power is limited to the agricultural sector, for the Court held in Vreugdenhil49 that

such a wide interpretation of the Commission’s powers can be accepted only in the specific framework of the rules on agricultural markets. It cannot be relied upon in support of provisions adopted by the Commission on the basis of its...
implementing powers in agricultural matters where the purpose of the provision in question lies outside that sphere.  

Where enabling provisions in the agricultural markets confer on the Commission general powers, the Court determines the limits of these powers with regard to ‘the basic general objectives of the organization of the market and less in terms of the literal meaning of the enabling word’. In United Kingdom v Commission, the Court had to deal with the interpretation of Article 9(3) of Council Regulation 1837/80, which empowered the Commission to take the necessary measures to levy a charge on sheepmeat exported from the United Kingdom. The Court found that the charge envisaged by the Commission amounted to an obstacle to the free movement of goods and could only be allowed if the enabling provision clearly allowed for an exception to that principle. As this was not the case the Court annulled the Commission’s implementing regulation.

The limits of the implementing powers of the Commission are also set by the provisions of the basic regulation. The Court held that the implementing measure could not derogate ‘from the provisions of the basic regulation to which it is subordinate’. The implementing measure can derogate from the basic act only if the basic act expressly confers the power to do so. However, as the Court decided in Eridania, these derogations have to be related to the general system of the basic act and may not ‘jeopardize the essential elements embodied in that regulation’. In European Parliament v Commission, the Court found that the Commission was allowed to provide for the inclusion of genetically modified micro-organisms (GMMOs) in organic products, as such inclusion could not be considered ‘as contrary to the provisions of the basic regulation’. This judgment has been heavily criticized (Bradley, 2006), as the inclusion of GMMOs was incompatible ‘with the essential objectives or material provisions of the organic production regulation’ (ibid., p. 429). In contrast, the Court applied a more restrictive approach in European Parliament v Council. The Court held that ‘an implementing directive such as the contested directive, adopted without consultation of the Parliament, must respect the provisions enacted in the basic directive’. The Court found that the purpose of the basic directive was to improve agricultural production through plant protection products. However, the basic directive also made respect for the environment in general, and for groundwater in particular, an essential precondition for the authorization of such products. The Court stated that ‘by not taking account of the effects which plant protection products may have on all groundwater, the contested [implementing] directive failed to observe one of the essential elements of the matter expressly laid down by the basic directive.’
In some cases, the Commission measure is based on an implementing measure of the Council which also adopted the basic act. In Zuckerfabrik Franken, it was up to the Council to adopt the general rules for the implementation of the basic act, whilst the adoption of the detailed rules for its implementation was the responsibility of the Commission. The Court ruled that this must be understood as meaning that, in the exercise of its powers, the Commission is authorized to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council.

Outside the agricultural area, the Community Courts seem to take a stricter line as to the scope of the Commission's implementing powers. In Netherlands v Commission the Court had to assess whether Commission Directive 1999/51/EC could validly have been adopted on the basis of Article 2a of Council Directive 76/769. Article 2a provided that amendments required to adapt the Annexes of the Directive to technical progress should 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. The Court 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.

It has to be admitted, though, that it is not always easy to determine the correct scope of an authorization 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. 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.

It should, however, be noted that cases in which the Commission exceeds its implementing powers are rare (Schaefer and Türk, 2002). 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. Secondly, Member State representatives in the committee can state objections. Thirdly, interest groups that have access to the draft
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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. Fifthly, the possibility of review by the Community Courts often acts as a powerful constraint on the Commission.

Procedural Requirements

The role of the Commission under the various comitology procedures

Although the power of the Commission varies according to the applicable procedure, the Court has provided the Commission with some discretion of action vis-à-vis the committee. Germany v Commission concerned the time-limit set by the chairman of a management committee who sent a telex convening a meeting of the committee two days before the meeting and distributed the draft measure on the day the meeting took place. The chairman, a Commission official, argued that this was a case of extreme urgency. The Court held that

whether a case is of extreme urgency is for the chairman of the particular management committee to decide. In view of the nature of the assessment which normally has to be made within a very short period the Court can revoke a decision adopted by the chairman only in cases of obvious error or misuse of powers.

The Court also accords the Commission considerable discretion in other instances. In Pharos, the Court found that a delay of 11 months between the negative opinion of the comitology committee and the submission of a proposal to Council by the Commission was not unreasonable. The Commission had submitted to the adaptation committee a request to include somatosalm in Annex II of Regulation 2377/90, which contains substances for which no maximum residue level in foodstuffs of animal origin is necessary. Despite the fact that its implementing measure was based on the opinion of the scientific committee, the Commission did not obtain the approval of the adaptation committee. Under the applicable regulatory procedure, the Commission had to present a proposal to Council ‘without delay’. After six months, the Commission again consulted the scientific committee, which did not share the concerns of some of the Member States in the adaptation committee. After another three months, the Commission finally presented a proposal to Council to include somatosalm in Annex II.

The reasoning of the Court of Justice, on appeal from the Court of First Instance (CFI), provides the Commission with considerable discretion. First, the Commission does not have to present to Council the same measures which failed to obtain approval by the comitology committee,
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but may submit an amended proposal to Council. Second, this means that the Commission must have 'sufficient time to consider the various courses of action open to it'.

Third, the Commission was entitled to seek the opinion of the scientific committee as the matter was 'highly complex and sensitive'. Fourth, the term 'without delay', which obliges the Commission to act swiftly, must be assessed 'in the light of the complexity of the matter concerned'. However, it is still unclear why it took the Commission six months to consult the scientific committee and then another three months to present a proposal to Council. Moreover, it is difficult to see why the Court only took into account the interests of the Commission and did not consider the interest of the applicant in swift action.

A similarly benevolent view was taken by the Court in Moskof. After obtaining the approval of the comitology committee in June 1993 for its draft implementing regulation, the Commission, instead of adopting the measure, continued the discussion to achieve a compromise with the two opposing Member States. The measure, which was to apply from 1 July 1993, concerned the conversion rates for the Community premium for the production of raw tobacco. As the new draft, which was presented to the committee in September 1993, did not find favour with the Greek delegation, the Commission withdrew it in October 1993 and finally adopted its earlier draft, which had been approved by the committee in June 1993, with retroactive effect. The Court again made a number of statements in favour of the Commission. First, it argued that the Commission had not withdrawn its earlier draft by presenting a new draft in September 1993, which had never been submitted to a vote. Second, the Court agreed with the Commission's position that although it was 'entitled immediately to adopt the text which the Management Committee had approved', the Commission could not 'be criticized for having tried to find a compromise acceptable to the two delegations which had refused to approve the initial text'. The Court's policy argument was that to hold otherwise 'would render more difficult any attempt at compromise intended to resolve the problems experienced by the certain delegations'.

Language

With an increasing number of Member States, the Commission has come under considerable strain to provide all Member States with the documents in their language in the comitology process. In Germany v Commission the Court followed a strict approach as to the timely availability of translated documents to the national representatives on the comitology committees. The Court rejected the Commission's argument that the German representatives had received the English version of the draft decision within the 20-day time-limit as contrary to Article 3 of Regulation 1, which requires...
an institution to send documents to a Member State in the language of that state. The Court emphasized that in contrast to ordinary working documents, for which the Commission may shorten the period within which Member States must receive them, the time-limit for draft measures to be voted under Article 20(2) of Directive 89/106 could not be shortened.\textsuperscript{85} The Court took this as an indication that ‘the Member States should have the time necessary to study these documents, which may be particularly complex and may require considerable contact and discussion between different administrative authorities, or consultation of experts in various fields or of professional organizations.’\textsuperscript{86}

However, in\textit{ Germany and Denmark v Commission}\textsuperscript{87} the Court seemed to have qualified that strict approach by finding that a breach of the language rules would only lead to the annulment of the act at issue if, ‘were it not for that irregularity, the procedure could have led to a different result’.\textsuperscript{88} In this case the German delegation requested, but never received, two documents in German from the Commission. The Court found that, as the German delegation ultimately objected to the draft measures proposed by the Commission, ‘[e]ven if the Federal Republic of Germany had had the German-language version of the two documents in question … it would not have been able to object more effectively to that draft.’\textsuperscript{89} As the final outcome of the case would not have been different had the German delegation received the documents in their language, the act could not be annulled.

A strict requirement to have all documents forwarded in all languages within a prescribed time-limit does allow the national representatives to consult thoroughly, but carries the risk of considerably slowing down the decision-making process. The proper balance between giving national authorities sufficient time to study the documents and preserving the efficiency of the decision-making process should take account of whether the documents are ordinary working documents or documents on which a vote is taken, the complexity of the documents and the need to consult by national authorities.\textsuperscript{90}

On the other hand, it is clear from\textit{ Küč}"{a}r\textsuperscript{91} that there is no ‘general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances.’\textsuperscript{92} The Court upheld in this case the language regime in Council Regulation 40/94 on the Community trade mark,\textsuperscript{93} which allows an application for a Community trade mark to be filed in one of the official languages of the EC but requires a second language, which has to be one of the five official languages of the Office for Harmonization in the Internal Market (OHIM), for opposition, revocation or invalidity proceedings.
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Consultation of scientific committees
Considering the increasing scientific complexity with which Community institutions are confronted when adopting decisions, it is not surprising that the incorporation of scientific expertise in the decision-making process has become an issue (Rudloff and Simons, 2006). In the Community’s decision-making process such expertise is mainly provided by scientific committees, the consultation of which is expressly foreseen by certain legal acts. Where the legal basis for a Community act provides for the consultation of scientific committees, acts that are adopted in violation of such a requirement are certainly unlawful. It is less clear whether in the absence of a statutory requirement the consultation of scientific committees is required in scientifically complex matters.

TU München concerned a decision of the Commission which stated that a Japanese electron microscope could not be imported free of common customs tariff duties because an apparatus of equivalent scientific value was manufactured in the Community. The Court held that ‘since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its task’. The Court emphasized that in such a case ‘respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance.’ Those guarantees included, in the Court’s opinion, ‘the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case’. The relevant procedure laid down by Regulation 2784/79 stipulated that the Commission had to consult the Member States and a group of experts comprised of the representatives of all the Member States. If the group came to the conclusion that there was an equivalent apparatus manufactured in the Community, the Commission would adopt a decision which stated that the conditions for a customs exemption were not met. In those circumstances, the Court held that ‘the group of experts cannot properly carry out its task unless it is composed of persons possessing the necessary technical knowledge in the various fields in which the scientific instruments concerned are used or the members of that group are advised by experts having that knowledge’. As this was not the case, the Court held that the Commission infringed its obligation to examine carefully and impartially all the relevant aspects of the case in point.

Similar considerations were pursued in Angelopharm v Hamburg. Angelopharm, a German company, produced Sedaterm, a product designed to prevent hair loss, containing the substance ‘11 alpha OHP’. The Court had to examine whether Commission Directive 90/121, which prohibited the use of the substance, was valid in the light of the fact that the Commission had not consulted the Scientific Committee on Cosmetology.
on the prohibition of the substance in question. As the provision at issue was ambiguous on the point as to whether the Commission was obliged to consult the Scientific Committee, the Court sought to find a solution on the basis of ‘the Committee’s role in the procedure for the adaptation of Annexes II to VII to the Cosmetics Directive’. The Court found that the Cosmetics Directive emphasized that the ‘rules governing cosmetic products are founded on scientific and technical assessments which must themselves be based on the results of the latest international research and which are frequently complex. This is particularly the case where it is a question of assessing whether or not a substance is injurious to human health.’

The Court stressed the fact that neither the Commission itself nor the Comitology Committee were in a position to make these scientific assessments. However, the Scientific Committee not only had the expertise, but, according to the legal act by which it was established, also the task ‘to provide the Commission with the assistance necessary to examine the complex scientific and technical problems entailed by the drafting and adaptation of Community rules on cosmetic products’. The Court concluded that, ‘since the purpose of consulting the Scientific Committee is to ensure that the measures adopted at Community level are necessary and adapted to the objective, pursued by the Cosmetics Directive, of protecting human health, consultation of the Committee must be mandatory in all cases’. Since the Commission had not consulted the Scientific Committee the Court consequently annulled Directive 91/121 to the extent that it banned the substance.

The Court therefore decided that in the case of ambiguity of a provision in the basic act as to whether or not to consult a scientific committee, established at EC level, which has the task and the ability to assist the Commission in scientific and technical assessments, the provision must be interpreted to require such consultation as mandatory. In Alpharma the CFI confirmed this interpretation of Angelopharm. The CFI found that the Court in Angelopharm had imposed a duty of consultation of the scientific committee only owing to the ambiguity of the provision at issue. Consequently, ‘given the unequivocal wording of the provisions applying in this case … that precedent is not applicable to the present case.’ The CFI thereby rejected the view that Angelopharm could be interpreted as obliging the competent institution to consult the relevant scientific committee even in the absence of a statutory requirement if the ‘nature of things’ so demands.

In Alpharma the competent Community institution was clearly not required to consult the scientific committee which had been set up. However, as the institution enjoyed broad discretion, ‘the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case’, which the Court had established in TU München
in administrative proceedings, also applied where the act at issue was of
general application. Consequently, a

scientific risk assessment carried out as thoroughly as possible on the basis
of scientific advice founded on the principles of excellence, transparency and
independence is an important procedural guarantee whose purpose is to ensure
the scientific objectivity of the measures adopted and preclude any arbitrary
measures.\textsuperscript{112}

This meant that

it is only in exceptional circumstances and where there are adequate guarantees
of scientific objectivity that the Community institutions may, when – as here
– they are required to assess complex facts of a technical or scientific nature,
adopt a preventive measure withdrawing authorisation from an additive without
obtaining an opinion from those scientific committees.\textsuperscript{113}

A related question concerns the manner in which the Commission is
bound by the opinion of a scientific committee. AG Alber in \textit{Monsanto}\textsuperscript{114}
pointed out that where the legislative act requires the Commission to draw
up a draft measure ‘having regard’ to the observations of the scientific
committee no binding force could be attached to the opinion, but that the
Commission could not disregard such an opinion without providing reasons
for diverging from it.\textsuperscript{115} The Commission is therefore ‘bound, albeit in [a]
relaxed manner’.\textsuperscript{116} He argued that the Commission when implementing
a legislative act whose objective is the protection of public health can
justify its divergence from the opinion of a scientific committee only on
grounds of public health. In addition, the AG stated ‘only if the committee
does not refute the Commission’s reservations concerning public-health
protection but nevertheless arrives at a different result is it permissible for
the Commission to diverge from the committee’s opinion.’\textsuperscript{117}

\textbf{Transparency}

The closed and secret nature of the deliberations between the Commission
and the Member State representatives in comitology have been gradually
made more transparent, mainly through the efforts by the EP to obtain
more information from the Commission. More recently, the Community’s
drive towards greater transparency in order to bring the citizen closer to
its decision-making process (Curtin and Meijers 1995, p. 421) has also
had an impact on comitology (Türk, 2003). The Community Courts have
contributed to this development in \textit{Rothmans} and \textit{BAT}. 
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The Commission in *Rothmans*\(^{118}\) refused access to minutes of the Customs Code Committee on the ground that it was not the author of the document. The CFI rejected this view by pointing out that the Commission provides the secretarial services for the Committee, for which it draws up the minutes. The CFI also found that ‘this Committee, in common with the other comitology committees, does not have its own administration, budget, archives or premises, still less an address of its own.’\(^{119}\) As the Committee does not belong to any other institution, in particular not the Council, or third party, the CFI concluded that ‘for the purposes of the Community rules on access to documents comitology committees come under the Commission itself.’\(^{120}\) Even though the CFI’s dictum that the function of comitology committees is to assist the Commission is more than doubtful (Bradley, 2006),\(^{121}\) the judgment reflects the Court’s desire to bring the comitology process within the rules on transparency, as ‘refusal of access to the minutes of the numerous comitology committees would amount to placing a considerable restriction on the right of access to documents’.\(^{122}\)

The CFI continued its quest to grant wide access to documents in *BAT*\(^{123}\) in relation to minutes of comitology committees. The Commission refused BAT’s request for the minutes of the meetings of the Committee on Excise Duties on the ground of confidentiality of the persons who supplied the information as set out in Commission Decision 94/90,\(^{124}\) which provided the legal basis for access to documents at the time. The CFI pointed out that, as the documents of the Committee had, in accordance with the ruling in *Rothmans*, to be regarded as those of the Commission, the latter was ‘entitled to rely upon the exception relating to the protection of the confidentiality of its deliberations where the documents to which access has been requested concern the deliberations of that committee.’\(^{125}\) However, the Commission had to ‘strike a genuine balance between the interest of the citizen in obtaining access to its documents and its own interest in protecting the confidentiality of its deliberations.’\(^{126}\)

The CFI found that the Commission was aware that BAT had a specific interest in ascertaining the positions within the Committee in order to deal with the tax and administrative implications of the treatment of expanded tobacco as smoking tobacco. The Commission consequently had to take that interest into consideration in its task of striking a genuine balance between the interests at stake. The CFI argued that, in the light of the differing tax treatment of expanded tobacco in the Member States, the identities of the Member States which expressed a position had to be regarded as being of ‘manifest importance’\(^{127}\) to BAT. This interest had to be weighed against the Commission’s interest in the confidentiality of its proceedings. The Commission argued that the disclosure of the information ‘could compromise the effectiveness of the discussions between the Member
States, that is to say, render them less full, frank and honest, and thus undermine the smooth running of the committee’s deliberations. This central concern of the Commission was, however, regarded by the CFI as ‘by itself, insufficient to override the applicant’s basic right of access under Decision 94/90.

In the present case the CFI found that the minutes at issue related to discussions which had already come to a conclusion by the time BAT made its request. The CFI therefore found that ‘disclosure of the identities of the delegations referred to in those documents could no longer inhibit the Member States from effectively expressing their respective positions regarding the tax treatment of expanded tobacco.’ Consequently, the Commission failed in its task properly to balance the interests at stake, which led the CFI to annul the Commission’s decision to refuse access to the minutes of the committee.

CONCLUSION

This survey of the Court’s case-law in the area of comitology has shown that the Court of Justice has been instrumental in regulating the comitology system. This is most obvious at the beginning when the Court, given the paucity of provisions in the original EEC Treaty, had to establish a constitutional framework for the delegation and exercise of implementing powers. It is equally clear that the Court has been strongly influenced by the developing practice, which it confirmed and elevated to constitutional status in its decisions. The formal incorporation of Article 202 third indent ECT is thus the consequence of a complex process of interaction between the Court of Justice and the emerging institutional practice. The Court has continued with its support for the comitology process by allowing wide delegation of powers to the Commission, which, the Court has argued, is justified by the political control which the Member State representatives exercise in the comitology committees. This emphasis on Member State supervision through committees operates to the detriment of the EP and its supervisory role.

The Court’s generous support of the comitology system is also in evidence when considering the case-law on the exercise of implementing powers by the Commission under comitology rules. The liberal interpretation of the Commission’s implementing powers is complemented in the case-law by strong support for deliberation with the committees. The Commission is given considerable leeway for finding compromise solutions with Member States (see Moskof) and for considering the relevant issues before referring the matter to Council (see Pharos). The language requirement set out
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in *Germany v Commission*,135 which provides Member States with the opportunity to consult and discuss implementing acts before their vote in the committee, has to be balanced against the efficiency of the implementation process.136 The Court also places a strong emphasis on implementing acts being grounded in adequate scientific expertise, thereby providing a stronger role for scientific committees in the deliberations.

The benign neglect in the case-law for the concerns of the EP should, however, not be understood as supporting a closed and secretive system of deliberations. The case-law on transparency in the comitology area reveals a desire, at least on the part of the CFI, to protect the interests of individuals in their quest to gain access to documents related to discussions in comitology committees. This reveals a desire on the part of the Court to balance the efficiency of the comitology process with a protection of individuals’ interests.

NOTES

1. The procedures that the Council would impose in the legislative act for the Commission to follow when adopting implementing acts would range from the requirement merely to consult the committees to seeking their approval before the adoption of implementing acts.
2. On the history of comitology, see Bergström (2005).
3. Article 211 fourth indent ECT, which is identical with Article ex 155 fourth indent EEC, states that the Commission shall ‘exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter’.
5. Ibid., para. 6.
6. The term legislative is here used in a wide sense referring to all acts based on the ECT. For a more detailed discussion of the term legislation see Türk (2006).
7. Many legislative acts in the agricultural area obliged the Commission to follow the management committee procedure when adopting implementing acts. The procedure foresaw that the Commission had to consult a committee comprised of Member State representatives. The Commission could adopt the draft implementing acts submitted to the committee provided that the committee did not object to them by a qualified majority, in which case the draft measures had to be referred to the Council.
11. Ibid., para. 40.
12. The Court does not provide a justification in Case C-378/00, but refers to its reasoning in Case C-259/95 Parliament v Council [1997] ECR I-5303, para. 26.
13. See the criticism by Bradley (2006), at p. 419.
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21. Ibid., at para. 22.


23. Ibid.


27. Ibid., para. 41.


30. Ibid., para. 15.


34. Joined Cases C-154/04 and C-155/04, supra note 32, para. 90.


36. Ibid., para. 10.


38. Ibid., para. 53.

39. Ibid., para. 53.

40. Case C-378/00, supra note 10.


42. Case C-378/00, supra note 10, para. 50.

43. The Court on request by the Commission only annulled Article 11(2) of Regulation 1655/2000, which imposed the regulatory procedure.

44. See Chapter 8.


46. Ibid., para. 41.

47. Ibid., para. 44.


50. Ibid., para. 17.


57. Ibid., para. 8.

58. Case C-156/93, supra note 17.

59. Ibid., para. 24.


61. Ibid., para. 23.

62. Ibid., para. 31.


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74. Ibid., para. 13.
76. Ibid., para. 24.
77. Ibid., para. 26.
78. Ibid., para. 30.
79. For an equally critical view, see Bradley (2006), at pp. 434–435.
81. Ibid., para. 38.
82. Ibid., para. 39.
83. Ibid., para. 40.
85. The CFI made it clear in Joined Cases T-134/03 and T-135/03 Common Market Fertilizers v Commission [2005] ECR II-3923 at para. 76, that this approach cannot be applied to expert groups which cannot be considered comitology committees.
86. See also Case C-263/05, supra note 84, para. 31.
88. Ibid., para. 37.
89. Ibid., para. 38.
90. See also Case C-170/00 Finland v Commission [2002] ECR I-1007, Opinion of AG Geelhoed, at para. 44.
92. Ibid., para. 82.
95. Ibid., para. 13.
96. Ibid., para. 14.
97. Ibid., para. 14.
99. Case C-269/90, supra note 94, para. 22.
103. Case C-212/91, supra note 100, para. 30.
104. Ibid., para. 31.
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106. Case C-212/91, supra note 100, para. 35.
107. Ibid., para. 38.
109. Ibid., para. 207.
110. Case C-212/91, supra note 100, para. 33.
115. Ibid., at para. 133.
116. Ibid., para. 134.
117. Ibid., para. 137.
119. Ibid., para. 58.
120. Ibid., para. 62.
121. See also the contrasting view in Case T-70/99, supra note 108, at paras. 213 and 232.
122. Ibid., para. 61.
125. Case T-111/00, supra note 123, para. 38.
126. Ibid., para. 40.
127. Ibid., para 48.
128. Ibid., para. 51.
129. Ibid., para. 52.
130. Ibid., para. 56.
131. It is submitted that under Article 4(3) of Regulation 1049/2001 (OJ [2001] L 145/43) the outcome in the case might now be different.
132. Compare the existing role of the EP in the comitology process with that foreseen in Articles I-36 and 37 of the Constitutional Treaty.
133. Case C-244/95, supra note 80.
134. Case C-151/98, supra note 75.
135. Case C-263/95, supra note 78.
136. Joined Cases C-465/02 and C-466/02, supra note 78.
11. Conclusion

Thomas Christiansen, Torbjörn Larsson and Guenther F. Schaefer

INTRODUCTION

How legitimacy is created and maintained in a political system is one of the classical questions in the political discussion and the social sciences. It is also one of the topics that has attracted considerable attention among those analysing the EU, especially in relationship to the so-called democratic deficit. 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 book the aim has been to try to fill this gap of knowledge by looking more deeply into the everyday life of the work of the committees, trying to get behind the official scene of decision-making.

The issues of democracy and legitimacy are also linked to another classical question, the existence of formal and informal governmental structures. Usually the official (formal) version of how a government is organised only tells us half the story of how it actually functions, and what is stated in the constitution of a state can in reality be a rather poor description of the real exercise of political power. The tension between the norm – how a government is supposed to function – and the reality is always there and sometimes it is very strong. There are many reasons why this tension between the norm and the reality occurs, but part of the explanation can be found in the two fundamental functions of a political system – the authoritative regulation of basic conflicts in society and maintaining the legitimacy of the political system as such (see Chapter 2). Not least for reasons of efficiency and effectiveness does a government need complementary structures to the ones officially mentioned in a constitution or otherwise publicly recognised in order to formulate and implement policies. In other words, the official and the formal structures are to a large extent established for reasons of
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legitimacy and should not necessarily be seen as textbook examples of how public institutions operate in real life.

The tension between the norm and real life in terms of how the government is organised and operates is usually a well-known fact to the citizens. It is, for example, widely acknowledged that in a parliamentary system the parliament is more of an arena where the political parties compete over power and influence than an actor which is actually controlling the government. However, when major changes are being discussed in a government many of the combatants often argue as if the normative picture of the government was actually the real one. It is in fact often a bit puzzling to the informed how the discussions on reforming government can be so closely linked to the actual structure of the existing government, especially evident in the case of the European Union, where – to make matters worse – the official structure is much less clear than in national governments. In addition to this – complicating the picture even further – (as stressed by Peters in Chapter 3) the line between the formal and the informal structures is always blurred, as well as the balance between the official and the unofficial understanding of the public power in a government. Therefore, any discussion on governmental weakness and strength from a democratic and legitimacy perspective must take into account the informal as well as the formal institutions and processes. And this conclusion leads us to the organisation and functioning of groups and committees – which constitute not only the most essential fabric of any political system but also the area where the balance between formality and informality is constantly at stake.

In most political systems the everyday 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 – 50 years ago the British political scientist K.C. Wheare published a book on the British system with the title Government by Committee, where he argued that the British committee system was hampering and sometimes even usurping 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. And, as expressed by Guy Peters in Chapter 3, informal structures and procedures are not necessarily a threat to democracy and its legitimacy; they can even sometimes enhance it.

But of course it can also work the other way. As the preparation and the actual decision-making is often taking place in one or several of the more than a thousand committees working within the institutions of the Community,
the EU also has to face up to this problem. In fact, even the Commission has sometimes tended 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 … tends to favour a limited group of powerful and professional actors in any given policy area.’ 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.

With the aim to find out how accurate this characterisation is, we have studied committees that are active during all the stages of the policy-making process of the EU, focusing on committees with a connection to the Parliament, the Council and the Commission – that is, expert groups, working groups in the Council under both the first and second pillars, comitology committees and standing committees in the Parliament.

THE PROBLEM OF LEGITIMACY AND DEMOCRACY IN A SUPRANATIONAL GOVERNMENT

As demonstrated by the multilevel 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 another 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 that created by supranational institutions and instead conflicting legitimacy processes sometimes 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, emphasises whether the rulers have established and are adhering to predefined rules and regulations concerning public decision-
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making. In other words, what goes into the decision-making machine as well as what comes out of it is of importance, and it is possible to argue that non-democratic governments have legitimacy as well as democratic ones. But when legitimacy is applied to democratic governments the two concepts – legitimacy and democracy – become closely linked.

In terms of democratic legitimacy, as described by Larsson (Chapter 2), a distinction is therefore often made between input legitimacy and output legitimacy and sometimes also throughput legitimacy. These three forms of legitimacy are in turn closely connected to four types of concepts that seem to be of essential importance in support of a democratic regime. They are accountability; checks and balances (input legitimacy); effectiveness and efficiency (output legitimacy); openness and transparency (throughput legitimacy). These four concepts may, of course, be given somewhat different meanings depending on who applies them, but when they are applied in a supranational context the emphasis will always need to be adjusted, no matter what the interpretation was in the national setting.

DEMOCRATIC ACCOUNTABILITY

Basically all democratic governments derive legitimacy from the people, either directly or indirectly, and ultimately if the people are 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 (Commission, 2001) lists 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. 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: ‘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.\(^5\)

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 and between different policy-making arenas. An important aspect is the traceability of binding decisions in such a complex system; that is, 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 in the end be held accountable but with the increased legislative role of the Parliament, particularly after the Amsterdam Treaty, it has become even more difficult to identify who can be held accountable and responsible. In both the Council and the European Parliament, committees play a key role. Hence, accountability in both institutions is closely linked to the role of the committees within.

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.

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, 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 as important as accountability in generating legitimacy for the system.

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 to 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 lose its legitimacy in the eyes of the public. Thus, every democratic systems needs
free and independent institutions which are able to oppose and challenge the current policy.

In the EU context, this concept refers to the way in which decisions by one set of actors are checked and controlled by other sets, conflict resolution, how co-ordination and co-operation between actors is managed 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, the Council, the Parliament and the Commission. An intricate web of co-operating and co-ordination mechanisms between these institutional actors makes it practically 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 the Council, where it must be assured 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 Member States or a small number of Member States. Voting is the last resort, every possible effort must first be made to find a solution via debates, a compromise most of the participants can live with, and only if one or two Member States cannot be convinced should the majority prevail. The name of the game is the search for consensus. Working styles and modalities in comitology committees are similar to those 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 still 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?

DEMOCRATIC EFFECTIVENESS AND EFFICIENCY

The output side of government activity has always been, as explained in Chapter 2, an important element in legitimacy-building in any type of government. The question here is to find a ruling system that not only takes decisions but also finds solutions that are accepted by the people affected and have an impact on 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
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expects the government to deliver, solve problems and do 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, that is, 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.

DEMOCRATIC OPENNESS AND TRANSPARENCY

First and foremost, openness means that those affected by decisions have the opportunity to participate in shaping them. Inclusiveness requires that the preferences of interests 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 extent representatives of the civil society are involved in the decision-making 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 they were 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 issues are ‘legibility’, ‘traceability’, ‘visibility’ and ‘understandability’, the possibility to ‘reconstruct’ the decision, the general public’s ability to find out who took the decision, who took what position in the debate and who in the end was in favour of the decision and who voted against it. The business may sometimes be carried out behind closed doors for a number of reasons, but afterwards it should always be possible to find out who took what position and how the decision was arrived at. If committee meetings – particularly COREPER – were open to the public, the debate would move away from the table in the meeting room to the coffee breaks and hallways, that is, away from the proper arena where reasoned debate can take place. In the Parliament it is different, of course: its plenary sessions and standing committee meetings 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 have 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.

SUPRANATIONAL ACCOUNTABILITY IN PRACTICE

At first sight, the European system of governance scores 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 difficulty in understanding 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 any better or think their readers would not understand it anyhow; the first because they want to obscure their own role in shaping the decisions and consequently escape being held accountable.

Again at first sight, the European Parliament would be expected to score high on an accountability scale: its members are elected directly, they 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 reveals that the daily reality is much more complex, as Chapter 7 demonstrates: the general public’s interest in what happens in Parliament is practically nil, except in controversial cases with high visibility such as 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 ‘pitched battle’ with the Council over the money that is to be spent on the LEONARDO or SOCRATES programmes.

Members of the European Parliament do try to keep in contact with their constituencies, spending as much as three days a week there, mostly at weekends. The increasing legislative workload of MEPs makes this ever more difficult. Christine Neuhold and P. Settembri also report 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,
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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 greet their MEPs. 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 one's position is an important aspect of accountability.7

Chapter 7 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 MEPs and committee staff for information, they attend committee meetings and one sometimes gets the impression that some MEPs are 'highjacked' by interest groups. The question of how representative these interest groups are, how fair and equal their participation and their involvement is in shaping decisions, is a difficult one to answer. Clearly, economically strong groups or groups with a strong voice in society exert more influence than minorities or interest groups with few economic resources. But the opportunities are there and interest groups are taking advantage of the fact: members of parliamentary committees are open to interest groups and the latter try to have an impact on the shaping of 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 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 centre stage, 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.8

The question of accountability of members of Council working parties is further complicated by their role perceptions. The authors of Chapter 5 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.9 On the other hand, they have no choice but to become frequently the representative of a compromise in Council to their own national
The role of committees in the policy-process of the EU
government. Particularly the staff members of the permanent representatives, the attachés and sectoral experts, owing to their daily interactions with colleagues from other Member States and in view of their relatively long tours of duty, tend to become members of a 'club'. An esprit de corps 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 a compromise. Empirical evidence presented in Chapter 5 strongly supports the hypothesis that working groups are not predictable intergovernmental battlegrounds but sites of inter-Member State, inter-institutional and ideological mediation.

Comitology committees seem to work in a vacuum of accountability, as shown by Schaefer and Türk in Chapter 8. Hardly anyone knows that they exist and 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 State 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 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, as in environment, however, the process is again one of long deliberation trying to reach compromise and consensus.

Nevertheless it should be noted, as pointed out by Türk in Chapter 10, that the European Court of Justice (ECJ) and its first instance (CFI) in the case of comitology has put increasing emphasis on clarifications on the internal work procedures of comitology committees, arguing in favour of exposing the results of how different Member States voted to affected interests. It is also the court which in practice has established the principle of a hierarchy of norms by establishing rules and procedures limiting the power of the EU and its institutions and on several occasions has concluded that the Commission has exceeded its mandate.

The accountability aspects of the comitology procedures are further stressed by Lintner and Vaccari in their study of the relationship between
the Parliament and the Commission (Chapter 9). The EU Parliament was from the very start sceptical about the comitology system and has continued to be so. On the other hand, although not being successful in getting direct access, as participants, to the comitology committees, the Parliament has achieved an awareness among the Member States and the Commission of its right to scrutinise the implementing process, especially in the area of legislation governed by co-decision. The *ultra vires* procedure granted to the Parliament, in checking whether the Commission with the help of the comitology procedure exceeds the power conferred to it by the Council and the Parliament, may at first sight seem a weak instrument but, as Chapter 9 shows, may have more teeth than first expected. In the shadow of a hierarchy informal governments are shaped and effected, as described by Guy Peters in Chapter 3. The system of comitology committees has over the years become more formalised. And strangely enough it looks as though the implementing part of the EU policy-making process is the most accountable one in terms of being controlled by the Member States as well as the Parliament.

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; they probably know of the proposal 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 are regularly in contact with Member State interest groups, particularly those groups that are affected by the decisions that are in hand. Civil society's impact on comitology processes strongly influences the outcomes, but the same questions that were asked about fairness and equal access 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 representatives 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 the decision.

However, although there are different techniques for linking the standing committees in the Parliament to the political parties and their constituencies, and working parties and comitology committees are answerable to Member States, generally speaking accountability is a weak spot in the EU system. This weakness is evident when we take a closer look at the role and functions of expert groups (consultative groups). As demonstrated by Larsson and Murk (Chapter 4), expert groups are not only abundant; they
are active everywhere in the decision-making process during initiating new legislation as well as in implementation. Furthermore, frequently more than one expert group is active in the same area and in some cases a more accurate description is systems of expert groups instead of the image of just one group. The role and the loyalty of the participants in expert groups are much hazier than in other types of groups and committees but the impact and the consequences of the work of the expert groups are often substantial if not decisive – either by their agenda-setting influence in the early stages of the legislative process or by their ‘shadowing’ and supporting influence in other phases of the decision-making process.

Another aspect of the numerous expert groups and their often very informal character is that it is hard for anyone to have an overview of them, what they do and who participates. In fact, as shown in Chapter 4, not even the Commission, and even less so the Member States, seems to have an updated view of its expert groups. In recent years some improvement has been made on the part of the Commission and today the Commission publishes on its website a list of its expert groups, but how accurate that list is and how often it is updated no one can tell at the moment, and information such as the names of the participants of the expert groups is still lacking.

However, accountability is not totally absent from the perspective of expert groups, since they are often set up in order to involve Member States at an early stage of the policy-making process. Interestingly enough Chapter 6 by Simon Duke on second pillar matter CSFP and ESDP shows that, in contrast to what is generally believed and what seems to be the case under the first pillar, committees can be used to enhance accountability. The Political and Security Committee (PSE) has obviously become a bureaucratic nerve centre around which different types of activities can be linked and supervised without formally being seen as a supranational power point. As stressed by Duke,

the significance of the Nice treaty amendments lies in the fact that the PSC is authorised, in crisis management scenarios, to take relevant decisions regarding the political and strategic direction of such operations. In essence, in these particular circumstances, the PSC assumes a function normally reserved for the Council and this serves as recognition that crisis scenarios may well necessitate some form of circumvented decision-making.

SUPRANATIONAL CHECKS AND BALANCES IN PRACTICE

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, as it might have done in the early days of the European Community (in the 1960s and '70s) where in the end the Council decided alone. In the second and third pillars and in the first pillar where consultation applies, it is still the Council that has the last word.

The European Parliament is the key arena for the inter-institutional debate. Chapter 7 demonstrates repeatedly how standing committee meetings are occasions where all the other institutions are present, where they are listened to and heard, where they ask and are being asked questions, where MEPs have the opportunity and use it to argue their positions.

Another instrument of inter-institutional checks and balances is the triilogue developed under the co-decision procedure in the 1990s. A small number of representatives from Commission, Council and Parliament meet to find a compromise acceptable to all three partners. Neuhold and Settembri document how the Parliament uses all means at its disposal to have a strong impact on the final outcome, sometimes even crossing the line of legality, as it did in the LEONARDO programme\(^\text{12}\) where it tried to link different programmes to ensure that this question was decided by co-decision, although in the Treaty it clearly was to be by 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 were not 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 achieve 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 champions and to speak for minorities and weak social groups that are at the periphery of political influence in the Member States.
The role of committees in the policy-process of the EU

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, as described by Fouilleux, De Maillard and Smith. The process of long negotiation in an effort to find a conclusion acceptable to all, characterised by reasoned debate, arguments, changing positions and coalitions ensures that minorities are not pushed to the wall. Consider for instance the drawn-out 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 two and a half years before France came on board. Clearly, if it had 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 – albeit the smallest – has the opportunity 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 the Council delegates implementing competences to the Commission it sets up these committees to control the Commission, as pointed out by Türk. 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 of ineffectiveness of the control mechanism. 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, as concluded by Schaefer and Türk.

The power-sharing nature of the comitology system becomes especially evident in Chapter 10, where Türk shows how this mechanism for control has been a major argument used by the European Court of Justice (ECJ), as early as the 1960s, giving legitimacy to transferring extensive implementing power to the Commission. Additionally the ECJ has upheld in its ruling the need for fair treatment of Member States in their right to be heard before a comitology decision is reached. In fact the ECJ has, over the years, put much effort into finding a proper balance between implementing powers
conferred on the Commission and the powers exercised through comitology procedures and in later years through the Parliament as a controller of implementing procedures.

The Parliament is not directly involved in comitology and has only recently gained some rights of information. But the interviews reported in Chapter 8 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 prevent conflicts later.

Lintner and Vaccari show in their study (Chapter 9) how the idea of power-sharing between the Parliament and the Council has always been an import element of the Parliament’s criticism of comitology committees. The Parliament has always felt there is an unbalance between their relatively limited control of the comitology system and that of the Council.

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 other’s 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 as if the committees are bridging the gap between the three institutions, making them partners in the decision-making game, not trying to curtail each other’s 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 their respective case, while on the other hand Council working parties and comitology committees are closed to MEPs.

The existence of expert groups shows very little sign of enhancing the power-sharing character of the EU system. On the contrary, expert groups are mostly set up to bridge institutional power gaps which power-sharing government often generates and which can result in gridlock and maintenance of the status quo. In other words, minorities, such as small Member States, with a strong view on specific issues should make sure that they are part of the relevant expert groups if they want to ensure that their voice is heard. And the same can be said for the rather complex committee structures set up under the second pillar, which, as shown in Chapter 6, do not seem primarily designed to foster a clear power-sharing community; instead it is more about co-ordination between the different EU pillars and different ministries in the Member States.
SUPRANATIONAL EFFICIENCY AND EFFECTIVENESS IN PRACTICE

In view of the complexity of the institutional systems of checks and balances that have developed in the European system of governance over time, one is tempted to conclude that it can hardly be efficient in the sense of its output responding to the needs of those concerned, the citizens, and doing 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 involving routine administrative acts in the area of agriculture, that important and controversial decisions will take a long time and that the Community is very slow in responding to needs of the citizenry. This may well be the case but then often it might 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 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 advice into the deliberation and decision process. As Chapter 7 shows, the standing committees of Parliament have developed a variety of avenues for acquiring expert advice, 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 have also become quite effective in channelling the influence of interest groups and civil society, offering them an opportunity to participate in shaping decisions. The description in Chapter 7 of how the committees work, how decisions are reached and 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 their 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 are trusted by other members for their understanding of complex policy problems.

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 frequently introduce more political arguments. Both observers of and participants in working parties insist on drawing a clear line between ‘political’ and ‘technical’ issues, arguing that working parties only deal with the latter.
The authors of Chapter 5 present convincing evidence that this boundary cannot be maintained and that working parties do get involved intensively in questions of policy and political direction. 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. 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 and 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 worse 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 than an effective arena for co-operation in a very complex system of governance. In fact, as pointed out by Schaefer and Türk, the comitology system is not only a way of controlling the implementing power conferred on the Commission by the Council but also a way for the Council to facilitate and speed up its decision-making process by delegating detailed and complicated issues – sometimes very controversial – to the administrative level. The existence of the comitology system has furthermore been used as an argument by the ECJ, as shown in Chapter 10, to limit the opportunities for the Council to convey implementing power to itself.

Expert and consultative groups are, generally speaking, not primarily set up to improve the accountability of the EU system nor to enforce its power-sharing capacity. In fact it could be argued, at least sometimes, that the existence of expert groups weakens the accountability and reduces the protection of minorities as intended by the power-sharing structure. However, on the dimension of effectiveness and efficiency the expert groups are scoring high points. A great deal of the explanation as to why the EU institutions are so successful in reaching agreements and decisions in spite of the sometimes confusing decision-making structure can be attributed to the work of expert groups. With the help of these committees bridges are built between the EU institutions and between Member States and other
interests, which reduces both the time to reach agreements and the level of conflict.

What can be achieved with a delicate balance between formal and informal committees in terms of effectiveness and efficiency is further demonstrated under the second pillar. In this area the vast number of committees and their complicated relationship has shown an impressing ability to reach decisions and take action in a minefield of national restrictions.

SUPRANATIONAL OPENNESS AND TRANSPARENCY IN PRACTICE

Critics of the European system of governance often describe it as one of the most closed and intransparent systems and the traditional way of understanding committees is as structures distorting democracy – as a reference to K. C. Wheare’s classic work *Government by Committee* (1955) at the beginning of this chapter indicated. However, as Guy Peters pointed out in Chapter 3, committees can also be understood in terms of improving democracy by opening up otherwise closed bureaucratic structures, which is precisely what the empirical evidence in this volume seems to suggest.

First of all, the issue should not be reduced to the question of whether committee meetings are open to the public. Instead it refers primarily to the nature of decision-taking, to the ability of interested parties, and in particular those affected, to contribute to shaping binding rules. From this perspective all types of committees we examined are rather more than less ‘open’.

Parliament as a whole, as well as its standing committees, is quite open to influences from civil society, interest groups and NGOs. Their input is not only accepted, it is often actively sought after. Particularly the organised interests in Brussels follow closely what Parliament does, try to influence the procedures and often have close working and consulting relationships with MEPs and with rapporteurs and group co-ordinators in the committees. This is to be expected of a parliament.

Access to influence working parties is only indirect, primarily by way of influencing the negotiating 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 8 also demonstrated the – again primarily – indirect involvement of interest groups in all aspects of the comitology committee activities. The Commission sometimes directly seeks the advice 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 close contact with the affected interests, brief them after meetings and discuss issues and concerns, future needs and future developments.

Transparency is a different issue. The only committee meetings open to the public are those of the standing committees of Parliament. This opportunity is used almost exclusively by interest group representatives, and only occasionally by the media or visiting groups. In contrast to other institutions, Parliament has had for a long time a very open approach with respect to access 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 the status of decision and discussion at any time.

Council working parties and comitology committees are not open to the public and many consider this 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 and efforts at persuasion and reaching compromise. It is impossible to do this in public, in view of rolling cameras so to speak. The negotiation process would be shifted to other places, to coffee breaks, lunches and hallways. For these committees, openness to the public is less important than getting access to information about the proceedings, the conclusions and how they were arrived at, 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, has contributed significantly to making the EU policy-process more open and accessible. Conclusions and summaries of the debates of ministers’ 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 relayed to the national capitals and at least in some of them, particularly in the Scandinavian countries, these reports are thus in the public domain. People can have access to them and find out what happened.

But having too many committees may become a problem when it comes to generating effectiveness and efficiency in a complicated legal structure, as is demonstrated in Chapter 6. Transparency and openness have certainly not been the guidelines when setting up the committee structure for the CFSP and the ESDP.

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. In fact, as Lintner and Vaccari show in Chapter 9, the Parliament has perhaps not been too successful in demanding direct access as a participant to comitology committees. On the other hand, the strategy of demanding more openness in the work of comitology committees has been extremely fruitful and, although the Commission sometimes seems to flood the Parliament with information, it looks as if the Parliament has maintained some degree of control.

The understanding that the comitology committees can be used as an instrument to open up otherwise closed decision-making structures for external interest seems to be shared by the European Court. Judging by its more recent rulings the court has, as reported by Türk, increasingly focused on hearing expert advice and interests that are affected by the specific comitology decision. A court decision even required the Commission to inform interested parties not only about the result of the voting but also the position of respective 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 and is spreading.

Openness and transparency are both helped and harmed by the Commission’s expert groups. Helped, because expert groups can bring many different stakeholders and interests into the decision-making process that otherwise would have found it difficult to be heard, especially in the early stages of the process. Many of the expert groups also encourage individuals and organised interests to put forward their opinions and the reports or opinions of expert groups are often published on the website of the Commission. However, expert groups can also be used to keep certain difficult actors on the outside in a carefully designed game played by the Commission, as argued by Larsson and Murk in Chapter 4.

Nevertheless, on the whole the developments seem to contribute to removing at least some of the opaque nature of the EC committee system.

THE EUROPEAN COMMITTEE SYSTEM: PROS AND CONS

In this study 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 respects – 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 from interviews with persons working in committees. It is reasonable to believe that anyone who is participating on a regular basis in
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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 one is led to believe by newspaper reports and 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 researchers 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, traceability 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 noting 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. But it is of course doubtful whether all citizens in the Member States can make a distinction between domestic and EU legislation.

An essential element for keeping the EU system under control is the different techniques of checks and balances. This is particularly 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 go back and forth between the working party and COREPER several times before a final decision is reached to transmit it to a Council meeting. In other cases a scientific committee (expert group) may be heard before a comitology committee takes a final decision. Interestingly enough, however, there are also signs indicating that the system has found other ways than through expert groups to overcome the structures intended to enforce checks and balances – by means of direct inter-institutional 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, COREPER and 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 where supposedly a fresh look is taken at its substance 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 – and 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 other’s committees, while the Parliament is kept more to the side – contact with the Parliament seems to be much more informal and on an ad hoc basis than other forms of interaction. It looks as if we have an interesting difference here, since Parliament does not take part in the Council’s and the Commission’s 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. In particular 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 conciliation. Moreover, even if conciliation cannot be escaped, and in politically controversial issues it rarely can, it is in the triilogue that a small group of representatives of the EP, the Council and the Commission reach a solution. Thus some of the checks and 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 openness and transparency to characterise a system, as described by Peters in Chapter 3, where different interests have a chance of participating in and influencing
the decisions that might affect 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 a solution can be found and agreement reached. This means that the same people will meet on a number of occasions, not just 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 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 to be heard or have the upper hand later on. Clever 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 excluded 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, according to our findings, seems to be more inclusive and focused on finding solutions through reasoning not bargaining, at least when compared with 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 interest. And precisely for that purpose ‘committees’ are created around which networks can be established.

THE POLITICAL SYSTEM OF THE EUROPEAN UNION – A MISUNDERSTOOD GOVERNMENT?

Over the years the political system of the European Union has been compared with 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 with a parliamentary (majoritarian) or consensual government as well as with a federal (powersharing) government – with all the weak and strong points (see Larsson, Chapter 2). 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 affect 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
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the protection of minorities. However, creating a supranational regime will always be problematic if legitimacy has to rely primarily on accountability – that is, 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 divided by different cultures and languages, since it may ultimately result in the suppression of strong minority interests.

Consensual government has a strong point in that it creates stable governments making for 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, lack of protection of new or small minorities which are not included in the groups forming the government and a tendency to maintain the status quo among the participating interests. In other words, just as a parliamentary government there is a clear risk of situations where one and the same majority (qualified) will repeatedly suppress a (number of) minority(ies).

A power-sharing or federal government, as it is often called, although not all power-sharing systems include a federal structure, is particularly strong when it comes to protecting minorities – even a very small minority will often have a fair chance of making its voice heard, at least if the judiciary is given extended jurisdiction. The problem here, of course, is that the system has a strong tendency to become gridlocked or too slow in its response to problems in the society – different types of majorities will balance each other out and maintaining the status quo will often be the final result.

According to our findings, the European Union can be characterised as being somewhere between a consensual and a power-sharing system. It operates by checks and balances, especially the dealings 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 the informal structures of the system, that is, 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 one, is more inclusive and more effective in finding solutions pleasing most of those affected by the decisions.

In recent years, there has been more focus on so-called deliberative democracy, a theory which inter alia stresses how different interests (defined as those affected by a decision) reach an agreement by means of discussions where all have equal rights and are given a fair chance of expressing their opinions, and everyone considers this to be the preferred and rational way of solving the problem at hand. What make this type of argument especially interesting is that it closely links input and output legitimacy
it is not enough to find a solution that all participants can agree on; it must also effectively and efficiently solve the problem. 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 conclusions which coincide with ours and the case becomes even stronger if one includes all the different types of committees (not only comitology committees) and regards them as being part of the system. The EU system is closer to the deliberative type of government than the parliamentary, power-sharing and consensual types. The EU of today is a system where different interests have a good chance of being listened to and if anyone is neglected or discriminated against on the national level this can be their 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, based on facts and scientific evidence, since the aim of this system is to find solutions acceptable to as many interests as possible, not only the 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 the Commission, lacking knowledge and credibility on the issues they are dealing with – a typical description given by a 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 to a large extent bases its legitimacy
The role of committees in the policy-process of the EU

A well-controlled system, the European Union is, through checks and balances, a thoroughly controlled system. But in contrast to national governments based on the power-sharing principle, like the United States, 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 be centre stage – perhaps something much more like what could be called a deliberative democracy than the ones we find on national levels.

But sometimes things go terribly wrong, which perhaps also illustrates the weakness of the deliberative process. As we have seen in recent years with the obstacles to adopting the services directive and the failed ratification process of the constitutional treaty, agreement among the interests concerned is not enough to push things through. What went wrong? One may ask, because in both cases many committees and groups were at work, as they would have been in any traditional process of the EU. According to our findings, lack of communication is not – as is argued by the Swedish commissioner Margot Wahlström – the explanation for rejected draft directives; it is rather a question of too much diffusion, making the solution unclear and thus the proposal difficult or impossible to defend when it comes under attack from the critics. The same goes for the constitutional treaty. Could anybody defend that document with clarity and passion? In other words, when the EU decision-making process moves back to traditional ways of negotiating like bargaining and horse trading, and neglects the need to find solutions which are acceptable even to small minorities, the prospect of actually getting the proposals through is greatly reduced – no matter how many committees and expert groups have been involved in the creative process.

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 it, or when they put forward suggestions on how to change it. Paradoxically, it looks as if 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, that is, a ‘normal’ parliamentary 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 the words and the action, such as national politicians occasionally wanting to hide behind the EU when they have to carry out unpopular decisions at home, that is, improving or maintaining the national system’s legitimacy at the EU’s expense. If, on the other hand, the national politicians strongly endorsed 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 is 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.

However, attempts to improve the legitimacy of the EU system by strengthening its majoritarian elements might jeopardise the existing checks and balances, including the deliberative character of the committee system, on which the Union’s legitimacy currently also relies. As this study of the different types of EU committees has demonstrated, even though the European Union may not look like a national government, and even less function as one, it is nevertheless possible to identify those elements which provide it with legitimacy and therefore to regard it as a democratic regime.
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NOTES

1. Wheare (1955).
2. Lebesis and Paterson (2000, p. 15). However, it should be mentioned that the work done by the previous forward unit in the Commission did not always present opinions that were shared by the Commission as such.
3. Ibid.
8. See Chapter 4, p. 63.
10. See Chapter 4, p. 83.
12. See Chapter 6, p. 111.
15. See Chapter 5, pp. 100, 118.
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