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Justifying Comitology: The Promise of Deliberation

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1. Introduction

The Amsterdam Treaty underlines that the European Union neither is nor will become in the foreseeable future anything comparable to a nation-state. Institutional reforms foreseen in the draft treaty are not part of a process of reinventing majoritarian governance on a supranational level but follow a logic of bits and pieces, of minor changes and incremental reform. After Amsterdam, the European project still is what it always has been: an effort to develop institutions and decision-making procedures which enable the Community to cope with transnational economic interdependence. Because the European project needs to do so without having any master plan to follow, it is a journey with a non-identifiable goal, driven largely by institutional experimentation and only at the margins restrained by the imperative not to sacrifice member state democracies.

The rise of comitology¹ surely is not the most important expression of this process - it is, however, indicative of this very nature of the European project. In functional terms, it originates from the need to relieve the Council of some of its legislative burdens by delegating decision-making powers to the Commission. Member States, however, were not willing to empower the Commission to legislate independently but sought a way of avoiding the adverse consequences to themselves of delegation. The different procedures foreseen by the Comitology Decision² therefore aim at providing a set of options for different degrees of delegation and control, which can be applied by the Council (and, since the adoption of the SEA, increasingly the Parliament) as it seems appropriate for the purposes of putting Community policies into practice. Although comitology was unforeseen by the Treaties, it has become today a most important institutional site for the everyday conduct of European legislative discourse. It therefore is not only witness to the growing importance of issues of implementation but also underlines the significance of "unconstitutional" elements of European governance such as the relevance of policy-networks consisting of non-governmental organisations, Member State administrations, and the Commission and its supposedly independent scientists. Comitology combines legal and administrative tasks in one institution, thereby resembling a kind of "political administration", underlining that state-oriented

1 For an early account of the comitology-phenomenon see Bertram (1967). Recent descriptions of the history of comitology are provided by Vos (1997) and Demmke et al. (1996). For a legal typology of committees see Knapp (1996). A quantitative assessment is provided by Falke (1996). Most important case law concerning comitology is collected in Türk (1996) and Bradley (1997).

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

analytical categories are inadequate for describing, understanding and justifying the European polity.³

The purpose of this paper is twofold: in the following section, it provides some basic data on comitology and introduces the normative concerns voiced by the European Parliament. Responding to the interinstitutional debate and reacting to the Commissions' proposal concerning a reform of comitology, the paper proceeds by asking for adequate normative justifications of supranational governance and their implications for a reform of comitology. It is argued that convincing normative justifications must not be developed in the void of general reflections about the procedural and substantive requirements of a democracy but need to take account of the very nature of the European polity. One way of formulating such a justification is provided by the concept of *deliberative supranationalism*.⁴ Deliberative supranationalism corresponds with theoretical interpretations emphasizing the *sui generis* character of the European Community (cf. Jachtenfuchs 1995; Jachtenfuchs/Kohler-Koch 1996; Neyer/Wolf 1996). It assumes that the legitimation of governance within constitutional nation states remains inevitably one-sided and parochial. Since democracies presuppose and represent collective identities, they have few mechanisms for ensuring that 'foreign' identities and their interests be taken into account within their decision-making processes. Deliberative supranationalism in this regard respects the member states constitutional legitimacy while at the same time clarifying and sanctioning the commitments arising from its interdependence with equally democratically legitimized states and with the supranational prerogatives which the institutionalization of this interdependence requires. It therefore rejects the idea of establishing political hierarchy above the nation-state and puts emphasis on the need for transnational discourse and deliberation.

The analytical scope of deliberative supranationalism is neither confined to issues of normative requirements nor to effective governance: by simultaneously underlining the functional need to harmonize diverse regulatory traditions without sacrificing the achievements of national regulatory standards *and* putting emphasis on the requirement that (inter)governmental

3 This article draws on the research project 'The Europeanization of risk regulation of technical goods and foodstuffs ("Comitology")' conducted at the Center for European Law and Politics, University of Bremen, financed by the Volkswagen-Stiftung, and chaired by Christian Joerges. The author is grateful for critical comments provided by Hervé Dupuy, Christian Joerges, Beate Kohler-Koch, Oliver Gerstenberg and Harm Schépel.

legislation is to be conducted within a framework of entrenched procedural rules, the concept rejects any contradiction between the two. Rather, they are viewed as being two co-existing sides of one coin which may only provide an adequate source of legitimacy if they occur in tandem. An essential challenge for facilitating deliberative interaction therefore is to identify the conditions under which both can simultaneously be expected and set into practice. Three necessary conditions are outlined in the essay: the definition of the substance and boundaries of legislative discourses, an understanding of governmental preferences as claims not as reflections of intrinsically legitimate national interests, and the existence of a competent Third Party which reflects shared normative concerns.

In the concluding remarks of this essay, it is argued that comitology is a normatively attractive decision-making procedure to the degree that it can facilitate intergovernmental discourse and promote transnational social integration. For making it compatible with the requirements of responsible and responsive governance, however, its future reform must enhance the discursive capabilities of governmental delegates, provide more accountability by increasing transparency and clarify the role of the European Parliament in the political administration of the Community.

2. Comitology and its Critics

2.1. Introducing Comitology

Comitology has significantly altered the way in which the Community copes with economic interdependence and conducts decision-making relevant for the administration of the internal market. It is no longer only the legislative procedure in the Council and the co-operation with Parliament in which Member States meet and discuss their differing approaches to market-building; delegation and comitology provide for the opportunity to restrict the legislative procedure to laying down essential requirements of harmonisation and leave the interpretation of those provisions to the Commission and Member State experts. Understanding the rise of comitology presupposes the insight that market-building in the EC⁵ - as anywhere - is far from being simply a technical question. It very often touches upon politically and culturally sensitive

4 The general outline of the concept of deliberative supranationalism has been elaborated in Joerges/Neyer (1997a). For a more recent explanation cf. Neyer (1999).

5 This essay is in both its analytical scope and its normative reasoning only concerned with the first pillar of the EU. Throughout the essay I therefore use the term EC and not EU.

issues such as determining acceptable levels of risk involved with different standards for products and methods of production. Market-building therefore needs to be understood as a complex endeavour of making not only markets but societies compatible with another.

In the EC, this complex undertaking was from its very beginning concerned with the question about adequate institutions and decision-making procedures. Until the introduction of the third indent of Art. 145 (now 202) in 1987 almost all legal acts were agreed upon according to Art. 148 (now 205) and/or Art. 189 (now 249). Bargaining in the Council was not restricted to basic legislative activity such as defining the general aims of secondary law but also very often encompassed defining the means for implementing them, adapting legislation to technical progress and specifying the technical details which products were expected to comply with. Even agreement on administrative and technical details such as the definition of recipes for foodstuffs was sought by means of intergovernmental bargaining and generally needed unanimity for being concluded (cf. Gray 1993: 2-3). Little wonder that market making was characterised by inefficiency, slow progress and over-detailed legislation.

Backed by the famous Cassis de Dijon decision of the European Court of Justice (ECJ), the Commission in 1979 announced a new legislative strategy which centred on the interpretation that the ruling of the ECJ could be understood as giving support for a *principle of mutual recognition*. This interpretation holds that all products which are legally marketed in one Member State may not be restricted in any other Member State. In its Communication of 8 November 1985, the Commission explained the implications it would draw from its understanding of the Court's decision. The Commission stated that the legislative approach followed in the past needed to be revised by drawing a distinction between: "... on the one hand matters which, by their very nature, must continue to be the subject of legislation and, on the other hand, those whose characteristics are such that they do not need to be regulated" (point 7). All actions proposed by the Member States falling outside these "essential topics" would, when notified through Directive 83/189, be subjected to the touchstone of Art. 30 (now 28).

Furthermore, in pursuit of the policy set down in this Communication, the Commission proposed to the Council a new legislative strategy which relied on the instrument of so-called "framework directives". Framework directives should be restricted to laying down only

essential requirements which products need to comply with and refrain from dealing with technical specifications. At the same time the Commission requested a wide delegation of powers for the enactment of implementing legislation which finally was granted to it by the amendment of Art. 145 (now Art. 202). In its third indent the Article states that the Council shall 'confer on the Commission in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down'. It soon became clear, however, that the Council was not prepared to invest the Commission with the exclusive power of implementing programmes which so often touch upon economically important interests and politically sensitive issues. Instead, in its so-called Comitology Decision of 13 July 1987,⁶ the Council made it clear that Member States were not willing to loosen their intergovernmental grip on the implementation process. More constructively speaking, the Comitology decision rejects the idea of a supranational central implementation machinery headed by the Commission, and thus indirectly forces national governments into a co-operative venture.

In that decision, the Council distinguishes among seven different procedures of Member State oversight under which the Commission is to execute its implementing powers. These so-called comitology-procedures represent specific combinations of autonomy of the Commission and control by the Member States. The advisory committee procedure emphasises efficiency and collective interests by merely requiring the Commission to consult Member States. In the case of the management committee procedure, more extensive consultation is necessary in order to avoid a negative qualified majority in the Council. The regulatory committee procedure, finally, forces the Commission to seek for a qualified majority supporting its proposal. It therefore may not only result in significant delays, but also gives great weight to the particular interests of the Member States. All of these comitology committees are composed of representatives of Member State governments and chaired by the Commission. The importance of comitology for the every-day conduct of Community affairs can be illustrated by the fact that only 11 per cent of all Union legislation enacted by the Council and EP since 1993 has been directly implemented by the Member States. The overwhelming majority of Union legislation is administered by the Commission (Dogan 1997: 38). In 1994 the Commission adopted, mostly as part of its implementing powers, a total of 7034 legal acts, of which 3064 were regulations, 3635 decisions, 33 directives, 26 recommendations and 263 opinions (Falke 1996: 117). Furthermore, the range of implementing measures the Commission undertakes in collaboration

6 See fn. 2

with comitology committees is not restricted to executive activities on a concrete, individual level such as imposing market restrictions on certain products and general advisory work in a broad range of topics, but also includes legislation of an abstract and/or general type such as the adoption of directives intended to harmonise technical or economic developments. Although comitology committees are primarily set up to control the Commissions' power, empirical evidence underlines that the working style in most comitology committees is rather co-operative, aiming at the facilitation of mutual understanding and centred around the exchange of experiences with colleagues from other Member States and with Commission officials (Eichener 1997: 222-260; Joerges/Neyer 1997a: 280).⁷

Broad quantitative data are useful in drawing an overall picture of comitology. Any more detailed descriptions of comitology, however, face the problem that comitology does not refer to a certain institution but to a huge number of committees, which only have a certain legal status and a catalogue of decision-making procedures in common. They do not only differ in terms of the applicable decision-making procedure, their working styles and problem-solving philosophies but also in the range of tasks they are expected to cope with.⁸ According to the Community budget, in 1996 no less than a total of 409 committees existed, of which 339 were to be consulted by the Commission in the course of Community rule-making.

2.2. The Parliaments' Critique

The expansion of bureaucratic competence in the administration of the internal market and the fusion of legislative and administrative activities in comitology have led to fierce criticisms of the European Parliament concerning its compatibility with the established institutional balance.⁹ Whilst Parliament was unhappy about the whole procedure since a long time¹⁰ and has

7 Falke (1996:142) reports that in nearly 12.000 meetings of agricultural management and regulatory committees between 1971 and 1995 only 8 out of approximately 50.000 decisions were unfavourable. In its opinion "Reinforcing Political Union and Preparing for Enlargement" of 28 February 1996 the Commission lists for the period 1992 - 1995 a total of only 6 cases which have been referred back to the Council.

8 For a recent collection of case studies on committees in the EU cf. Joerges/Vos (forthcoming) and van Schendelen/Pedler (1999).

9 For a critical account of that argument cf. Vos (1998).

10 For an excellent and detailed account of Parliaments struggle with the Council and the Commission to become involved in comitology cf. Bradley (1997). He characterizes the overall attitude of the Parliament towards comitology as one of "deep distrust, boiling over on occasion into barely disguised hostility" (at 231).

characterised the comitology decision already in July 1987 as an "alarm bell demonstrating the manifest lack of political will on the part of the Member States to give practical effect to the objectives of the SEA"¹¹, its critique has gained momentum with the adoption of the Treaty on European Union. Parliament now argues that the third indent of Art. 202 [145] only refers to acts which the Council has adopted and therefore could not be applied to acts adopted under the co-decision procedure which implies "full equality of Parliament and Council".¹² As opposed to Parliament, Council argues that the execution of legal acts of the Community is, according to Art. 10 [5] in the sole competence of the Member States. Only by their autonomous decision they delegate parts of their sovereign powers to the Commission and only insofar as it seems necessary to them (cf. Jacqu  1996). The Parliaments efforts to enlarge its competencies by participating in the implementation of European legal acts therefore are not covered by the provisions of the European Treaties but need to be viewed as an intrusion into competencies of the Member States and a violation of Treaty provisions. The Council furthermore argues that it is the Member States and not any European institution, which command the expertise to decide on how best to integrate European legal acts into their respective national legal systems. Finally, comitology deals - as the Council argues - only with technical implementation of secondary law and therefore does not need to be under general supervision of the Parliament, which should restrict itself to co-operate in elaborating basic legal acts and leave the implementation of these acts to the administrative machinery and the deliberations of technical experts.

After Parliament refused to accept implementing procedures under which the decisional power could revert to the Council alone (types II and III) and the first failure of a co-decision procedure occurred, both institutions agreed on a so-called "modus vivendi".¹³ This provisional agreement was expressed to be without prejudice to the positions of principle of the institutions concerned, and pending any revision to be discussed at the IGC 1996. It provided that Parliament should be informed about all draft general implementing acts and any negative opinion delivered by supervisory committees. Furthermore, the Council should adopt measures being referred to it only after giving Parliament a reasonable time to deliver an opinion and by taking due account of the Parliaments' point of view. The modus vivendi, however, has not brought the inter-institutional debate to an end. Not only did it fail to put the Council and

11 OJ 1987 C 246/42.

12 OJ 1994 C 20/176.

13 OJ 1996 C 102/1.

Parliament on an equal footing but it has also failed on its own limited terms. Neither did the Commission provide an adequate flow of information to the Parliament nor did it always allow Parliament sufficient time to adopt a position. Although the IGC was expected to solve the inter-institutional problem (probably by changing the third indent of Art. 202 [145]), it failed to do so and only demanded the Commission to prepare a proposal for a reform of comitology before the end of 1998.

In its proposal dating from 24 June 1998, the Commission, however, proposed only minor changes to the comitology procedures.¹⁴ Basically, its proposal contains three elements: 1. general criteria for guiding the legislator's decision about the adequate procedures to be applied; 2. a reduction of the procedures from seven to four (advisory, management, regulatory and safeguard procedure) and 3. an effort to put the Council and the Parliament on equal terms in cases where a Commission's proposal does not meet with approval in the committee. While the first two innovations will most probably be easily accepted by the Council, it is the last point which hits the disputed issue of the "full equality-problem": after adoption of the Commission's proposal concerning the reform of comitology, Parliament will no longer stand apart when issues are referred back from a committee to the legislator but will be fully involved in deciding about new implementation measures of the Commission. The proposal from June 1998 therefore surely makes an important step towards a necessary rebalancing of the Council's and the Parliament's competencies. For assessing, however, whether not only the direction of the reform but also its scope is adequate, it is necessary to understand comitology in the broader context of the normative foundations of supranational governance.

3. Normative Foundations of Supranational Governance

What are the appropriate guidelines for reform? Is Parliament right in its claim that comitology is to be viewed as part of a process of intergovernmental fusion, bypassing its right of co-legislation and to be condemned for distorting the institutional balance? Or is it an expression of the necessity to establish efficient structures of governance which are technically able to cope with complex interdependence as it exists in the EC? Answering these questions obviously is no easy task. Which are the normative criteria to apply to comitology? If they are

¹⁴ Proposal for a Council Decision, laying down the procedures for the exercise of implementing powers conferred on the Commission, KOM (1998) 380 fn.

the criteria of majoritarian democracy, defenders of the comitology procedure are in a difficult position: comitology is neither under control of the European nor of the national Parliaments; it is neither transparent in terms of openness for the media nor accessible to the general public but is conducted behind closed doors and confidential deliberations among appointed experts.

3.1. Justifying Supranational Governance

Any justification of comitology needs to confront these issues. Such a justification, however, must start from identifying basic normative criteria, from which it is possible to deduce implications. These criteria cannot be developed in the void of general reflections about the procedural and substantive requirements of a democracy but need to take account of the very nature of the European polity. But what is the nature of the beast like? Few issues in European integration studies have attracted more attention and provided less acceptable conclusions. This paper does not want to join the chorus of those trying to analytically capture the whole thing¹⁵ but approaches the problem in a less ambitious way by focusing on some basic normative underpinnings of the EC. It therefore starts with adopting Weilers' understanding of the idea of a community which "is not meant to eliminate the national State but to create a regime which seeks to tame the national interest with a new discipline" (Weiler 1995: 249). The primary objective of the EC, in this perspective, is to provide the Member States with an institutional framework that accepts the normative limitations of state-based constitutional democracies (disregard of external effects) and focuses on harmonizing structurally inward-looking polities. The indisputably correct claim that if the EC were to apply for membership in the EU "it would not qualify because of the inadequate democratic content of its constitution" (Offe 1996:145, own translation) is therefore of only limited relevance for assessing the normative status of the EC. The fact that - except for Art. 177 [130u] of the new Amsterdam Treaty (which is concerned with the identification of normative criteria for development aid) - the word "democracy" is not at all mentioned is neither mere accident nor expression of some "New Reason of State" aiming at bypassing subnational constituencies by means of interexecutive politics¹⁶; it only is witness to the deliberate intention that EC decision-making is

15 For recent attempts cf. Caporaso (1996), Risse-Kappen (1996).

16 "The strategy of the New Reason of State consists in the reorganisation of statehood... with the aim of entering into inter-governmental commitments which can be removed as far as possible from the sphere of domestic political debate and thus rendered immune to revision" (Wolf 1997: 74, own translation; see also Moravcsik 1994).

not about organising the self-governance of a European collective of individuals but only about coping with transnational economic interdependence in a limited number of issue-areas.

For assessing the legitimacy of the EC, it is of crucial importance to keep in mind that the fact that majoritarian procedures are of utmost importance for justifying democratic governance in the Member States does not automatically translate into a normative imperative to democratise the Community also by means of majoritarian procedures. Whereas the concept of democracy can be understood as referring to a set of political institutions backed by consented (or even constitutionalised) norms which aim at enabling a collective of individuals to rule itself, the Communities' normative rationale is its existence as a non-majoritarian institution, achieving consent and legitimacy by means of argumentation and persuasion (Majone 1998). A more accurate starting point than simply to measure the difference between an idealtypical democracy and the practice of the Community is to argue that the Communities normative claim only holds to make Member States economies compatible with another. More convincing than to conceptualise the EC as a more or less democratic polity therefore is to follow Majone and conceptualise the EC as a non-majoritarian regulatory apparatus which is not substituting Member State polities but adding decision-making procedures to their political systems and reforming existing ones. Arguing that supranational governance neither is nor should be conducted in institutions which claim democratic legitimacy does not imply, however, that their adequate normative yardstick is simply efficiency (but see Majone 1994: 31). Its intrusion into national legal systems and therefore its relevance for influencing public order in the Member States is far to intense for not having to comply with additional requirements such as ensuring transparency, accountability, subsidiarity, parliamentary oversight and substantive rationality. What is needed for guiding normative reflection about decision-making procedures in the EC therefore is a justification of supranational governance which equally takes into account that the concept of democracy cannot be easily translated to the European Community but also rejects the claim that a sufficient degree of legitimacy of European decision-making system can be provided by efficiency alone. Finally, it also should be mentioned that a growing number of European citizens seem to put increasing emphasis on a decentral Community which situates legitimacy and political power at the lowest level possible. Demands for the centralization of the sources of legitimacy and political power therefore carry some inevitable flavour of obsolescence. In contrast, arguing for an understanding of the EC as a collection of decision-making procedures which need to be justified in terms of their contribution to making

interdependent democracies compatible with another, escapes the trap of demanding centralism in the name of democracy and is open for alternative horizons of legitimate governance.

As opposed to democracy, legitimacy is a much broader concept: it is analytically not restricted to indicating the degree of self-determination which a collection of individuals realises in a polity but can be understood as referring to the degree to which a decision-making procedure can convincingly be justified by reasonable arguments,¹⁷ and is therefore accepted by its addressees. Important to note, reasonable arguments will very often but not always be those which apply principles of self-determination. Arguments in the affirmative are those which are normally used in explaining the reasons for parliaments, referenda, or the application of the principle of subsidiarity. On the other hand, however, reasonable arguments can also be in sharp contradiction to notions of self-determination: in arguing for the independence of institutions such as courts or central banks most people today put emphasis on the requirement that neither the general public nor the legislature should be able to interfere with their deliberations. Their legitimacy does not derive from being part of a process of organising self-determination but - on the contrary - is based on an assumed isolation from interference by parliaments or the general public. Asking for the legitimacy of an institution or decision-making procedure therefore does not imply simply to assess in how far they are in conformity with principles of self-determination; it also encompasses to relate the claim for self-determination to the equally necessary condition of respecting functional imperatives concerning the problem-solving capacity of decision-making systems.

A further necessary requirement of a legitimate supranational decision-making procedure is its promotion of what Dworkin calls "integrity" (1991: 164-167): integrity as a concept of legitimate decision-making builds on the assumption that any legislative body needs to treat like cases alike. It therefore requires that past legislative decisions do have a restraining impact on the range of options available to legislation. As Dworkin argues, integrity in legislative activity is insofar a necessary political ideal as it is a precondition for a legal act to be recognised as expressing a certain conception of fairness, justice or decency. This requirement, however, is far from being unproblematic: it may not imply that past decisions should be viewed as anything sacrosanct, removed from the possibility of even major changes and therefore binding legislation to old-fashioned values and/or scientific errors. It only puts

emphasis on the need of a coherent legal frame under which society conducts its daily affairs and in which major changes - if assumed to be necessary - need to be backed not only by a majority of opinions but by convincing arguments. Any assessment of the legitimacy of a decision-making procedure therefore needs to take into account at least three elements: a) respect for the principle of self-determination, b) their problem-solving capacity and c) the integrity of law.

3.2. Facilitating Deliberative Discourses

Neither an orthodox supranational nor an intergovernmental decision-making procedure can satisfy this triple requirement by itself: both of them fall short with respect to either the principle of self-determination or a high degree of problem-solving capacity and none of them knows procedural guarantees that decisions taken are in principle in accordance with decisions of the past. An idealtypical orthodox supranationalist perspective, to begin with, starts from the assumption that one of the basic problems of European decision-making derives from the fact that Member States still insist on their national sovereignty. Only because they are reluctant to accept that interdependence requires a re-establishment of hierarchical political relationships at the European level, giving clear precedence of supranational majoritarian over intergovernmental consensus principles, the problem-solving capacity of European decision-making systems remains insufficient. Without major reform and the establishment of European statehood, so the argument, Member States cannot cope efficiently with problems of market failure and will have to face ineffective and therefore undemocratic supranational institutions (Mancini 1998). What is needed therefore, so the argument, is either a broad extension of majoritarian principles or the establishment of a supranational European executive, probably by means of empowering independent agencies (Majone 1998). The problem of this perspective is rather obvious: the overwhelming majority of the Member States regards both majoritarian rule and authoritarian imposition at the European level as being simply politically unacceptable (i.e. illegitimate) because it does not take account of the fact that democracy - and therefore supreme political legitimacy - is rooted in their national political systems and not at the European level. Empowering the Community to make collectively binding decisions by means of simple majoritarian voting, hierarchical imposition and authoritarian enforcement must be

17 This understanding is in accordance with Habermas' definition of legitimacy as the "Anerkennungswürdigkeit einer politischen Ordnung" (cit. in Guggenberger 1986: 271).

highly problematic. As a general norm of European governance, it would imply a major shift of emphasis away from democratic self-determination and towards European statehood. Simple majority voting, independent agencies and expanded supranational administrative competencies can therefore only under very limited circumstances be assessed as being in accordance with the normative imperatives of a decentral democratic polity.

Equally insufficient for satisfying the triple requirement of self-determination, problem-solving capacity and integrity is intergovernmental co-operation. Co-operation denotes an idealtype of decision-making which assumes member state preferences as being intrinsically legitimate reflections of democratic procedures which therefore may only under very restricted conditions be outvoted (Moravcsik 1997, Beitz 1991). Under a co-operation procedure each and every Member State has the right to veto decisions which implies that agreements need to be unanimous. Whilst any outcome of a co-operation procedure is at least from a formalistic point of view normatively unproblematic (because all parties have agreed), it carries the risk of lowest common denominator politics, can easily be instrumentalised by single parties for strategies of obstruction and provides no procedural mechanisms of ensuring that decisions respect the integrity of law. Legal provisions deriving from intergovernmental bargaining are heavily shaped by substantive compromises, package dealing and the logic of two-level-games (Putnam 1988). Respect for law's integrity is rather detrimental to it, and difficult to accommodate. The extension of qualified majority voting (QMV) by the SEA and the Treaties of Maastricht and Amsterdam has changed a lot with regard to the risk of lowest-common-denominator politics and the danger of obstruction (cf. Lewis 1998). With regard to safeguarding integrity, however, QMV changed nothing.

As opposed to both an orthodox supranationalist normative perspective (extension of majoritarian and hierarchical elements) and an intergovernmentalist perspective (strategic bargaining, eventually modified by QMV), a deliberationist type of decision-making has the potential to perform according to the triple criteria introduced. Its capacity to do so, however, depends on at least three necessary conditions. These can be summarised as procedural requirements any deliberative decision-making system needs to incorporate:

- (1) Definitions of discourse

The most important procedural requirement of a deliberative legislative discourse among Member State delegations is an as concrete as possible definition of (a) the collective aim of the participants of the group (for example balancing of Art. 28 [30] and 30 [36]) and (b) substantial boundaries of the discourse. As Stephen Holmes rightly argues, "a conversation is invariably shaped by what its participants decide *not* (own emphasis) to say" (1988: 19). To avoid destructive conflicts and cognitive overload, controversial themes are very often suppressed by means of "strategic self-censorship" or - as Rawls has put it - "the method of avoidance" (Rawls 1985). Examples for this are ubiquitous in European politics: most basically they can be found in the principle of enumerated competencies; more concretely in the Commission's new Green Paper on foodstuffs,¹⁸ which states that the only relevant topics for legislative discourses are those which are in direct relation to issues of public health and safety. Accordingly, in the deliberations of the Standing Committee for Foodstuffs, an important gag rule is not to mention explicitly the distributive implications of measures adopted but only to assess their contribution to health and safety aspects.¹⁹ In discriminating between legitimate and illegitimate arguments and providing criteria for assessing the validity of an argument (scientific evidence), bargaining among delegates is conducted under the shadow of consented principles, and decisions being agreed upon must be legitimised by reference to the underlying principle of promoting health and safety. Not only to reach compromise, but to be able to give convincing reason to policy outcome is precisely what the integrity of law demands.

(2) Arguing not bargaining

The second most important procedural requirement of any deliberative discourse is the condition that the act of casting votes plays only a minor role in decision-making and is in importance subordinated to argumentative interaction. Promoting this requirement entails that the preferences of delegates are not viewed as intrinsically legitimate reflections of the individuality and democratic nature of any Member State's preferences but only as governmental claims which attain their normative status by being convincing to the other delegates. The very act of convincing, however, is far from common to traditional notions of intergovernmental interaction. Delegates normally are assumed to be hierarchically subordinated to national ministries, to represent national interests and to try to persuade others of their point of view - but not to be convinced by the arguments of others. Deliberation

18 COM(97) 176 final.

therefore not only presupposes a disposition to accept others point of view as equally legitimate concern but also that governmental delegates have the necessary leeway for changing their opinion - even if that contradicts what their ministers assume to be in the national interest. Deliberation therefore also demands an increase in the discursive capabilities of delegates by means of either more efficient intermediary structures between them and their ministries or - if that is not achievable - a significant increase of their discretionary competencies. What at first sight seems to be a basic practical problem in terms of internal ministerial hierarchies and an equally crucial normative problem in terms of responsiveness of delegates to domestic constituencies, is ultimately a necessary precondition for reaching multilateral agreements above simple aggregation. If all delegates were insisting on their status as being representatives of an intrinsically legitimate domestic interest, all solutions apart from identifying common denominators would be outruled and systematically excluded. The main decision-making method of a deliberative discourse therefore is to argue, which means to back claims by giving evidence to its propositions. As opposed to a voting procedure in which a slight unhappiness with a provision counts as much as a strong support for it, different intensities of preferences do not need to be ignored but can become an essential issue in a process of pooling individual judgements (Miller 1993: 75-77). The mode in which discourses are conducted in a deliberative procedure can be understood with the help of Dworkin's conceptualisation of legal reasoning (1991: chap. 2): each of the actors in a given legal dispute interprets a given norm relevant for a decision to be taken (in our terms: a substantive definition of the discourse) according to his subjective understanding of its meaning and by openly describing his or her way of deducing implication from a consented norm. By doing so, a sample of different interpretations emerge which may in only rare cases converge towards a commonly shared opinion of what kind of concrete measure or behaviour a given norm requires. Legal reasoning by openly describing subjective ways of deducing implication from a norm, however, helps clarifying differences of understanding and is accessible for critical evaluation by third parties.

(3) Existence of a Third Party

The existence of a Third Party which reflects shared normative concerns (substance and boundaries of discourse) is another necessary procedural requirement. It serves the double

function of giving opinion in cases which cannot be solved by means of discourse among the parties themselves and providing incentives to actors for behaving in accordance with the requirements of legal reasoning. Analytically, this Third Party could be, for example, a court (assessing the legal status of arguments), a scientific body (assessing the scientific soundness of arguments), or even the general public (assessing in how far arguments are in accordance with a given political will). From a normative point of view, there can be little doubt that in an ideal world it is always the general public which acts as the Third Party. In doing so, the public can control whether political agents comply with substantive and procedural requirements of a given definition of discourse and thereby enable itself to impose political costs on non-compliant governmental actors. Under conditions of enlarged discretionary competencies of governmental delegates, this control is obviously of utmost importance. In the real world of scarce informational resources and often highly technical matters on the legislative agenda, it may, however, rather often be the case that neither an interested general public nor interested media actually exist. In these cases, the general public needs to be supported by functionally equivalent third parties which act in its interest. Which of the three possibilities may be the adequate one in a given decision-making system, directly depends on the nature of the definitions of a given discourse. If these definitions include for example the provision that arguments are only to be viewed as legitimate if they refer to scientific evidence, the adequate Third Party might be a scientific committee. If the definitions are more broad and only provided by secondary or even primary legislation, the adequate Third Party might more adequately be the ECJ. In all European discourses, above even Treaty law (for example, IGCs), however, the Third Party needs to be equally broad and must be the general public and/or the national legislatures. In all three instances, the function of the Third Party is not to give authoritative decisions which lay the ground for executive enforcement but to provide a disciplinary function to the actors involved in the discourse, to induce them to refrain from openly selfish arguments and legitimise their preferences by referring to the normative criteria laid down in the definitions of a given discourse.

4. Comitology as a Means for Facilitating Deliberation

What is the relevance of the above reflections for suggesting a new normative perspective of comitology? The argument presented so far holds that neither hierarchical-majoritarian nor strategic intergovernmental decision-making can by itself provide the legitimacy needed for

European decision-making. Both need at least to be supplemented by elements of a deliberative discourse. Delegation, in this perspective, is not simply to be understood as a means for outsourcing those tasks which are of minor importance, referring only to technical implementation. Rather, it needs to be understood as structuring the legislative process itself, introducing elements of procedural rationality and substantial integrity to intergovernmental bargaining. Its most important justification is the double acknowledgement of the need for and the difficulty of facilitating deliberative decision-making and its potential to restrict the bargaining process in the Council to formulating basic standards and criteria for framing the way in which disputed issues are dealt with. It is essential elements of the problem-solving process itself therefore, which are being delegated. Delegation therefore needs to be viewed as expressing the intention to change the logic of the decision-making process from one dominated by strategic bargaining and preference aggregation to one conducted by means of deliberative interaction. Accordingly, comitology refers to a set of decision-making procedures which are neither simply characterised by different intensities of Member State control nor can be understood as merely technical devices for propelling efficiency. Rather, comitology refers to a redefinition of the terms under which problem-solving is conducted and resembles a kind of intrinsically political administration rather than an apolitical and technical procedure.

It is important to emphasise that intergovernmental deliberation is neither *per se* legitimate nor separate from democratic governance. In the perspective outlined above, it is viewed as a necessary supranational supplement to state-based majoritarian democracy and international co-operation. Its focus is not on substituting state-based majoritarian democracy but on enabling the Community to harmonise equally legitimate but highly diverging preferences of Member States and to cope systematically with the external effects of state-based democratic decisions. Comitology surely is not to be misunderstood as any real world expression of the normative ideals being proposed above but as a procedure which is to be legitimised and criticised against the yardstick of its ability to realise the promise of a deliberative decision-making procedure. The appraisal of comitology and its critique therefore are two sides of one coin: its appraisal is the need for deliberation in propelling the efficiency of decision-making; its critique is the degree to which the promise of deliberation remains unfulfilled.

The political price for comitology so far has largely been paid by the European Parliament. Article 202 [145(3)] can easily be interpreted as a partial negation of the legislative rights

which have been given to Parliament by the introduction of Article 189b EEC. In agreeing to the comitology procedure, Parliament factually disempowers itself of some of its legislative rights; and Parliament has always made clear that it strongly disapproves of the whole procedure. Without major reform, comitology implies either the danger of a hollowing out of the co-decision procedure (because important legislative activities are delegated to the Commission), or falls victim to an upset Parliament which rejects any legislative act that does not specify every technical detail. These dangers should be taken seriously when the Council reflects on the Commission's proposal for a reform of comitology. Its reform should have as its basic element a compromise between Council and Parliament about the conditions under which both can accept delegation. Such a compromise, however, must not aim at legally enabling the Parliament to broadly participate in executive legislation (for which it is not an adequate institution). A possible way of dealing with Parliament's political demands, without involving a legislative body in mainly executive implementation, might be to introduce for both the Council and the Parliament a right of revocation for all implementing acts referring to basic legislation conducted under the co-decision procedure. Such a right would entail that both institutions could, under certain specified conditions, require the Commission not to implement its decisions but to refer them back to the legislative procedure. Agreeing on such a proposal would imply that both Council and Parliament could be rather relaxed about increasing discretionary competencies of delegates, step back from demands of overseeing the day-to-day practice of comitology and nevertheless remain in a position to enter the decision-making discourse whenever single topics become of crucial importance to them.

Finally, any proposed reform which is oriented at realising deliberative ideals needs to incorporate a huge leap towards increased transparency: until today comitology committees generally conduct their affairs behind closed doors and neither publish minutes nor their agendas. This practice is neither necessary nor useful but detrimental to the promise of deliberation. Except for deliberations concerning highly sensitive issues such as the fixing of prices of agricultural products or the allocation of grants under Union expenditure programmes, comitology committees should generally convene publicly, and grant access for the media and interested non-governmental actors. Increased transparency would both encourage the discipline of delegates to behave according to the definitions of given legislative discourses and also provide the public and Member State legislatures with a more accurate account of what governmental delegates in committees are actually doing. Realising

deliberative ideals ultimately carries the promise of a new logic of intergovernmental co-operation: secret diplomacy, the practices of scape-goating and credit-claiming and the factual non-accountability of “faceless bureaucrats” would all become features of the past. The normative ideal of intergovernmental co-operation would escape the realm of secretly aggregating domestically constituted preferences and become something more close to sector specific “little Parliaments” (even if composed of governmental delegates) with clearly identifiable personal accountabilities. Such a proposal might seem rather radical if compared to our common understanding of the practice of intergovernmental politics. It is, however, no more radical than the existing discontinuities between both traditional national and international normative theories on the one hand and the facticity of an ever closer European polity on the other.

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