

The Secret Life of Comitology *or* the Role of Public Officials in EC Environmental Policy*

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1. Introduction

In his book *“Politics of Globalisation”*, Ulrich Beck¹ asks what would happen if the European Union were to apply for membership of the European Union. In Beck’s view, the EU’s application would be rejected owing to its lack of democratic structures.

But what about the Member States themselves? This rather naïve question is much more difficult to answer because – although the Member States of the European Union are certainly democratic states – they are being deprived more and more of their capacities to act as sovereign democratic states.

The Member States have had to face up to this reality for years. The environmental sector serves as just one example: up to 90% of all environmental legal acts within the national legal systems are of EU origin and national parliaments have – at least in these areas – sometimes nothing other to do than to simply transform European directives into national legislation.²

This “decline” of national parliaments has been only gradually compensated by the strengthening of the powers of the European Parliament. For example, legal activity in the legislative process has drastically decreased over the last few years in the environmental sector. Legal activity is still maintained in the executive process, but here legal acts (the so-called implementation acts) are decided by national experts together with the European Commission and the European Parliament is excluded. In this respect, one could say that the growing importance of the European Parliament within the legislative process has – at least in the environmental field – not really increased the powers of the European Parliament as more and more decisions are delegated to the Commission (in the so-called comitology committees) and the Member States.

In addition, both the European Parliament and the national parliaments have to implement more and more international treaties and conventions which have been decided by experts in international organisations (such as United Nations, NATO, the World Bank, the International Monetary Fund, the G-7). Today, already 28% of all proposals of the European Commission have their origin in international treaties (which have to be implemented in the Community).³ This present trend

towards “denationalisation” and “deparliamentarisation” will further increase as decisions are taken more and more at international and global level. As a result the role of the executives will be heightened and a new form of international elite will be created with the responsibility for decision-making.

Historically, the “Act”, “Loi” or “Gesetz” has first of all symbolised its source, namely the will of the people, and then its effect, namely its supremacy over the monarch’s ordering powers.⁴ Today, international organisations have become the monarch and the people have – through their parliaments – lost their supremacy when deciding on an “Act”, “Loi” or “Gesetz”. In this respect, one might say that the national parliamentarians are increasingly turning into executive policy-makers who have to obey international obligations. One might even say that we are entering a post-parliamentary age where national parliaments are losing decision-making powers and the European Parliament only partially compensates for this loss of sovereignty.

The process of “governance without government” or “governance without legitimacy” in international organisations (and agencies) is becoming both necessary and ever more problematic.

At European Union level, the role of the national administrations and of national civil servants in the environmental sector (at European level), in particular within the executive process, has – surprisingly – up till now received very little attention from the scientific sector. The reason for this lack of interest relates partly to the structure of the Treaty itself; committees in the environmental sector are not mentioned in the Treaties. Art. 157 2 TEC states that in the performance of its duties the European Commission shall neither seek nor take instructions from any government or other body. Each Member State must respect this principle and not seek to influence the members of the Commission in the performance of their tasks. Art. 157 2 TEC therefore supports the view that the Commission is a hermetic body which does not provide links to the Member States (e.g. by establishing committees). This image of the Commission ignores some basic features of the proceedings in the Commission (and the Council). The traditional view of the Commission is that it is the sole executor of Community policies. Curiously, there is nothing in the treaties to suggest that the Commission should have the exclusive right to manage Community policy and to take decisions of an executive nature. It is more the case that Community policies are normally

* *Un bref résumé de cet article en français figure à la fin.*
See announcement of seminar “Managing European Environmental Policy – The Role of Public Officials in the Policy Process of the European Community” on page 42.

managed by the Commission under powers conferred by secondary legislation adopted by the Council and delegated to the Commission under Art. 145 3 TEC.

As regards the Council, Art. 145 TEC stipulates that it shall “have power to take decisions”. The Council is therefore widely understood as being the legislative body of the EC. This presumption is misleading. In reality, the Council is the main source of legislation but it also exercises executive powers (and is a more or less permanent negotiating forum in which, below the level of a Ministers meeting, Coreper and working party meetings create a spirit of multinational cooperation).

Over the last few years there has been a significant trend, particularly within the European Union, towards a mutual interweaving, intermixing, interlinking and merging between the national and Community levels.⁵ Particularly at Community level, the political decision-making process is becoming ever more labyrinthine, as it were, and decisions are increasingly the result of negotiations within informal or formalised networks. In 1997, 10950 meetings (an increase of 1.3% on the previous year) were organised by the European Institutions and other European bodies. The Joint Interpreting and Conference Service provided 138,000 interpreter days (9% more than in 1996).⁶ The multi-level interaction of civil servants from national and international administrations has thus reinforced the trend towards the “sharing” or “fusing” of powers between bureaucrats and politicians.⁷

In an increasing number of areas, national civil servants are becoming involved in expert committees of the Commission who advise the Commission in preparing proposals (within the legislative process), working groups of the Council (composed of civil servants) whose task is to prepare the meetings of COREPER and the Council of Ministers (within the legislative process) and comitology committees whose task is to implement (within the executive process) the legal acts decided upon by the Council or by the Council and the Parliament.⁸ In the environmental sector, there are approximately 100 consultative committees composed of national civil servants and other experts assisting the Commission in shaping proposals put to the Council.⁹ It is difficult to create an exact picture as to the number of expert committees of the Commission and their activities in the environmental sector. The Commission differentiates between 5 special committees created by legal act, 65 permanent expert groups of the Commission and 35 ad-hoc expert groups. With respect to this differentiation, it is worth mentioning that in the *Anglopharm* case,¹⁰ the Court announced its dissatisfaction with the fact that the Commission insists on using its right to decide whether or not to consult advisory expert groups. The Court stated that the drafting and adaptation of Community rules is founded on scientific and technical assessments which must themselves be based on the results of the latest international research. In carrying out such assessments, the Commission should therefore consult experts on

scientific and technical issues because neither the Commission nor the comitology committees, which generally comprise representatives of the Member States, are in the position to carry out the type of assessment required. According to the Court, this means that the consultation of expert groups may be mandatory in some cases to ensure that measures adopted at Community level are both necessary and adapted to the objective of protecting human health as pursued by the legislative act in question.

The object of this article is *not* to describe the Comitology decision 87/373/EEC or to explain the different committee procedures as this has already been done elsewhere.¹¹ The intention is more to look into the “daily life” of the comitology committees from the point of view of a national civil servant and to analyse their working methods, rules of procedure, style of negotiation and composition. There will be a critical assessment of the comitology committees in the environmental sector in terms of their efficiency and effectiveness, and against the background of the discussions on the democratic deficit in the EU. The article will conclude with some realistic proposals as to how the comitology system can be reformed.

2. “Comitology” in the Environmental Sector

In EC environmental law an initial distinction should be made between the approximately 130-150 legal acts of the Council and the amending acts of the Council (or the Council and the Parliament) within the official legislative procedure and the approximately 100 implementation acts of the Commission and the Council within the executive procedure (on the legal basis of Article 145, third indent and the Comitology decision 87/373/EEC of July 1987).¹²

The spectrum of executive measures set up by the implementation acts covers:

- adaptation to technical progress, mainly by amending the annexes (for example Council Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources; Directive 94/67 EC on the incineration of hazardous waste);
- the evaluation of standards and substances and the establishment of lists (Directive 94/62/EC on packaging and packaging waste);
- approval of funds (in the case of the LIFE-committee, Art. 13 of Regulation 1973/92 of 21 May 1992, modified by 1404/96);
- rule-making activities of an abstract general type (for example plans on how to protect the Community’s forests from pollution, Commission Regulation 836/94 of 13 April 1994);
- decisions regarding the lifting of import bans or the fixing of quotas for substances and stipulations for the use of certain substances (to be put on the market) (Regulation 3093/94 on substances that deplete the ozone layer);
- collection of data (Council Directive 92/43 on the

conservation of natural habitats and of wild fauna and flora).

According to the budget, the total number of comitology committees in the environmental sector has increased from 0 in 1975 to 17 in 1985 and 34 in 1998. However, Directorate-General XI itself lists 36 comitology committees, of which 20 were active in the year 1995.¹³ Among the different comitology committees one can differentiate between advisory committees, management committees (Type IIa or Type IIb) and regulatory committees (Type IIIa or Type IIIb). The relationship between the Member States' officials within these committees and the European Commission is different in each of the three committees and the five procedures.

- Within an *advisory committee*, the Commission only has to take the opinion of the committee "into utmost consideration" before it implements its draft measure.
- Within a *management committee*, the Commission can only be prevented from proceeding with its draft measure if there is a qualified majority of the Member States' votes against the Commission proposal. If this is the case, the Commission *may* implement the measure if the Council does not take a different decision within one month (Type II-a). In a IIb committee the Commission *must* defer the implementation of its proposal up to three months. The Council will then have three months to take another decision by qualified majority.
- "In contrast, within a *regulatory committee*, the Commission needs a qualified majority of the Member States' votes *for* its proposed measure (62 out of 87 votes)".¹⁴ If this is not the case the Commission will have to present a proposal to the Council, which can either accept the proposal or override it by unanimity (IIIa procedure). In addition, in the regulatory committee (Type IIIb) the Council can also override the proposal of the Commission by simple majority. "Clearly, the last type, particularly the IIIb version, within which the Council can pull the 'emergency brake', the Commission's freedom to act is limited".¹⁵ In the environmental sector, nearly all comitology committees are regulatory committees (Type IIIa or Type IIIb).

2.1 *Voting procedures and implementation practice in the environmental sector*

According to the only official sources from 1995 the 20 committees which met in 1995 issued 35 opinions, of which 30 were positive and 5 not positive, i.e. did not reach a qualified majority in favour (approx. 17%).¹⁶

There are several reasons why one should hesitate before assuming that the official figures give a realistic picture of the exact number of comitology committees and voting procedures.

Several studies on comitology committees show

how the working procedures are clearly geared towards consensus. Statistically, voting patterns indicate that over 90% of all opinions expressed were favourable towards the Commission's position.¹⁷ These statistics are generally interpreted as showing that voting patterns do not necessarily imply the dominance of the Commission but more that the Commission tends to make proposals acceptable for the Member States. On the other hand, the comitology committees do not want to rely on the Council (politicians) to intervene.¹⁸ Another reason is that contrary to what "scholars (and even European institutions) had believed for a long time, the IIIa and even the IIb procedure provide the Commission with quite a strong position".¹⁹ This argument can be illustrated by three practical cases:

- (a) During a 1995 meeting of the so-called Article 19 Committee (IIIa) established by the Council Regulation (EEC) 1836/93 of 1993 (OJ 1993 L 168/1) (the so-called EMAS-regulation) the Commission did not obtain a qualified majority in favour of its proposal (there were only 48 votes in favour). Germany, Italy and Austria voted against, Spain, Greece and Luxembourg abstained. Hence, the Commission had to refer the decision back to the Council which, in a meeting held in December 1995, could neither reach a qualified majority in favour of the proposal nor unanimity against it. Consequently, the Commission adopted the proposal in February 1996 (OJ 1996 L 34/42).
- (b) Another interesting case concerned the implementation of Directive 91/689/EEC on hazardous waste within a regulatory committee (Art. 18 of Directive 75/442/EEC as amended – Type IIIa). The initial proposal of the Commission to implement the Directive (with the aim of establishing a list of hazardous waste) was not approved by qualified majority by the committee and therefore had to be referred to the Council. The Council had to decide on the proposal by 21 December 1994 at the latest but could not reach an agreement (especially) because of the negative position of the United Kingdom.²⁰ This time the Commission did not adopt its original proposal but gave the Council another opportunity to find a solution!!! Consequently, the Council established a list of hazardous substances (OJ L 2356/14 of 31.12.1994).
- (c) As regards the IIb procedure, the Commission had no problem overcoming the resistance of the Member States when it came to implementing Directive 91/672/EEC of 23 December 1991 (OJ L 377 of 31.12.1991). One proposal of the Commission to implement the Directive on the standardisation and rationalisation of reports on the implementation of certain directives went very far and was not accepted by many of the Member States. In addition, when it came to vote on the proposal not all Member States showed up at the meeting. The result was that although the overall attitude towards the proposal was very negative the

remaining Member States could not reach a negative opinion. Consequently, the Commission implemented its proposal.

The voting patterns in the above-mentioned cases indicate that the impressive record of consensual voting behaviour does not necessarily mean that there are no conflicts between the Member States and the Commission within the committees. The voting practice in the environmental sector shows however that the position of the Commission is stronger than expected even in policy fields (such as the environmental sector) where the vast majority of committees are regulatory ones. On the other hand, the Member States seem for a long time to have neglected the problem of the Council having to vote unanimously against a Commission proposal in the case of a IIIa procedure (if the committee has not approved it beforehand).

2.2 The secret life of comitology or the problem of intranparency and complexity

Much of the administrative and policy-making work of the Community has, until very recently, been characterised by secrecy. Working documents and protocols of committee sessions have rarely seen the light of day and it has been very difficult for researchers to gain access to internal committee documents, either from the Council or the Commission. Together with the immense complexity of the various procedures, this in no way creates the transparency which is supposedly one of the main new objectives of improving EC legislation. Sometimes even those experts who represent their countries in these committees have difficulty in identifying the exact type and form of the committee. There are various possible reasons for this:

- *The different committees meet together*

Lots of committees meet together on matters in which they have a common interest and common competences. For example, Article 1 of the rules of procedure for the "Habitats Committee" (92/43/EEC of 21 May 1992) provides for joint meetings with the scientific and technical committee for the purposes of modifying Directive 79/409/EEC on the conservation of wild birds. The same procedure is foreseen in the Committee set up under Directive 91/676/EEC of 12 December 1991 and the Urban Waste Water Committee 91/271/EEC of 21 May 1991 (as authorised by Article 9 of Council Directive 91/676/EEC).

- *The committees established by the budget do not meet at all*

One interesting case is that of the Drinking Water Directive 80/778/EEC,²¹ Articles 14 and 15 of which set up a committee to deal with the adaptation of the rather unimportant Annex III. Because of its limited competences, the committee never convened, although in the Community budget it is listed as a IIIb committee (with a budget of ECU 10,000 for the financial year

1996). In the actual text of the Directive however the committee is not defined as a IIIb committee. The Commission proposal – not yet adopted by the Council – to revise the Drinking Water Directive now provides for the creation of a IIb committee.²²

- *The same committee may be allocated tasks by several legal acts.*

Most of the legal acts in the environmental sector decided on by the Council make provision for the establishment of a comitology committee. However, it appears that very often one committee is allocated the task of implementing several legal acts.

In the air sector for example, the regulatory committee (IIIa) set up under Directive 96/62 EC of 27.9.1996 has implemented Directive 80/779/EEC, Directive 82/884/EEC and Directive 85/203/EEC. Furthermore, the regulatory committee (IIIa) in Directive 79/113/EEC decided on the implementation of 7 legal acts.

In the waste sector, a single comitology committee (the waste committee set up under Directive 75/442/EEC, as amended) exercises implementing powers for the most important aspects of the Community's waste management policy. Despite this impressive concentration of power within one committee, evidence has shown that committees are even more important in the case of other European Union policies. In the food sector for example, some 35 directives and regulations make reference to the Standing Committee on Foodstuffs. In his analysis of the food sector, Falke has identified 117 different groups of tasks.²³

- *The committees change their nature when it comes to voting on a certain proposal*

Very often, comitology committees only exist when it comes to the vote on a formal proposal. Representatives of European interest groups are generally invited to participate in committee sessions. The same applies to environmental groups, though they are rarely present. In some cases (such as the case of the Article 19 Committee of the EMAS regulation) the committee acts as an advisory committee as long as it is composed by various groups. The comitology committee only exists when it comes to a formal vote and even then only national delegations are allowed to participate.²⁴

This mixture of working group and comitology committee sometimes makes it very difficult for national civil servants to know when they have to act as a representative of a Member State within a comitology committee and when as an independent national expert.

- *The committees may set up information exchange groups and technical sub-groups*

Nearly every rule of procedure of the different comitology committees allows for ad-hoc groups, technical groups or informal groups to be set up or for experts to be invited to discuss special technical issues. The IPPC – Comitology Committee is supplemented

with an IPPC Information Exchange Forum and by Technical Working Groups. Furthermore, Article 10 of the Rules of Procedure provides the option of inviting experts. For some representatives these distinctions between the different groups (committees, technical groups, scientific groups, etc.) are not very clear especially in view of the fact that they sometimes meet at the time or on the same floor.

3. Negotiating comitology – the power struggle between the institutions

3.1 *Difference in opinion as to what sort of committee to set up*

There is regular disagreement as to the appropriate committee procedure, with the Commission and the Parliament favouring advisory and management committees and the Council generally favouring regulatory committees. The Council's stance ensures that the Member States have the chance of having some influence on the proceedings. As a rule, the Commission itself proposes advisory committee procedures for the exercise of implementing powers under Article 100a TEU.²⁵ For proposals not relating to the Internal Market it is also possible to envisage a IIa, IIb or even a IIIa committee. The choice between these types depends on the type of measure to be adopted and the requirements of the sector in question. For example, in its proposed directive on the new water framework directive, the Commission has proposed a IIIa procedure.²⁶ Yet once a common position with the Parliament and the Council has been achieved, it seems to be quite arbitrary as to what type of committee is finally set up under the committee procedure of any given directive.

3.2 *The problem of the Council delegating implementing powers to itself – Directive 91/414/EEC*

Furthermore, within EC environment law it is not always clear on what basis the Council confers or does not confer implementing powers on the Commission. In those cases where the Council has assumed implementing powers for itself and acted in the absence of formal parliamentary participation, it has been tempted to circumvent previous legislative decisions. This happened when, in the context of the implementation of the Pesticide Directive 91/414/EEC, the Council approved the infiltration of pesticides in groundwater at a rate which went beyond the limits set by the Drinking Water Directive.

The Parliament protested against the continued procedure for the implementation of this directive and, consequently, the Court of Justice annulled the Council Implementation Act 94/43/EC of 27 July 1994, in case C-303/94 of 18 June 1996. The Court held that the Council could not be required to draw up all details of regulations or directives. It was therefore sufficient for only the essential elements of the matter to be dealt with to have been adopted in the legislative process. On the other hand, the Court held that the implementing directive did not respect the provisions enacted in the basic

directive and that the provisions of the contested directive had been amended without the Parliament having been consulted. Consequently, the Court decided that the Parliament's prerogatives had been violated and that the directive therefore had to be annulled.

3.3 *The power struggle between the Member States in the Council*

Finally, there is no general agreement within the Council as regards the setting up of a certain comitology procedure.

In the case of the amendment of the Drinking Water Directive 80/778/EEC, in an early draft proposal of 1994 the Commission proposed a IIb Committee for the implementation of annexes II and III. Later on, in its official proposal 94 (612) the committee procedure was changed into a IIa one. In its first reading, the Parliament made an amendment and asked to be informed and formally involved in the implementation of the Directive according to the comitology procedure (a reference was made to the Modus-Vivendi (OJ C 102, 4.4.1996) in the text). This request was rejected by the Commission in its amended proposal 97(228) in which – interestingly! – the Commission proposed that the Parliament be only informed (according to the Plumb-Delors Agreement) about the implementation of the Directive.

The positions of the various Member States concerning the committee procedure varied considerably. In the Council Working group of 12 September 1997, only the United Kingdom agreed on a IIa Procedure whereas Germany and Italy preferred a IIb procedure. Denmark requested a IIIb procedure. All of the other Member States reserved their opinion. Later on in a Council working group of 10 October 1997 the Dutch chair suggested that a IIb procedure be set up. However, the Commission insisted on a IIa procedure. Austria was now asking for a IIIa procedure to be set up and France even for a IIIb procedure. Finally, in December 1997 the Council was able to agree on a IIb procedure. However, in its second reading the European Parliament again made reference to the Modus Vivendi of April 1996 and requested the introduction of a completely new type of comitology procedure in the text. In addition, it asked for the committee to meet in public, to publish the agenda two weeks in advance and to publish the minutes for the meeting.

At the time of writing, the Council has not yet reacted to this new proposal (see Table 1) .

4. Composition of committees and rules of procedure

In general, all comitology committees in the environmental sector are composed of two governmental experts per Member State, although the wording of the texts and the rules of procedure do not oblige the committees to be exclusively composed of governmental experts but also allow private and scientific experts. The rules of procedure of the Urban Waste Water Committee allow each Member State to be represented by no more

than 4 officials. Contrary to this, Article 6 of the rules of procedure of the IPPC-Directive allow each Member State to send one representative to the Committee (the Commission only pays the costs of one representative). In addition, whilst one would expect national civil servants to be members of the comitology committees, this is not always the case. Committees may include “representatives of the Member States”, “highly qualified persons”, “experts” or “experts from the private sector”. As regards the composition of the committees, one has to bear in mind the distinction between comitology committees and scientific committees, whose task is mainly to advise the Commission and the comitology committee on the implementation of certain aspects. In the environmental sector, the most important scientific committee is the Scientific Committee for Toxicity, Ecotoxicity and the Environment. Its members are exclusively scientists from institutes and universities who are appointed by the Commission (Decision 97/579/EC of 23 July 1997).²⁷

Generally, the rules of procedure on the composition of the committees merely give a rough idea of who is to represent the Member States, which agendas are to be discussed or which formal rules of procedure are to be followed. The rules of procedure allow lots of committees to create subgroups composed of independent experts and lobbyists. The members of the committees are generally appointed by national administrations, although in some cases they are appointed by the Commission (Art. 4 of Decision L 105/29 of 26.4.1988). The committees usually meet at the Commission’s headquarters in Brussels (Borchette-building) or Luxembourg (Plateau Kirchberg), although exceptions to this are possible (Art. 9 of OJ L 105/29 of 26.4.1988).

The Commission’s duties as regards convening the meetings, the time limit for distributing the agenda and materials to the Member States are very different and depend on the rules of procedure of the respective committee. The rules of procedure of the Habitat Committee for example require that the agenda and materials be sent out 21 days before the meeting, in special cases 10 working days, in the case of the Urban Waste Water Committee this is 35 days (Art. 3 RP), in special cases 21 days, and the LIFE Committee (Regulation 1973/92 of 21.5.1992) and the draft proposal for the IPPC-Committee both specify 35 days in advance (Art. 3), in special cases 10 days and 14 days respectively. As regards time arrangements, in case C-263/95 of 10 February 1998 the Court of Justice ruled that the deadlines stated in the rules of procedure must be respected by the European Commission (and therefore that there is no possibility of shortening the period of notice without the approval of the Member States). Furthermore, the Court ruled that the Member States should have the necessary time to study the documents, that these documents should (also) be sent to the Permanent Representatives of the Member States (and not only to the members of the committee) and that they should be drafted in the language of each State.²⁸

5. The Council and the scope of delegation powers in the environmental sector

In the environmental sector, the Council has for a long time attached great importance to regulating matters itself in the legislative process as much as possible (such as timetables and annexes in the directives 70/220 EEC, 76/769 EEC, 70/157 EEC, 76/464 EEC etc.), primarily because the powers of the Parliament were previously only of a consultative nature. In some very sensitive areas (such as in the case of the implementation of Annexes I to V in Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora), the Council has assumed implementing powers for itself (without stating in detail why it was doing so). In the case of Directive 76/464/EEC on dangerous substances discharged into the aquatic environment, the Council did not delegate any implementation powers. In addition, no committee was set up in the basic text of Directive 76/464/EEC. As a consequence, very little has come of the further amendment and implementation of Directive 76/464/EEC. So far, emission limits and environmental quality standards have been laid down for only 18 of the 130 priority “black substances” in altogether 6 Council directives.²⁹ After the last amendment of this directive, no further measures were taken, probably because after the ratification of the Single European Act the Council had to decide by qualified majority (Art. 100a of the Treaty establishing the European Community).

This is a very poor result, particularly in view of the fact that no less than 1500 dangerous substances qualify for inclusion on the “black list” of the directive. This very slow decision-making process can be explained by the fact that it was the Council of Ministers who always had to amend the directive in the legislative process. On the other hand, it was not possible to speed up the procedure because no committee was laid down in the basic act 76/464/EEC. Furthermore, following the ratification of the Maastricht Treaty in 1993, the Council required the involvement of the Parliament and qualified majority voting (according to the co-decision procedure) if it wanted to amend the directive and to include a comitology procedure. There was apparently never enough political will to do so. The Commission now intends to include Directive 76/464/EEC and its implementation acts in the new water framework directive (COM (97) 49, OJ 184/97).

Despite these examples, it has become clear in the nineties that the Council’s practice of assuming the responsibility for regulation as much as possible has come to an end. It now seems to be the case that the Council generally delegates very broad powers to the Commission, mainly to relieve its own workload (such as in the case of Directive UVP 85/337, the Nitrate Directive 91/676 or the Urban Waste Water Directive 91/271), or in order to escape the growing influence of the Parliament in the legislative process. The latter argument is supported by the empirical findings of Dogan who shows that in the period 1987-1995 a comitology committee was set up for only 16.7% of all

the legal acts decided according to the consultation procedure. On the other hand, in those cases where the cooperation and co-decision procedure were applied, a comitology committee was established for 49.6% of all acts.³⁰ Only in some cases is the Council not willing to delegate broad powers (such as in the case of Directive 96/61/EC on integrated pollution prevention and control).

It has been shown over the last few years in particular that the basic legal texts of the Council often use an exceptional amount of vague legal concepts and offer derogation clauses for the national systems. Using wording such as “the Member State may adapt to technical process the directive” the European legislator therefore does not clearly delimit the delegation of implementing powers. On the other hand, this practice gives the Commission broad powers of implementation by means of the comitology committees.³¹

6. Comitology and the quality of the legal acts

From the point of view of the national administrations charged with applying the legal acts, constant adaptation, amendment and implementation – as in the case of Directives 67/548/EEC, 70/220/EEC and 76/769/EEC – contributes considerably to the fragmentation of law and poses immense problems for the civil servants in the Member States who have to implement and apply them.³² A good example of this is Directive 67/548/EEC. The Commission, in its 14th report on the control of the application of Community law, had to admit that the Member States had difficulty in keeping up with the constant amendments to the directive and incorporating the technical adaptations into their legal systems.³³ The Commission has adapted Directive 67/548³⁴ to technical progress 17 times. The Council itself dealt with the technical adaptation twice because the Commission proposal was blocked by the implementation committee on the eighth and eleventh adaptation to technical progress of the Directive. Furthermore, the Council itself adapted the Directive to technical progress several times and amended it seven times. The last time Directive 67/548 was amended completely was the seventh amendment (Directive 92/32). All in all, this Directive has been amended and adapted 27 times.³⁵ In order to improve the situation, the Directive is now in the process of consolidation (almost 2000 pages long).

The Council also amended Directive 76/769 EEC³⁶ on restrictions on the marketing and use of chemicals 16 times, mainly by enlarging or altering the annexes to include certain substances (for example by means of the well-known PCP Directive 91/173). Directive 70/220/EEC on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive ignition engines of motor vehicles³⁷ was implemented by the Commission twice and amended by the Council seven times (including Council Directive 74/290/EEC³⁸ which had to be decided upon by the Council because the comitology committee blocked it).

However, the greatest problem is still that many rules appear to overlap one another. In this respect it still has to be seen whether especially the Directive 96/61/EC on integrated pollution and control and the proposed new Water Framework Directive (COM (97) 49 final) might help in the future. More generally, from the point of view of legal clarity it would seem necessary to publish an updated version of the implemented basic act with every implementation act.

Finally, the clarity, and therefore applicability, of the provisions in the annexes is decreasing rapidly as the number of changes increases. The reason for this is that the changing legal act often mentions only the change in the annex itself, and not the complete new version of the annex now applicable. Therefore, one has to obtain an overall view of all changing legal acts and make a comparison in order to be able to understand the technical provisions of the annex.

7. Conclusion

The concept of the separation of powers and democracy in general has been developed for the classical and sovereign national state but not for international organisations such as the European Union. The famous judgment of the German Constitutional Court on the Treaty of Maastricht was a good illustration of how many difficulties are involved in defining democracy in a “denationalised world”.³⁹

International organisations continuously gain competences and decision-making powers without creating well-developed democratic structures at the same time. Furthermore, international organisations and agencies lack public identification and support because of their technocratic decision-making procedures and geographical distance from the citizens. The German Constitutional Court has therefore invented the artificial notion of “Staatenverbund” (somewhat more than a confederation and somewhat less than a federation of states) in order to define the European Union. This term is trying to identify an organisation which is not a federal state (and will probably not develop into one) nor a typical international organisation.

Both the Member States and the European Institutions seek to balance their interests and powers in this “Staatenverbund”:

- As regards comitology, the Council of the European Union is happy with the current structure because it means that the “overloaded” Ministers do not have to decide on every detail in the legislative process. The delegation of wide implementation powers to the comitology committees does not pose a threat to national sovereignty because the large number of regulatory committees guarantees that the national administrations may – if they want – exercise a maximum of control over the implementation activities of the European Commission. Furthermore, the more powers the Council delegates, the more the Ministers of the European Union can escape from the growing

influence of the European Parliament in the legislative process.

- The European Commission is happy because the Council – in order to discharge itself from its heavy workload – has been tempted to delegate very broad implementation powers to the Commission. Furthermore, despite some difficulties the negotiation style in the comitology committees seems to be more consensual and the Commission can push through most of its proposals. Furthermore, the large number of IIIa committees within the environmental sector guarantees that the Commission's proposals can be overridden only by unanimity in the Council (in the case that the Commission does not get 62 votes in favour of its proposed measure).
- The European Parliament has certainly been unhappy for a long time as it was excluded from all implementation activities. Nowadays, things have changed gradually because both the European Commission and the Council have – since the signing of the Treaty of Maastricht – been under more and more pressure from the Parliament and they have already made concessions to the European Parliament.⁴⁰ However, these concessions are of an informal nature. The new proposal of the European Commission⁴¹ (with the objective of reforming the provisions of the Treaty relating to implementing measures) is very ambivalent in this respect and provides a greater informal but not necessarily a greater formal role for the European Parliament. It firstly proposes that the Parliament should be informed of committee proceedings on a regular basis. Secondly, if the Commission does not receive a qualified majority for its proposal in the regulatory procedure, it *may* present a proposal. Only in this case will the Parliament be formally involved according to the Treaty provisions (e.g. Artt. 189c and 189b TEC). As the Commission is not legally obliged to do so, the question remains whether it will present a new proposal. Only if the Commission presents a proposal will the role of the European Parliament increase. It will then be a question of whether this proposal of the European Commission will be acceptable to the Council of Ministers but especially to the European Parliament.

Comitology shows that academic questions such as whether Europe might move towards more federalism or intergovernmentalism are highly abstract debates. The present characteristics of European integration are dominated by the growing influence of the European and the national executives in the policy-making process of the EU (within the broader context of the growing influence of “experts” in international organisations in general). With this in mind, one could say that the growing importance of the European integration process is developing in parallel with the growing influence of the Member States in “Brussels”⁴² and at the same time

the impact of “Europe” in the national administrations. This can best be illustrated by the growing number of comitology committees (in the environmental sector) whose decisions have an enormous impact on the national legal, political and economical systems of the Member States. These committees guarantee that the Member States have resort to considerable “blocking power” against the Commission in the executive process. On the other hand, regulatory committees have not hindered the Commission to push through the vast majority of its proposals.

A more profound controversy surrounds the fact that “comitology” touches upon an elementary aspect of Community law, namely the institutional balance. More generally speaking, the balance of power between the institutions and the Member States, and between the institutions themselves, has altered in significant ways.

Criticising this reality would mean offering an alternative. But what would be this alternative be? Regulating in the legislative process as detailed as possible (and consequently giving more powers to both the Council and the European Parliament?) or delegating even more powers to agencies and standardisation bodies? None of the two solutions would seem to respond to the problem.

The Council and the European Parliament have neither the political will, the expertise, nor the structure to decide alone on detailed legislative and/or implementation acts.

As regards the proposal to delegate more powers to agencies, in its Meroni decision the ECJ⁴³ set up obstacles to the decision-making powers of regulatory agencies. The delegation to standardisation bodies would lead to even more intransparency and decisions would be left to experts and interest groups.

Obviously the issue of committees and comitology needs a combined (and not separate) answer to the question as to how the European Union addresses the question of effectiveness, efficiency, transparency and – within this context – democracy.⁴⁴

As regards the question of effectiveness, one might say that the fact that European and national experts rather than politicians take the decisions might be good for the overall state of the environment because politicians are not experts and cannot judge important technical questions. Therefore, politicians and diplomats should decide only on the essential questions. On the other hand, some observers argue that the system of committees should be seen as enhancing the effectiveness and efficiency of the Community's institutional structure in that it provides a link between the Member States and the Community administrations. The development of networks and the involvement of national experts in the implementation process at European level should have a positive effect on the implementation of EC environmental law.

Although this observation is certainly true, the complexity of the different committees ranging from advisory committees to regulatory committees (Type

IIIb) and the various complicated procedures could be seen as a bureaucratic mechanism which is robbing the Community decision-making process of its last vestiges of democratic accountability. Democratic legitimation therefore needs reinforcement. But how? Whilst during the seventies and eighties commentators on the “democratic deficit” of the EC almost unanimously supported the strengthening of the European and the national parliaments, the focus has meanwhile shifted to one of activating the citizens, decentralising powers and the access to the courts, enabling access to documents and information, opening up the meetings of the Council of Ministers, etc.⁴⁵

This shift of attention is important as the future will very much depend on the question how international organisations can be made visible, accountable and transparent to the citizens. In the European Union the element of transparency, or rather, the lack of transparency, is a moot point when it comes to comitology. At least one (very modest) proposal to increase transparency would be to “streamline” the hundreds of different rules of procedures and provide for clearer and standardised rules of procedures. Furthermore, the Commission should publish an overview of the different types of Committees in the environmental sector, their composition, tasks, competences etc. Especially in the field of comitology, a comprehensive guide should be published explaining in which cases which committees assume the function to implement several acts (like the “Art. 18 Committee” in the waste sector) and in which cases they act as an advisory committee, a management committee (type a or type b) or a regulatory committee (type a or type b). Furthermore, in those cases where the comitology committees create sub-groups these groups should be composed beside the representatives from (industrial) lobby groups as well of experts from environmental NGOs.

If international organisations continue to develop intransparent technocratic decision-making processes, they will increasingly lose public support. On the other hand, the citizens have to become active themselves (why not together with the parliaments) at international level and develop “their” concepts for international organisations. Who knows, in ten years’ time there may be mass demonstrations against the decision-making procedures in global institutions.

RÉSUMÉ

La comitologie ne désigne en aucun cas ce que la simple analyse du mot pourrait laisser supposer. Il ne s’agit pas d’une science des comités, mais d’une pratique très réaliste et complexe permettant aux exécutifs nationaux et européen de décider sur de nombreuses questions techniques. Au regard du fonctionnement du pouvoir exécutif au sein des Etats, un tel système peut apparaître comme le triomphe de la bureaucratie au détriment de la démocratie. Cet article essaie d’analyser la

comitologie dans le domaine de la politique de l’environnement.

NOTES

- ¹ Beck, U. (Ed.), *Politik der Globalisierung*, Frankfurt am Main, 1998, p. 32.
- ² 35% of all legal acts in Denmark are of EU origin, 50% in the Netherlands and Germany, 80% in the UK and up to 95% in Portugal, Greece, Italy and Spain. See: Demmke, C., *Bremser oder Vorreiter? – Deutsche Umweltverwaltung und europäische Umweltpolitik*, will be published in: *Die Verwaltung* 1/99.
- ³ Lamport, C./Lughofer, S., *Keine Angst vor Brüssel*, Wien 1995, p. 56.
- ⁴ Winter, G., “Reforming the sources and categories of EC legal acts: A Summary”, in: Winter, G. (Ed.), *Sources of European Union law*, Baden-Baden 1995, p. 23.
- ⁵ See very detailed: Schmidt-Aßmann, E., “Verwaltungs-koooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft”, *Europarecht*, No 3, 1996, p. 270 et seq.
- ⁶ European Commission, *General Report on the Activities of the European Union 1997*, Brussels/Luxembourg 1997, pp. 450-451.
- ⁷ Wessels, W., *Comitology: fusion in action. Politico-administrative trends in the EU system*, *Journal of European Public Policy*, June 1998.
- ⁸ See the concept of the Policy Cycle: Windhoff-Héritier, A., *Policy-Analyse*, Frankfurt/New York, 1987; Pedler, R.H./Schäfer, G.F. (Eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, Maastricht 1996.
- ⁹ European Commission, SEC (96) 2371 of 13 December 1996.
- ¹⁰ Case C-212/91, Judgment of 25 January 1994, ECR 1994, p. I-0171.
- ¹¹ See Pedler, R./Schäfer, G. (Ed.), *Shaping European Law and Policy*, op.cit.
- ¹² These figures refer only to the environmental sector in the strict sense of the term. This means that animal protection and consumer protection are excluded, as well as the legal acts decided within the EURATOM Treaty. Furthermore, this number does not include all the international conventions concluded by the EC.
- ¹³ European Commission, Directorate-General XI, *Inter-institutional Relations, List of Committees*, Brussels, 13 December 1996.
- ¹⁴ Schäfer, in: Pedler/Schäfer, op.cit. p. 14.
- ¹⁵ Schäfer, in: Pedler/Schäfer, op.cit. p. 14.
- ¹⁶ See: European Commission, *Fonctionnement des Comités en 1995*, Brussels, 18 June 1996, p. 5. (Council Directive 74/290/EEC adapting Directive 70/220/EEC; Council Directives 87/432 and 90/517 adapting Directive 67/548/EEC, Directive 94/31/EC implementing Directive 91/689, Directive 91/596 implementing 90/220/EEC Council Directive 96/21 adapting Directive 94/54).
- ¹⁷ J. Falke, “Comitology and other committees: A Preliminary Assessment”, in: Pedler/Schäfer, op.cit. p. 139/140; J. Falke/G. Winter, “Management and regulatory committees in executive rule-making”, in: G. Winter, *Sources and Categories of European Union Law*, Baden-Baden 1996, p. 567 et seq.
- ¹⁸ Wessels, W., “Comitology: fusion in action. Politico-administrative trends in the EU system”, *Journal of European Public Policy*, June 1998, p. 225.
- ¹⁹ Toeller, A.E., “The Article –19 Committee” on the Regulation on the Environmental Management and Audit Scheme”, published in: van Schendelen/Pedler, *EU-Committees as influential policy makers*, Aldershot, p. 207-236 (forthcoming).

- ²⁰ See General Secretariat of the Council, 1817th session – 15-16 December 1994.
- ²¹ OJ L 229/11 of 30 August 1980.
- ²² Article 15 of the Commission’s Proposal for a Council Directive, COM (94)612, OJ C 131 of 30 May 1995. See also: Amended proposal COM (97)228 final of 4.6.1997
- ²³ Falke, J., in Pedler/Schäfer, p. 117-166; See also: Joerges, C./Neyer, J., “Multi-Level Governance, Deliberate Politics and the Role of Law”, Paper presented at the European University Institute, Florence, 9-10 December 1996, pp. 10-11.
- ²⁴ See Toeller op.cit., p. 210.
- ²⁵ In this context, it is worth mentioning that around 20% of all environmental acts are based on Art. 100 TEC.
- ²⁶ COM (97) 49 final of 26.2.1997.
- ²⁷ In this case it is interesting to note that DG XXIV gives very detailed information about the Committee, its Agenda, Members and discussions on the Internet. See: http://www.europa.eu.int/comm/dg24/health/sc/sct/index_en.html
- ²⁸ Case C-263/95 of 10 February 1998 concerned an action brought under Article 173 of the EC Treaty against the Federal Republic of Germany concerning the annulment of Commission Decision 95/204/EC of 31 May 1995 implementing Article 20(2) of Council Directive 89/106/EEC.
- ²⁹ Interestingly, the Council did not implement the Directive itself but amended the Directive within the official legislative process on a proposal of the Commission and after consulting the Parliament
- ³⁰ Dogan, R., “Comitology: Little Procedures with Big Implications”, *West European Policies*, No 3, 1997, pp. 31-61.
- ³¹ Broad powers of implementation have been delegated for example through Council Directive 91/156/EEC of 26 March 1991 (OJ L 78/32) on waste which set up a committee charged with defining a list of waste and adapting the technical annexes of the directive. Council Directive 91/689/EEC of 12 December 1991 (OJ L 377/20) set up a committee with the task of defining a list of hazardous waste and adapting the technical annexes of the directive.
- ³² OJ L 196, 16.8.1967, OJ L 76, 20.3.1970, OJ L 262, 27.7.1976.
- ³³ European Commission Services Document, 14th annual report on monitoring the application of Community law, Com (97) 299 final, 29.5.1997, p. 93.
- ³⁴ Council Directive 67/548/EEC of 27 June 1967, OJ L 196 of 16 August 1967.
- ³⁵ At the time of Greece’s accession, the annex of the Directive was amended to provide for the Greek translation.
- ³⁶ Council Directive 76/769/EEC of 27 July 1976 on the approximation of laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, OJ L 262/201.
- ³⁷ OJ L 76/1 of 20 March 1970.
- ³⁸ OJ L 159/61 of 28 May 1974.
- ³⁹ BVerfG, Judgment of 12.10.1993.
- ⁴⁰ See the Klepsch-Millan agreement of 13 July 1993 (OJ C 255 of 20.9.1993, p. 19), the so-called Modus Vivendi (OJ C 102 of 4.4.1996) and the Samland-Williamson agreement of 25.9.1996.
- ⁴¹ Proposal of the European Commission for a Council Decision laying down the procedures for the exercise of implementation powers conferred on the Commission, OJ C 279/5 of 8.9.1998.
- ⁴² Golut, J., “State Power and Institutional Influence in European Integration: Lessons from the Packaging Waste Directive”, *Journal of Common Market Studies*, September 1996, p. 313 et seq.
- ⁴³ EJCE – C-9,10/1956, Meroni, ECR 133, 157.
- ⁴⁴ Metcalfe, Les, “Building Capacities for Integration: The Future Role of the Commission”, *EIPASCOPE*, No 2, 1996, p. 8.; Winter, G., “On the effectiveness of the EC Administration: The Case of Environmental Protection”, *Common Market Law Review*, No. 33, 1996, p. 689 et seq.
- ⁴⁵ For a very illustrative account of the whole topic of openness and transparency, see: Deckmyn, V./Thomson, I. (Ed.), *Openness and Transparency in the European Union*, EIPA 1998. □

Table 1

Institution	Document	Position on Comitology procedure
European Commission	Draft proposal 1994	I Ib
European Commission	Proposal 94 (612), OJ C 131, 30.5.1995	I Ia
European Parliament	First reading, OJ C 213, 15.7.1997	Rejection of Comitology, reference to the Modus Vivendi
European Commission	Proposal 97 (228), COM (97) 228 final of 4.6.1997	I Ia, Rejection of Modus Vivendi, instead acceptance of Plumb-Delors Agreement
Council Working group	Working group meeting of 12 September 1997, Dossier No. 95/0010 (SYN)	UK accepts a I Ia procedure, D and I prefer I Ib, DK requests I Ib, all others reserve their positions
Council Working group	Working group meeting of 10 October 1997, Dossier No. 95/0010	NL proposes a I Ib procedure, Austria requests I Ia, France I Ib, Commission maintains its I Ia proposal
Council of Ministers	Common Position C4-0083/98 – 95/0010 (SYN)	Decision to adopt a I Ib procedure
European Parliament	Second reading (A4-0146/98)	Reference to the Modus Vivendi, request for new comitology procedure