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AND POLICY IMPLEMENTATION**

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1. General Introduction

The objective of the state of the art report is to provide an overview of the state of knowledge in each of the subprojects and to sketch briefly how the research to be carried out will complement and contribute to this body of knowledge. Since there has been very little research on the objects of the subprojects on Parliament, Council and comitology, their reports are relatively brief. It is an entirely different story with the theoretical project on legitimacy and EU-committees, where the authors have tried to focus on the key issues, referring only to publications that are most relevant for our research. The subject matter could easily fill a book.

The research team felt it was important to include in the report also a brief outline of the empirical research and the methodology to be used during the research project. This helped to focus the issues to be addressed, identified still existing weaknesses in coordination between the various subprojects and provided a better overview of the total project. At this stage it was not yet possible to link the theoretical issues of the subproject on legitimacy to the empirical subprojects. This is work that will have to be carried out in the next few months. The theoretical considerations will have to be integrated in the empirical work particularly into the questionnaires of the other two subprojects. The reader will nonetheless most certainly realize the significance of the theoretical reflections and the way they will provide the over-all framework for the whole project.

For practical reasons and in view of these considerations, the four subprojects in the report stand more or less on their own. Each also contains its own bibliography. In preparing this state of the art report the need to integrate the four subprojects was realized by every member of the team. The objective of addressing the questions and fundamental issues raised by the theoretical subproject in the empirical work of the other three subprojects has emerged as a top priority for the activities in the next four months. It will also be a top priority for the discussions at the next workshop.

2. Subproject 1: The Standing Committees in the European Parliament

Christine Neuhold

2.1. Introduction

This paper is starting with the assumption that the existing body of knowledge about committees of the European Parliament (EP) is rather limited. Although most general studies on the EU include a chapter on the EP, the specific studies on the workings of its committees are, for the most part, not only descriptive, but also very brief.

This report will put the EP committees into a more general context, by highlighting major points in the evolutionary process of the EP from consultative assembly to co-legislator.

An overview will subsequently be given about the existing body of knowledge on how EP committees function both in the legislative and implementing process. The paper will close by focusing on approach, methodology and open questions of our research.

2.2. The Evolution of the European Parliament: From Consultative Assembly to Co-legislator

The fact that the EP is now commonly seen as co-legislator with the Council is a relatively new development. For more than three decades it did not enjoy any effective rights of participation in the legislative process. It started out as an assembly possessing only two major powers: the competence to pass a motion of censure against the High Authority¹ and the right to be consulted by the Council on selected legislative proposals. The opinions, given in this classical consultation procedure, were non-binding.

The original 142 members of the EP were not directly elected, but delegated by the national parliaments of the Member States. Although the possibility of direct elections was provided for in the Treaty of Rome (1957), due to the reluctance on the part of the Member States it took almost 20 years for the Council to give its consent to this step. The first elections were finally held in June 1979, when 410 members of the EP (MEPs) were elected from nine Member States according to the national election procedures of their respective countries.

The Single European Act (SEA) (1987) represented a major step forward for the EP. It marked the beginning of a new “triangular relationship”² between the Council, the Commission and the EP by introducing the cooperation procedure, which improved inter-institutional dialogue significantly, giving the EP the first chance to “flex its legislative muscles” and the possibility to exploit its “agenda setting powers”.³ The workings of the procedure showed that the Community institutions were able to come to a compromise rather quickly: the procedure lasted 734 days on average. The

¹ The forerunner of the European Commission.

² Westlake, Martin (1994): *A modern guide to the European Parliament*, Pinter Publishers, London and New York, p. 135.

³ For a detailed account of these conditional “agenda setting powers” and an illustrative example on how the EP used these powers to its favour, see Tsebilis, George: “The Power of the European Parliament as a Conditional Agenda Setter”, in: *American Political Science Review*, Vol. 88, pp. 128-142.

relevant data reflects that the Commission significantly contributed to the successful conclusion of the procedure.⁴ At the beginning of the new millennium, the cooperation procedure, which was principally linked to the completion of the internal market, is, however, losing importance. After the Amsterdam Treaty, it has only been retained for matters falling within the sphere of Economic and Monetary Union (EMU).

2.2.1. The EP as a Legislative Actor after Maastricht

Building on the positive experiences gained during the cooperation procedure, the EP's legislative competences were extended by the Treaty on European Union (TEU) – the so-called Maastricht Treaty (1993). Through the introduction of the co-decision procedure the MEPs were, for the first time, granted the power of veto in several policy areas.⁵

The innovative element of the procedure lies in the possibility to convene a conciliation committee in order to reach a compromise between the Council and the EP. The committee, which is composed of members of the Council or their representatives and an equal number of representatives from the European Parliament, has to reach an agreement on a compromise text within the very short time-span of six weeks. The Commission is also represented in the conciliation committee where its role is circumscribed, however, as it can no longer withdraw its proposals and prevent an agreement between EP and Council.

The EP was not put on a completely equal footing with the Council. The Council still had the possibility, if conciliation failed, to confirm its common position by qualified majority. The EP was then left with a “take it or leave it option”: either it rejected the text by an absolute majority of its members or did not act within six weeks. This put the EP into the uncomfortable position of being seen, in the latter instance, as responsible for the failure of a legislative act as it was forced to put in its veto in the final stage of the procedure.

⁴ See: Maurer, Andreas (1998): “Regieren nach Maastricht: Die Bilanz des Europäischen Parlaments nach fünf Jahren Mitentscheidung”, in: *integration* 4/98, p. 218.

⁵ Initially only 15 Treaty items were covered by the procedure, covering articles falling into the policy fields of the internal market, consumer protection, trans-European networks, cultural policy, public health and education. See: Smith, Julie (1999): *Europe's Elected Parliament*, Contemporary European Studies, 5, Sheffield Academic Press, Sheffield p. 75.

Consequently, the EP used its power of veto extremely sparingly. Up to the end of the 1994-1999 legislative term, a total of 379 legislative proposals had been forwarded to the EP according to the co-decision procedure, of which 200 have been concluded. In 166 cases, the Commission's proposals have resulted in binding secondary legislation.⁶ Two cases failed, as the conciliation committee could reach no agreement. Only in one case – the legal protection of biotechnological inventions – did the EP plenary reject a compromise agreement, which had been laboriously prepared over several conciliation meetings. As the Council was also split on this matter, it did not make use of the possibility of reaffirming its common position.

The potential and the dynamics of the co-decision procedure are reflected in the evolving relationship between the EP and the Council. The amount both of formal and informal contacts have increased significantly since the introduction of the procedure, bringing representatives of both institutions to the negotiating table in search of compromise and consensus.

The Treaty of Maastricht has, by introducing the co-decision procedure, presented both the Council and the EP, as well as to a certain extent the Commission, with a major challenge. It has enhanced cooperation between the institutions and given rise to new patterns of negotiations, preparing the ground for the interaction of the co-legislators after the coming into force of the Treaty of Amsterdam (1999).

2.2.2. EP and Council on an Even Footing after Amsterdam

The Treaty of Amsterdam strengthens the EP's role considerably, especially as regards its involvement in the legislative process. The co-decision procedure has been extended from 15 to 38 Treaty articles. It now applies to new areas within the fields of transport, environment, energy, development cooperation and certain aspects of social affairs. For certain areas⁷ within the third pillar, it is stipulated that the co-decision procedure should come into effect five years after the entry into force of the Treaty. The EP is still, for the most part, excluded from policy fields such as the Common Agricultural Policy (CAP), fiscal harmonisation and the conclusion of international agreements (except for association agreements).⁸ There are also new cases of “non-involvement” of the EP, the consultation procedure having been expanded by nine Treaty provisions. The EP is, for example, only asked to give an opinion on recommendations on employment policy and on agreements concluded by the European social partners.⁹ It is noteworthy that in its opinion of 26 January 2000 on the next IGC on institutional reform, the Commission proposes an extension of the

⁶ The Commission's proposal failed in 24 cases. In 17 of these, the procedure lapsed because the Council was unable to adopt a common position and in four cases the Commission withdrew its proposal prior to the first reading in the EP. See: Maurer, Andreas (1999): *(Co-)Governing after Maastricht: The European Parliament's institutional performance 1994 – 1999. Lessons for the implementation of the Treaty of Amsterdam. Study for the European Parliament*, Directorate General for Research submitted under Contract No. IV/99/23, p. 11.

⁷ Visa procedures and conditions (article 62(2bii) TEC) and Visa uniformity rules (article 62(2biv) TEC).

⁸ Article 37 TEC (ex-43); Article 152 (4) TEC (ex-129); Article 93 TEC (ex-99); Article 300 TEC (2) (ex-228).

⁹ Article 128 (4) new title on employment and Article 139 (ex-118b). See: Nentwich, Michael; Falkner, Gerda (1997): *The Treaty of Amsterdam: Towards a New Institutional Balance*, *European Integration online Papers (EIoP)* Vol. 1 (1997) No. 015; <http://eiop.or.at/eiop/texte/1997-015a.htm>.

scope of co-decision to common commercial policy rules such as basic anti-dumping rules and to legislative aspects of the CAP and the common fisheries policy.¹⁰ It remains to be seen whether Member States can agree on an enhanced legislative role of the EP in these fields, which currently fall under the intergovernmental domain.

2.2.2.1. The Streamlining of the Co-decision Procedure

A significant new element in the Amsterdam Treaty is the streamlining of the co-decision procedure. Most importantly, the possibility now exists to adopt a legislative act during the first reading, if either the EP proposes no amendments to the Commission proposal or if the Council agrees to the changes put forward by the EP. The significance of this new step becomes apparent when one considers the functioning of the co-decision procedure after Maastricht: of the total number of procedures finalised between November 1993 and June 1999, over 55% could have been concluded after the first reading, as the EP did not put forward any amendments to the common position or as the Council approved all parliamentary changes.¹¹ This seems to suggest that the new procedure might lead to an acceleration and simplification of the legislative process. The practice of the procedure so far has shown however that in this first stage of the decision-making process, dossiers have not been passed for the most part except when technical matters were at stake. From May 1999 until the end of 1999, four legal acts were concluded at the first reading, a phase which now starts simultaneously in the Council and the EP. These acts covered the approximation and adaptation of laws on technical issues within the fields of: measurement;¹² the Trans-European Networks (TENs);¹³ animal health protection;¹⁴ and the CAP¹⁵.

There was one notable exception to the “rule” that only technical issues can be resolved at the first reading stage: the establishment of a European fraud prevention office (OLAF) in May 1999. It was of high political significance after the European Commission resigned in March 1999 due to allegations of fraud, mismanagement and nepotism. This legal act was concluded under extreme time pressure to convey the impression that the Community institutions were undertaking all possible measures within their means to combat fraud and corruption. The Commission put forward its (modified) proposal in March 1999 and the legal act was adopted just two months later.¹⁶

¹⁰European Commission (2000): *Adapting the institutions to make a success of enlargement. Commission opinion in accordance with Article 48 of the Treaty on European Union on the calling of a Conference of representatives of the governments of the Member States to amend the Treaties*, p. 27.

¹¹ Maurer (1999): *op.cit.*, p. 8.

¹² See: 1999/0014/COD.

¹³ Decision 1741/1999/EC of the European Parliament and the Council of Ministers.

¹⁴ Directive 1999/72/EC of the European Parliament and the Council of Ministers.

¹⁵ Directive 1999/87/EC of the European Parliament and the Council of Ministers.

¹⁶ Regulation 1073/1999/EC of the European Parliament and the Council of Ministers concerning investigations conducted by the European Anti-Fraud Office (OLAF). The new act on the Fraud Prevention Office provides, *inter alia*, that the Office has its own right of initiative to carry out investigations, will be totally independent from instructions from Member States and that investigations can be carried out in the Member States as well as in all bodies, institutions and offices in the Community, <http://wwfdb.europarl.eu.int/oeil/oeil>.

A model for cooperation between the institutions developed under the Finnish Presidency during the second half of 1999, involving the newly elected EP and the new Commission. A series of contacts were established between the Council and the EP spanning the following levels:

- Working Group chairman - EP rapporteur;
 - COREPER chairman - EP committee chairman;
- The European Commission is involved as a mediator.¹⁷

The difficulty, which the institutions face, at least at present, is that the stage of first reading is used by the institutions to lay down their own positions before they are ready to embark on extensive inter-institutional liaison and bargaining. Negotiations are complicated by the fact that the individuals concerned do not have a mandate, as internal discussions are still underway in their respective institutions. The Council negotiator has to keep in constant contact with the Member States, most conveniently through the Council Working Party. The negotiator for the EP has to ensure that positions of his/her political group, the respective parliamentary committee and of the plenary are reconciled. It is therefore rather difficult for the negotiators to make concessions as regards politically sensitive matters.

A second innovation of the Amsterdam Treaty significantly strengthened the power of the EP in the legislative process: the abolition of the so-called third reading. Before Amsterdam the Council had had the right to adopt its common position after the conciliation procedure had failed, unless the EP could mobilise a majority of its members to put in its veto. According to the new procedure, the draft legal act is deemed to have failed in the absence of agreement in conciliation. The EP is no longer in the uncomfortable position of having to use the emergency brake, i.e. having to reject the Council's common position and therefore, in the last instance, bearing the sole responsibility for the defeat of a piece of legislation. After Amsterdam, both the Council and the EP are now deemed to be responsible for the failure of a legal act.¹⁸

2.3. The Role of the EP Committees in the Legislative Process

Hand in hand with the increase of the powers of the EP went a revaluation of the EP Standing Committees, which have been described as the "legislative backbone"¹⁹ of the EP. Everything that could conceivably be dealt with by the EP falls under the competence of these committees, which officially only examine questions, which are referred by the bureau. In the practical political process, incoming legislative proposals go directly to the responsible committee or committees.²⁰

The number of EP Standing Committees, whose competences are laid down in annex VI to Parliament's Rules of Procedure,²¹ was reduced from 20 to 17 subsequent to the

¹⁷ Information provided by the Finnish Permanent Representation, Brussels.

¹⁸ Neuhold, Christine (2000): *Into the New Millennium: The Evolution of the European Parliament from Consultative Assembly to Co-legislator*, in: *Eipascope*, No. 2000/1, p. 3-11.

¹⁹ Westlake (1994): *op. cit.*, p. 191.

²⁰ Neunreither, Karlheinz (1999): "The European Parliament", in: Cram, Laura; Dinan, Desmond; Nungent, Neil (eds.): *Developments in the European Union*, Macmillan Press, Houndmills, Basingstoke, p. 78.

²¹ European Parliament (1999): *Rules of Procedure*, 14th edition, <http://www.europarl.eu.int/omk/>.

June 1999 elections. They each cover a particular area or policy field of EU-activities and now have been "reshuffled" to:

- represent stronger issue "clusters" (external economic relations has been merged with "industry" and "research" and the committee on regional policy now includes the policies of "transport" and "tourism"),
- to emphasize new priorities (e.g. equal opportunities now has a more prominent role in the committee on women's rights and the same is true for human rights in the committee on foreign affairs),
- or to provide a greater committee overview.

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

- | | |
|---|---|
| 1. Foreign Affairs, Human Rights, CFSP | 11. Fisheries |
| 2. Budgets | 12. Regional Policy, Transport & Tourism |
| 3. Budgetary Control | 13. Culture, Youth, Education, Media, Sport |
| 4. Citizens' Freedoms & Rights, JHA | 14. Development & Cooperation |
| 5. Economic & Monetary Affairs | 15. Constitutional Affairs |
| 6. Legal Affairs & the Internal Market Opportunities | 16. Women's Rights & Equal |
| 7. Industry, External Trade, Research & Energy | 17. Petitions |
| 8. Employment & Social Affairs | |
| 9. Environment, Public Health & Consumer Policy ²² | |
| 10. Agriculture & Rural Development | |

The EP's committee structure does not correspond to any particular model. The Foreign Affairs, Human Rights, CFSP committee is, according to Westlake²³, clearly modelled on its equivalent in the United States' Senate, but has far less powers. Its Committee for Economic and Monetary Affairs corresponds much more closely to the German Arbeitsparlament model. Due the fact that the EP is - as the only directly elected trans-national parliament - an institution sui generis, the EP committees have their own distinctive characters and styles, resulting from a combination of their functions, active members and chairmen.

In addition to its Permanent or Standing Committees, the EP has the right - according to article 193 TEC (ex-138) - to set up a temporary Committee of Inquiry to investigate "alleged contraventions or maladministration in the implementation of Community law." In the course of 1996 two committees of inquiry were established, the first to examine the Community transit system and the second to investigate the origins and the developments of the BSE crisis. Both completed their work in early 1997.²⁴

²² For the sake of brevity this committee will hereafter be referred to as the Environment Committee.

²³ Westlake (1994): *op. cit.*, p. 135.

²⁴ For more details see: Shackleton, Michael (1998): The European Parliament's New Committees of Inquiry: Tiger or Paper Tiger?, in: *Journal of Common Market Studies*, Vol. 36, No.1, pp. 115 – 129.

Besides committees, Inter-parliamentary Delegations have an important role in the life of the EP. These delegations are the means by which the EP may discuss foreign trade policy or trade issues with parliamentarians from third countries. They were first set up in the framework of association agreement with Greece and Turkey in the early 1960s with the aim to assure a link between the EP and the parliament of the associated country. They are composed of an equal number of MPs of both sides, with a mixed chairmanship and secretariat. The scope of the committees was expanded continuously with the result that practically the whole world is now covered by more than 15 such delegations.

In the framework of Europe Agreements and similar agreements establishing close relations between the EU and third countries, inter-parliamentary delegations have been upgraded to Joint Parliamentary Committees. Joint Parliamentary Committees are formed with parliamentarians from associated countries or from countries, which have applied for membership. In the latter case, the Joint Committees have no formal responsibility, but in general they monitor the course of the accession negotiations. In the framework of the association agreements, the Joint Committees are responsible for monitoring their implementation in the EU and the countries concerned.²⁵

2.3.1. Membership in EP Committees

The membership of the committees aims to broadly reflect the political and national balance of the EP as a whole. Committee members are appointed by way of political negotiation in the constituent session after an election. The most recent ones took place in July 1999, taking the stronger position of the centre-right political groups European People/ European Democrats (EEP/ED) into account. The committee members are elected during the first part-session following the re-election of the EP and again two and a half years thereafter.

Each committee has a chairman and up to three vice-chairmen. For the nomination of these posts the new EP has applied the so-called d'Hondt formula: a mechanism that assures the large political groups the majority of the posts. Consequently, eight of the chairs of the 17 committees are from the EEP/ED, while six are from the PES. As was the case in the EP prior to the 1999 election, only three committee chairs are held by the other groups (Group of Liberal, Democrat and Reform Party; the Group of the Greens/European Free Alliance; and the European United Left/Nordic Green Left Group).²⁶ The allocation of chair positions in the committees has been characterised by a remarkable stability despite the change of majority in favour of the EPP/ED, as the committee chairmen are only in theory elected by their respective committees. In practice, however, their selection is almost always, as Martin Westlake argues, a formality. Their selection lies within the realm of the political groups and depends primarily on national contingents within political groups. There has only been one direct "transfer" between the EPP/ED replacing the PES in the Environment Committee and the PES taking over the chair of the Economic & Monetary Affairs Committee from the EPP/ED. The committee chairmen can be powerful political players, both within their committees and within the EP as whole and with respect to other Community institutions. This is especially true for those committees with an

²⁵ Neunreither (1999): *op. cit.* p. 78f. See also: The EU Committee of the American Chamber of Commerce in Belgium: *Guide to the European Parliament 1999-2004*, Brussels, p. 38.

²⁶ The EU Committee of the American Chamber of Commerce in Belgium (1999): *op. cit.*, p. 23f.

important inter-institutional function – such as Foreign Affairs, Human Rights, CFSP, Budgets and Legal Affairs & the Internal Market and those carrying heavy legislative loads or possessing extensive legislative powers. After the coming into force of the Maastricht Treaty the EP rules of procedure were changed in such a way as to formalise their collective powers by establishing a Conference of Committee Chairmen. Its formal function is to make recommendations about the work of the committees and the drafting of the agenda of the part sessions. This, at first sight weak power, is in fact extensive in the practical political process. The Conference of the Committee Chairmen has become an essential element in the successful functioning of the EP's legislative machinery, by "having their collective finger on the Parliament's legislative pulse."²⁷

Committees appoint a rapporteur for each proposal or issue to be dealt with who prepares a draft report, taking into account the contributions of other committees. The position of rapporteur is one of high political prestige, especially if the report is going to receive a lot of publicity. While each committee is formally responsible for nominating its own rapporteur, the political groups will supervise and closely follow the appointment of rapporteurs and are likely to intervene if necessary.²⁸

The size (between 20 and 65 members)²⁹ and the importance of the committees differ depending on the topics they deal with and also upon the legislative powers the EP has in specific areas. The committees are assisted in their work by professional staff of the Secretariat General in Luxembourg and in Brussels.³⁰

2.3.2. Powers and Competences of EP Committees

Meeting in the two weeks following the plenary session, the committees prepare the work of the EP. The parliamentary committees, combining practical and theoretical expertise, have formal powers such as:

- tabling oral questions to the Council and the Commission;
- tabling questions to external experts;³¹
- tabling resolutions following statements by the other Community institutions;
- proposing amendments to the Parliament's plenary agenda.

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

- the EP can put requests to the Commission for legislative proposals³² which must be based on reports initiated by an EP committee;

²⁷ Westlake (1994): *op. cit.*, p. 194.

²⁸ Neunreither, Karlheinz (1999): *op. cit.*, p. 78.

²⁹ The Committee on Fisheries has 20 Members. The Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy is composed of 65 Members.

³⁰ Of the EP's 3,500 staff (not counting the groups staff of about 700 and a large number of private assistants to MEPs), about 1,000 are based in Brussels. The others, including most of the purely administrative and translation services, are still in Luxembourg.

³¹ Any of the standing committees or subcommittees of the European Parliament may organise a hearing of experts if it considers this essential to the effective conduct of its work on a particular subject (Rule 151 of the Rules of Procedure). Such hearings may be held in public or in camera.

³² Art. 192 (ex – 138b).

- all legislative proposals and other legislative documents must be considered in committee, where the bulk of the legislative process under all legislative procedures takes place, from the tabling of amendments to the scrutiny of the Council's common position. The Council and the Commission are required, once a month, to provide information to the EP about their proposals and intentions. The work of the committees then consists in drawing up reports and opinions on proposals for legislation. These build on formal consultations of the EP with the Commission and the Council (or on the EPs own initiative):

"En votant des amendements qui modifient les propositions du Conseil et de la Commission, les élus affirment leur pouvoir, en proportion des enjeux que recèlent les textes. Ici le travail des commissions parlementaires est décisif, car la qualité de l'argumentation, de sa formulation, de son soubassement juridique, est essentielle, lorsqu'on atteint le jour fatidique de la plénière."³³

When a committee has been allocated a specific issue, the committee appoints its rapporteur, who draws up a text, which is presented to all committee members. If the text is adopted it is sent to the committee secretariat and translated into the eleven official languages. It is then submitted to the plenary as a sessional document and only at this point in time becomes open to the public.³⁴

As our specific research is dealing with the following selected policy areas, it might be useful to give an overview of the briefs of the EP committees active in these respective policy fields:

- Environment: The responsibilities of the EP Committee on the Environment, Public Health and Consumer Protection include: EU environmental policy and protection measures at regional and international level, including pollution, recycling, climate change, dangerous substances, noise, waste, protection of fauna, protection of the seas, European Environmental Agency; public health, including food content, safety & labelling of foodstuffs, pharmaceutical products, medical research, public health checks, cosmetic products, civil protection, including the protection of consumers' economic interests and provision of better information;
- Culture: The EP Committee on Culture, Youth, Education, Sport and the Media deals with issues such as: cultural aspects of the EU, including the knowledge and dissemination of culture, the conservation of a cultural heritage, cultural exchanges and artistic creation; the EU's education policy, including the teaching and dissemination of Member State languages, student and teacher mobility, cooperation among educational establishments, development of distance education and life-long learning and the development of the European University and promotion of European Schools; youth policy, including youth exchange (with the exception of young workers), the European voluntary service or the European Youth Forum; the audiovisual industry and educational aspects of the information society; information and media policy; the development of a sports and leisure policy; cooperation with third countries and international organisations in the fields of culture and education;

³³ Abélès, Marc (1995): La fonction politique Européenne acteurs et enjeux, in: Mény, Yves; Mueller, Pierre; Jean-Louis Quermonne (eds) : *Politiques Publiques en Europe*, L'Harmattan, Paris, p. 68f.

³⁴ The EU Committee of the American Chamber of Commerce in Belgium (1999): *op. cit.*, p. 23f

- Research and Development and Telecommunications; (including the liberalisation of the electricity market): The EP Committee on Industry, External Trade Policy, Research and Energy focuses on the following topics: industrial policy and its application in specific sectors (e.g. Trans-European networks in telecommunications infrastructure sector or the freedom to provide services or Community technical standards); monitoring the Community's common commercial policy; pre-industrial research (such as the framework research programme); energy policy and energy supplies.
- Social Affairs: The EP Committee on Social Affairs and Employment has the following responsibilities: Employment policy; social policy including protection of living and working conditions, wages and pensions, collective protection of workers' and employers' interests, social security, social cohesion, employment conditions for legal residents from third countries, housing schemes; social dimension of the information society; European Social Fund; vocational training; free movement of workers; social dialogue; discrimination.
- Internal market: The responsibilities of the Committee on Legal Affairs & the Internal Market include (besides issues such as the legal aspects of the creation, interpretation and application of Community law, which are not of main interest for our specific project) questions such as the co-ordination of national legislation concerning the single market; consumers' legal protection and ethical questions related to new technologies.

2.3.2.1. Case Studies on EP Committees

Only few case studies³⁵ have been carried out concerning EP committees, where a notable one was conducted by Earnshaw and Judge in the early/mid-nineties.³⁶ The most prominent objective was to assess and evaluate the actual contribution of the Environment Committee to the development of EC environment policy.

The main findings of this case study can be summarized as follows:

- The role of the Environment Committee in the initiation stage: The Environment Committee was exceptional by producing a considerable amount of 'own initiative reports', where its initiatives sometimes culminated in the genesis of directives.³⁷
- Closely connected is the role of the Environment Committee as an agenda setter. In cases such as the eventual Commission proposals on landfill of waste the Environment Committee engaged in a pro-active strategy of articulating its own policy concerns to the Commission.
- In the consultation procedure, where the Council is only required to consult the EP on Commission proposals, the EP successfully maximised the significance of this

³⁵ For an analysis of the European Parliament's New Committees of Inquiry, see: Shackleton, Michael (1998): *op. cit.*, pp. 115-130.

³⁶ Earnshaw, David; Judge, David (1994): Weak European Parliament Influence? A Study of the Environment Committee of the European Parliament, in: *Government and Opposition*, pp. 262-276.

³⁷ These directives concerned issues such as major industrial hazards and the importation of seal pup skins.

procedure. In the Isoglucose ruling of the European Court of Justice of 1980, the Court stated that the Council should not adopt Community legislation without obtaining the EPs opinion. The EP then changed its rules of procedures as to allow a draft legislative proposal to be referred back to the appropriate committee for reconsideration. This threat of delay served to enhance the EPs bargaining position with the Commission.

- Under the co-operation procedure the EP has only in exceptional cases sought to reject a common position, and only in four cases has it succeeded. It is significant that two of these (successful) rejections involved the Environment Committee.³⁸
- In the process of implementation the Environment Committee has been of some importance trying to raise the profile of the issue. The committee has produced several 'landmark' reports on the subject and tabled respective resolutions.

2.3.3. Effect of the Co-decision Procedure on the Work of the EP Standing Committees

The co-decision procedure has enhanced the importance of the EPs committees significantly and particularly the political skills of the committee chairs and rapporteurs who carry out evaluations of specific proposals. The most powerful MEPs are those, who play a dominant role in their committee, are well integrated into the concerned sectoral policy networks and are consulted on a regular basis in the initiative phase, when the Commission formulates its proposals.³⁹

The research conducted on the effect of the co-decision procedure on the EP committees has shown that co-decision has led to a structural concentration of the bulk of the workload in only 3 out of 20 (after 1999 - 17) Permanent Committees. The 3 committees dealing with the majority of the draft legal acts submitted under co-decision were:

1. The Committee on the Environment, Public Health and Consumer Protection;
2. The Committee on Economic and Monetary Affairs and Industrial Policy;
3. The Committee on Legal Affairs.

These three committees concerned handled almost 80 % of all procedures concluded until the end of June 1999, which proved to be very time-consuming for committee members. The concentration of co-decision on these three committees was primarily due to the exploitation of the legal bases concerned. Since most of the procedures were based on Art. 95 TEC (ex-90), the majority of concluded co-decision procedures fell under the three committees mentioned above. As regards the distribution of these "Art.-95-co-decisions", the Committee on the Environment was engaged 46 times, the Committee on Economic and Monetary Affairs and Industrial Policy 29 times and the Committee on Legal Affairs 13 times. As regards to the timespan needed to conclude a co-decision procedure, the analysis reflects that the Environment Committee – with the heaviest co-decision burden of all committees – stabilized the time required for

³⁸ The common positions concerned were on a proposed directive on the protection of workers from benzene in the workplace and on a proposal for a Directive on artificial sweeteners.

³⁹ Peterson, John; Bomberg, Elizabeth (1999): *Decision-making in the European Union*, The European Union Series, Macmillan Press LTD, p. 44.

adoption. The Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Legal Affairs have even reduced the time needed for the adoption of legislative acts considerably since co-decision was introduced in 1993.

The shift of the EP committees towards legislative power and its effective execution has led to a significant decrease in the number of non-legislative resolutions, own initiative reports and resolutions after statements or urgencies (from 455 in 1986 to 168 in 1998).⁴⁰ Own initiative reports and urgency resolutions reflect the individual and political awareness and interests of MEPs in publicising an issue for the EU citizens and for the electorate.

2.4. The Role of EP Committees in Implementation

Another important issue is the process of implementing legislation. EP committees play only a marginal role in comitology procedures. As effective co-legislator, the EP demands an equal right to the Council in controlling the implementation process.

The respective agreements⁴¹ which the Parliament negotiated with the Commission and the Council provided, inter alia, a mechanism by which the EP committees are informed of draft implementing measures relating to their competence by the Commission and by which they also have to be consulted by the Council.⁴² Apart from this mechanism the Commission had to – according to the *modus vivendi* – “take account as far as possible of any comments by the European Parliament and had to keep it informed at every stage of the procedure.”

The agreements neither guaranteed that Parliament’s view would be taken into account, nor allow Parliament real influence over the content of implementing legislation.⁴³ As a consequence the EP has made the decision about the type of implementing procedure, a central issue in conciliation.⁴⁴ The Intergovernmental Conference of 1996 was supposed to solve the conflict over comitology but it failed to do so, as it only called upon the Commission⁴⁵ to submit a proposal to the Council for the revision and updating of the procedures as regards the exercise of implementing powers conferred on the Commission (Comitology Decision of 1987).⁴⁶

⁴⁰ Maurer, Andreas (1999): *op. cit.*, p. 33ff.

⁴¹ “Samland-Williamson Agreement” of September 1996, (concluded by the Chairman of the EP Budget Committee, Detlev Samland and the former General Secretary of the Commission, David Williamson, OJ C 347, 1996, p. 134),

Modus vivendi between the European Parliament, the Council and the Commission of December 1994, OJ C 102 1996, p. 1f;

“Plumb-Delors Agreement” of March 1988 concluded by the former President of the European Commission, Jacques Delors, and the former President of the European Parliament, Lord Plumb, Conference of Committee Chairmen, PE 212.909, 7.7.1995.

⁴² The EP has to be consulted whenever a draft general implementing act is referred to it as a result of a negative, or no, opinion from the committee.

⁴³ Bradley, Kieran (1998): *Institutional Aspects of Comitology: Scenes from the Cutting Room Floor*, mimeo, p. 5.

⁴⁴ Bradley, Kieran (1997) “The European Parliament and Comitology: On the Road to Nowhere, in, *European Law Journal*, vol. 3, No. 3, 1998, p. 230-254

⁴⁵ Declaration No. 31 annexed to the Final Act of the Intergovernmental Conference.

⁴⁶ The Council had laid down the procedures in Council Decision 87/373/EEC of 13 July (OJ L 197, 18.7.1987, p. 33).

The Commission put forward its proposal in June 1998 and the Council adopted a new Comitology Decision on 28 June 1999.⁴⁷ This decision provides for a (limited) involvement of the EP as regards to acts adopted by co-decision. It meets the demand of the EP for a "protection of the legislative sphere"⁴⁸, but rejects far-reaching demands that the EP should be placed on an equal footing the Council.⁴⁹

The Commission and the EP have subsequently concluded an agreement for implementing the Comitology Decision of 1999, which gives the EP the following rights:

- It is to be informed by the Commission on a regular basis about 'comitology' procedures. To that end, it is to receive, at the same time as the members of the committees and on the same terms, the draft agendas for committee meetings, the draft measures submitted to the committees for the implementation of basic instruments adopted by the co-decision procedure, and the results of voting and summary records of the meetings and lists of the authorities to which the persons designated by the Member States to represent them belong.
- Furthermore, the Commission agrees to forward to the European Parliament, for information, at the request of the parliamentary committee responsible, specific draft measures for implementing basic instruments not adopted under the co-decision procedure but which are of particular importance to the European Parliament. Pursuant to the judgment of the Court of First Instance of the European Communities of 19 July 1999⁵⁰ the European Parliament may request access to minutes of committee meetings. Once the appropriate technical arrangements have been made, the documents referred to in Article 7(3) of the Comitology Decision will be forwarded electronically. Confidential documents will be processed in accordance with internal administrative procedures drawn up by each institution with a view to providing all the requisite guarantees.
- According to Article 8 of the new Comitology Decision, the European Parliament may indicate, in a resolution setting out the grounds on which it is based, that draft measures for implementing a basic instrument adopted by the procedure provided for under the co-decision procedure exceed the implementing powers provided for in that basic instrument. The European Parliament is to adopt such resolutions in plenary; it is to have a period of one month in which to do so, beginning on the date of receipt of the final draft of the implementing measures in the language versions submitted to the

⁴⁷ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23-26).

⁴⁸ See opinion of EP in: OJ C 279/258, p. 404, 411.

⁴⁹ For a detailed analysis see: Haibach, Georg (1999): Council Decision 1999/468 – A New Comitology Decision for the 21st Century!?, in: *Eipascope*, No. 1999/3, pp. 10-18.

⁵⁰ Case T-188/97, Rothmans v Council

Commission.⁵¹ Following adoption by the European Parliament of a resolution, the Member of the Commission responsible is to inform Parliament or, where appropriate, the parliamentary committee responsible, of the action the Commission intends to take.

This new agreement, which replaces the 1988 Plumb/Delors agreement, the 1996 Samland/Williamson agreement and the 1994 *modus vivendi*, aims to streamline and simplify for the EP the process of controlling the implementing powers conferred on the Commission. The EP committees will *inter alia* be responsible to check the draft measures as to whether they exceed the implementing powers provided for in the basic instrument, adopted under the co-decision procedure. This will increase the workload for the committees significantly if this is to be done systematically and on a regular basis. The committees are to be informed more comprehensively than under the various inter-institutional agreements and that this is to be done via email is an innovation that will hopefully simplify the forwarding of documents.

This survey conducted on the existing body of knowledge on the EP has shown that most general books on the EU, and especially the ones dealing with its institutional system include a chapter on the EP. Corbett, Jacobs, Shackleton (1995) and Westlake (1994) provide a very comprehensive overview of the EP. Maurer (1998 and 1999) has conducted extensive research on the EP in general and its decision procedures in particular. Authors such as Bradley (1997) and Hummer (1998) have analysed the role of the EP in the implementing process.

The literature focusing on the standing committees of the EP is very limited. , It consists, for the most part, of a short, descriptive analysis of these committees within the general context of the EP. Little empirical evidence is available on how EP committees work and the role they play within the whole process of EU-decision making.

2.5. Approach, Questions and Methodology

2.5.1. Major Research Questions

The basic questions to be addressed by this subproject are:

- Is the work of EP committees determined more by political factors or technical expertise? What is the role of "democratic values" (i.e. transparency, openness) vis-à-vis the need to be efficient?
- Do they derive their legitimacy by being efficient and effective?
- Does this committee system weaken the bond to the voter, because less time is spent in constituencies?

⁵¹ In urgent cases, and in the case of measures relating to day-to-day administrative matters and/or having a limited period of validity, the time-limit will be shorter. That time-limit may be very short in extremely urgent cases (in particular on public health grounds). The Member of the Commission responsible is to set the appropriate time-limit and state the reason for that time-limit.

The research will be carried out in the form of case studies designed to trace and analyse the negotiations process as regards to three legislative acts from each of the following selected policy areas. These policy areas are politically highly sensitive for the citizens of the European Union and have been at the centre of European political debate:

- environment;
- culture;
- research and development and telecommunications; including the liberalisation of the electricity market;
- social affairs;
- internal market.

Within each sector, three legislative acts will be selected in cooperation with subproject 2 on working groups in Council. In a first step an effort will be made to answer the following questions through the analysis of documents:

- The attribution of a specific act to a specific EP committee: does it always depend on the issue in question (e.g. environment) or is it in some cases a political decision? Is this question at all an issue within the EP or just a matter of routine?
- The members of these committees and their role: Are they technical experts or "fullblood politicians"? What is it that "counts and matters", is it technical expertise or political standing? How are rapporteurs chosen? Are they "mandate free agents" or do they act on behalf of their party, their country or their constituency?
 - The role of the EP committee in the EP decision process: What are the competences of the respective committee as laid down in the EP rules of procedure? What happened to the result of the committee deliberations in the course of the EU-decision making process? This question will be analysed from two angles:
 - a) contribution of EP committees to the legislative process: How well do they "pre-cook" what is passed in plenary? How important are reports put forward by committees?
 - b) interaction with Council working groups: Are political or technical issues on the agenda? How does this interaction with the Members of Council working groups differ from committee to committee?
- Controlling powers of the respective EP committee in the implementing phase: Is the comitology question on the agenda of the committee? Does it table resolutions, make use of its possibilities according to the new inter-institutional agreement?

In a second step structured interviews, divided into two stages, will be conducted with members of the respective committees and their staff, for which six respondents will be chosen from each committee. This means that about 30 interviews will have to be conducted.

- Stage 1 will concentrate on answering open questions that we were not able to get answers to through the documentary analysis
- Stage 2 will address more fundamental issues such as how do members of committees and their staff view their role in the legislative process and what is their view on the issue of comitology?

2.5.1.1. Draft Interview and Documentary Analysis Guide

Three sets of questions, which are co-ordinated with subproject 2 on Council working groups, are part of this draft interview guide. These standard sets of questions need, of course, to be adapted to each case study and person to be interviewed.

- A. The state of play at the beginning of a EP's committee activity on a legislative proposal
 - Why was this issue delegated to a specific EP committee?
 - Were several committees responsible and why?
 - Who are the members of the committee and how were they selected? How was the rapporteur chosen?

- B. How was the proposal dealt with in a committee?
 - Did committee members have different positions on the issue (shaped for example by party cleavages)?
 - Was (technical) expertise integrated from "outside" the committee (e.g. hearings of independent experts)?
 - What was the role of the Commission and the Council at this stage of the decision making process?

- C. Output and effects of the EP committee deliberations
 - Did the result of the committee deliberations meet with reservations from plenary, if so why? How were these problems resolved, i.e. why could they not be resolved?
 - Interaction with Council working groups: were issues on the agenda more of a technical or political nature? Did the proposed measures put forward by the EP committee meet with reservations from members of the Council working groups and if so how were they resolved?
 - Did the committee make use of its controlling powers in the implementation phase?

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3. Subproject 2: The Working Groups of the Council

Andy Smith, Eve Fouilleux and Jacques de Maillard

3.1. Introduction

The point of departure for this part of our project is that the existing body of knowledge about the Council's working groups is relatively weak. More precisely, as we highlight in section 1, most research on these groups is descriptive and highly general. Nevertheless, this work has thrown up a number of explicit and implicit hypotheses that our research could usefully develop and test. In similar fashion, more general approaches to EU decision-making all implicitly make assumptions about, and provide some insights into, the role played by working groups. For this reason in section 2 we have set out what we consider each theory of decision-making *would* hypothesize about working groups *if* it were to be applied to the subject of our research. The ideas thrown up by these two types of bibliographical resources are subsequently brought together in section 3 where we attempt to develop our own approach to the study of working groups. Particular stress is laid here upon the research methodology we intend to adopt, our choice of case studies and questions which will be used to structure our interview guides and documentary analysis. A final section lists in separate categories all the bibliographical references quoted in this paper. Given the preliminary nature of this document, it is important to underline that its content has not been driven by a wish to "academicize" our research project. On the contrary, the primary function of the references to existing research made here is to build a solid framework for our empirical investigations and thus ensure that the line of questioning adopted does not simply end up "putting new wine in old bottles".

3.2. Existing Knowledge about the Working Groups

To our knowledge, Beyers and Diericks (1997, 1998) have undertaken the only research specifically targeted on the Council's working groups. This material is a valuable asset for our own project, but suffers from being used to test an excessively binary comparison between supranational and intergovernmental theories of European integration (see section 2)²⁹. In reading the rest of what has thus far been written about the Council's working groups, we are struck by a paradox. On the one hand, it is generally assumed that these bodies play a very important role in the legislative process by preparing COREPER and Council meetings. Impressive figures are put forward to support this idea (Westlake, 1995). It is generally acknowledged that there are more than 200 working groups which all together hold more than 2,500 meetings each year. Some scholars go even further in estimating that 70% of the agreements reached in Council are actually decided upon at the level of working groups. On the other hand, this literature provides little information about the decision-making processes within working groups. In particular, existing studies rarely distinguish between detailed "technical" decisions and political ones, thus rendering the above-mentioned figures less meaningful (Van Den Bos, 1998). A brief look at the literature on other EU committees (1.1) and on the workings of the Council

²⁹ In our view, Beyers and Diericks' research design suffers from a number of flaws. First, it concentrates on "communication networks" between working group members rather than on the decision-making process itself. Second, it concentrates on staff in the permanent representations rather than on this population and national civil servants from the capitals. Finally, by choosing quantitative analysis rather than detailed case studies, this research tells us little about the effects of working group deliberations.

as a whole (1.2) provide us with some questions with which to start such qualitative research.

3.2.1. Knowledge of other EU Committees

Over the last few years, research has begun to look in detail at the EU decision-making process. At least three types of approach to the role of committees in this process are useful for our purposes:

- a law-making approach has looked in particular at the role of the EU treaties in institutionalizing the role of committees (Haibach, 1997; Joerges & Neyer, 1997; Voz, 1997).
- a focus on the normative implications of using committees to make decisions offers a constant reminder that these bodies can sometimes be considered to act anti-democratically (Dehousse, 1998 ; Dogan, 1997; Steunenberg, 1996).
- finally, a more empirically-driven approach has looked in detail at how different committees shape the final decisions made by the EU (Pedler & Schaefer, 1996). Focusing in particular upon the comitology committees, much attention has been paid here to the various processes linked to the amendment (or non amendment) of legislation that takes place between an initial Council decision and the final product (European Parliament deliberations, European Commission and Council committee reactions etc.).

From their respective angles, these three types of research throw up at least four sets of questions which merit reformulating and addressing in our research:

- *how and when are working groups and their agendas set up?* Who decides which working group will deal with which issue? Are working groups permanent or temporary? How often do the civil servants who come to working group meetings change?
- *the room for autonomy given to national government representatives in the working groups.* How detailed are the instructions given to these agents? What room for manoeuvre do they have to actually negotiate and compromise their own initial positions during and between group meetings?
- *what forms of cooperation arise within each group?* Are these essentially fleeting agreements on very specific issues or more long-term alliances based on common perceptions of the issue area as a whole?
- *how are meetings run and compromises brokered?* how influential is the Council Presidency? what role is given to the Council's secretariat? how do Commission officials play their hand in working groups?

Working on the general hypothesis that there is likely to be considerable difference between the practices of each working group on these four points, we need to try to establish variables which explain such differences. For example, are they essentially attributable to the nature of each policy area (a functionalist hypothesis) or is difference better explained by retracing the emergence of each working group and its

standard procedures (neo-institutionalist hypothesis)? These points will be addressed more systematically in section 2.

3.2.2 Knowledge about the Council as a Whole

Before proceeding to this stage, it is important to recall that the hypothesis of "variable geometry" within EU decision-making has also been developed at the level of the Council of Ministers as a whole. As any student of the EU knows, there is not one Council but many sectoral permutations of this body. Over time, different Councils tend to develop different approaches to decision-making (Hayes Renshaw & Wallace, 1995; 1997) which logically have an impact upon the way working groups become established and operate. In order to take this general idea further, however, the existing literature on the Council encourages us to look at three points in particular.

- *the link between the European Council, the Council of General Affairs and each sectoral council.* It is generally accepted that the European Council can determine which Council deals with an issue and the "mandate" it has to produce legislation. But how do these matters work out in practice? Does the Council of General Affairs, for example, simply enact the European Council's declarations or does it interpret them and thus guide which Council (and therefore which working group) deals with what?
- *what is the relationship between COREPER and the working groups?* Again, the literature tends to stress the importance of COREPER in the shaping and taking of EU decisions (Lewis, 1998). However, does each working group have the same relationship to COREPER?
- *the effects of the temporary nature of the Council Presidency.* The fact that this changes every six months is a distinctive characteristic of the EU. Some authors argue that its relative brevity weakens the role of the Presidency as regards decision-making, whereas others conclude that on the contrary this role is often vital (Wurzel, 1996). Both hypotheses could usefully be tested by our research.

Obviously much more could be said about both the research on other EU Committees and on the Council as a whole. For our purposes, however, the questions raised by both strands of research are more important than their detailed conclusions. These questions will now be refined by looking at the different ways in which theories of European integration would tend to translate them into testable hypotheses.

3.3. What can General Approaches to EU Decision-Making lead us to hypothesize about Working Groups?

Although nearly all EU scholars have never systematically studied the role of the Council's working groups, it would be foolhardy to cut our own research off from the rich vein of ideas about the EU's decision-making processes present in more general theories. Taking the perhaps unusual step of hypothesizing what five such theories *would* hypothesize about working groups *if* their respective authors set out to do so, the purpose of this section is to ally deductive reasoning to the inductively produced knowledge summarized in section 1.

3.3.1 Intergovernmentalism: Working Groups as Fora for National Delegates

Although a distinction should be made between classical intergovernmentalist approaches to the EU (Hoffman, 1993) and more "liberal" ones (Moravcsik, 1998a, b & c), the basic argument put forward by this research tradition is that the EU is an arena dominated by national governments. More precisely, such authors downplay the role of the Commission and of transnational interest groups while stressing instead the influence of national interest groups and the interests of national governments. Together, in each Member State, the relationship between the latter two types of actors determines national positions as regards proposals for EU legislation and policy. During negotiations, these national positions translate into potentially powerful resources for Ministers and their civil servants because of the nature of the Council's voting procedures. If one follows the logic of this argument, three hypotheses could be made about the Council's working groups:

- representatives of national governments arrive with stable and clear negotiation positions and strategies. Instructions to the civil servants concerned are detailed and all compromises are only reached after agreement between the ministries and interest groups involved in each national capital.
- because each national government possesses considerable resources of policy expertise (Moravcsik, 1998c), working groups just provide them with a means to supplement their information about the negotiating stances of other governments. As such these groups just "lubricate" the making of EU decisions, they do not shape them.
- the brokering of compromises is essentially carried out through the formation of temporary agreements between representatives of national governments. There is thus only a minor role for longstanding alliances at this level. Similarly, Commission and Council Secretariat officials only act as facilitators of decision making; they do not influence the outcome of negotiations.

To sum up, such an approach has the advantage of being clearcut and developing testable hypotheses. However, as it postulates that differences between working groups would be minor, or more precisely insignificant, finer approaches to decision-making need to be used to delve deeper.

3.3.2 Neofunctionalism: Working Groups as Vectors of Transnationalism

The traditional opponent of intergovernmentalist visions of European integration is neofunctionalism. Developed initially in the 1950s and 1960s (Haas, 1958; Lindberg, 1963; Lindberg & Sheingold, 1970), this approach essentially sees integration as a transnational process driven by increasing contact between economic and political actors from each of the Member States. Such interdependence has taken the form of European-level trade associations and interest groups on the one hand, and European-minded institutions on the other. From this perspective, at least two hypotheses on the nature of working groups would be made

- whilst ostensibly engaged in intergovernmental bargaining, all EU committees are at the same time arenas where actors from each Member State are progressively socialized into developing common viewpoints and accepting common ways of reaching decisions. Consequently the stability over time of group membership would be postulated, together with the idea that in reality individual civil servants going to Brussels have considerable leeway to bargain and thus modify their own government's initial position.
- a second point crucial to neofunctionalist analysis concerns the impact of new decision-making procedures in one sector upon other sectors of the economy and polity. Formalized in the concept of "spillover", we would therefore expect proponents of this theory to hypothesize considerable homogeneity between the practices and priorities of different working groups. Any difference observed would be attributable to the functional specificities of the part of the economy dealt with by the working groups concerned.

The neofunctionalist approach has the advantage of beginning to think about the way decisions are not just taken but how they are shaped prior to this final act. However, again the question of variation between working groups would end up being dealt with in broad-brush terms by research that only uses such an approach.

3.3.3 Policy-Making or Governance: Working Groups as Arenas of Interdependence

Frustrated by the breadth of the conclusions of the two previous "schools", over the 1970s and 1980s emerged a third approach to European integration based on sectoral case studies of public policy-making (Wallace, 1985; Mazey & Richardson, 1992; Richardson, 1996; Peterson & Bomberg, 1999) and governance (Kohler-Koch, 1996; Armstrong & Bulmer, 1998). Although little of this research has focused specifically upon the inner workings of the Council, logically it would throw up two hypotheses to explain the functioning of working groups.

- policy is essentially formulated in situations of uncertainty. Actors do not enter EU negotiations with fixed preferences and negotiating strategies. Rather they participate in an iterative process that shapes EU legislation by implicitly arriving at a common view on the form and intensity of EU intervention used to design a policy. In other words policy-making is more about European-level collective learning and adaptation than straightforward confrontations between cost-benefit driven positions established at the level of the nation state.
- despite the transnational character of this process, however, national negotiating styles remain highly important. Moreover, no automatic process of spillover from one sector to another is likely to occur. The working practices of each committee can only be analyzed on the basis of its own particular history.

Like all inductive approaches to politics, public policy or governance approaches to EU decision-making often have trouble identifying variables for comparison and for the identification of reasons for difference. In short, the danger is one of "all study and

no case". Nevertheless, as this tradition of research is also based upon rigorous qualitative research methods, its implicit hypotheses need taking seriously.

3.3.4 Neo-Institutionalism: Working Groups as Rule-Bound Institutions

Rigorous methodology is also a hallmark of neo-institutionalist approaches to EU decision-making which have sought to build upon observations made by policy specialists in order to propose a deductive explanatory theory. The general argument made here is that the orientation of decision-making in the EU is systematically influenced by the presence of institutionalized norms, rules and procedures (Bulmer, 1998; Pierson, 1996; Pollack, 1996; Sandholtz, 1996; Stone & Sandholtz, 1997). These norms create "paths" where certain types of ideas and interests are favoured. From this perspective, committees such as working groups are given considerable importance. Applied to working groups they implicitly generate two hypotheses:

- each working group has a set of standard procedures that have developed over time. These sets of rules structure not only the ways decisions are taken, but the types of policy outcome that is produced (eg. regulatory-type policies rather than redistributive ones). Although some variation between working groups is to be expected (for reasons of "path dependence"), the formal rules that apply to all such groups mean that a single general pattern of behaviour is probable.
- spillover from one working group is not due to socialisation or economic determinism. Rather rules that have been successful in one sector are tried in others. By locking in behaviour, these rules in turn produce decision-making norms that transfer from one sector to another through precise and identifiable inter-sectoral negotiations. The processes which established and institutionalized these rules and norms thus provide the key to understanding both the specificity of each working group and what makes them different. Particular attention thus needs paying to the role of co-ordinating bodies, particularly the General Secretariat of the Council Secretariat.

3.3.5 Constructivism: Working Groups as Shapers of "European Problems"

The goal of constructivist approaches to politics is less to decide which institution dominates EU decision-making (still the goal of neo-institutionalism), and more to discover how policy problems and public interventions (or "solutions") are constructed over time and impact upon the question "who gets what?" (Checkel, 1997; Ruggie, 1998; JEPP, 1999). The central premiss of this approach is that public problems are not simply elements of a society that malfunction. Rather in each society a problem is taken on by public actors (and thus rendered "public") because their very legitimacy depends upon them at least appearing to structure its very definition (Muller, 1995). For this reason attention is not only placed upon the negotiating procedures which shape public decision-making, but great weight is given to analyzing the cognitive and emotive processes which have been at work prior to such negotiations. For example, European agricultural policy is seen as not just determined by today's interest groups and public authorities, but by a representation of farming which precludes simply subsidizing intensive and large scale production in favour of efforts (which are not always successful) to save "the family farm". A more radical version of this research tradition stresses the role of imbalanced power relations within each society in influencing these processes (Bigo, 1997). In this way, particular emphasis is placed upon the social, cultural and therefore historical genesis of a public problem.

This approach has rarely been systematically applied to the study of European decision-making. However, in conducting research into the emergence of "European problems", constructivists would logically seek to test the following hypotheses.

- the positions expressed by national civil servants in working groups are the fruit of long processes of negotiation a) within each Member State; b) between the Member States. These processes have progressively defined a problem in such a way that certain forms of public intervention are ruled out right from the start (eg. massive EU redistributive payments) whereas other forms are "ruled in" (e.g. "cheap" regulatory measures).
- the definition of European public problems cannot be isolated from the impact of other international fora for debate on public policy orientations (eg. the OECD). Research must therefore also tackle the work done by national and international experts before working groups of the Council meet to try to formulate their decisions and recommendations.

To sum up, the constructivist case is centred more on the "shaping of problems" and its impact upon decisions, than on just the processes that "shape decisions".

Evidently this exercise of deducing hypotheses from general theories could be extended. No doubt we will come back to these reflections when we try to interpret our own empirical material. In order first to collect it, the objective now is to clarify our research questions and methodology.

3.4. Our Approach, Questions and Methodology

Ultimately, our research project can be boiled down to the two-sided question "what do working groups do?" and "why do they differ?". To refine these questions and translate them into an empirical research programme, the two previous sections have taken ideas from both inductively and deductively driven studies. It is now time to synthesize the lessons of this exercise and clearly identify our own research design.

3.4.1 A Set of Competing Hypotheses

Although a table always runs the risk of caricaturing approaches to politics, in these circumstances, such a risk seems worth taking. Ways of dealing with three sets of questions are thus compared: the establishment of a working group, what happens during its procedures, and what happens after it has finished its work on a piece of legislation.

3 sets of questions	Inter-government.	Neofunctionalism	Policy-making	Neo-institution.	Constructivism
Creation of WG	Council, NGs	Com, Council	Com	Com, Council	Com, experts
WG Membership	Not important	Stable, socializes	Variable	Variable	Link to experts
WG Rules	Not important	Generalizing	Sector specific	Precedents set	Interiorisation
Initial NG stance	Clear and vital	Uncertain	Uncertain	Variable	Variable
Autonomy to neg	Low	High	Variable	High	Variable
Alliances?	Temporary	Frequent, stable	Frequent, unstable	Frequent, stable	Frequent, stable
Brokers?	Big Member States	Com.	Com, presidency	Com, Sec	Big states, Com
Role of WGs	Just lubrication	Decision shapers	Decision shapers	Decision shapers	Problem shapers
WGs differ due to	NG interests	Transnat. interest-socialisation	Sectoral interests, role of Com.	Rules and norms	Problem and interest definition

WG = working group; NG = national government; Com = Commission; Sec = Council secretariat; neg = negotiate

3.4.2 Research Methods, Case Studies and Interview Guide

In order to test these hypotheses, we have chosen a number of case studies and developed a draft interview and documentary analysis guide.

The case studies

We will collect and study the negotiation of three pieces of legislation for the following five different policy areas. These areas have been chosen for their mode of decision in the Council (qualified majority voting -QMV-or unanimity-U) and because of the different policy rationales used to justify a European level of intervention:

- telecommunications (QMV) as an example of the completion of the single market;
- environment (QMV), an accompanying regulatory-type mode of intervention;
- research and development (QMV) as an accompanying redistributive-type policy;
- social affairs (U) as a contested set of accompanying regulations;
- culture (U) as measures designed to deal with international competition whilst asserting the EU's specificities.

Within each sector, we will choose our three case studies by identifying from documents and with the help of officials in COREPER and/or the Council Secretariat:

- the arrival of this issue upon the Council's agenda
- the attribution of this issue to a working group (and what alternatives were implicitly ruled out...)
- the initial membership and mandate of the working group
- what the working group produced on this issue (a decision, a recommendation)
- what happened to this output over the course of the rest of the EU decision-making process?

For each sector we anticipate undertaking between 15 and 20 interviews covering:

- representatives of the Permanent representations and of national representations who worked on these issues in working groups;
- 5 Member States (chosen to reflect a balance between large/small, unitary/federal, North-South): France, UK, Belgium, Spain, Italy;
- representatives of the Presidency at that time;
- staff, functionaires, officials from the Council secretariat and the Commission.

Draft interview and documentary analysis guide

Three clusters of question structure this draft interview guide. This guide should be seen as a standard set of questions which naturally needs to be adapted to each sectoral case study and according to the role of the person being interviewed.

A. The state of play at the beginning of a working group's activity on a "decision"

How did an initial definition of the problem arise?

- when and who pushed for it to be on the Council's agenda? (Commission, European Council, Presidency, etc...)
- what form did the "problem" take at this stage?

How was the problem designated to a Council working group?

- Role of General Secretariat
- which Council delegated it?
- did a sub- committee intervene before or simultaneously?
- was the working group already set up? ("a standing group") or was it dealt with by a more *ad hoc* body? ("working party").
- who were the members of this group? (which ministry, stability over time, etc...)
- which actors from the Commission and the Council secretariat were involved?

B. How was the problem and the decision shaped by the working group?

What were the initial positions of the Member States and the Commission?

- was the mandate of the group seen as clear?
- did national government representatives already appear to have fixed positions? If so, what were they?

What were the positions of the members of the group as its proceedings progressed?

- did their instructions from their home civil service appear to change?
- did their behaviour within the group change?
- did the problem as a whole take on a new definition that required changes in positions?

Who participated in brokering the final deal?

- what role did the Presidency (and/or the Troika) play?
- how did the Commission's agents modify their text and behaviour?
- role of actors with specific interest or of Member State that « pushed » issue

C. Output and effects of the working group's deliberations

What type of recommendation was produced by the group?

- a clear COREPER “ I point ” recommendation (no debate in COREPER needed)
- a COREPER “ II point ” recommendation (debate needed on certain points)

What happened in COREPER and in Council?

- legislation passed without problems
- issues referred back to the Working group

Implementation and feedback

- was there any opposition to the working groups definition of the problem and the decision at the Comitology and EP Committee stage?
- has implementing this decision posed any particular difficulties in the Member States?

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- the Council of Ministers and its Committees;
- general approaches to EU decision-making;
- sectoral case studies.

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4. Subproject 3: Policy Implementation and Comitology Committees

Günther F. Schäfer, Georg Haibach and Alexander Türk

4.1. Introduction

The vast majority of legal acts in the European Community are not enacted by the legislative authorities (Council and European Parliament), but by the European Commission.³⁰ Most of them are adopted by the Commission after the Council has conferred implementation powers on the Commission and a so-called “comitology” committee, composed of civil servants of the Member States, has given its opinion on a proposal by the Commission. Although among these legal acts there are many “routine” measures, decisions with an enormous political and economic importance such as the embargo against British beef in connection with the BSE crisis in 1996³¹ are also taken according to comitology procedures.

The first comitology committees were established in the early 1960s when the Council recognised that it lacked the resources to make all the necessary implementation rules in the first agricultural market regimes. However, it did not want to delegate the implementation powers to the Commission without keeping some control. The committees – which have differing legal “weights” depending on the type of committee – have the task to give an opinion on an implementation measure proposed by the Commission before the Commission can adopt it.

The procedures for adopting EC implementing measures have been criticised ever since these procedures were set up in the early 1960s.³² Many suggestions and proposals have been made to ensure that decisions of a legislative nature or with significant budgetary implications are made following the regular EC legislative process,³³ i.e. proposed by the Commission and enacted by the Council either in consultation, co-operation or co-decision with the European Parliament.

The line that separates routine implementing measures from those with legislative and budgetary implications is, however, rather blurred and difficult to draw. The Treaty does not specify how detailed legislative acts must be or how much discretion the Council can delegate to the Commission in its transfer of implementing powers³⁴. This question in the last analysis has to be answered by the European Court of Justice.

³⁰ In 1996 the European Commission adopted - in addition to numerous decisions - 2,341 regulations and 2,806 directives (being legal acts with general application), whereas the Council adopted 484 legal acts in total (European Commission, *General Report on the Activities of the European Union*, 1996, Office for Official Publications of the European Communities, 1997, p. 424, 426). For a comprehensive statistical overview see: Falke, *Komitologie - Entwicklung, Rechtsgrundlagen und erste empirische Annäherung*, in: *Das Ausschußwesen der Europäischen Union*, Joerges/Falke, Baden-Baden, 2000, p. 43, 44-49.

³¹ Commission Decision 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy, [1996] OJ L 78/47. See for a detailed analysis: Falke, *Komitologie - Entwicklung, Rechtsgrundlagen und erste empirische Annäherung*, in: *Das Ausschußwesen der Europäischen Union*, Joerges/Falke, Baden-Baden, 2000, p. 43, 117-135.

³² Cp. e.g. Trotman, *Agricultural Policy Management: A Lesson in Unaccountability*, Common Market Law Review 1995, p.1385; Blumann/Adam, *La politique agricole commune dans la tourmente: la crise de la “vache folle”*, Revue trimestrielle de droit européen 1997, p. 239.

³³ See e.g. the European Parliament’s Resolution of 14 November 1996 on the Commission report pursuant to Article 189b(8) of the EC Treaty on the scope of the codecision procedure (SEC(96)1225 - C4-0464/96), OJ [1996] C 362/267.

³⁴ Falke, *Komitologie - Entwicklung, Rechtsgrundlagen und erste empirische Annäherung*, in: *Das Ausschußwesen der Europäischen Union*, Joerges/Falke, Baden-Baden, 2000, p. 43, 53.

In a series of decisions the Court has left it basically to the legislator to allocate the powers between the legislator and the executive.³⁵

In cases where the Council legislates alone (consultative procedure), it is for the Council to decide the content of the basic act and the scope of the powers to be delegated to the Commission. The Council has tended to be rather generous in conferring implementing powers to the Commission since it can control the Commission through comitology committees. Since the Court has been rather reluctant to interfere in that choice, the Council enjoys practically complete freedom in that respect. Drawing the line between legislative and implementing acts has become almost an entirely political issue.³⁶

Whereas the Council and the Commission³⁷ have no principle objections to this situation, the European Parliament which has no influence on the committee procedures wants to restrict the delegation of implementing measures to purely routine matters. This is the root of the conflict between Council and Parliament.³⁸ In cases where the co-decision procedure applies, the European Parliament and the Council have to find a compromise as to what is decided in the legislative act and what in the implementing act. The new comitology decision of 28 June 1999³⁹ has not

³⁵ The landmark case in this respect is Case 25/70, *Einfuhrstelle v. Köster*, [1970] ECR 1161, where the Court decided that “it is sufficient ... that the *basic elements of the matter to be dealt with* have been adopted in accordance with the procedure laid down (by the Treaty). On the other hand, the *provisions implementing the basic regulations* may be adopted according to a (different) procedure, either by the Council itself or by the Commission by virtue of an authorisation complying with Article 155”. In fact, the European Court of Justice has, however, never annulled an implementing measure because of the fact that it dealt with *basic elements* of a specific subject matter.

See also Case 23/75, *Rey Soda v Cassa Conguaglio Zuccheri*, [1975] ECR 1279, in which the Court confirmed that in the context of the Common Agricultural Policy the Council may confer “wide powers” on the Commission. In Case 29-77, *SA Roquette Frères v France*, [1977] ECR 1835, the Court ruled that whenever the “evaluation of a complex economic situation is involved, the Commission and the management committee enjoy, in this respect, a wide measure of discretion”.

³⁶ Falke, *Komitologie - Entwicklung, Rechtsgrundlagen und erste empirische Annäherung*, in: *Das Ausschußwesen der Europäischen Union*, Joerges/Falke, Baden-Baden, 2000, p. 43, 55 mentions two directives in similar fields as examples to illustrate this: *Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances*, [1967] OJ L 196/1 until 1999 had been amended **8** times using a legislative procedure, but it also has been adapted to technical progress **25** times using comitology procedures. On the other hand, *Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations*, [1976] OJ L 262/201 has always been amended in legislative procedures (**14** times by 1994), although also in the case of this directive the necessity to take quick action would often have required the possibility to adopt implementing acts in order to avoid the lengthy legislative procedures.

³⁷ See e.g. Schmitt von Sydow in: Groeben/Thiesing/Ehlermann/Schmitt von Sydow, *Kommentar zum EU-/EG-Vertrag*, Art. 155, para. 76 who – summarising his experiences from working in the Commission for decades – is of the opinion that “in practice the management and regulatory committees have proven to be better than any academic definition of the borderline between technical implementation and political decisions; the negative opinion of a committee rings an alarm clock which indicates the existence of political problems to the Council and authorizes it to intervene”.

³⁸ See for more details of this “power struggle”: Haibach, *The History of Comitology*, in: M. Andeans, A. Türk, *Delegated Legislation and the Role of Committees in the EC*, Kluwer Law International, 2000.

³⁹ Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, [1999] OJ L 184/23.

contributed to resolving the question of what must to be decided in a legislative or in an implementation procedure⁴⁰.

4.2. Objectives and Research Questions

The research questions to be addressed by this subproject should contribute to a constructive solution to this important issue of the institutional balance by first establishing criteria for an operational demarcation between legislative and implementing measures, and secondly by assessing a large number of EC implementing acts to determine whether and in which cases implementing measures have in fact violated the prerogatives of the legislators Council and Parliament. The subproject therefore concentrates on the following questions:

Subproject 3a):

- How can the line that separates implementing measures from those with legislative implications be drawn?
- How can that differentiation between legislative and implementing legal acts be made operational?
- How could an effective system of control be established that limits the implementing powers of the Commission and safeguards the prerogatives of the legislators, especially Parliament?

Subproject 3b):

- Have the prerogatives of the legislative authorities been generally respected in implementing decisions in the course of the past years or have decisions with important legislative implications been decided upon according to comitology procedures?
- In which policy arenas has this primarily occurred?
- In what way have these possible “transgressions” affected the institutional balance?

The allocation of law-making powers between the institutions is not determined with sufficient clarity by the Treaty or for that purpose by the Court. Before one can answer the questions posed in subproject 3b), as to when the prerogatives of the legislative authorities have been violated, it is first necessary to solve the theoretical problem of what these prerogatives consist of. In other words it has first to be clarified where the dividing line between legislative and implementing powers should be drawn before attempting to decide whether implementing decisions have strayed into the field reserved to the legislative authorities.

Subproject 3a) has the task to develop operational criteria to distinguish between legislative and implementing powers. As outlined in more detail below in section C, it will begin with analysing how the EC Treaty deals with the issue of how legislative and implementing powers should be allocated to the institutions. It will secondly examine to what extent the EC legal system is based on a hierarchy of norms and will

⁴⁰ Falke, *Komitologie - Entwicklung, Rechtsgrundlagen und erste empirische Annäherung*, in: *Das Ausschußwesen der Europäischen Union*, Joerges/Falke, Baden-Baden, 2000, p. 43, 108 expects, however, that a positive aspect of the new decision will be a more intensive discussion of the scope of the delegation of implementation powers in the future.

compare the legal framework of the EC Treaty in this respect with that established in some of the Member States, including theoretical considerations on which these systems are based. Third, the role of the Court in interpreting the allocation of legislative and implementing powers will be examined. These theoretical considerations should lead in a concluding part to developing a checklist, which can then be used in subproject 3b).

4.3 Theoretical Approach to Distinguish Between Legislative and Implementing Powers

4.3.1. The “EC version” of the Principle of Separation of Powers: Art. 7 EC Treaty

A basic feature of the constitutions of the Member States is the principle of separation of powers:

- The 1789 French *Déclaration des droits de l’homme et du citoyen*, to which the present 1958 Fifth Constitution commits itself in its Preamble, even proclaimed that “a society where the separation is not established is no society at all”.
- The 1949 German *Grundgesetz* establishes, in Art. 20 (2), that “all state authority shall be exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary”. The principle of separation of powers is a basic constitutional principle which according to Article 79 (3) of the *Grundgesetz* cannot be amended.
- In the unwritten British Constitution the principle also exists, but refers mainly to the independence of the judiciary, as executive and legislative powers are closely intermingled.⁴¹

In contrast to this, in the EC Treaty the principle of separation of powers has not been institutionally manifested and in this form has been expressly rejected by the European Court of Justice⁴². The respective judgment followed a case in which the United Kingdom had argued that Directive 80/723/EEC which had been adopted by the *Commission* was void because it was “clear from the Treaty provisions governing the institutions that all original law-making power is vested in the Council, whilst the Commission has only powers of surveillance and implementation”.

According to the Court of Justice there is, however, “no basis for that argument in the Treaty provisions governing the institutions”. Article 7 [ex-4] (1) of the Treaty provides, instead, that “each institution shall act within the limits of the powers conferred on it by this Treaty”. Referring to Articles 7 [ex-4], 202 [ex-145], 211 [ex-155] and 249 [ex-189] of the Treaty, the Court ruled that “the limits of the powers conferred” on an institution “are to be inferred not from a *general principle*, but from an interpretation of the particular provision in question”.

⁴¹ Finer et al, *Comparing Constitutions*, Clarendon Press, 1995, p. 21.

⁴² Joined Cases 188 to 190/80, *France, Italy and United Kingdom v. Commission*, [1982] ECR 2545, 2573.

4.3.2 The Hierarchy of Norms in EC law (Primary Law, Basic Acts and Implementing Acts)

4.3.2.1. Legal Framework

The Treaty provisions do, indeed, not distinguish between legislative, executive and judicial powers. The Court of Justice has, however, ruled in the Köster case⁴³ that “the legislative scheme of the Treaty, and in particular the last paragraph of Article 211 [ex-155], establishes a distinction between the *measures directly based on the Treaty itself* and *derived law intended to ensure their implementation*”. It has been suggested⁴⁴ that

- measures directly based on the Treaty itself should be considered as *legislative acts*,
- whereas derived law should be seen as *executive acts*.⁴⁵

Despite the lack of a principle of separation of powers in the conventional sense, the EC legal system has thus a clear hierarchical structure with three different sets of rules:⁴⁶

- *Primary Law* (i.e. the Treaty provisions and general principles of community law)
- *Secondary Law*. It can be adopted according to
- the procedures provided for in the Treaty itself (*basic acts*) or
- other procedures (*implementing acts*).

The existence of this hierarchy of norms in the EC legal system is, however, less “obvious” than in the legal orders of the Member States: Whereas national parliaments adopt legislative acts in the form of an “Act” (United Kingdom), a “*loi*” (France) or a “*Gesetz*” (Germany), and governments enact executive acts as an “Order” or a “Regulation” (United Kingdom), an “*ordonnance*” (France) or a “*Rechtsverordnung*” (Germany), that difference in terminology does not exist in the EC: Both legislative and executive acts are adopted in the form of regulations and

⁴³ Case 25/70, *Einfuhrstelle v. Köster*, [1970] ECR 1161.

⁴⁴ Lenaerts, *Regulating the regulatory process: “delegation of powers” in the European Community*, *European Law Review* 1993, p. 23.

⁴⁵ Please note that the European Parliament in its *Resolution containing the European Parliament’s proposals for the Intergovernmental Conference* of 13 April 2000 (A5-0086/00, Resolution Dimitrakopoulos/Leinen) uses a very similar terminology. At 26.2 of the report it proposes to distinguish between

- *legislative measures* (to be adopted by the Council and the European Parliament in the co-decision procedure) and
- *administrative measures* (to be adopted by the European Commission).

⁴⁶ Bradley Kieran St. Clair, *Comitology and the Law: through a glass, darkly*, in: *Common Market Law Review* 1992, N° 29, pp. 693-721; Haibach, *Comitology: A comparative analysis of the separation and delegation of legislative powers*, *Maastricht Journal of European and Comparative Law* 1997, p. 373; Haibach, *Die Rolle von Ausschüssen in der Europäischen Gemeinschaft und in der Rechtsprechung des EuGH*, *Die Öffentliche Verwaltung* 1997, p. 710; Hoffmann, in: *Certain Rectangular Problems of European Integration*, Study prepared under the Direction of J.H.H. Weiler, Harvard Law School and European University Institute, Florence, 1996.

directives.⁴⁷ Different proposals to introduce a clearer hierarchy of norms in the EC have not been implemented so far.⁴⁸

4.3.2.1.1. *Basic Acts*

The legislative power (that is the power to enact measures directly based on the Treaty itself) lies in the EC - depending on the relevant procedure - with the European Parliament acting jointly with the Council, the Council alone, and - in a two exceptional cases⁴⁹ - with the Commission.

According to Art. 7 EC Treaty, basic acts must have a legal basis in the Treaty. Furthermore, secondary Community law must not infringe upon the general principles of community law such as the fundamental rights as provided for in Art. 6 (2) EU Treaty. The Court of Justice supervises the compliance with these requirements under procedures such as Art. 230 [ex-173] and 234 [ex-177] EC Treaty which grant the competence to the court to review the legality of secondary law and annul basic acts on the ground of infringement of the Treaty.⁵⁰

4.3.2.1.2. *Implementing Acts*

The executive power (that is the power to implement the basic acts) lies - as far as the Community executes its legislation itself, and not the Member States - with the Council which, however, according to Article 202 [ex-145] EC Treaty must confer it to the Commission and may reserve the right to exercise directly implementing powers itself only in specific cases.

For implementing acts the same principles apply as for basic acts: They have to comply with the basic act which delegates implementation competences, and the implementing acts must not go beyond the limits of the delegation.⁵¹ Implementing measures must thus respect the basic instruments which they apply, execute or specify. If they fail to do so, the Court of Justice has the power to annul them on the ground of lack of competence.

⁴⁷ See Art. 249 [189] EC Treaty: "... in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives ...".

⁴⁸ See for an overview over the most important developments from the European Parliament's 1984 Draft EU Treaty, the proposal of the Italian delegation in the context of the IGC leading to the Treaty of Maastricht and the reactions of the Commission and the European Parliament, to the Declaration No. 16 to the Maastricht Treaty: Hoffmann, *Hierarchy of norms in European Community Law*, in: *Certain Rectangular Problems of European Integration*, Study prepared under the Direction of Weiler, Harvard Law School and European University Institute, Florence, 1996.

⁴⁹ See Articles 39 [ex-48] (3) (d) and 86 [ex-90] (3).

⁵⁰ Craig/de Burca, *EU Law*, Oxford, 1998, p. 453.

⁵¹ Case 6/71, *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1971] ECR 823 (841); Case 34/78, *Yoshida Nederland BV v. Kamer van Koophandel en Fabrieken voor Friesland* [1979] ECR 115; Case 114/78, *Yoshida GmbH v. Industrie- und Handelskammer Kassel*, [1979] ECR 151; Case C-478/93, *Netherlands v Commission* [1995] ECR I-3081; C-303/94, *European Parliament v Council of the European Union*, [1996] ECR I-2943.

4.3.2.2. Allocation of Law-making Powers in the Member States

The EC Treaty lacks, however, a clear definition of how to separate basic acts (legislative acts) from implementing acts. The constitutional systems of the Member States face the same problem of how to distinguish legislative acts and implementing acts and have solved this issue in different ways.

The French system provides an apparently clear separation of legislative (Article 34) and executive (Articles 37 and 21) functions, but on the other hand also provides in its Article 38 that the executive is allowed to adopt acts of a legislative nature.⁵² The constitutional approach of the 1958 Constitution can be contrasted with the German constitutional rules on the allocation of law-making powers between legislator and executive.⁵³ The German constitution severely restricts the allocation of such powers. The German Constitutional Court, in particular with its theory of essentialness (*Wesentlichkeitstheorie*), has undertaken to define and police the allocation between legislative and executive powers. The UK system, on the other hand, is characterised by its total absence of legal criteria for the allocation of law-making powers. The principle of parliamentary sovereignty means that no legal restrictions can be placed on an Act of Parliament, which might contain as much or as little content as it pleases. With regard to implementing acts, the UK system relies to a large extent on political and judicial supervision of these acts and not on a definition of their scope.⁵⁴

4.3.2.3. Theoretical Considerations

The approach in the Member States to divide the line between legislative and executive acts, is, to some extent, based on theoretical considerations.

4.3.2.3.1. *The Role of Basic Acts and Implementing Acts in a Legal System*

Kelsen's hierarchy of norms⁵⁵ demonstrates the connection between basic acts and implementing acts. Kelsen argued⁵⁶ that each legal norm could be based on a higher norm until one reaches the *Grundnorm* from which all other acts emanate. Every norm contains two forms of legal rules; one contains substantive (general) rules, the other organisational rules authorising norms of a lower level to create law. The norm below the *Grundnorm* in the hierarchy of norms derives its authority from the higher norm, but can also contain substantive and organisational rules for norms of a lower level. This produces a cascade of acts that lead to ever more specific rules, which result in an individual act applicable to the individual. Basic act and implementing

⁵² See Boyer-Mérentier, *Les Ordonnances d'Article 38 de la Constitution du 4 Octobre 1958*, Aix, 1996; Picard, *Delegation of Legislative Power in French Public Law*, in: Andeans, Türk, *Delegated Legislation and the Role of Committees in the EC*, Kluwer Law International, 2000.

⁵³ See Türk, *Delegated Legislation in German Constitutional Law*, in: Andeans, Türk, *Delegated Legislation and the Role of Committees in the EC*, Kluwer Law International, 2000.

⁵⁴ See Tomkins, *Delegated Legislation in the English Constitution*, in: Andeans, Türk, *Delegated Legislation and the Role of Committees in the EC*, Kluwer Law International, 2000.

⁵⁵ Kelsen, *Allgemeine Theorie der Normen*, Ringhofer and Walter (eds.), Wien, 1979, and Kelsen, *Reine Rechtslehre*, Leipzig and Wien, 1934.

⁵⁶ Kelsen, *Reine Rechtslehre*, Leipzig and Wien, 1934, p. 62 et subs.

acts have to be seen as a whole, as only both will form the totality of legal rules applicable to the citizen.⁵⁷

Kelsen's theory makes it possible to understand the link between basic act and implementing act in the EC legal system. The Council can only adopt norms that delegate powers to the Commission, if a higher-ranking norm allows it to do so. Article 202 3rd indent contains the norm that authorises the Council to delegate implementing powers to the Commission. The act adopted by the Council corresponds to the Kelsen's model, as it contains substantive rules and organisational rules, the latter authorising the Commission to act. The authorising norm (Article 202 3rd indent), the delegating norm (basic act) and the norm exercising powers contained in the enabling norm (implementing act) form a whole that contains the relevant law. None of these three elements can be eliminated without distorting the meaning of the law.⁵⁸

4.3.2.3.2. *Justification for the Allocation of Law-making Powers*

However, Kelsen's theory does not determine the level of detail of an act at each level of the legal system. More traditional legal theories developed by Hobbes, Montesquieu, Locke and Rousseau seek justifications for the allocation of powers between the legislative and the executive. These theories have been developed in the 19th century, mainly to justify the actual allocation of powers between the legislator and the executive.⁵⁹

Modern constitutional systems tend to base their allocation of law-making powers on the principle of democracy and the rule of law. These principles are once again related to the nation state and might not necessarily be capable of being applied to the EC legal system. It seems, however, that whereas the results of the application of such principles in the national systems cannot be transferred without adaptation to the EC level, these principles form part of the legal heritage on which the EC is founded and could serve as valuable guidance and inspiration. Moreover, Article 6 (1) of the EU Treaty emphasises the democratic principle and the rule of law as principles on which the EU is based. Some writers reject, however, the idea of applying general principles to solve concrete problems even in the national context.⁶⁰

A justification for the allocation of law-making powers could be seen in the circumstance that each act has certain characteristics that make it best suited to pursue a certain task. This approach is based on the specific functions exercised by the institutions and the procedures and legal instruments they have at their disposal to pursue these functions. Each legal act has to be measured against certain parameters, such as the organic qualities of the institution (democratic nature, composition, problem-solving capacity) that adopts it, its procedural structure (participation of other institution, transparency, control etc) and constitutional requirements. The respective qualities are then set in relation to the functions to be performed.⁶¹ In this

⁵⁷ See Guiheux, *la notion de délégation en droit public*, Thèse 1996, Rennes.

⁵⁸ Guiheux, *La notion de délégation en droit public*, Thèse 1996, Rennes.

⁵⁹ Rottmann, *Der Vorbehalt des Gesetzes und die grundrechtlichen Gesetzesvorbehalte*, EuGRZ (Europäische Grundrechtszeitschrift) 1985, p. 277.

⁶⁰ See Staube, *Parlamentsvorbehalt und Delegationsbefugnis*, Berlin, 1986, pp. 182 et subs.

⁶¹ See Staube, *Parlamentsvorbehalt und Delegationsbefugnis*, Berlin, 1986, pp. 201 et subs.

respect it seems to be useful to consider the impact of acts on the individual (human rights), its political importance (e.g. budget, acts that affect a large number of people) and their effect on the institutional system (e.g. efficiency).

4.3.2.3.3. *Control over the Implementing Act by the Basic Act*

The enabling act (basic act) can use various techniques to govern the implementing act. These methods are linked to the nature of legal acts. Two such techniques can be distinguished.⁶² The basic act may lay down conditional programmes, e.g. determine that “if it rains everybody has to use an umbrella”. This programme provides a particular solution for a particular problem. The level of detail might vary. It could be left for an implementing act to define the amount of rain necessary to trigger the obligation to use an umbrella, or it could specify what an umbrella is, etc. The basic act might also lay down purpose-oriented programmes, which describe a particular problem, but allow for different options in an implementing act of how to solve the problem. This norm could be formulated as follows: the norm sets out the dangers of rain to human health. Here the aim is to protect humans from rain, but only to the extent that is required to protect their health.

In addition to the control that can be exercised through the basic act by the legislative authorities, the constitutional systems of the Member States and the EC rely on judicial review exercised by the courts. In most systems ordinary or administrative courts exercise such review. In all systems the judiciary leaves a greater or lesser degree of discretion to the implementing act.

4.3.3. The Role of the European Court of Justice

4.3.3.1. The Enforcement of the Hierarchy of Norms by the European Court of Justice: Case C-159/96, Portugal v. Commission, [1998] ECR I-7379 as an Example

4.3.3.1.1 *Introduction*

It is evident that there is a need for an effective control of the compliance of the EC institutions with this hierarchy of norms. As far as implementing acts are concerned, the comitology committees with their tendency to create an “*esprit de corps*” or “*Fachbruderschaft*” which is more likely to establish mechanisms of defence against “outside” attacks than mechanisms of control versus the Commission can hardly be seen as a provider of a guarantee that the limits of the basic legislation are observed.⁶³ This is a task assigned by the EC Treaty to the European Court of Justice: Both individuals (in a Art. 230 [ex-173] procedure, if an implementing measure is of “*direct and individual concern*” to them, or otherwise under Art. 234 [ex-177] procedures) and Community institutions and Member States (in Art. 230 procedures)

⁶² See Busch, *Das Verhältnis des Art. 80 Abs. 1 S. 2 GG zum Gesetzes- und Parlamentsvorbehalt*, pp. 134 et subs., Berlin, 1992.

⁶³ Falke, *Komitologie - Entwicklung, Rechtsgrundlagen und erste empirische Annäherung*, in: *Das Ausschußwesen der Europäischen Union*, Joerges/Falke, Baden-Baden, 2000, p. 43, 72.

can request a judgment of the Court whenever there is a possible violation of the hierarchy of norms.⁶⁴

In the past the Court has repeatedly annulled both basic acts which had no or a wrong legal basis in the Treaty,⁶⁵ and implementing acts which did not respect the basic legislation under which they were adopted, or had no legal basis in that basic act.⁶⁶ A recent example of the latter case is the judgment of the Court of 19 November 1998.⁶⁷ In that judgment the Court annulled the decision adopted by the Commission “following the favourable opinion of the Textile Committee, which met on 6 March 1996, concerning the importation of textile products and clothing originating in the People’s Republic of China”, because the Commission had exceeded its implementation powers.

4.3.3.1.2. *Legal Background of the Case*

In 1988 the Community and the People’s Republic of China signed the *Agreement on trade in textile products*⁶⁸ which was provisionally applied in the Community by Council Decision 88/656/EEC.⁶⁹

*Council Regulation 3030/93/EC on common rules for imports of certain textile products from third countries*⁷⁰ (as amended by Council Regulation 3289/94/EC⁷¹) defines the system for importation into the Community of textile products originating in third countries which are linked to the Community by agreements, protocols or arrangements, or which are members of the World Trade Organisation.

⁶⁴ See Bücken/Schlacke, “Politische Verwaltung” durch EG-Ausschüsse, in: *Das Ausschußwesen der Europäischen Union*, Joerges/Falke, Baden-Baden, 2000, p. 161, 239-254. They stress, however, with a reference to Bradley Kieran St. Clair, *Institutional aspects of comitology: Scenes from the Cutting Floor*, in: Joerges/Vos (eds): *EU Committees: Social Regulation, Law and Politics*, Oxford, 1999, p. 71-93 that whereas it is possible to challenge the legality of binding legal acts, “it is, in principle, not possible to challenge directly in legal proceedings any decision of a committee, whether this is scientific, advisory or comitology in character”.

⁶⁵ See e.g. C-84/94, *United Kingdom v Council of the European Union*, [1996] ECR I-5755. A case pending at the moment is C-376/98, *Germany against the European Parliament and the Council of the European Union*. Germany argues in this case that the “tobacco” Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products ([1998] OJ L 213/9) was adopted without any legal basis in the Treaty.

⁶⁶ See e.g. C-303/94, *European Parliament v Council of the European Union*, [1996] ECR I-2943. In this case the Court annulled a Council implementing measure which had “modified, without following the legislative procedure prescribed by the Treaty ... the scope of the obligations imposed on the Member States by the basic directive”. The implementing directive had provided “only for protection of water intended for the production of drinking water”, therefore failed to “take account of the effects which plant protection products may have on all groundwater” and thus “affected the scope of the principles defined in the basic directive”.

See also Case C-156/93, *European Parliament v Commission of the European Communities*, [1995] ECR I-2019, where the European Parliament’s argument that the Commission had exceeded the limits of its competences was rejected by the Court.

⁶⁷ C-159/96, *Portuguese Republic v Commission of the European Communities*, [1998] ECR I-7379.

⁶⁸ The Agreement was signed pursuant to Article 4 of the 1973 Multilateral Arrangement regarding International Trade in Textiles (the “Multifibres Agreement”) to which the Community became a party by Council Decision 74/214/EEC, [1974] OJ L 118/1.

⁶⁹ [1988] OJ L 380/1.

⁷⁰ [1993] OJ L 275/1.

⁷¹ [1994] OJ L 349/85.

4.3.3.1.3. *The Facts of the Case*

The Commission found during the early months of 1996 that the competent Chinese authorities had issued export licences for certain textile products which exceeded the quantitative limits agreed between the Community and China for 1995. As a result, the products sent from China remained blocked on entry to the customs territory of the Community. The Commission expressed its disapproval of those breaches of the quantitative limits and requested the Chinese authorities to remedy the inadequate administration of the limits and to intensify the computer network linking the Chinese and Community systems for the transmission of data concerning the granting of export and import authorisations.

The Chinese authorities admitted that it was true that the exceeding of the quotas was due to a breakdown of the Chinese administration's computer system. They maintained, however, that other factors had contributed to complicating the monitoring of the compliance with the quantitative limits, especially the falsification of export licences. They requested the application of "flexibility measures" by adjusting the quantities provided for under the 1996 quotas.

On 6 March 1996 the Commission called an urgent meeting of the *Textile Committee*.⁷² At that meeting the Commission proposed to charge the 1995 breaches against the 1996 quotas. The *Textile Committee* delivered a favourable opinion to that proposal.⁷³ After the meeting the Commission adopted a decision in which it authorised the importation of textile products from China with respect to 1995 in a quantity higher than that provided for in the EEC-China Agreement and in Regulation 3030/93, and reduced the corresponding amount of import quantities for 1996.

In May 1996 Portugal brought an action for annulment of the Commission decision before the European Court of Justice. It claimed that the Commission did not have the competence to adopt the contested decision and had thus violated the Council Regulation.

4.3.3.1.4. *The Judgment of the European Court of Justice*

4.3.3.1.4.1. General Principles

Before determining whether the Commission had the "power to adopt the contested decision on the basis of Articles 8 or 12 (4) and (8) of the Regulation", the Court deemed it "necessary to examine the Commission's powers in relation to the administration of import quotas for textile products" and thus recalled some general principles concerning the adoption of implementing acts:

"Where Article 145 of the Treaty provides that "the Council shall... confer on the Commission, in the acts which the Council adopts, powers for the

⁷² The *Textile Committee* is a IIIa) comitology committee (see Art. 17 of Council Regulation 3030/93/EC).

⁷³ Belgium, Spain and Greece expressed reservations because of the "size and repetitive nature" of the breaches. Portugal voted against the Commission's proposal "by reason of its opposition in principle to exceptional flexibility measures and of the damage suffered by the Community industry".

implementation of the rules which the Council lays down”, it follows from the Treaty context in which Article 145 must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation.⁷⁴ Since only the Commission is in a position to watch closely and constantly international market trends and to act quickly when necessary, the Council may confer on it wide powers in this sphere. Consequently, the limits of those powers must be determined by reference amongst other things to the essential general aims of the legislation in question. Thus, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council⁷⁵”.

4.3.3.1.4.2. Art. 12 of Regulation 3030/93

The Court then excluded Art. 12 of Regulation 3030/93⁷⁶ as a possible legal basis because it only concerned the procedure for monitoring the compliance with the quantitative limits. In the opinion of the Court this was “clear from the general scheme of the system defined by the Regulation”. Art 12 (4) and (8) could therefore not “confer upon the Commission the power to change those limits”:

- The fact that the Commission had to establish a “contact” with the authorities of the supplier countries pursuant to Article 12 (4) of the Regulation (when the notified requests exceeded the available quotas) could “not justify an agreement with the authorities of that country providing for a derogation from the Community quantitative limits fixed by the Council”.
- Also the measures referred to in Article 12 (8) served only to “implement the procedure for administering available quotas”.

4.3.3.1.4.3. Art. 8 of Regulation 3030/93

The Court then considered Art. 8 of the regulation⁷⁷ as a possible legal basis of the Commission decision because it was “clear from the very wording of Article 8” that it authorised the Commission to “allow opportunities for imports greater than the quantities available under the total Community quantitative limits”.

The question to be examined was, however, whether “*particular circumstances*” as required by Art. 8 existed that were “capable of justifying the authorisation of additional quantities of imports” for 1995. In the eyes of the Court, Art. 8 could only be “*interpreted restrictively*”, since it allowed the Commission to offer additional

⁷⁴ Case 23/75, *Rey Soda v Cassa Conguaglio Zucchero*, [1975] ECR 1279, paragraph 10.

⁷⁵ See, in relation to agricultural matters, Case C-478/93 *Netherlands v Commission* [1995] ECR I-3081, paragraphs 30 and 31.

⁷⁶ Article 12 lays down the procedure relating to the issue of import authorisations. Art. 12 (4) provides i.a. that “... the Commission shall contact the authorities of the supplier country concerned immediately in cases where requests notified exceed the quantitative limits in order to seek clarification and a rapid solution”. Under Art. 12 (8) “the Commission may ... take any measure necessary to implement this Article.”

⁷⁷ Article 8 deals with the administration of the flexibility measures concerning the quantities of imports. It provides i.a. that “... where, *under particular circumstances*, additional imports are required, the Commission ... may open up additional opportunities for imports during a given quota year”.

import opportunities “in derogation from the general system established by the Regulation”:

- The fact that the Chinese authorities had issued additional export licences mainly because of a breakdown in their computer system could not justify the additional import opportunities authorised by the Commission decision because the exceeding of the quantitative limits had its origin in the administration of the double-checking system established by the EEC-China Agreement. It could therefore not be described as an “unusual or unforeseeable event, but as a risk inherent in the procedure for monitoring quantitative limits”.
- The Commission had also not demonstrated that the situation in 1995 in which there was an excessive number of export licences had occurred so suddenly that it could not have adopted appropriate measures.⁷⁸

4.3.3.1.4.4. Annulment of the Commission Decision

The Court concluded therefore that the Commission had exceeded its powers under Regulation 3030/93: “In those circumstances ... the contested decision must be annulled”.

4.3.3.2. Allocation of Powers between Basic Acts and Implementing Acts by the Court

The Court does not only enforce the hierarchy of norms, but also requires that basic acts contain a certain amount of detail, which cannot be dealt with in an implementing act. The Court in *Köster*⁷⁹ has decided that basic acts must contain the basic elements of a subject matter.⁸⁰ The Court has, however, been wary to interfere with the decision of the legislator of what is dealt with by way of implementation and has to this day not annulled a single act on the basis that it did not contain the basic elements. The Court has left this issue to the “political” control of the comitology committees instead of actively policing the allocation of powers in accordance with its criteria. The Court has therefore *de facto* entrusted the ‘political’ institutions with the decision, which matters should be contained in the basic act and which in the implementing act. This approach appears not to be in conformity with most of the legal systems of the Member States.

4.3.3.3. Definition of “Legislative” Act by the Court

The Court’s definition of implementing and basic act under Articles 202 [ex-145] 3rd indent and 211 [ex-155] 4th indent stands in striking contrast to the Court’s definition of legislative acts in cases concerning Article 230 [ex-173] (4) and Article 288 [ex-215] (2). Article 230 (4) allows individuals to challenge acts adopted by EC institutions. In some cases the Court found that individuals could not challenge acts

⁷⁸ Such as the measures provided for in Article 12 (1) of Regulation 3030/93.

⁷⁹ Case 25/70 *Einfuhrstelle v Köster* [1970] ECR 1161. See also Case C-240/90 *Germany v Commission* [1992] ECR I-5383.

⁸⁰ See Bradley, *Comitology and the Law: through a Glass, darkly*, *Common Market Law Review* 1992, p. 693; Haibach, *Die Rolle von Ausschüssen in der Europäischen Gemeinschaft und in der Rechtsprechung des EuGH*, *Die Öffentliche Verwaltung* 1997, p. 710; Türk, *The Role of the Court*, in: Andeans, Türk, *Delegated Legislation and the Role of Committees in the EC*, Kluwer Law International, 2000.

that were legislative in nature. The decisive criterion in such cases was the general applicability of the act⁸¹ and not its form or the procedure used to adopt the act.⁸² Under Article 288 (2) individuals can claim compensation, where an unlawful act adopted by an EC institution caused them damage. Where individuals claim that a “legislative” act has caused the damage, the Court has awarded compensation only under restrictive conditions.⁸³ The Court has defined “legislative” in such cases in accordance with the same criteria used to define “legislative” in cases brought under Article 230 (4).

The definition of what constitutes a “*legislative act*” under Articles 230(4) and 288(2) is therefore wider than the concept of “*basic act*” under Article 202 3rd indent. As a result, acts which are classified as implementing acts under Article 202 3rd indent can be legislative in nature under Articles 230(4) or 288(2). This approach seems to question the basis of the objectives of this study, which seems to suggest that acts are either legislative or implementing in nature. The (possible) existence of implementing acts, which are legislative in nature, contradicts this assumption. The Court’s approach is, however, in conformity with the allocation of law-making powers in the national system, which provide for the possibility that acts with a legislative content can be adopted by the executive. The term ‘legislative act’ can, therefore, be used in relation to an act that is based on a competence provided for in the EC Treaty (legislative act in the narrow sense), but also to an act, which is in substance of a legislative nature (legislative act in the wider sense).

4.4. Conclusion: Checklist

The theoretical analysis in subproject 3a), as outlined above, should lead to a development of criteria to differentiate legislative from implementing acts. These criteria will then serve as a “checklist” for subproject 3b).

The empirical research undertaken in subproject 3b) will look at whether implementing acts have remained within the scope of the basic acts, on the basis of which they were adopted. The criteria developed in subproject 3a) will enable subproject 3b) also to explore whether some implementing acts, even though they formally remained within the powers granted to them in the basic act, actually encroached on the competence of the legislative authorities, as they are dealing with matters of a legislative rather than implementing nature.

⁸¹ See Case T-472/93 *Campo Ebro v Council* [1995] ECR II-421, where the Court held at para. 31 that legal acts are of general applicability where they ‘apply to objectively determined situations and produce legal effects vis-à-vis classes of persons envisaged in a general and abstract manner’.

⁸² See Case 147/83 *Binderer v Commission* [1985] ECR 257, where the Court held at para. 14 that ‘the distinction between a regulation [i.e. a legislative act in substance] and a decision may be based only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption.’

⁸³ See Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975.

Annex 1: Methodology of Subproject 3a)

1. Methodological Basis

Subproject 3a) will analyse the wealth of literature and case law in the constitutional systems of the Member States, in order to determine how these systems allocate legislative and implementing powers between the law-making institutions. It is clear that these findings cannot directly be applied to the EC legal system. However, certain general principles and traditions can be extracted from the analysis.

In addition, theoretical considerations have to be developed. First, the role of legislative and implementing acts in the context of the legal system as a whole will be examined. Second, justifications have to be found for the adoption of legal acts by one or the other branch of government and whether they are apt to be applied to the EC legal system.⁸⁴ Third, criteria have to be developed as to which legal acts (legislative or implementing acts) should be used for which functions of law-making. Fourth, techniques have to be found with the help of which basic acts can control implementing acts. Finally, the question of which institution should enforce the allocation of law-making powers has to be raised.

General principles and traditions of the constitutional systems of the Member States together with the more theoretical considerations outlined above, will be applied to the EC legal system in order to find criteria to differentiate legislative from implementing acts.

2. Functional Approach Applied to EC Acts

Subproject 3a) proceeds on the hypothesis that a functional approach should be applied to the EC legal system. Each legal act (characterised by the institution that adopts it and the procedure in accordance of which it is adopted) is assumed to be best suited to perform a certain function. To give an example, we might assume that the co-decision procedure, is best suited for fundamental decisions concerning the environment, whereas an act adopted by the Commission without control by comitology committees or the EP is less apt for such a purpose. On the other hand, where a speedy reaction is required that does not involve fundamental policy considerations, as in case of adaptation of agricultural prices to changing market conditions on the basis of strict criteria laid down in the basic act, a Commission decision with or without control by committees, is better suited for this task than an act adopted by the Council and the EP under the co-decision procedure.

The respective institutions (EP, Council and the Commission) will be assessed as to their organic qualities (democratic nature, composition, problem-solving capacity), the procedures they have at their disposal (participation of other institution, transparency, control etc) and the efficiency with which they can act. Here, some cross-fertilisation with subprojects I and II are expected.

⁸⁴ The concept of government is taken here in its wide meaning and comprises all those bodies exercising public power.

Second, the acts founded on basic acts (implementing acts) will be considered in accordance with the same principles as in the paragraph above. Emphasis will be placed on the political (comitology committees) and judicial control (European Court) that is currently exercised over these acts.

Third, it seems to be logic to apply the same principles that have been applied above to the European Court. The Court's review procedures have to be assessed as to their strengths and weaknesses in the same way as it is done with regard to the other institutions. This will determine whether the Court should exercise a full review of the allocation of law-making powers or whether a more limited approach is to be preferred. This will then also allow determining the adequate level of judicial control of implementing acts. Part of the considerations has to be the level of "political" control exercised over implementing powers and whether this political control is more adequate than the review by the Court. The fact that many Member States rely in that respect on a judicial control, which is mostly not exercised by a constitutional court, but ordinary or administrative courts, should not be overlooked.

Annex 2: Methodology of Subproject 3b)

We will examine a sample of implementing measures for which we propose to use a (preliminary) typological scheme which views the adoption of implementing measures either as executive rule making or fund approving.⁸⁵ The typological scheme will be further refined on the basis of the results of the theoretical analysis in subproject 3a). The criteria for differentiation are essentially material in nature, focusing on the substance of implementing decisions taken.

We differentiate three types of rule making implementation and two types of budgetary measures as follows:

- **“Rule application”**: refers to measures, which are adopted within the clear limit values of the basic legal act (e.g. routine decisions in the market regimes of CAP, but also for decisions like the embargo against British beef in the BSE case).
- **“Rule interpretation”**: refers to cases in which minor adaptations of the original legal act are made and the Commission has certain discretion/room for manoeuvre (e.g. Commission decisions concerning mergers of companies).
- **“Rule-setting/evaluation”**: refers to measures where, within a general framework of a legal act, particularly directives, more specific rules are adopted (e.g. the setting of limits in environmental law or adjusting safety requirements due to technological change).
- **“Routine fund-approving”**: refers to funding decisions within a specific, well-defined framework laid down by the legislative authorities (e.g. the management of specific R&D programmes and economic aid to third world countries).
- **“Extension/new specification of fund-approving”**: refers to measures in which either existing programmes are extended or modified (e.g. modification or revision of an expenditure programme in R&D or foreign aid).

In addition to differentiating implementing measures according to the type of rule making or fund approval, we also need to take the nature of decision on implementation into account. Again we propose three categories for rule-making and two categories for fund-approving measures as follows:

- **“Routine”** (within clearly defined limits such as the setting of prices in market regimes or approving specific research projects);
- **“Normative”** (setting/amending legal requirements like annexes of directives resulting in a substantive change of the norms set out in the original legal act);
- **“Programmatic”** (setting up new programmes in the field of R&D or initiating new activities on the basis of an existing legal act);
- **“Budgetary I”** (inside/internal clearly defined budgetary limits);
- **“Budgetary II”** (the significant extension or modification of a budget line leading to a significant change in expenditure).

⁸⁵ The typological scheme is a further development of a differentiation proposed in: Schaefer, *Committees in the EC Policy Process: A First Step Towards Developing a Conceptual Framework*, in, Pedler/Schaefer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, European Institute of Public Administration, Maastricht, 1996.

The research team for this subproject has developed and tested this typological scheme in an earlier study (*The Impact of the European Community Implementing Measures on EC Legislative and Budgetary Authorities*, 1999). In a random sample of 200 implementing measures, 20 critical cases could be identified of which two represented a violation of the prerogatives of the legislators.

By combining the two sets of categories we obtain the following matrix:

	Routine	Normative	Programmatic	Budgetary I	Budgetary II
Rule application	+			+	
Rule interpretation	+				
Rule-setting/ evaluation					
Routine fund approving	(+)			+	
Extension of/new specification of fund approving					

Critical instances where implementing measures may possibly have overextended the competences of the executive and would have required the involvement of the legislative authorities are cases that would fall into the shaded fields. By classifying a sample of implementing measures it will be possible to identify these critical cases for further analysis. During the classification procedure we are likely to encounter a significant number of borderline cases, which will require revision and refinement of the preliminary scheme. A reclassification of the whole sample will allow us to draw general conclusions about the incidence, distribution and nature of community implementing measures and whether and to what extent executive competences have been overextended.

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5. Subproject 4: The Committee System, Legitimacy, Citizen's perceptions and Acceptance of the EU-System of Governance

Torbjörn Larsson and Andreas Maurer

5.1.1 Introduction

The purpose of this report is to present an overview of the discussion of political legitimacy and its relevance for the different types of EU committees and their functions. The report consists of two parts. The first one is a more general introduction to ideas and thoughts about how legitimacy is created in a democratic state (society). In the second one the ideas of legitimacy are linked to the discussion of what is believed to be the functions of EU-committees.

5.1.2 The Traditional Way of understanding Political Legitimacy

One of the classical discussions in political science is the issue of political legitimacy – that is, what gives the rulers the right (power) to impose their will on the people or, slightly rephrased, why should the public follow the decisions taken by the rulers, especially when a decision goes against their private interest?

The discussion has roots going far back in history, long before the democratic regimes of today had emerged. Even the philosophers of ancient Greece found this topic to be of great importance. Plato, for example, stressed the importance of rule by law in a good government while the rule of men meant a bad government, and Aristotle questioned whether it was ‘more convenient to be governed by the best men or by the best laws’.⁸⁶ Thus, a concern for these early philosophers as well as for later ones was the distinction between legitimate power and power which was not legitimate, because if the power was exclusively founded on brute force what distinguished a state from a band of robbers? Or, as the question once was formulated by St Augustine: ‘Without justice, what would in reality kingdoms be but bands of robbers’?⁸⁷

Later, in the 19th century, Mosca saw two basic sources for authority given top down from God, or bottom up from the people. To him, in other words, legitimacy was a question of authority, not reason - the realisation of either God’s will or the will of the people gave legitimacy to the decisions of the rulers.⁸⁸ The problem here, of course, was to find a method that made it plausible to the public that the decisions that were taken or the laws that were passed could be deduced from the will of God or the will of the people. It is also worth mentioning that the will of the people in those days was not necessarily manifested in general elections. Monarchs, for example, often saw themselves as the supreme interpreters of the general opinion - ruling in the name of the people but without consulting any representatives. And on the other hand, relying on God almost always entails giving a lot of influence to the clergy – which is not always a totally reliable source for the King’s intentions.⁸⁹

From the ‘pre-democratic’ days, at least two more types of arguments can be found for how the political power of the rulers could be given legitimacy - one based on

⁸⁶ Bobbio, N. (1989), p.91.

⁸⁷ *ibid*, p. 82.

⁸⁸ Mosca, G. (1939).

⁸⁹ Aquino, T. of (1948).

history and one based on natural law. In order to find principles and reasons justifying the use of power by the rulers some would turn to the system that many believed to exist 'by natural order' which had been in place since the beginning of mankind. Still today some would argue that some natural rights (principles) are given to an individual the moment he or she is born, principles which have to be respected by the rulers and which can not be set aside. But what nature tells us is not always that easy to translate into principles for ruling society. For example, one lesson that nature is teaching us may well be interpreted as the survival of the fittest; a society founded on Nietzscheism where the strong not only has the power but also the right to rule the weak. However, in many cases, those who argued in favour of legitimacy based on natural law did not make direct references to observations of the wilderness but to observations made in the Bible. The Irish constitutions is, for example, to a large extent based on natural law, and it lists several rights given to the people which clearly originate from the Bible. In other words, although we frequently find references to natural law legitimising the power of the rulers, it was not the order among the flora and fauna that primarily engaged the thought of the philosophers of the 18th and 19th centuries. Instead, the focus was on a theoretical construction of what happened when the naked ape (man) for the first time had to adjust to some kind of social order. This was supposed to have established some kind of social contract, giving some individuals the right to rule others but only on certain conditions, i.e. only if certain rights of those ruled were respected.

Anybody using historical arguments as means of justifying the public power will follow one of two different roads - the conservative (static) or the more radical (change). From the conservative point of view, and in the spirit of Burke, some laws are more basic than other and get their special legitimacy simply from being very old, just like some institutions and regulations.⁹⁰ When applying this perspective, the rulers in those days had to build their legitimacy on the previous order and any change to society had to be carried out gradually. In stark contrast to Burke and the conservative ideas those with a more radical approach also used historical arguments in their legitimacy strategy, but here the historical future was the focal point. According to the radicals, what gave legitimacy to a revolutionary change of the state was a deterministic historical process, going through a development of predetermined changes affecting society. Thus the state had to change drastically in order to cope with the changes in society if it were to survive at all.

Max Weber had to some extent a distinct approach to the question of legitimacy. To him the question was not so much from what general principle the rulers could deduce their right to rule the people but rather what made people follow certain leaders. He identified three types - charismatic, traditional and rational leaders. We often find that people will follow leaders just by tradition, they have been more or less indoctrinated since birth to follow those who hold higher offices. In this case, the legitimacy is largely linked to the office, not the person.⁹¹ The charismatic leader on the other hand gets his or her legitimacy from his or her personality. What Weber had noticed was that certain leaders got what they wanted just because their personality inspired confidence. The third type of legitimacy is based on rationality, i.e. people follow leaders who make suggestions and decisions that are rational (logical), because they

⁹⁰ Burke, E. (1790).

⁹¹ Weber, M. (1978).

think this will solve the problem and it is presented in such a way that they can understand it. Weber believed this to be the modern form of leadership, suitable for a democracy. People would according to him in the future increasingly follow leaders who could give rational and logical arguments to support their decisions. This type of leadership would also mean the rule of law since rationality is the foundation for new laws.⁹²

Thus, from the ancient Greeks and onwards, the discussion has been carried out according to two principle lines. To begin: with from what sources can rulers deduce their power if it is not to be based on brute force? Secondly, to what extent is the power of the rulers limited and in what respect? The contemporary discussion concerning democracy has ended up with a number of answers to these questions and the arguments concerning the legitimacy of modern democracy are thus dependent on what type of democracy is favoured.

5.1.3 Common Organisational Features of Democratic Regimes

The work of a government is basically twofold: the authoritative allocation of resources and legitimacy building (support).⁹³ Or, to rephrase it, a government tries to regulate basic conflicts in society by solving different types of what are regarded as the current societal problems, e.g. unemployment and healthcare. Legitimacy-building and problem-solving are interrelated and there is input and output in both cases. Government input is when the government in its decision-making capacity respects certain procedures, which are well known in advance and accepted by the public, allowing the public to participate in and influence the decisions. Government output is when it receives support from the public because it has proved its efficiency in its problem-solving capacity.⁹⁴ The legitimacy of a political system is made clear by the fact that the public is willing to participate in the decision-making procedure and by the fact that the people respect and adhere to the decisions, even when they go against their personal interests.⁹⁵

However, problem-solving is not just a rational technical means to find the best solution to a specific problem; it is also about who gets what, when and how.⁹⁶ In other words, problem-solving (the regulation of conflicts) is all about whose preferences should be allowed to take precedence. In a democracy the simple answer to this question is usually the majority.⁹⁷ But democracy is not only about the right for the majority to rule (which some people see as the tyranny of the majority): minorities also have rights in a genuine democracy.⁹⁸ In short, a democratic system concerns problem-solving, efficiency and legitimacy but also the balance between majority rule and minority (human) rights.

⁹² Weber, M. (1977), p. 42.

⁹³ Easton, D. (1957).

⁹⁴ Scharpf, F. (1999), pp. 7-16.

⁹⁵ Weiler, J.H.H. (1993), pp. 253-54.

⁹⁶ Lasswell, H.D. (1936).

⁹⁷ Arblaster, A. (1991), pp. 68-73.

⁹⁸ Majone, G. (1996), pp. 286-87.

Furthermore we will always find those who argue that democracy is not only instrumental but a goal as such - a way for human beings to develop.⁹⁹

Democratic regimes can be organised in many different ways but there are generally some common features. These common features, to a large extent, originate from the traditional distinction of three different powers: legislative (decision-making), executive and judicial, which in turn correspond to three different types of institutions: an elected assembly (parliament), an executive (government) and a judiciary (courts).¹⁰⁰ The assembly, elected by the public in free and open elections, often comprises two chambers. All, or some, of the members of the upper (first) chamber are often indirectly elected, or in rarer cases not elected at all but appointed. Alternatively seats are inherited. In an assembly with two chambers, where only one chamber is directly elected, the directly elected second chamber is the more powerful one. The main object for the assembly is legislative but it also has functions like supervising and scrutinising the executive and the judiciary. The parliament usually get its legitimacy, its mandate to exercise power, from the fact that it is elected by the people and in that sense is believed to represent the people.

The executive can either be of a monolithic or a dualistic type. In many cases the government includes both a president and a prime minister, or a monarch and a prime minister (who is figuratively the first minister of the monarch). But there are other arrangements: Switzerland does not have a prime minister or a monarch but a rotating presidency.

The normal function of the executive is to implement the decisions taken by the assembly and to put forward suggestions to the assembly on how to change the present legislation in different areas and how resources should be allocated in the yearly budget. The executive often also has an important role to play in suggesting or appointing people to higher offices such as the head or members of the board of the Central Bank or judges in the Supreme or High Courts. How the executive gets its legitimacy differs from one political system to another; in some cases the executive gets its mandate by being appointed by and accountable to the assembly while in other cases it gets it by being directly elected by the people.

The judiciary is of course mainly responsible for the application of laws, but it is also involved in the functions of the executive and the assembly either through a constitutional court or through judicial review exercised by the regular courts. The right of the individuals to appeal government decision can also affect the execution of government policies. As opposed to the assembly and the executive, the courts do not build their legitimacy primarily on being elected (although judges are directly elected in some countries) or by being appointed by an elected body. The real legitimacy of the courts can be found in the fact that they are supposed to be independent from all types of interests and outside pressure.¹⁰¹ The impartial interpretation and application of the law is the key to their authority, which sometimes is also true for other governmental institutions like the central bank and the auditing office.

⁹⁹ Räftegård, C. (1998), pp. 69-78.

¹⁰⁰ Montesquieu, C.L. (1990).

¹⁰¹ Neal Tate, C. (1995).

Finally, it is important to remember that these entities do not function independently from each other, they are part of a common political system. The role of and balance between the three may differ from one democratic political system to another but if changes are made in the functions of one, it affects the other two. Therefore, should the rules and regulations that guide the work of an assembly be changed, for example, it will most certainly also have an impact on how the executive and/or the judiciary operate/s. However, to predict what is going to happen in other parts of the political system is often difficult. In fact, what is sometimes seen as minor changes to one part of the political system can have rather drastic effects as the consequences are felt throughout the whole system.¹⁰²

Thus, although the balance between the three entities may vary greatly from one country to another we seem to have three basic principles for organising a democratic regime.

5.1.4 Contemporary Democratic Governments

One can discern two different types of democratic government, based on two different principles that attribute varying degrees of relative importance to the four values of efficiency (problem-solving capacity), legitimacy building, majority rule and minority protection.

Fundamental to a democratic regime is, of course, the right for the majority to rule, but this right does not go so far as to threaten the life and existence of minorities. Therefore, in a democratic society, there has to be some kind of protection for the individual (the smallest minority). The problem here is, of course, how to design this protection while not making it so far reaching as to circumscribe the basic principle of majority rule. What is needed, in other words, is some kind of balance between the two principles. And here you will find a demarcation line between governments based on power sharing (presidential or pluralist governments) and governments based on the parliamentary idea.¹⁰³

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

But even if the principle of majority rule is more clearly expressed in a parliamentary system one usually finds mechanisms for protecting minorities. For example, decisions such as amendments to the constitution may need a qualified majority in the parliament to be accepted. In other cases there may be certain delaying techniques that can be activated or are compulsory when a parliament is about to take a decision that

¹⁰² Pierson, P. (1996), p. 127.

¹⁰³ Dahl, R. (1989), Coultrap, J. (1999).

might restrict a basic right for minorities. It is worth noting here that the demand for qualified majority by voting means that we are talking about a ruling minority not a majority - i.e. a minority can block (veto) a proposal from the majority side, although it cannot impose a new decision. The power of veto is a choice between saying yes or no, or maintaining the status quo or not, in other words.

5.1.4.1 Power Sharing Systems

A power-sharing system provides better protection for minorities as it is more explicitly based on the idea of checks and balances. In a power-sharing system none of the central parts of the government (executive, legislative and judiciary) has supreme power over the others. In certain fields one may dominate but there are always areas where the power is shared and public power is diffused rather than centralised. There are two kinds of power-sharing techniques, and again one emphasises the input and the other the output of government activity. The input has to do with procedures that restrict the government and which have to be observed when decisions are taken, while the output has to do with the content of certain decisions (legal or not). To be more precise, on the input side it is quite common to find rules prescribing that new laws must be adopted by a common accord between the executive and the parliament - i. e. both must come to the same conclusion on the phrasing of a new law. An example of how the output technique works is when courts by their mandate of judicial review nullify laws they find to be in conflict with the wording of the constitution.

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

The vertical principle of power sharing - a federal system - is characterised by a division of power on different levels, where some limited power is given to a federal level while the rest remains at the state level or is shared between the federal and state level. It is, of course, debatable whether the states should be regarded as being below, above or on an equal footing with the federal level, especially where the states are the foundation for the federal level i.e. where it all began. In reality a power-sharing system is often a mixture of different kinds of power-sharing principles - vertical and horizontal - as well as input and output principles.¹⁰⁴

5.1.4.2 Different Types of Political Legitimacy

The different systems - power sharing and parliamentary - build their legitimacy in two different ways. A parliamentary system gets its legitimacy from the fact that all power is entrusted to a parliament that is elected by the people and that is superior to

¹⁰⁴ Coultrap, J. (1999).

the other central governmental entities. Since the parliament is operating in the name of the people it has more or less unlimited power; it can for example dismiss the executive.

A high turnout on election day is therefore more critical in a parliamentary system than in a power-sharing one, since this creates the impression that the parliament speaks in the name of the people. In this way a parliamentary system is a simpler construction and therefore easier to understand for, or explain to, the general public.

In contrast, a power-sharing system is more complicated and gets its legitimacy from the fact that the power of the executive is controlled (limited) by checks and balances. In short, the power is both disseminated between parts of the system and overlaps them.

Consequently, a power-sharing system is often stronger when it comes to legitimacy building than in problem-solving, since it usually provides better protection for minorities and more than a simple majority is usually needed in order to change laws. But again if, for example, the judiciary is weak and the same majority rule in the different elected bodies, minorities may be even more neglected than in a parliamentary system. In order to avoid this, elections to the different public institutions are usually held at different times and/or one of the elected bodies does not elect all its members at the same time. However, in most cases a power-sharing system is pre-coded for making minimal decisions (which are in effect the lowest common denominator) or maintaining the status quo. However, there are those who claim that a parliamentary system acquires its legitimacy by its problem-solving capacity and its efficient decision-making.¹⁰⁵

In reality no government fits the model of either a power-sharing or parliamentary system perfectly and usually one finds some elements of both. In Ireland for example, there is a predominately parliamentary system with a very pro-active judiciary.

5.1.4.3 Divided Government

However, in some countries the mixture of the two original models is so intricate that it is more appropriate to talk about a third type of model, which could be called divided government.¹⁰⁶ In France, for example, a horizontal power-sharing system is combined with a parliamentary system. In France and Finland the president, as well as the parliament, is elected directly by the people and the president appoints the executive, but the prime minister and individual ministers can be removed by a motion of censure by the parliament. In Germany there is a parliamentary system not only combined with an activist court system but also with a vertical power-sharing (federal) system, while the Spanish system gives a lot of power to its autonomous regions.

Summing up, three types of democratic government can be discerned. A parliamentary one, a power-sharing one and a combination of the two called a divided government. However, theoretically speaking there is of course a fourth model - so far

¹⁰⁵ Weiler, J.H.H. (1993), Weiler, J.H.H. (1999), pp. 81-86.

¹⁰⁶ Elgie, R. (1999).

not mentioned - direct democracy. Seen by ancient Greek philosophers and 19th century democracy theorists as the only genuine type of democracy, in contrast to representative democracy, which to them meant a ruling elite. Maybe the best known form of direct democracy is the referendum. Some people still see direct democracy as the only true form of democracy but no government today uses it as their basic principle of organisation.¹⁰⁷ Even Switzerland, often used as an example in the discussion of the pros and cons of direct democracy, is predominantly ruled by the principle of indirect democracy - a power-sharing system of the vertical type.¹⁰⁸ All the same, in most democratic governments one finds some element of direct democracy, but not in the EU.

Within democratic governments one also discovers on examination that parliamentary systems are not always what they pretend to be, so let us take a closer look at the relationship between the parliament and the executive.

5.1.5 The Parliament and the Executive

An exact definition of a parliamentary system is far from easy to give and those who have tried often end up listing a number of criteria, not all of which will be mentioned here.¹⁰⁹ However, an essential element of parliamentary theory is the link between the parliament and the executive. In a parliamentary system the executive is accountable to the parliament and the executive is, for its very existence, dependent on the majority of the parliament. The parliament both scrutinises and criticises the work of the executive. However, the institutional link between the executive and the parliament can be so tight that it is sometimes hard to draw a sharp line between the two. In Britain, for example, every member of the government is at the same time a full member of the parliament. However, in most other parliamentary governments ministers need not be selected from the parliament but can also be recruited from outside. In some countries members of parliament who become ministers lose their right to vote in parliament.

An important instrument with which the parliament is supposed to control the executive is through the right to raise a motion of censure against the whole government or against individual ministers, but this is of course a sword which cuts both ways. When a government is not getting acceptance for their major policies by the parliament it could, and should, according to parliamentary theory, threaten to resign, i.e. it should be subjected to a vote of confidence. Parliament will then either have to face the consequences of the government resigning or else accept the government's proposal. In other words, the option to control the government by bringing it down is not always the powerful instrument it appears. However, the government also has other means to counter the power of the parliament. In most countries the government has the right to dissolve the parliament, which of course is an important counter balance to the parliament's right to issue a motion of censure against the government. In some countries a government can even counter a motion of censure by dissolving the parliament.

¹⁰⁷ Saward, M. (1998), pp. 84-85.

¹⁰⁸ Linder, W. (1998).

¹⁰⁹ Beyme, K. von (1970), Sydow, B. von (1997).

Furthermore, it may be true that the parliament takes the final decision on new laws and scrutinises the implementation of old ones, but normally the executive initiates and puts forward suggestions on how the future policy should be formulated. In some parliamentary systems the parliament can only reject or amend the proposals made by government. It is also the case in some systems that the government's proposal for a new budget is accepted automatically if the parliament does not reject it before a certain date. In yet other countries, the executive can partly side step the parliament's law-making function by using the right to rule by decree.¹¹⁰

5.1.5.1 Interdependency

Thus, even in parliamentary systems the parliament can find it difficult to control the executive and in reality it is often better to describe the relationship between the parliament and the executive in terms of interdependency instead of hierarchy and dominance. Furthermore, if one of the two dominates the other, it is more likely to be the executive, not the parliament. A closer look at the parliamentary systems of Europe will show, for example, that almost always there are arrangements working in favour of the executive - either in terms of how a government is formed and dismissed or how laws are passed through the parliament. In Germany, for example, the parliament cannot move to censure the government if it does not have an alternative candidate for the post of Chancellor. In Sweden, no one actually has to vote in favour of the candidate for prime minister, only those who vote against him should not constitute a majority.¹¹¹ Meanwhile, in Italy and France there is the possibility of ruling by decree, and in the United Kingdom a large number of the members of parliament on the ruling side are at the same time members of the government.

Even in genuine parliamentary systems there are, in other words, a lot of checks and balances between the central entities of the government and particularly between the parliament and the executive.

The paradox is that it is in the power-sharing systems where the parliament has the most influence in terms of policy making, while in parliamentary system it boils down to the right to appoint and censure the executive. Large changes in proposals presented by the government to the parliament are not supposed to happen.¹¹² In principle, the parliamentary majority is supposed to support the government's proposals. The role of the opposition is to oppose them more or less totally. In the end this usually means that the parliament is performing a kind of controlling function over the decision-making process, making sure that the proper methods of decision-making have been observed and that all relevant differences of opinions have been heard. In a parliamentary democracy, the major part of the policy-making process often takes place before a proposal reaches the parliament and that is where the big changes and compromises are made. In fact a lot of the influence MP's have is exercised outside parliament.

In a power-sharing system the relationship between the parliament and the executive is, in theory, different from the relationship in a parliamentary system. In a power-sharing system the different powers of the state are first separated and then made to

¹¹⁰ Carey, J. M. and Shugart, M.S. (1998).

¹¹¹ Larsson, T. (1995), p. 38.

¹¹² Lord, C. (1998), p. 65.

balance each other. Thus, in a true power-sharing system, a government is not dependent on the majority of the parliament for its existence, and the parliament cannot bring down the government as a result of a motion of censure or a vote of no confidence. The only way for the parliament to dismiss the head of the government is through impeachment. On the other hand, the executive cannot dissolve the parliament, but in some states the head of state can impose marshal law without the consent of the parliament. However, the parliament can refuse, after careful examination, to accept the ministers suggested by the prime minister or president for his/her government or the higher civil servants the government wants to appoint.

This means that parliamentary and power-sharing governments are more alike than is generally believed: power-sharing systems to a large extent get their legitimacy from directly elected bodies and parliamentary governments include a lot of mechanisms to provide checks and balances between the executive and the parliament.

But parliaments are also supposed to fill the important function of linking the people to the government, i.e. to represent the people. One of the most important elements in a democratic system today is a body representing the people which has been elected in free and open elections. However, what is to be included in the concept of representation usually leaves room for discussion. We find a clear division between representing different opinions in society and representing social groups or strata. In other words, the public opinion is thought to be expressed in the parliament and any person (man) should be able to be elected to the parliament - in that way members of the parliament become a mirror of society. In reality, the idea of a representative government can not be fully met and certain legitimacy gaps will always appear. For example, in order to maximise the opinions expressed in the parliament the MPs would need to be free from any affiliation to the political parties. On the other hand if every MP was a free agent - i.e. constituted a political party of his own - it would be difficult for low income person with few assets to be elected.¹¹³ In other words, political parties make it easier for ordinary people to be elected to parliament but this improved representation has its price - fewer opinions are expressed in the parliament since parties not people are behind the opinions expressed.

5.1.6 Political Parties and Modern Democracy

So far we have only discussed the formal (constitutional) part of the government of today's democracies. However, in order to fully understand modern democracies one also has to take into account the more informal structures and organisations of a political system. Three types of actors are of particular interest here: political parties, interest groups and the media. This paper, however, focuses on political parties since they play a special role in the relationship between parliaments and executives.

What has previously been described as characterising the different types of constitutional governments take on a different aspect when one considers the informal parts of the political system. In the case of divided governments the party political structure is of particular interest, as the result of an election may drastically change the character of the constitutional design of the government from one day to another.

¹¹³ Manin, B. (1997), chapter 6.

A well-known example is that in parliamentary systems where there is an institutionalised division between the executive and the parliament, with the parliament supposedly controlling the executive, the gap between them being bridged by well-disciplined political parties. The main feature of modern democracies in the 20th century is not the leading role of the parliaments but of the political parties.¹¹⁴ By means of general elections it is decided which party or parties will be in government and which in opposition. Thus it is closer to the truth to say that in parliamentary systems today, the parliament is often an arena for competition between the political parties rather than an actor in its own right. In fact, when suggestions are made to empower or to extend the influence of the parliament, the suggestions are in reality normally either in favour of increasing the power of the opposition or the parliamentary delegation/s of the ruling side. Today, the parliaments do not control the governments, this is done by the political opposition with the assistance of interest groups, the public and, increasingly, by the media.¹¹⁵

5.1.6.1 The Party Structure

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

Party governments can therefore belong to different categories. A distinction is usually made between minority and majority governments and between one-party governments and coalition governments. A one-party government with a majority in the parliament is often described as a strong government and a coalition government lacking a majority of its own is seen as a weak government.¹¹⁶ The development of the party system thus affects the balance between minority and majority rule, as well as the problem-solving capacity and legitimacy of the state.

To begin with, in a predominately two-party system the government will of course be of the majority type. This will further reinforce the already strong tendency in a parliamentary system for majority rule and problem-solving efficiency. On the other hand, we find that the structure of a party government can be a counter force to the basic constitutional character of the system. This means that in a parliamentary system more protection is given to minorities, while in a power-sharing system majority rule is reinforced. In some countries, parliamentary governments are not formed from coalitions based on the principle of the minimum number of parties necessary to rule; instead they opt for large coalitions. In countries like Finland and the Netherlands the formation of a government is more about which party or parties should be excluded from government rather than which parties should be included.

¹¹⁴ Bobbio, N. (1989), pp. 105-107.

¹¹⁵ Beyme, K. von (1993), pp. 278-285.

¹¹⁶ Lijphart, A. (1984).

Multi-party systems in general provide better protection of minorities especially if small parties have been given seats in the government. Large coalition governments, called consensual democracy by Lijphart, not only provide better protection of minorities in parliamentary systems but also maintain some capacity for majority rule and effective problem-solving. There is, of course, a limit as to how small a minority can be in order to be protected by the political party system and very small groups never make it to the parliament. The rights of an individual against the state can after all only be protected by recourse to the legal system.¹¹⁷

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

In a divided government system the picture is more muddled. The result of an election can quickly affect the character of the system and shift it in another direction, away from the parliamentary type of system to a power-sharing one. The so-called 'cohabitation' which occurs from time to time in France is a good example of this phenomenon.

The role of the parliament differs according to the structure of the party system. In a power-sharing system the parliament is more likely to be a policy-making arena, while in a parliamentary system it is more likely to be one of competition between the party or parties in power and the opposition. But we also find differences in different parliamentary regimes. In some countries with a predominantly two-party system, like in the United Kingdom, we have a 'talking' parliament. The opposition has little or no chance at all to directly influence the proposals for new laws that are put forward by the government. What is left for the opposition is to publicly point out what they believe to be the major drawbacks with the government's proposals and hope that public opinion will force the government to change its mind. In countries where the government is often of a minority type the situation is somewhat different. Here the opposition at least gets a chance to directly influence new policy presented by the government. However, influencing public opinion may not be the best way to maximise this influence. As a result we get a parliament in these countries that is less skilled in brilliant rhetoric and more focused on negotiating behind closed doors with the government - a 'working' parliament as opposed to a talking one.

The different political systems are also more or less suitable for different types of societies. A society characterised by strong conflicts about language, religion, ethnic and regional identity and possibly even ideology would probably be better off with some kind of power-sharing system but a parliamentary government is better suited to fill the needs of a more homogeneous society.¹¹⁸ It should therefore come as no surprise that the government of Belgium, trying to control a society characterised by

¹¹⁷ Nugent, N. (1999), pp. 498-499.

¹¹⁸ Dahl, R. (1998), pp. 149-156.

strong tension between three groups separated by language, region and religion, has moved in its organisational design from a consensual, parliamentary type of government towards a power-sharing system of a federal type. The opposite seems to be happening in Finland, as the tension between ethnic groups and classes is decreasing. The Finnish government has developed towards a more genuine parliamentary system - less power to the president and QMV is usually no longer needed in the parliament to pass laws.

To summarise, the pre-coded tendency in the constitutional structures of different types of government to favour the principle of majority rule or the protection of minorities can, in terms of legitimacy building or problem-solving capacity, be reinforced or balanced out by the structure of the informal government. How strong this effect will be to some extent depends on how well-disciplined the political parties are. In some countries, like the United States, party discipline is weak, and if the same party should happen to gain the majority in all the elected bodies the impact will not be as strong as when the same thing happens in France.

However, parties and other informal actors (interest organisations and media) are important also for other reasons as they are channels linking people to the government and not only on election day. An important question for a democratic society is therefore to what extent it should encourage the people to interact with the government. Here we find two basic principles juxtaposed against each other: governments encouraging as much interactions as possible and governments referring more limited interaction and, stressing voting as the supreme form of interaction.¹¹⁹

In the next part of this report the discussion of political legitimacy will be applied to the EU system and its committees.

¹¹⁹ For example Schumpeter, J.A. (1976), Held, D. (1997), chapter 7.

5.2. Theoretical Perspectives on Committees, Administrative Interaction and Legitimacy of governance in the European Union

5.2.1. Introduction: Committees in the European Union – Substantial Features of and in a Growing Multi-Level System

The European Union (EU) is a political system in full evolution. It is undergoing fundamental changes in respect to its functional as well as to its geographical scope and organisational structure. Permanent institutional and procedural changes, the outcomes of the Treaty on European Union and the newly introduced Amsterdam Treaty have provided the Union with additional rights and obligations. Many key issues – embodying vital political sensibility – have become subject matter to the European Union over the past 45 years. Though many citizens take the increasing competencies and the significance of the Union for granted, serious concerns circulate about the transparency, legitimacy and democratic accountability of the EU, particularly with regard to those acting within the European bureaucracy. In general terms, committees play a significant role in national West-European political systems as they are an elementary part of the functioning of modern governments and governance. Related to the European Union, committees in the Council and the European Commission deserve special attention and arouse controversial debates. Major features determining this discourse are latent fears of an “Archipel Brussels”, an ever-growing swamp bringing forth a new political class of „Eurocrats”.¹²⁰ Beyond this popular scenario, analysing the impact of civil servants on the governing process has a long and extremely varied academic tradition in Western Europe, evoking stimulating research results in the fields of law, economic and social sciences.¹²¹ However, most of these contributions focus on the national level. Though there has been a significant rise in studies about European policy-making, governance by committees and the related administration in the European sphere has so far found only limited recognition.

Yet, one particular element of the Union's committee-administrative infrastructure has found special attention in the last few years. Committees, which act on the basis of the comitology decision 87/373 of the Council, have become a matter of serious discussion.¹²² The main controversy in the so-called »comitology debate« centers around the question to what extent these comitology committees effect the process of implementing Community legislation, how and through whom are they supervised and controlled and how they exercise influence through some kind of a »government by committee«. ¹²³

¹²⁰ Spinelli, A. (1966).

¹²¹ Mayntz, R. (1982): Problemverarbeitung durch das politisch-administrative System: Zum Stand der Forschung, in: Hesse, J. J. (eds.) (1982), pp. 75 ff.

¹²² Generally Bach, M. (1992), pp. 16-30; Grams, H.A. (1995), pp. 112-131; Schendelen, M.P.C.M. van (1996): EC Committees. Influence Counts More than Legal Powers, in: Pedler, R.H./Schaefer, G.F. (eds.) (1996), pp. 25-37; Neyer, J. (1997), pp. 24-37; Wessels, W. (1998a), pp. 209-234.

¹²³ Generally Wheare, K.C. (1955); Schaefer, G.F. (1996): Committees in the EC Policy Process: A First Step Towards Developing a Conceptual Framework, in: Pedler, R.H. /Schaefer, G.F. (eds.) (1996), pp. 3-24.

Besides this debate, committees and the related network of public administration in the European sphere in more general terms is still met with scepticism and indifference in academic discourses. For three reasons, much of the responsibility for this state of affairs lies in the theoretical and methodical framework. First, academics frequently tend to concentrate on the activities of a particular institution, a distinct policy-sector or a particular type of decision making. Of course, differentiation across the spectrum of EU policy-making and a detailed analysis is a prerequisite for understanding the Community system. Nevertheless, a wider and more dynamic view has to be considered as a necessary addition to such micro- or case-studies. A perspective, which takes the variety of interactions between different actors into account and embeds findings in a broader context so that observations can be compared with other outcomes and overall developments, offers a substantial completion. Second, research on European integration has difficulty in devising empirical tests capable of demonstrating relevance and impact of integration theories. Due to the lack of reliable data, clear empirical evidence is hard to achieve.¹²⁴ Especially the development of administrative committees is - according to their vague, discretionary, amorphous and constantly evolving character - rather difficult to measure. However, in order to develop a progressive research program, theories must devise hypotheses and test them against real data. Third, theory on European integration is primarily affiliated and marked by the nation-state. Methodological challenges stem from the widespread use of nation-state-like categories and the need to develop an analytical approach peculiar to administration in the European Union as a whole.

With its current structure, the EU is neither comparable with national constitutional systems nor with international organisations or associations. Its autonomous development results from a process of growth and differentiation which has not reached a final stage and might not do so in the near future. Thus, research on European integration has to develop a more complex approach. We need coherent explanations for the mechanisms through which committees shape political outcomes. Using state-like instruments in its first pillar, the European Union has passed the boundary from horizontal cross-border co-operation to vertical policy-making in a dynamic multi-level system.¹²⁵ Such a new type of political system representing a new kind of polity requires theoretical approaches which reveal the mutual interplay of both levels.¹²⁶

In order to accomplish these theoretical and methodological challenges, our conceptual approach is based on a more general point of departure.¹²⁷ We do not intend to scrutinise single actors or the specific function of committees in the various stages of the policy process. Instead, we try to take a closer look at the general dynamics of the EU's political system and organisational structure in total. Assuming that interaction through and within committees should not be researched in the European sphere alone but also at the national level, we should take both perspectives

¹²⁴ First empirical material was compiled the Institut für Europäische Politik (1986) and by Falke, J. (1996): *Comitology and other Committees: A Preliminary Empirical Assessment* in: Pedlar, R.H./Schaefer, G.F. (eds.) (1996), pp. 117-165; Wessels, W. (1998a).

¹²⁵ Rometsch, D./Wessels, W.(1996) (eds.), pp. 328-365; Jachtenfuchs, M./Kohler-Koch, B. (1996): *Regieren im dynamischen Mehrebenensystem*; in: Jachtenfuchs, Markus/Kohler-Koch, Beate (eds.) (1996), pp. 15-44; Marks, G. (1996), pp. 341-378.

¹²⁶ Siedentopf, H./Ziller, J. (eds.) (1988).

¹²⁷ Principally for such an approach Wessels, W. (1998).

into consideration. The phenomenon of committees as vital players in the European decision-making process should be regarded as a kind of simultaneous interaction of different institutional levels and several realms of European governance. It is essential to reflect on both supranational institutions and different governance circuits and to some extent on sub-units of national governments, as regional powers. We have to go beyond those descriptions and categorisations which separate legislative activity of the supranational institutions on the one hand, and policy-implementation activity of national administrations on the other. Opening up the »black box« of European legislation means in our study to analyse the patterns of interaction between administrations and other actors in view of what allies and competitors are doing in the political sphere. »Brussels« is thereby not an isolated arena but an integral part of the relationship between interlocking systems, non-governmental networks, governmental institutions and actors.¹²⁸

5.2.2. Committees in the Context of Public Administration and Policy Formulation

The increasing role of committees in European governance can be seen as a response to the need for an ever higher level of technical "expertise", which stems from the growing complexity of regulating contemporary western societies. The role itself is to define and to solve substantive policy problems. In multi-level governance systems like federal political systems, committees also perform another function: they ensure efficient co-ordination mechanisms between the different levels of government.¹²⁹ The growing regulatory tasks of the EC and the need for multi-level co-ordination explain why the committee system is so highly developed in the EC system of governance. A very basic typology identifies five different types of "committee" of various sorts involved at every stage of the EC process:

- The "expert" committees which provide the Commission with external advice during the elaboration of EC proposals;
- The role of institutions with consultative status such as the Economic and Social Committee and the Committee of the Regions;
- The "working groups" and the Committee of Permanent Representatives (COREPER) which prepare the decisions of the Council of Ministers;
- The standing committees of the European Parliament through which the latter exercises its legislative powers;
- The "comitology committees" which assist the Commission in exercising its implementing functions delegated to it by the Council and the Parliament.

Committees „shape policy and play a significant role in contributing to the formulation and adoption of binding rules”.¹³⁰ They can generally be defined as “institutionalised groups of specialised and representative people”.¹³¹ Committees may fulfil rule-interpreting, fund-approving or rule-setting functions.¹³² In other

¹²⁸ Streeck, W./Schmitter, P.C. (1991), pp. 133-164.

¹²⁹ On the concept of multi-level governance see, for example, Scharpf, F.W. (1997).

¹³⁰ Schaefer, G.F. (1996), p. 3

¹³¹ Schendelen, M.P.C.M. van: „Prolegomena to EU Committees as Influential Policymakers“, in: Schendelen, M.P.C.M. van (Ed.) (1998), p. 4.

¹³² Schaefer, G.F. (1996), p. 16.

words, committees act both as decision-takers and decision-makers. Besides comitology committees, one may find in the EU context consultative committees, which are almost private, i.e. non-governmental as well as sectoral specialists and expert groups consisting mostly of national administrators or specialists nominated by the Member States surrounding the Commission. Administrators from the EU institutions, the Member States and third parties are joined in several Council infrastructure committees, COREPER, working groups and intergovernmental joint committees. The potential influence of committees differs largely: Advisory committees of the Commission have a high potential of influence at the early pre-proposal stage of the EU's policy cycle. Unlike consultative committees, expert groups advise the Commission on the basis of the Member States' interest. In general, expert groups indicate the Member State's acceptance on a given issue. In this way, they act as »early warning units« of the Commission: Will Member State »X« and its administration be able to transpose the directive within a given time period? Will the envisaged legal act have an effect on the administrative law of Member State »Y«? The influence of the Council's working parties may be found at the stage of decision making. According to van der Knaap, 90% of EC legislation is »adopted« at this stage.¹³³

5.2.3. Comitology Committees as A Starting Point of Reflection

If we put a particular emphasis on the comitology committees, they can briefly be defined as a number of miscellaneous committees in the process of implementing European legislation and policies. The comitology process historically originated from the delegation of Council's executive powers to the Commission in the early 1960s.¹³⁴ The Council's intention was to implement a number of Council regulations organising the agricultural market. Since this initiative the total amount of these committees has grown eminently. Generally, the European Commission was responsible for implementing decisions adopted by the Council (Article 145). In 1987, the Single European Act (SEA) added a third indent to article 145 of the EEC Treaty. The Council used this text as basis for adopting the already mentioned so-called comitology decision, determining three distinct procedures for the exertion of implementing powers conferred on the Commission - Advisory Committees, Management committees, and Regulatory committees. Because of its right to finally choose the kind of implementing committee, the Council prefers management and regulatory committee procedures. Consequently, the different comitology committee formulas lead to the question, which kind of multi-level administration is emerging within the EU system: Is the Commission's DG-administration dominating? Or the Member States? Who influences what, whom and in which way? Do committees act as an independent network of specialists or are they mirroring the Council's predominance in the EU's policy cycle?

¹³³ Knaap, P. van der (1996): Government by Committee: Legal Typology. Quantitative Assessment and Institutional Repercussions of Committees in the European Union, in: Pedler, R.H./Schaefer, G.F. (eds.) (1996), pp. 83-116, p. 114.

¹³⁴ Vos, E. (1997), pp. 210-229.

5.2.4. Integration Theories on Administrative Interaction: An Overview

In order to illustrate the wide-spread assumptions and theoretical approaches in academic debates on EU committees and public administration, we pay special attention to a set of various administration models like they may be deduced from theories on European integration.¹³⁵ These models are heuristic and ideal archetypes and do not gain subsistence in this distinct manner. However, to classify the potential of administrative interaction we are interested in describing these focussed models might prove helpful. Two different dimensions of participation in the multi-level system of the European Union can be distinguished - the relationship between the national and the European level of the EU's policy process, and the perennial tension between bureaucracy and government.

5.2.4.1. Realism, Diplomatic Administration, Functional Co-operation and Intergovernmental Monitoring

Realists conceive the sovereign nation-state as the authoritative actor in cross-border interactions.¹³⁶ Although various inner state actors participate in the making of political decisions, the nation-state is identified as a unified protagonist of clearly defined interests and preferences.¹³⁷ Following neo-realist assumptions the EU and its institutional set-up are products of a general strategy of national governments and their to gain and to keep influence vis-à-vis other countries.¹³⁸ „The fundamental goal of states in any relationship is to prevent others from achieving advances in their relative capabilities“.¹³⁹ Within the framework of the EU, the principal task of Member States is to retain their supremacy as ‘masters of the Treaty’.¹⁴⁰ National actors defend and shape an institutional balance favouring the Council and – to a growing extent – the European Council: the Council's infrastructure is then considered as an addition to national institutions sharing the control of the Commission's activities and thus preventing an evolution towards an unrestrained supranational bureaucracy: „The influence of supranational actors is generally marginal, limited to situations where they have strong domestic allies.“¹⁴¹ The style of European law making is characterised by conflict between Member States in which zero sum games predominate. Accordingly, the behavioural pattern of actors in the Council of Ministers would be characterised by unanimous decision-making and distributive – ‘quid-pro-quo’ - or "integrative balancing".¹⁴² National administrations would be regarded as essential in sheltering the ‘institutional balance’.

The interaction style between the two levels of co-operation-governance would follow a model of diplomatic administration: Civil servants – regularly hailing from foreign ministries and prime minister departments – would prevent any attempts from

¹³⁵ The following model is adopted from Wessels, W. (1996): *Verwaltung im EG-Mehrebenensystem: Auf dem Weg in die Megabürokratie?* in: Jachtenfuchs, M./Kohler-Koch, B. (eds.) (1996), pp. 165-192.

¹³⁶ Waltz, K.N. (1979); Evans, P.B./Rüschemeyer, D./Skocpol, T. (1986); Volgy, T./Imwalle, L.E./Schwarz, J.E.. (1999), pp. 246-262.

¹³⁷ Grieco, J.M. (1988), p. 494.

¹³⁸ Grieco, J.M. op.cit., pp. 485-587; Link, W. (1998); Moravcsik, A. (1999).

¹³⁹ Grieco, J.M op.cit., p. 498.

¹⁴⁰ German Constitutional Court, op.cit.

¹⁴¹ Moravcsik, A. (1995) , pp. 611-628 (here p. 612).

¹⁴² Link, W. (1998), op.cit.

supranational actors to gain influence. Unlike classic realism, the liberal intergovernmentalist variant of neo-realism analyses the construction of national preference building. „National interests are [...] neither invariant nor unimportant, but emerge through domestic political conflict as societal groups compete for political influence, national and transnational coalitions form, and new political influence, national and transnational coalitions form, and new policy alternatives are recognized by governments.“¹⁴³ The analysis of the configuration of national interests therefore includes to look at how actor groups beyond the core of governments and administrations steer the definition or – as regards public opinion – the background of interests and preferences: „Groups articulate preferences; governments aggregate them.“¹⁴⁴ Liberal intergovernmentalism therefore shares the (neo-)realist assumption on the centrality of Member States’ actors within the EC/EU and it explicitly “denies the historical and path dependent quality of integration“¹⁴⁵, which both neo-functionalism and neo-institutionalism stress as the rationale to explain the very process of “supranational governance”¹⁴⁶ in the European Union.

According to this concept, the committees surrounding the EU’s organisational set-up are products of a general strategy of national governments and administrations to pass the way to more influence in the Brussels sphere.¹⁴⁷ The principal task of the respective administrative committees is to restrain the supremacy of the Member States as »masters of the treaty«. ¹⁴⁸ Particularly the Council’s administrative infrastructure and the comitology committees are considered as an addition to national administrations sharing with them the controlling of the Commission’s activities, thus preventing an evolution towards an unrestrained supranational bureaucracy. Considering the above mentioned various forms and procedures of comitology committees, this approach would anticipate a constant trend towards a typology which would guarantee national civil servants an extremely large influence. Relating to the question of legitimacy, committees would have a high rating on the scale since they are representatives of the holders of national sovereignty. Accordingly, realists would suggest to neglect the relevance or oppose the reality of supranational administration.

Following the model of diplomatic administration, binding European legislation is principally influenced by national administrations. Civil servants – regularly hailing from foreign ministries – prevent any attempts from supranational actors to gain influence. As a kind of autonomous bureaucracy, national administrators try both to emphasise the supremacy over the national politicians and to keep the frequency of political cross-border meetings restricted. Neither legislative outcomes nor spill-overs

¹⁴³ Moravcsik, A. (1993), p. 481.

¹⁴⁴ Moravcsik, A. (1993), p. 483. „The most fundamental influences on foreign policy are, therefore, the identity of important societal groups, the nature of their interests, and their relative influence on domestic policy.“

¹⁴⁵ Moravcsik, A. 1995, op.cit., pp. 612-613.

¹⁴⁶ Stone Sweet, A./Sandholtz, W.: Integration, Supranational Governance, and the Institutionalization of the European Polity, in: Sandholtz, W./Stone Sweet, A. (eds.) (1998), p. 5, who view “intergovernmental bargaining and decision-making as embedded in processes that are provoked and sustained by the expansion of transnational society, the pro-integrative activities of supranational organizations, and the growing density of supranational rules”. Consequently, they argue, “these processes gradually, but inevitably, reduce the capacity of the Member States to control outcomes”.

¹⁴⁷ Wessels, W. (1990): Administrative Interaction, in: Wallace, W.(ed.) (1990), pp. 229-241.

¹⁴⁸ Bundesverfassungsgericht (1993): Urteil über die Verfassungsbeschwerden gegen den Vertrag von Maastricht, Judgement of October 12 1993, in: Oppenheimer, A. (ed), 190.

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

5.2.4.2. Federalism and Federal Administration

According to the federalist paradigm, the struggle of national actors for access, influence and veto powers e.g. for an effective control of the Brussels arena has not been, is not and will not become successful.¹⁴⁹ Instead, Member States' actors will be more and more marginalised and substituted by EC/EU bodies and institutions which are being transformed from arenas into actors. Each step of treaty building would increase the role of supra-national institutions and decrease veto powers of Member States. The behavioural pattern of the Council of Ministers would be dominated by referring to and using articles providing the option for qualified majority voting. Those EU-related bodies which bring the national actors together (Council, COREPER and its related working groups) would be seen as primarily serving the national interest and thus constituting a major obstacle to a proper federal system which alone could guarantee efficient, effective and legitimate European policies. Concomitantly, the attempts of national administrations to lock into the EC/EU system of supranational governance and government are rejected as a strategy against the real will of the European people and the path to a federal union.¹⁵⁰ In this view the European Parliament is a key institution of the constitutional set-up of the (future) EU government. Federalism would assume a legitimate supranational order which formulates far-reaching policy agendas, articulates ideals and brokers strategies for the deepening of the integration process. The national actors – governments, administrations and their EC/EU-related agencies – would wither away. Moreover, inter-administrative bargaining within committees is considered an obstacle to solve the problems of the European Union and its Member States. In this view the opposition of the European Parliament to the comitology committees goes beyond the quest for more power; it is a key issue, in fact, of the constitutional set-up of the EU government. Consequently, federalist theories on European governance would suggest to abolish both the management and the regulatory committees. Following this school of thought, the model of European administration would be a European bureaucracy

¹⁴⁹ Mayne, R. and Pinder, J. (1990), pp. 214-215.

¹⁵⁰ Schneider, H.: Föderale Verfassungspolitik für eine Europäische Union, in: Schneider, H. Wessels, W. (eds.), pp. 21-50.

which clearly dominates the national administrative bodies in each relevant field of European public policy, but which itself is dominated by a supranational government. Thus, the model of a supranational bureaucracy is - compatible with realist views - considered as a kind of antagonist. Since federalism suggests a division of competences between the different levels of policy making (European – National – Regional – Local), co-operation between administrations would be modelled according to the subsidiarity principle. Moreover, federalism would assume a European Bureaucracy acting as a »political promoter« which formulates far-reaching policy agendas, articulates ideals and brokers strategies for the deepening of the integration process.

5.2.4.3. Neo-Functionalism and the Supranational Technocracy

From neo-functional points of view the very nature of integration “is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones.”¹⁵¹ The main feature of integration would be the concept of functional, institutional and procedural spill-over - a process which refers “to a situation in which a given action, related to a specific goal, creates a situation which the original goal can be assured only by taking further actions, which in turn create a further condition and need for more action, and so forth.”¹⁵² Consequently, spill-over gradually involves “more and more people, call(s) for more and more inter-bureaucratic contact and consultation, thereby creating their own logic in favour of later decisions, meeting, in a pro-community direction, the new problems which grow out of the earlier compromises.”¹⁵³ Neo-functionalism would thus expect that the actors tend to expand the scope of mutual commitment and to intensify their commitment to the original sector(s).¹⁵⁴ In view of this approach, Treaty revisions are the legally sanctioned products of spill-over processes which provide the EU institutions with more exclusive powers for shaping binding outputs for its Member States. The latter would accept their roles as but parts of a process without a fixed picture of its final outcome. Neo-functional spill over within policy fields and from one policy area into another would lead to a widening of the functional scope of EC/EU law i.e. to an increasing number of treaty provisions for a growing number of policy fields. The EC/EU related structures and procedures of Member States would be oriented to an emerging supranational bureaucracy. The European bureaucracy would be expected to act as a ‘political promoter’ which formulates far-reaching policy agendas, articulates ideals and brokers strategies for the deepening of the integration process.

Linked with (neo-)functional assessments, comitology committees would be considered as functional necessities, tackling technical problems together without the need for further reflection on their democratic legitimisation. In this perspective, one would expect comitology committees to be arenas where functional „problem-

¹⁵¹ Haas, E.B. (1964), p. 16.

¹⁵² Lindberg, L.N. (1963), p. 10.

¹⁵³ Haas, E.B., op.cit. p. 372.

¹⁵⁴ Schmitter, P.C. (1969), p. 162.

solving“ rather than political „bargaining“¹⁵⁵ would dominate the interaction style. Committees would be conceived as bodies of experts, where people with highly specialised technical knowledge in a certain area come together in order to shape European secondary legislation. The participants would not be interested in the exact legal form of their committee, but in agreements on the basis of common analysis. Distributive effects, vertically among the two levels, or horizontally between member countries, would be clearly subordinated to the best technical solution in the interest of the common good. Neo-functionalism generally explains the growth in number of committees and in the frequency of their meetings as product of spill-over processes.¹⁵⁶ Given this basic orientation, the neo-functionalist model of European administration would be characterised by the existence of relevant administrative interactions depending in its number and characteristics primarily on the functional scope of the Union. Cross-border contacts would be considered a necessary addition to the interstate adjusted bureaucracy. These interactions strengthen the proficiency of national administrations in finding adequate task-orientated solutions without lessening the conventional relationship to other interstate actors or distressing the relationship to political leadership. The impact of supranational actors remains to some extent restricted, domestic political concerns dominate the convenience of national actors for supranational co-operation. Whereas the model of functional co-operation would suggest a dominance of the national level in European policy making, the model of a supranational technocracy would tend to argue, that the European level, i.e. the European Commission and its Directorates General, would dominate the game of policy field oriented administration. Similar to the model of functional co-operation, this kind of bureaucracy would not depend on a particular constitutional basis or on certain institutional arrangements which organise joint decision-making. The co-operation of national and European civil servants would not be undertaken for its own merits, but seen as a chance to find problem-orientated solutions finding on the European level. The technical requirements determine the number and depth of administrative interactions. However, unlike functional co-operation, information inflow and the specific demands for implementing European secondary legislation would depend on the services of the Commission and only to a lesser extent on those of national administrations.

5.2.4.4. The Erosion View and the Model of a European Mega-Bureaucracy

In view of an erosion school of thought,¹⁵⁷ bureaucratic expansion is the consequence of national and European administration's intense interactions, shaping together a multi-level Mega-Bureaucracy.¹⁵⁸ By pursuing a highly regulated multi-level game, bureaucrats from both the European and the national level would emphasise their autonomy against the political class by using their administrative experience.¹⁵⁹ As experts in complex administrative procedures, they mutually would replace

¹⁵⁵ Scharpf, F. (1988).

¹⁵⁶ Schmitter, P.C. (1996): If the Nation-State Were to Wither Away in Europe, What Might Replace it?, in: Gustavsson, Sverker/Lewin, Leif (eds), pp. 211-244.

¹⁵⁷ For this term see Delbrück, Jost (1987): Internationale und Nationale Verwaltung - Inhaltliche und institutionelle Aspekte, in: Jeserich, Kurt G. A. et al. (eds) (1991), pp. 386-403 and Scharpf, F.W. (1991), pp. 621-634.

¹⁵⁸ For this term see Wessels, W. (1996) or expressly for the comitology committees, a »comitocratie«, Fabien, D. (1995), p. 17.

¹⁵⁹ Weber, M. (1950): Staatssoziologie, Berlin, p. 17. Weber distinguishes between academic knowledge and office knowledge, only the latter can be amassed inside bureaucracy.

democratic policy-makers, thus constructing a conglomerate unmatched by parliamentary or judicial control – instances to which national administrations are normally subjected. The “logic of bureaucracy” membership and the influence which the involved actors may execute would produce a strong „logic of committees“.¹⁶⁰ The participating civil servants betray their governments and populations alike. Thus, the individual citizen would be confronted with a multi-layer functional set-up which is not willing to create loyalty or to establish any kind of solidarity with the public. By excluding others from their activities, mega-bureaucracies create an independent political space, which is different from norms established by legislatures or elected governments. In this perspective, the model of mega-bureaucracy is not only the result of »Eurocrats«, but also of national administrations, leading both to enlarge their areas of influence which are uncontrollable by others. The characteristic indicators of the mega-bureaucracy are largely explicable in terms of an unlimited coincidence of national and supranational administrative structures. Using their special bureaucratic abilities both civil servants of the Commission and national civil servants would use administrative interactions to prevent any serious control. The disappearance of other actors leads to a »government by committee« with low efficiency.

5.2.4.5. Governance, Fusion theory and the Models of Horizontal and Vertical Fusion and Mixed Administration

In view of major approaches within the modern i.e. post-1989 school of governance the institutional and procedural changes in the EU treaties need to be analysed as one particular element of rather minor relevance within the complex multi-level game of the EU.¹⁶¹ The EU polity is seen as a “post-sovereign, polycentric, incongruent” arrangement of authority which supersedes the limits of the nation-state.¹⁶² Assuming a non-hierarchical decision-making process, the EU does matter but as one realm for collective decision-making and implementation. In other terms, “policy-making in the Community is at its heart a multilateral inter-bureaucratic negotiation marathon”.¹⁶³ As formalised and informal networks¹⁶⁴ among different and several groups of actors are the decisive arenas for decision-making, formal rules are generally less taken as a major factor. The ‘governance-inspired’ pendulum thesis then assumes some kind of cyclical up and down between “fusion and diffusion”.¹⁶⁵ This “pattern of the pendulum varies over time and across issues, responding to little endogenous and exogenous factors, and including shifts between dynamics and static periods or arenas of co-operation”¹⁶⁶. With Maastricht as a more permanent fixture¹⁶⁷ leads to an “unstable equilibrium”¹⁶⁸ where ‘Europeanisation’- and ‘re-nationalisation’-trends come into a close competition. In clear contrast to neo-realism and intergovernmentalism some contributions of multi-level governance would conceive

¹⁶⁰ For the terms in this context see Schendelen, M.P.C.M. van (1996), p.31.

¹⁶¹ Note the classic school of European governance refers rather exclusively to the European institutions. See: Smit, H. and Herzog, P. (eds.) (1976).

¹⁶² Schmitter, P.C.: If the Nation-State Were to Whither Away in Europe, What Might Replace it?, in: Gustavsson, S./Lewin, L. (eds.) (1996), op.cit., p. 136.

¹⁶³ Kohler-Koch, B.(1996), p. 367.

¹⁶⁴ Héritier, A. (1996), pp. 149-167.

¹⁶⁵ Wallace, H. (1996), op.cit., p. 13.

¹⁶⁶ Wallace, H. (1996), *ibid.*, p.14.

¹⁶⁷ Jachtenfuchs, M. and Kohler-Koch, B.: Regieren im dynamischen Mehrebenensystem, in: Jachtenfuchs, M. and Kohler-Koch, B. (eds.) (1996), pp. 15-46.

¹⁶⁸ Wallace, W. (1996), op.cit., p. 439.

the European Parliament as an active player in the net. “Irrespective of whether the EP provides legitimacy of European executive decisions, it certainly interferes with the negotiating process.”¹⁶⁹ It can, and sometimes does, overturn the results of negotiation in and around the Commission and the Council. 'Maastricht' would however not constitute a major structural change for the daily governance practices of the EU. Even if the European Parliament is seen as „perhaps the largest net beneficiary of the institutional changes in the TEU“¹⁷⁰, multi-level governance would not expect the Parliament as a key player in the EU’s arenas. From the perspective of this school of thought, Member State structures do merely perform as unified actors. They rather matter as arenas of collective decision preparation and implementation, thus indicating a new stage for both administrations and for the state. European governance thus contributes to a „decrease in the unilateral steering by government, and hence an increase in the self-governance of networks“.¹⁷¹ Accordingly, changes with regard to the style of EC/EU-related interaction mechanisms could be taken as a significant indicator for this phenomenon.

In view of this school of thought, administrative interaction might be regarded as one particular element within the complex multi-level game of the EU. Assuming a non-hierarchical decision-making process overarching the geographical limits of the EU and its Member States beyond, committees do not (intend to) move the EU into a certain direction or transform its basic character and organisation. Instead, they perform as defenders of the status quo. Committees do matter as arenas for deliberation and collective problem-solving. If „good governance” contributes to a „decrease in the unilateral steering by government, and hence an increase in the self-governance of networks“, committees could be taken as a significant indicator for this phenomenon.¹⁷²

The fusion theory¹⁷³ goes beyond the analysis of the integration at a given (set of) time and offers tools to understand the very process of interaction and joint problem-solving beyond the state. It regards EU institutions and committees as core channels and instruments by interested actors - national governments and administrations, MEP, other public and private actors - increasingly pool and share public resources from several levels to argue on commonly identified problems and to attain commonly identified goals. Institutional and procedural growth and differentiation – starting from the ECSC onwards - signal and reflect a growing participation of several actors from different levels, which is sometimes overshadowed by cyclical ups and downs in a political conjuncture. However, each ‘up’ leads to a ratchet effect by which the level of activities in the valley of day-to-day politics will have moved to a higher plateau. The major feature of this process is a ‘fusion’ of public instruments from several state levels linked with the respective ‘Europeanisation’ of supranational, national, regional and de-nationalised actors and institutions. The result is a new grade of institutional and procedural complexity once put into the treaties. On the national

¹⁶⁹ Wallace, H. (1996), op.cit., p. 33.

¹⁷⁰ Wallace, H. (1996), op.cit., p. 63; Maurer, A. (1999).

¹⁷¹ Kohler-Koch, B. (1996), op.cit., p. 371.

¹⁷² Kohler-Koch, B. (1996): pp. 359-380, p. 371.

¹⁷³ Wessels, W. (1996), op.cit.; Wessels, W. (2000).

level the fusion thesis suggests a significant trend of Europeanisation.¹⁷⁴ EU policy making thus triggers institutional adaptation in the Member States, alters domestic rules and the interinstitutional distribution of means for complying with the requirements for an effective participation in European governance. National and regional actors socialise with the EU legislative process and are continuing with an extensive process of adaptation to the procedures.

The fusion theory¹⁷⁵ regards committees as indicators of the permanent process of combining and sharing resources from several institutional and instrumental levels. Committees are the manifestation of growing Europeanisation of national administrations. In this view, committees in general and comitology committees in particular are significant in the way the European Court of Justice has put it: if powers „fall partly into the competences of the Community and in part within that of the Member States it is essential to ensure close co-operation between the Member States and the Community institutions”.¹⁷⁶ Thus, committees with national and European civil servants are examples and a main driving force behind the merging of public instruments. They are to some extent a product of the increasing competition for access and influence in the EU policy cycle. We could distinguish between the model of horizontal and vertical fusion and the model of co-operative administration, which mainly differ with regard to the level of influence of administrative bodies against governments. The model of vertical and horizontal Fusion would help us to design interrelated processes of Europeanisation on the level between the Member States and EC/EU institutions on the one hand and on the level between national and European administrative bodies on the other. Like in the case of the new Economic and Financial Committee (EFC), both Europeanised levels of interaction (Commission and European Central Bank (ECB) on the EC level and Member States representatives on the national level) meet in a special committee which co-ordinates views and opinions of Member State and EC/EU administratives on a given set of issues (Article 114 [ex-Article 109c] EC-Treaty). The fusion theory would expect that committees like the EFC would neither act as the »guard dogs« of national governments charged with controlling the ECB or the European Commission nor as forums for more intergovernmental negotiations. In opposition to both views, committees would rather behave as specialised bodies for joint action. Consequently specific interaction styles within committees - horizontally between its members and other committees [e.g. between the EFC and the ECOFIN working groups or the EC Employment committee] and vertically between its members and other specialised Member States institutions/committees - are to be expected: “a constructive team spirit, a confidential club atmosphere, an effective collegiality will dominate over strict interpretation of legal texts and formal rules”.¹⁷⁷ Unlike horizontal/vertical fusion, co-operative administration would be more oriented towards and more dependant on the Member States’ governments level. A good example could be the new CFSP planning and

¹⁷⁴ Rometsch, D. and Wessels, W. (eds.) (1996); Goetz, K. (1995), pp. 91-116; Carter, Caítrona and Scott, Andrew (1998), pp. 429-445; Knill, C./Lehmkuhl, D. (1999), <http://eiop.or.at/eiop/texte/1999-007a.htm>.

¹⁷⁵ Especially Wessels, W. (1992): Staat und (west-europäische) Integration, Die Fusionsthese, in: Kreile, M. (ed.) (1992), pp. 36-61.

¹⁷⁶ European Court of Justice (1994): Rs. 1/94 (World Trade Organization) Summary in: Proceedings of the Court of Justice and the Court of First Instance of the European Communities 30 (1994), pp. 7-14.

¹⁷⁷ Hanny, B./Wessels, W. (1998): „The Monetary Committee: A Significant though not typical case“, in: Schendelen, M.C.P.M. van (Ed.) (1998), *ibid.*, p. 111.

early warning unit established by the Treaty of Amsterdam, where the members (from the Member States and the Commission) will act under the auspices of the Council's Secretary General and in the interest of the »joint strategic decisions« to be formulated by the European Council.

5.2.5. Growth and Differentiation – Empirical Trends

Concentrating on the development of the EC/EU's policy agenda between 1952 (ECSC-Treaty) and 1997 (Amsterdam Treaty), we observe an extension of responsibilities leading to an extensively enlarged scope of action. The total number of Treaty articles dealing with decision making rules in specific policy areas has considerably grown from 64 (EEC Treaty 1957) to 195 (Amsterdam Treaty).¹⁷⁸ Committees are both a product and a tool of the European policy making process. Consequently, the EC/EU legislative output, i.e. the sum of binding decisions adopted either by the Council of Ministers and - since 1 November 1993 – of the European Parliament and the Council (acting under the codecision procedure) or by the European Commission gives a first impression about the potential for European governance by committees. Thus, we have to sketch out a general assessment on the EC/EU's legislative output from the ECSC onwards. Altogether, we can list a total sum of 52.799 legal acts adopted between 1952 and December 1998.¹⁷⁹ Of course, these legal acts are not of equal ranking in terms of their legal relevance. Besides regulations, directives, decisions and recommendations authorised by the Council, the European Parliament and the Council or the Commission, the EU's databases also include a set of political events which are less binding (conclusions of the Council of a political nature etc.). The European Commission's output started to grow from 1976 onwards, although the relative growth maintained stable between 1980 and 1993. With the coming into force of Maastricht, it decreased dramatically; reflecting the net decline in Council legislation from 1986/1987 onwards.

Institutional growth leads to institutional specialisation and differentiation: Since 1958, the number of the European Commission's Directorates General has grown from 9 to 24 in 1995 (in fact, DG I is split into three different DG's: DG I –

¹⁷⁸ Numbers for every Treaty: EEC Treaty 1957: 64; EEC Treaty after the Single European Act: 86; Maastricht Treaty: 152; Amsterdam Treaty: 195. We have counted every Treaty article and Indent which describes a specific decision making procedure.

¹⁷⁹ According to the annual reports of the Commission the number is much higher. The reason for this discrepancy is that the annual reports also list all internal administrative acts including appointments, decisions regarding salaries etc. On the other hand, if we refer to the Community legislation in force, the overall number is much smaller. Calculating on the basis of different times of publication of the Directory of Community Legislation in Force (DCL), we find 5515 legislative acts for the period between 1952 to June 1986, 8431 for the period until 1993 and 10388 for the period until December 1999. These numbers are quite below the total sum of EC/EU legislation across the period of 1952-1998. The difference between these rather low numbers and the overall legal output roots in different statistical methods. Whereas studies based on the DCL are mainly interested in the structure of the EU legal corpus, counting the legislative activity over time provides us with the necessary data for exploring the dynamics of the system. Therefore, we relay our data basis on the overall amount of legislation produced over time. The methodological problem is that 'legislation in force' does not take into account the very process of decision-making and legal output over time. Since the DCL is updated twice a year, it has to be understood as a snapshot of EC/EU output at a given time. What cannot be derived from these data is the dynamic of the system which produces legislation across the time. See Page, E.C. and Dimitrakopoulos, D.(199)7, pp. 365-387.

Commercial Policy and Relations with North America, the Far East, Australia and New Zealand, DG IA – Europe and NIS, External Policy and CFSP, and DG IB – Southern Mediterranean, Middle and Near East, Latin America, South and Southeast Asia and North-South Cooperation). Institutional partiality at the EC level also leads to a broader involvement of national administrations in coping with the daily business of the Euro-polity. Today, nearly every national ministry sends representatives to Brussels both to Council meetings and meetings of its working groups under COREPER I and II as well as to the Commission's expert and comitology committees. Summarising the various bodies we can list for 1995 roughly 270 working groups, approximately 400 comitology committees and at least 600 expert groups and ad-hoc advisory committees for the Commission – altogether the administrative infrastructure includes at least around 1.300 bodies. Again, we observe a remarkable growth along the evolution of the EU and as well a linear trend.

According to the policy cycle, comitology committees are precisely settled in the implementation phase. Due to the different rights conferred upon national civil servants in the comitology committees it is rather laborious to assess the concrete influence of these bodies in shaping European law. Nevertheless, it can safely be said that the comitology network is confronted with a growing number of policy fields and thus in some way decisive for preparing, taking and implementing the concrete »appearance« of the EU in relation to its »User-Community«. However, the overall picture which we get from the comitology network embodies divergent specimen but also convergent patterns. For the very concrete impact of each committee indicators such as the issue at stake, the type or character of a given policy area (regulatory, redistributive or programmatic), the legal basis (specifying the type of legislation allowed, the Council's voting rules and the decision making procedures with regard to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions) or the origin of a dominant chairperson might be more relevant. Some committees may have the right to harmonise technical or economic standards, other may only have the task to revise the appendices of original legislation. This should be analysed on a case to case basis.

If functional growth leads to institutional growth, differentiation, specialisation and administrative fragmentation in the Member States, co-ordination becomes a crucial element of efficient and effective policy-making. Both qualitative analysis and empirical data illustrate a more elaborate co-ordination in the Member States.¹⁸⁰ Approximately 25% of all higher civil servants of the German government are directly involved in miscellaneous kinds and on various levels of EU policy making. These interaction patterns involve many levels of the national administration hierarchy. For instance, in the case of the Federal Republic of Germany around 500 civil servants from the »Länder« administrations are increasingly involved in EC/EU Council negotiations dealing with education, culture, research, justice and home affairs.

National and European administrations and governments are not alone in the Brussels sphere. To illustrate the quantitative growth in the various forms of interest representation, lobby groups and NGO's are a remarkable example. The number of

¹⁸⁰ Page, E.C. and Dimitrakopoulos, D. (1997); also Pappas, S. (ed.) (1994); Mény, Y./Muller, P./Quermonne, J.-L. (eds.) (1996).

listed groups has increased to approximately 2.000 representations of interest groups in Brussels in 1996.¹⁸¹ These actors turn out to play an increasingly significant role, both in the respective political systems of Western Europe and in the European sphere and in shaping the preparing, taking and implementing of binding legal acts. National and supranational administrations are forced to take these actors into consideration as competitors or partners.

5.2.6. The Models Revisited

Our overview indicates that from the original EEC Treaty to the Treaty on the European Union many core issues of public policy have become subject to supranational decision making procedures. Like policy fields and decision making norms, institutions have been further developed or been newly introduced in order to cope with the functional scope of the EC/EU. Like the Parliament, the Council and the Commission, committees are the result of both functionalist institution-building and bargaining. They are part of the EC/EU's institutional structure and do not purely and simply constitute a neutral arena, but structure the policy processes according to a variety of norms, rules and procedures. Thus, analysing committees in an unsettled but moving environment means to scrutinise the various interactions between European and national governmental as well as bureaucratic actors, companies, non-profit and private interest representatives. If any dominant factor is to be made responsible for the popular fears of the »bureaucratisation« in Brussels, it is the specific constellation of a de-nationalised public authority and the impact of the various multi-level arenas acting therein. Consequently, the patterns of administrative interaction can not only be analysed as a search for consensus between a limited and stable number of actors. Not only the well-known kinds of formal bargaining or other asymmetric dependency situations should be examined minutely, but as well the exchange of resources on the basis of equality and mutuality. Due to their particular character, administrative interactions have to be investigated beyond the formal structures of the EC/EU policy-cycle.

If we compare the explanative power of the different models of administrative interaction, the empirical validity test does not paint a clear unequivocal picture. Certainly it can be concluded that committees in the EC/EU system are no artificial creation, nor a typical development by pure accidental factors, nor merely a bureaucratic plot to keep, or even extend, their influence. Whereas the Member States acting in the Council of Ministers dominate the creation of comitology committees – as realism (?) would suggest -, the concrete business of policy implementation through comitology is clearly shaped by the European Commission – an argument fitting more into federalist conceptualisation of a federal administration. And indeed, according to van der Knaap, the Commission gets its own way in 99% of all cases. However, the EC/EU's committee system is not characterised by a tendency whereby the different bodies are being replaced by pure Community institutions. The realist concept of diplomatic administration hardly corresponds to our empirical findings. Committee members in the Council's sub-units or acting in the European Commission's committee network may feel a certain type of »togetherness«. But given the Commission's power to dominate the game of implementing measures on

¹⁸¹ For the statistical data see Wessels, W. (1997): A Corporatist Mega-Bureaucracy or an Open City? Brussels and the Growth and Differentiation of Multi-level Networks, in: Wallace, H./Young, A.R. (eds.) (1997), pp. 17-41.

the one hand, and the powers of the Council in establishing committees, as well as the power of the Member States to nominate their representatives and the power of the European Parliament to scrutinise the comitology system at least to a certain extent on the other hand, the image of independent diplomats shaping the preparation and implementation of EC law without the Commission is rather misleading. Of course, if we focus our view exclusively on the committee networks in the field of justice and home affairs established prior to the Maastricht Treaty (within the Schengen and the TREVI regime), we would have to acknowledge a certain trend of intergovernmental monitoring combined with some kind of governmentally monitored diplomatic administration between the early 1980s and the post-Maastricht era. However, since Maastricht came into effect, the TREVI committee structure of the third pillar has shifted towards functional cooperation with a pre-dominance of the national level at all stages of the policy process.¹⁸² Some of the indicators may suggest neo-functionalism as the most appropriate tool for investigating the committee network in the field of EC legislation. Especially the evolution of the Council's and the Commission's legislative output (graph 1) in comparison to the increase of comitology committees (graph 2) suggests to conceptualise administrative interaction as a supranational technocracy in process. However, qualitative studies on national administrations and their interaction within the EU do not indicate subsequent shifts of loyalty from the nation-state towards the EU committee systems as neo-functionalism would suggest. The concept of a multi-level mega-bureaucracy would expect growing complexity and a lack of transparency, hence administrative interaction networks that are impossible to control either by the European Parliament or by the national parliaments of the Member States. However, this concept ignores that the control capacities of the European Parliament, especially with regard to the comitology system, have been developed. This is not to say that Parliament's demands regarding the accountability of the comitology network have been fulfilled. But especially in those cases of post-Maastricht secondary legislation, where the codecision procedure applies, the European Parliament is able to influence the choice and to control the operation of comitology procedures.¹⁸³

Our interpretation leads to a characterisation of both the committee system and the administrative interaction taking place according to the concepts of horizontal and vertical fusion and co-operative administration. The growth rates of the meetings of Council working groups, of the number of civil servants, of the frequency of comitology meetings in the field of agriculture and of the expenditure for comitology meetings, indicate a process of institutional and personal mobilisation within an evolving (?) and concentric political system, in which national administrations are shifting their attention towards Brussels. The challenges of a Commission providing the operational rules of comitology, the claims of a Parliament pressing COREPER into »pre-conciliation« meetings for codecision and the demands of interest groups offering advice and bringing in »transnational« expertise spill back into national

¹⁸² Article 100d ECT in combination with Article K.4 TEU established the so-called K.4 Committee bringing together Senior Officials from the Member States in order to assist the Council and COREPER in the preparatory phase of measures in the field of justice and home affairs. The TREVI-system is thus being replaced by the K.4 Committee structure with 3 steering groups and 19 working groups. Unlike in the TREVI system, the European Commission is now fully associated in the work of the K.4 Committee.

¹⁸³ See the contribution of Hix, S. in this volume, and Blumann, C. (1996), pp. 1-24; Bradley, K.St.C (1997), pp. 230-254.

administrative systems. Moreover, national civil servants are increasingly confronted with different administrative cultures and interaction styles. Consequently, mobilisation leads to some kind of Europeanisation of institutions and staff.

Thus, we need further research into the administrative interaction in process. Special attention should be given to the question, if the emerging networks are changing the hierarchical institutional system or if they are leading to some kind of non-hierarchical governance. In other words, we propose a closer look into the real application of the committee rules by the different actors concerned.

5.2.7 European Parliament Committees

The Treaty on European Union (both the Maastricht and the Amsterdam version) strengthened the position and role of the European Parliament. Despite the reduction of the democratic deficit in institutional terms, developments after the conclusion of the TEU have led to a loss of public support and made the project of integration more contested than ever within the Member States; the post-Maastricht discourse on democracy and democratic governance in the Union seems to have weakened the legitimacy of the Union.¹⁸⁴

This paradox hints at different perspectives from which legitimacy can be defined. While legitimacy understood as an attribute of the political system of the EU has been strengthened, legitimacy as an orientation among the citizens has decreased. The tension between both dimensions of legitimacy has been one of the characteristics of the development of the integration process.

5.2.7.1 Situating the European Parliament in Flux

Whatever the language used, political scientists and lawyers classify the EC/EU as a system for joint decision-making in which actors from two or more levels of governance interact in order to solve common (and commonly identified) problems. Whereas the areas of co-operation and integration were originally restricted to the coal and steel industry and its related labour markets, the European Union of the Third Millennium pertains on a much wider scope of potential action: Nearly every field of traditional state activity can become subject to policy-building beyond the nation-state. But can we also observe the dynamics of this system?

Neo-institutionalism and the 'path' dependency approach of policy preferences, institutions and procedures, policy-outcomes and policy-instruments¹⁸⁵ offers one important step among our starting considerations. The 'masters of the treaties' i.e. the Member States seek not only for functional, but also for institutional solutions to shared problems on the basis of what already exists. Critical junctures - revisions of the Treaties or exogenous developments affecting the EC/EU or a major part of it - offer the chance to adapt and to 're-design' the existing arrangements.¹⁸⁶ The logic of

¹⁸⁴ Telò, M. : « Démocratie internationale et démocratie supranationale », in: Télò, M. (ed.) (1998), p. 18.

¹⁸⁵ Pierson, P: "The Path to European Integration: A Historical Institutionalist Analysis", in: Sandholtz, W. and Stone Sweet, A. (eds.) (1998): p. 30.

¹⁸⁶ Pierson, P. (1998), op.cit., p. 131; March, J.G. and Olsen, J.P. (1996), op.cit., p. 257.

'path-dependency' suggests that in such an institutionalised arrangement like the EC/EU, "past lines of policy [will] condition subsequent policy by encouraging societal forces to organise along some lines rather than others, to adapt particular identities or to develop interests in policies that are costly to shift".¹⁸⁷ Institutions - rules and procedural routines at both the national and the European levels of governance - therefore become capable to "structure political situations and leave their own imprint on political outcomes".¹⁸⁸ In other terms, institutional arrangements contour the realm for further developments insofar as they narrow "down the areas for possible change" and oblige the actors to "think of incremental revision of existing arrangements".¹⁸⁹

One of the key elements of European democratic systems is that directly elected parliaments represent the citizens, aggregate their views and opinions and act on their behalf. In this regard, the EU's institutional design faces a multitude of questions as to how representative this system of multi-level governance is, in which way its quasi-executive branches – the Council and the Commission - are accountable to the citizens via a directly legitimated body and how democratic the decision making procedures between the Union's legislative authorities are. Of course arguing about the European Parliament and its potential to provide the European "Demoi" - functionally, nationally or ideologically different realms of identity and interest formation and communication - a representative voice in the Union's policy cycle does not mean that de-nationalised, supra-national parliamentarism is the only way for bridging the gap between the citizens and the Union. Accordingly one can easily assume that even with the entry into force of the Amsterdam Treaty, many scholars and practitioners of European integration will continue to argue that focusing on the input structures of the Union is only one of several ways in which governance "beyond the state"¹⁹⁰ might gain legitimacy. However, since the EU story is not only about territory and identity or - in the language of the German Constitutional Court, about culture, shared heritage, language and ethnic belonging it is logical to (?) assume that any kind of supra- or super-national governance structure without a directly elected parliamentary structure would pervert the Union into a dictatorial regime. In other terms, I conceive the European Parliament and the "parliamentarisation" of the Union's decision making system must be conceived (?) as one but an essential and necessary tool for building a legitimate European order.

Of course, the process of European integration does not feature clear and unequivocal trends towards the establishment of nation-state like government structures. In the contrary, the main idea of integration is the continuous search for problem-solving capacities in specific policy areas without explicitly considering the mode of appropriate government structures.

However, the cumulative process of functional, special-purpose or single-policy oriented integration affects the institutional design and the decision-making process between institutions on both European and national (and to a growing extent even sub-national and sub-regional) levels of governance. Accordingly, the process of co-operation and

¹⁸⁷ Hall, P.A. and Taylor, R.C.R. (1996), p. 941.

¹⁸⁸ Bulmer, S. (1994), p. 356.

¹⁸⁹ Shackleton, M.: Democratic Accountability in the European Union, in: Brouwer, F./Lintner, V./Newman, M. (eds.) (1994), p. 20.

¹⁹⁰ Jachtenfuchs, M./Kohler-Koch, B. (1996).

integration leads to what Wessels defines as a "fusion" of national and Community instruments where major actors of the EU Member States try to achieve an increase in effectiveness for preparing, taking and implementing decisions through European institutions. Given these indicators, one may agree to the assumption that the European Parliament "does not operate as part of, or in relation to, a system of government".¹⁹¹ But European integration is more than an ongoing bargaining process on politics. More specifically, the European Community and – at least with regard to the third pillar – the European Union are entitled to limit national sovereignty. Not only the Member States, but the Parliament, the Council, the Commission and the Court are enabled to take decisions directly binding the residents of its constituent Member States without the prior and individual assent of each national government. The European Parliament should be analysed in this context.

For many, the Maastricht Treaty indicated major implications for the European Parliament and its roles vis-à-vis the other institutions, specifically the Council and the Commission. They argued that the European Parliament "was perhaps the largest net beneficiary of the institutional changes in the TEU"¹⁹² and that "Maastricht marks the point in the Community's development at which the Parliament became the first chamber of a real legislature; and the Council is obliged to act from time to time like a second legislative chamber rather than a ministerial directorate".¹⁹³ Hence, through the introduction of the co-decision procedure, the European Parliament gained more control in the legislative process (- it can prevent the adoption of legislation -) and acquired more means of input into binding EC legislation (- the final legislative act requires Parliament's explicit approval -). With regard to the impact of the European Parliament on the EU's legislative output, and therefore the potential of its "output-legitimacy", the co-decision procedure itself was interpreted as being (too) complex, lengthy, cumbersome and protracted.¹⁹⁴ Indeed, the procedure described in the then Article 189b TEC (now 251), could well be interpreted as symptomatic for the "general trade-off" between the efficiency of EU decision-making on the one hand and parliamentary involvement on the other. "Expanding the legislative (...) powers of the European Parliament could render European decision processes, already too complicated and time-consuming, even more cumbersome".¹⁹⁵ (Perhaps you want to add a sentence that your research has demonstrated that this - at least in quantitative terms- is not the case)

5.3. Democratic Legitimacy of Governance by Committees

The proliferation of transnational policy making has had crucial implications for traditional conceptions of democracy: grounded in the institutions of the nation state reflecting and responding to the Demos. Despite the construction of supranational institutions modelled on key organs of liberal democratic states (executive, legislature, judiciary etc.) since its inception' the European Union has been unable to fill the democratic deficit;¹⁹⁶) that has accompanied its development. More recently

¹⁹¹ Coombes, D. (1999), p. 7.

¹⁹² Wallace, H./Wallace W. (Hrsg.) (1996), p. 63.

¹⁹³ Duff, A. (1995), pp. 253-254.

¹⁹⁴ Earnshaw, D. (1996), p. 109; Westlake, M. (1998), p. 119; Nugent, N. (1998), p. 119.

¹⁹⁵ Scharpf, F.W. (1994), p. 220; Wessels, W. (1996), p. 58.

¹⁹⁶ Reich, C. (1991); Williams 1991, Pliakos, A. (1995); Follesdal, A. (1998).

with the expansion of the EU's competence into areas of greater overtly political sensitivity for states and citizens (including Justice and Home Affairs and monetary union, as well as foreign and security policy) and a growing Euro-scepticism among the EU's publics, the democratic deficit has developed further as the leitmotif for the future of European integration.

The issue of democratic legitimacy plays a significant role in western political systems; interestingly, it reveals special importance if related to the European Union, arousing heated debates among scholars of European integration studies. While each of the EU Member States enjoys some kind of a democratic government, the EU as a political system is widely perceived to suffer from what is called a 'democratic deficit'.¹⁹⁷ The EU's institutions and their national counterparts face a multitude of questions as to how transparent, representative and responsive the system of multi-level governance is, in which way the Union's quasi-executive branches are accountable to a directly legitimated body and how democratic the decision making procedures between the Union's legislative authorities are.

Although the two major functions of committees in the EC political process – mastering technical expertise and multi-level co-ordination – are uncontroversial and generally viewed as legitimate, the EC committee system is frequently criticised from two different points of view:

Committees are seen as embodying the most opaque and even secret part of EC decision making. They are considered to be the most intransparent aspect of the EC system of governance.

The committee system also raises serious questions about the democratic legitimacy of the EC policy process. They are not mentioned in the treaties and their proliferation is often seen as a deviation from EC "constitutional" rules. Since their members are not elected on a democratic basis (except for those of the EP committees), committees are frequently seen as symbolising the "democratic deficit" and "bureaucratic and technocratic bias" of the EC system. In short, the EC committee system challenges traditional perceptions of democracy which value the transparency of decisions that should, in addition, only to be taken by elected and politically accountable representatives of the people.

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

From this perspective, new developments in democratic theory, informed by regulation theory, have sought to "update" classical democratic concerns (in terms of legitimacy, transparency and accountability) by confronting them with the growing need for an autonomous regulatory competence with technical expertise.¹⁹⁸ Classical democratic requirements can be met by different means, for example through the

¹⁹⁷ Laprat, G. (1991); Lodge, J.: "The European Parliament", in: Andersen, Svein/Eliassen, Kjell (eds.) (1996); Pliakos, A. (1995); Reich, C. (1991).

¹⁹⁸ For example Majone, G. (ed.) (1996).

"technical" delegation of powers from democratically elected authorities to "expert bodies", or through a "cross-control" system whereby one set of experts control another.¹⁹⁹

Working groups and comitology committees, for example, can be deemed legitimate from this point of view because they act in the name of the democratically elected Member State governments. The standing committees of the EP derive their legitimacy from the fact that their members are democratically elected. Their expertise function – supported through a relatively large professional staff – may also be seen as providing a means of ensuring there are "checks and balances" on the technical expertise of the Council's working groups.

Theoretically informed empirical research on the role and function of committees in the EC policy process commenced only a few years ago. Recent publications have contributed to elaborate typologies of the different types of committees according to their role in the EC policy process and their internal rules of procedures. Much attention has also been drawn to the inter-institutional debate about comitology committees. Most of the research has been essentially institutional and descriptive, trying to assess the functions of the different kinds of committees in the EC policy process: providing "technical" expertise, rule-setting, fund-approving, consensus-building, inter-level co-ordination, "networking", influencing policy, etc.

Building on this body of research, the proposed project will focus on the question of to what extent, and how, different committees in the EC policy process go beyond their basic functions as providers of technical expertise and fora of multi-level co-ordination and constitute a central aspect of the "democratic legitimacy" of the evolving system of European governance. Democratic legitimacy is not interpreted using traditional legal concepts but is based on the notion that governing and regulating complex contemporary systems requires delegating the solution of technical problems to competent bodies of "experts" that are controlled by democratically elected institutions and which (in a multi-level system) mutually provide a means of "checks and balances".²⁰⁰

The Definition of a political order as being legitimate when it is worthy of recognition and approval (Anerkennungswürdigkeit) and thus encourages social integration, communication and consensus, stems from Habermas.²⁰¹ There can be distinguished three elements that are required in order to establish the legitimacy of a constitutional order:²⁰²

"auctoritas" – the respectability and trustworthiness of the political actors of a system of governance – otherwise the system must be treated with contempt (Verachtung);
problem solving capability and an ability to accomplish tasks ("finale Legitimation") otherwise the system is meaningless (sinnlos);
a structure, which inspires and secures consensus, and which is limited and controlled, otherwise the system would be despotic (despotisch).

¹⁹⁹ Hesse, K. (1962).

²⁰⁰ cf. Majone, G. op. cit and Hesse, op cit.

²⁰¹ Habermas, J.: Legitimationsprobleme im modernen Staat, in: Graf Kielmannsegg, P. (1976), pp. 39-61.

²⁰² Hennis, W.: Legitimität – Zu einer Kategorie der bürgerlichen Gesellschaft, in: Graf Kielmannsegg, P. op. cit. pp. 9-38.

Similar concepts of legitimacy – all further developments of Max Weber’s typology (legal, traditional, charismatic) – can be found in social and political theories of the 20th century such as Parsons AGIL scheme, where legitimacy is derived through Adaptation, Goal attainment, Integration and Latent pattern maintenance.²⁰³

Of particular relevance is Jachtenfuchs’ definition of legitimacy and democracy within the framework of EU governance: “By legitimacy, I understand a generalised degree of trust of the addressees of the EU’s institutional and policy outcomes towards the emerging political system”. As Weiler²⁰⁴ pointed out, a political system which is entitled to limit national sovereignty and which is enabled to take decisions directly binding the residents of its constituent Members without the prior and individual assent of each national government requires more than the formal approval of founding treaties and their subsequent amendments. In Weiler’s terms, such a political system - like the European Union - needs social legitimacy: The willingness of minorities to accept the decisions of the majority within the boundaries of the EU’s polity.²⁰⁵ In other words, social legitimacy supposes that decisions which are not taken by unanimity at all levels of and at every stage in the policy cycle have to be based on a broad acceptance of the system. Even if the citizenry of the EU polity is not fully aware of or interested in the way binding decisions about their way of life are taken, the system and the institutions which deliver the law must be aware of the risk that the public attitude towards it can shift from some kind of a “permissive consensus” or “benevolent indifference” (Brok, 1999) to fundamental scepticism. By democracy, ‘Jachtenfuchs’ understands the “institutionalization of a set of procedures for the control of governance which guarantees the participation of those who are governed in the adoption of collectively binding decisions”.²⁰⁶ Of course, this definition does not automatically induce democracy to be synonymous with parliamentary government. At least theoretically, there are many ways to secure the participation of the citizenry in governing a given polity. But if we turn to the evolution of the EU over the last decades, we observe a trend: The search for establishing some kind of representative governance structures, in which institutions aggregate participation needs and try to fulfil their general function as arenas and rules for making binding decisions, and for structuring the relationship between individuals in various units of the polity and economy.²⁰⁷

In this sense, the lack of control over governments firstly on the national and secondly on the European level – the Council of the EU - creates a "double democratic deficit".²⁰⁸ Of course, those stressing that national sovereignty resists European integration would argue that decision-making in the EU rests primarily upon the Member States and the Council of Ministers and, since Maastricht and Amsterdam, upon the European Council. Accordingly they would ascribe only a minor role to the European Parliament and parliamentary institutions in general.²⁰⁹ However, since the

²⁰³ cf. Münch, R. (1982) *Theorie des Handelns*, Frankfurt/11. 1982)

²⁰⁴ Weiler, J.H.H. (1993)

²⁰⁵ Shackleton, M. (1998), pp. 130-134.

²⁰⁶ Jachtenfuchs, M. (1998), p. 47.

²⁰⁷ Hall, P.A./Taylor, R.C. (1986), p. 19.

²⁰⁸ Lodge, J. (1996) op.cit., pp. 190-191.

²⁰⁹ In this regard, the IGC blueprint of the old British Government is highly illustrative: "A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996", Presented to Parliament, March 1996.

entry into force of the Single European Act (SEA) and the introduction of the co-operation as well as the assent procedure, the real distribution of powers between the institutions goes far beyond this conceptualisation of the Union. Within the sphere of the European Communities, the Treaty revisions from 1986 onwards reveal a tendency towards a multi-level Polity where competencies are not only shared between the Members of the Council but also between the Council and the European Parliament. Nevertheless, even if the SEA, the Maastricht and the Amsterdam Treaty (TEU) opened new opportunities for an original kind of parliamentary democracy in the EC/EU, they left considerable gaps in parliamentary involvement and control in many policy areas which directly affect the way of living of the Union's citizens.

From a functional or technocratic point of view it could be argued that legitimacy is delivered by the success of problem-solving and does not need further justification: In this perspective, the EU may be seen as some kind of a 'regulatory regime'²¹⁰ or a "special purpose organisation"²¹¹, which is less dependant on its parliamentary democracy than on efficiently-oriented policies. The "output-legitimacy" of the Union then "depends on its capacity to achieve the citizen's goals and solve their problems effectively and efficiently: The higher this capacity, the more legitimate the system".²¹² This concept does not go far enough, because it ignores the fact that legitimacy is not purely built on the substantial outcome of politics –dictatorial regimes are also able to produce positive output.

The lack of democratic accountability and transparency seems to constitute one of the most serious problems of the EC/EU committee network. Consequently, new insights on the level of secrecy, on the public acceptance of discretionary policy making, and on the interaction between parliamentary committee structures on the one hand and administrative bodies taking ultimately binding decisions on the other should be considered. (I would suggest to delete this)

²¹⁰ Majone, G. (1994); Majone, G. (1996).

²¹¹ Dehousse, R. (1998).

²¹² Schimmelpfennig, F. (1996), p.19.

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