Restrictions on National Autonomy and the Reform of Comitology Procedures
A Case for a Pluralist Approach
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Citizens' Rights and the Reform of Comitology Procedures.

The Case for a Pluralist Approach

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The Intergovernmental Conference that has drafted the Treaty of Amsterdam has been unable to agree on a substantial reform of the comitology system. Declaration N. 30, adopted in the framework of the Final Act of the conference, simply invites the Commission to submit by the end of 1998 a proposal to amend the framework decision of 13 July 1987, laying down the procedures for the exercise of implementing powers conferred on the Commission.\(^1\)

Discussion of comitology's legal status is by no means a new feature of the European institutional debate. A shift of emphasis, however, has occurred in recent years. For about three decades discussion focused on demarcation of the respective competences of the Council and Commission in the implementation of "primary" Community legislation and on comitology's role in the basic institutional balance established by the EC Treaty.\(^2\) In this earlier period, efficiency concerns were regularly voiced. Inter-institutional quarrels as to which procedure was to be chosen were thought to be the source of considerable delay in the legislative phase, leading the Commission to make comitology one of its main battle-horses in the years of the internal market programme.\(^3\) More recently, the legitimacy of comitology has come to the fore as a major issue. Even since the European Parliament gained greater legislative power at Maastricht, it has challenged comitology as incompatible with its new institutional role stressing inter alia the undemocratic character of a system in which obscure committees, primarily composed of national bureaucrats, play a central role in the rule-making process.\(^4\) Moreover, the BSE crisis revealed the risk of committee "capture" by specific interests.

The purpose of this paper is not to explore in detail the various legal problems surrounding comitology. Rather, adopting a broader perspective, it will try to identify the structural causes that explain the shift from efficiency to

\(^1\) OJ L 197/33 of 18 July 1987.


legitimacy concerns in discussions on comitology and consider various ways of enhancing comitology's legitimacy. While my comments will be confined to comitology proper, i.e. the web of committees that assist the Commission in the implementation of Community legislation, some of the ideas discussed in the following pages could probably be of use for other types of committees that operate at European level.

**Regulation by Committees: Institutional Discourse and Realities**

Comitology, like any form of governance, must be analyzed in light of the functional reasons that have underpinned its development. Like much modern legislation, Community legislative rules are often incomplete. The reasons for this are manifold. The complexity of the Community legislative process makes it unwise to try to decide on everything at the legislative stage -- even assuming that this would be possible, which is not always the case. It may also be more expedient politically to defer contentious items to a subsequent stage of the policy process. Last but not least, the technical character of the issues addressed may require a further input from scientific experts. A similar need may also arise when basic rules must be adapted to changing conditions, a common situation in an era of rapid technological change. Community legislation must therefore often be supplemented or updated by secondary rules. In addition, in some areas, the actual application of Community rules may require centralized decisions: this is notably the case when Community funds are distributed (e.g. in the framework of research and development programmes) and when producers seek a European authorization for their products, as is now possible in relation to certain kinds of pharmaceuticals.  

Although Article 155 of the EC Treaty provided from the outset that the Commission could be entrusted with implementation powers, it was soon perceived that committees, mostly composed of national experts, were necessary to assist the Commission in this task. This innovation was dictated not only by national governments' wish to keep an eye on the Commission, but also by the technical character of many decisions. The Commission can only count on a small staff -- roughly equivalent in numbers to that of a middle-sized European city -- and therefore does not always have the expertise needed to dispose of the thousands of issues delegated to it.

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All these elements are reviewed here simply to stress that comitology, which has at times been depicted as a kind of institutional hydra, is to a large extent a natural development. Any system of two-tiered government, particularly when it opts for decentralized implementation of rules adopted at central level, as has been the case in the European Community, will be inclined to develop structures of this kind, as can be seen in the emergence of "executive federalism" in Canada or of "Politikverflechtung" in Germany.

This notwithstanding, the institutional discourse on comitology has been rather conflictual, particularly after the Single European Act. The Commission has made no mystery of the fact that it regards the most restrictive forms of committee control -- in particular the contro-filet variant of the 1987 framework decision -- as an excessive intrusion into its powers, which could hamper the adoption of implementing measures or even affect the legislative process. The Single Act's failure to simplify comitology procedures was one of the main reasons for the Commission's initial reservations concerning that treaty. Up to the Maastricht Treaty, the Commission kept insisting on the necessity of a significant overhaul of Community procedures.

However, the Commission's choice of comitology procedure in its legislative proposals is often in contrast with its public rhetoric. While it has repeatedly blamed the Council for ignoring the Single European Act's preference for the advisory committee procedure in the internal market sector, the Commission appears to bear part of the responsibility, as it has proposed other procedures in over 25% of the relevant cases. Likewise, in spite of its declared aversion for regulatory committees, the Commission itself proposed almost 40% of the regulatory committee procedures enacted by the Council in the period between July 1987 and July 1995. Apparently, institutional concerns play less of a role than official statements would suggest. The Commission is frequently prepared to compromise on comitology procedures, if this will obtain the Council's agreement on delegation of implementation powers.

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8 Ehlermann, supra note 3.

9 See e.g. its communication of 10 January 1991, SEC(90) 2589 final, 7.


This pragmatism may be explained by the consensual nature of the committees' work. The available data suggest a rather smooth exercise, where acute conflicts are a rare event. Indeed, out of the thousands of decisions taken by the Commission in co-operation with committees in the years 1993 to 1995, in only six cases did the Council intervene because of disagreement between the Commission and the relevant committees. Moreover, the accounts of committee members suggest that votes tend to be a rare event, and that the Commission, which chairs these meetings, exerts considerable influence over the committees' work.

Undoubtedly, the smooth functioning of comitology proceedings is positive for decision-making efficiency. However, it does not follow that this will necessarily strengthen the overall legitimacy of the system, as shall now be seen.

The Legitimacy of Comitology Procedures

Comitology's legitimacy is not merely a normative issue: it is likely to become a political problem of growing importance as a result of the evolution of Community regulatory activities. The Maastricht ratification debates have made it plain that large segments of the European populace do not recognize the legitimacy of European policy-making processes. So far, discussion on how to improve the legitimacy of European institutions has essentially focused on the powers of the European Parliament. Legislative procedures, however, are but one part (admittedly important) of the decision-making process. Now that the legislative framework for the internal market is nearly complete, there seems to be a slow down in the Community's legislative activities. Figure 1 shows that the number of primary legislative proposals has declined in recent years.

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It would be wrong to conclude from this that the overall volume of Community regulatory activity is declining. Indeed, the overall volume of Commission rule-making, most of which takes place in the comitology framework, seems to be increasing, as shown in Figures 2 and 3.

The Commission has long been -- and by far -- the main producer of Community regulations. Moreover, in 1997, the number of directives adopted by the Commission exceeded for the first time that of directives adopted by the Council.

The combination of these two trends -- the decline of purely legislative activity, and the growth of secondary rule-making -- suggest that a growing number of salient political issues are likely to arise in the post-legislative phase, be it in rule-making or the concrete application of Community rules. Should a given product be authorized? What kind of precautionary measures are needed to protect human health in the case of scientific doubts related to our alimentary habits? The management phase may gain even more importance in the future, as the Amsterdam Treaty has enhanced the powers of the European Community to deal with what is known as "risk regulation" in areas such as human health, consumer policy and environmental protection. As risk regulation decisions are often made on the basis of complex scientific evidence, they cannot always, or indeed most of the time, be made in abstracto, once and for all, in legislation, but rather require individual, ad hoc decisions, taken by administrative bodies.

If this analysis is correct, committees are likely to be the forum for a growing number of important decisions at European level in the years to come. However, the way they operate may be a source of a variety of legitimacy problems. First, the system is striking in its opacity. Who does what and how is nearly impossible to tell for a lay audience. This lack of transparency may undermine the authority of Community decisions: citizens may find it difficult to accept decisions based on recommendations from obscure bodies, the composition and functioning of which remain a mystery. Secondly, it is not clear that the social prestige of committee members will be sufficient to command obedience. While scientific experts may derive some authority from their technical knowledge, bureaucrats are the focus of widespread mistrust in European countries. Thirdly, the little we know of the way comitology works may also become a source of concern. The convergence of concerns, interests and language among experts which is said to be the hallmark of comitology seems to enable the system to operate fairly smoothly. However, while positive from the standpoint of efficiency, this consensus may undermine the legitimacy of the system, as it can easily be depicted as one more instance of power in the hands of a closed circle of elites. The risk of collusion is quite real: can experts be regarded as neutral in areas where research is largely financed by industry? Can we really assume that they will not be influenced by their national origins? The BSE crisis has shown that issues of this kind are far from moot. They must therefore be addressed squarely if one is to put comitology on firmer grounds for legitimacy purposes.

How may this objective be achieved? Generally speaking, five different types of arguments are traditionally used to legitimize bureaucratic processes. Given the specificity of the Community regulatory process, it would be wrong to assume that they can be mechanically transposed to the European level. However, they furnish good yardsticks for assessing the legitimacy of bureaucratic decisions taken at that level.

- The "legislative mandate" approach is the most traditional. Parliament is seen as the main repository of legitimacy and the administration must strive to achieve the objectives that are set out in governing legislation.

- In the "accountability or control" model, legitimacy is grounded in the fact that the administration is somehow under control, i.e. that it is held accountable for its decisions by a representative body (generally the legislature) or by courts.


The "expertise" claim stresses that as a result of their technical character, many decisions cannot be taken by the legislature; expert judgement is needed to judge the respective merits of competing options, and experts must be granted sufficient discretion.

The "procedural" approach emphasizes the fairness of decision-making processes. It demands that consideration be given to the interests of persons affected by administrative decisions. Procedures designed to associate such persons to the decision-making process are therefore viewed as essential. They tend to vary according to the kind of decisions that are taken. Under "due process" requirements, administrative bodies must consider the interests affected by individual decisions. As regards rule-making, the same concern for fairness may lead to the adoption of rules guaranteeing transparency and participation or consultation rights.

Efficiency is also often claimed as a grounds for legitimacy, particularly in recent times, as the ability of government structures to deliver results is becoming increasingly important. While there are many ways of defining efficiency, two meanings are particularly relevant for our purposes: decision-making efficiency (the ability to take decisions when needed) and substantive efficiency, i.e. the ability to take the "right" decisions.

Obviously, these approaches are not necessarily mutually exclusive. Accountability and control can be used to monitor the effective implementation of legislative mandates or the compliance with the procedural requirements of the "due process" model. Likewise, the resort to experts is often advocated on efficiency grounds, and can be balanced through various accountability techniques. Nevertheless, there are clear differences among various claims. The degree of discretion required in the "expertise" model is at odds with the idea of exhaustive legislative mandates. Similarly, the vision of the public interest inherent in the "legislative mandate" model is at odds with the idea of exhaustive legislative mandates. Similarly, the vision of the public interest inherent in the "expertise" model approach often assumes the existence of a collective body—the people—whose interests are represented by Parliament, while the "procedural" model is informed by a more polycentric vision of the polity, in which the coexistence of a wide variety of interests, which must all be given due consideration, is acknowledged.

At this stage, my concern is not to endorse any one of these models, but rather to discover how suitable they may be, given the specific character of Community decision-making. To streamline somewhat the discussion, I will take as a starting point the limits of an approach that would rest exclusively on the "expertise" model. Involving experts at various levels of the decision-making process is undoubtedly necessary, particularly when the decisions to be taken have a sizable technical content, as is often the case at the European level. Providing much-needed expertise is clearly an important achievement of the European committee system. It can even be argued that the quality of deliberations among experts will not only contribute to the quality of the regulatory process, but also to its legitimacy, as was suggested by Joerges and Neyer. Yet, granting experts "carte blanche" is likely to be unpopular in a period of widespread mistrust of technocrats of all kinds. Right or wrong, lay people may also have views on the decisions to be taken, and insist that they too should be considered.

Our reflections should therefore focus on the remaining approaches. Various versions of the "legislative mandate" and the "accountability" models have been invoked by those who argue that the European Parliament, now that it has acquired the status of a co-legislator in many areas, should have more power over delegated legislation. Both types of arguments are part of the same, supra-national avenue: the European Parliament, it is said, being the institution most representative of the European people at large, should play a greater role in overseeing comitology. In contrast, as was just indicated, the procedural model rests on a radically different vision of legitimacy, one which would require the opening of comitology to representatives of all interests affected by its decisions. Each of these two options will now be reviewed in turn.

The Supranational Avenue: Legislative Mandates and Parliamentary Control

Since the introduction of codecision in 1993, the European Parliament has insisted on being treated as a Council co-equal in supervising Commission implementing decisions. It has opposed particularly vigorously management and regulatory committees, which it regards as a way of circumventing its newly acquired legislative powers: in the four years since codecision was introduced, comitology was an issue in about two-thirds of the dossiers that were subjected to the conciliation procedure. Disagreement over the proper implementing procedure was also at the root of Parliament's rejection of the directive on voice telephony -- the first time that Parliament used its codecision prerogatives to

16 See their contribution cited supra note 14.
There are several ways in which the European Parliament could become more closely involved with the decisions currently being taken within the comitology framework. The first, "legislative mandate", approach would suggest that the current balance between legislation and administrative decisions be altered in order to ensure that the most salient policy decisions are taken as legislative measures. A return to legislative policymaking is a technique widely advocated in order to combat the growing influence of bureaucracies. 11 Surely, it would be historically incorrect to describe comitology as having robbed the European Parliament of its legislative prerogatives, as comitology predates Parliament's rise to the status of a full-fledged legislature. However, MEPs have consistently called for a clearer demarcation between decisions that can be taken through comitology and those that require a proper legislative procedure, 18 a position that underlies Parliament's support for a clear hierarchy of Community acts. The European Court of Justice itself has suggested that "the basic elements of the matter to be dealt with" must be adopted in accordance with the legislative procedure laid down by the Treaty, while "the provisions implementing the basic regulations" may be adopted according to a different (i.e. comitology) procedure. 19

However, there seem to be clear functional limits to what can be achieved along these lines. As indicated above, it is not always possible for legislation to anticipate all the problems that may arise in the implementation phase. Parliaments may lack the time or the necessary expertise to solve all problems in advance, and they may find it expedient to delegate part of the problem-solving task to implementing agencies. Moreover, the borderline between policy choices and implementation "details", between legislation and administration, is often blurred when scientific or technical choices must be made. Prior to the BSE crisis, who would have thought that animal feed was an issue that would gain considerable public attention?

Parliamentary control over the executive, another traditional oversight instrument seems equally difficult to adapt to the specific features of Community governance. While at national level, parliamentary control over the administration is a by-product of its control over the cabinet via the institution of ministerial responsibility, no such thing exists at European level. Parliament has gained considerable control over the Commission in the post-Maastricht years, but, of course, formally comitology committees are not under the Commission's authority. The vertical chain of command thought to exist at national level (parliament-executive-bureaucracy) is broken at European level, where delegated legislation is, at least partly, in the hands of networks of national experts. The European Parliament's role must be adapted to this network-based reality if it is to be of more than symbolic relevance.

Parliament's response to that structural difficulty has been to put pressure on the Commission, as the later plays a leading role in implementation procedures, and appears to be extremely influential in comitology committees. The Plumb-Delors agreement of 1987 stipulated that the Parliament would be notified by the Commission of most draft implementing measures. These were then to be forwarded to the responsible parliamentary committee so that it could voice its concerns whenever necessary. Clearly, the effectiveness of such an agreement depends primarily on the Commission's willingness to keep the Parliament informed and to take its views into account. In both respects, the first years of the agreement have been rather disappointing: many drafts have not been sent to the Parliament and, in all but a handful of cases, parliamentary committees have failed to react. 20 The strengthening of Parliament's grip over the Commission in the post-Maastricht years leaves room for hope that its access to comitology materials will improve. Even if this were to occur, however, a question would still remain: how should the border between policy choices and implementation "details", between legislation and administration, be delineated?

Entrusting supervision to Parliamentary committees, decided in the wake of the Plumb-Delors agreement, is a sound division of labour. Members of committees are likely to be better equipped than many of their colleagues to make sense of the technical issues addressed in draft implementing measures, further, decentralization is needed to deal with the masses of documents involved. But what kind of relationship should be established between Parliamentary committees and their counterpart(s) in the web of Comitology committees?

Interestingly, Parliament's ambitions seem to have increased in parallel with the emergence of its legislative profile. Parliament has at times expressed an interest in being more closely involved with the work of committees, e.g. by including its own observers in the committees. 21 This proposal raises a delicate

18 Bradley, supra note 4, at 234.
21 Bradley, supra note 4 at 234.
but fundamental issue: in a system where influence appears to be directly related to the degree of expertise enjoyed by the various participants in the debate, what can be the impact of elected representatives, namely politicians? True, the European Parliament could set up its own expert networks to control the work of committees. But in terms of legitimacy, the "value-added" of another layer of experts would be rather thin. Rather than have politicians clothe themselves as technical experts, as they at times seem tempted to do, would it not be preferable to limit their role to a number of basic policy choices and to grant them the right to intervene when issues they deem fundamental arise in the implementation phase? Indeed, Parliament's most recent thinking seems to favour an improvement of the Modus Vivendi signed in 1994 with the Council. Rather than systematically participating in the adoption of implementing legislation, it would be given the right (on a par with the Council, one can assume) to step in whenever it feels a political input is needed.

Admittedly, such a division of labour would better correspond to the respective functions of legislator and executive in modern societies. Of particular importance, given the technical character of many issues tackled within European committees, is the Parliament's power to hold hearings. This technique could be used more systematically, as a means of obtaining independent expertise and facilitating a dialogue with interested parties. It would also enable the Parliament to exert greater control over the Commission, as the latter would be called upon to react to the views expressed by witnesses. Furthermore, hearings would very likely attract media attention to particular issues, thereby contributing to improved public awareness of the decisions taken at the European level. Such an approach, which emphasizes accountability and the importance, given the technical character of many issues tackled within European committees, is the Parliament's power to hold hearings. This technique could be used more systematically, as a means of obtaining independent expertise and facilitating a dialogue with interested parties. It would also enable the Parliament to exert greater control over the Commission, as the latter would be called upon to react to the views expressed by witnesses. Furthermore, hearings would very likely attract media attention to particular issues, thereby contributing to improved public awareness of the decisions taken at the European level. Such an approach, which emphasizes accountability and the expertise model is no longer sufficient in a world where technocracy has become the focus of much criticism. Legislative mandates cannot always sufficiently clear, as it is impossible to consistently set down precise standards and objectives. Although more promising, the transnational logic of parliamentary democracy. To put the matter bluntly, German or Danish consumers might feel more effectively represented by, say, a delegate from a national consumer organization involved in committee proceedings, than by a similar association of Greek or Portuguese MEPs.

Reflections on the legitimacy of the European policy process must also come to terms with the polycentric character of the European populace. Not only is there no European "demos," but "we the people" cannot simply be read in the plural as a reflection of the coexistence of different states within the European Union. The truth is that the peoples of the Member States, too, are a kaleidoscope of regions, cultures and interests not always identified with the state apparatus, and can all legitimately claim to voice their views and be heard at the European level. After all, even at national level, the reductive nature of representative democracy, distorted even further by the structure of many electoral systems, makes it impossible for parliaments to mirror perfectly the broad range of interests and feelings that coexist within a single polity. Hence the attractiveness of alternative forms of legitimation, which provide for some form of direct participation of affected parties in the decision-making process.

The Transnational Avenue: Transparency, Openness and Proceduralization

So far, I have argued that several of the approaches traditionally used in order to legitimate delegated legislation are ill-adapted to the specific needs of comitology. Reliance on the expertise model is no longer sufficient in a world where technocracy has become the focus of much criticism. Legislative mandates cannot always sufficiently clear, as it is impossible to consistently set down precise standards and objectives. Although more promising, the accountability claim remains elusive, as Parliamentary control over comitology decisions are still far from effective. Additional techniques ought therefore to be considered if the legitimacy of comitology is to be put on firmer ground.


22 Bradley, supra note 4, at 253.
Bearing in mind what has just been said about the growing gap between citizens and government in Europe, one such technique might be to empower all the parties affected by comitology decisions to express their concerns before the relevant committees. The main advantages of such an approach would be twofold. An extensive dialogue with the various segments of civil society would obviate some of the shortcomings of representative democracy at the European level. It might also improve public awareness of the issues discussed at the European level, thereby contributing to the emergence of a truly pan-European public sphere.

From the standpoint of openness to the populace at large, the present situation is defective in several respects. As any scholar who has done research on comitology knows, information on the actual operation of committees is difficult to find. The total number of committees remains a mystery. In 1994, Parliament had to freeze a share of the appropriations for committees in order to obtain more information from the Commission on the number of meetings and their work product. Committees’ rules of procedure are difficult to get hold of. When formal rules do exist, they appear to focus on the internal operation of committees: regulating deliberation among experts, i.e. relationships between the Commission and national representatives, is their main target. In contrast, little or no attention is paid to the relationship between the comitology web and the outside world. Provisions on the consultation of affected parties are striking in their absence. True, in some areas, committees have been created specifically for the purpose of allowing organized interests to give their input. In the food sector, for instance, an ad hoc committee has been set up to represent the views of various socio-economic interests. Yet the Advisory Committee on Foodstuffs offers a good illustration of the limits of what have been achieved so far. As its members are appointed by the Commission, the latter may privilege certain interests; for instance representatives of environmental interests have been excluded. Moreover, the committee can only act at the Commission’s request, which explains why it has remained inactive for long periods.

Rather than ad hoc representative fora, greater openness in the work of all committees is needed. This could be achieved with a standard set of procedural rules regulating the interface between comitology committees and civil society at large. What kind of principles should these rules contain? Without entering into a detailed examination of the question, it may be useful to point out some basic elements. Thus, for instance, the agenda of committee meetings, the draft proposals to be discussed, and the minutes should be made public. Interested persons should be given the opportunity to express their views on any item on the agenda; public hearings could even be envisaged for matters of particular importance. Committees should also be required to explain the considerations that underly their eventual choices.

A procedural approach of this nature, with its participatory ethos, would bolster the legitimacy of comitology. It should not however be seen as an alternative to parliamentary control. On the contrary, proceduralization, because it would foster public debate, might significantly reinforce the accountability of committees vis-à-vis the European Parliament, provided the latter is granted the power to review comitology decisions. One can imagine, for instance, that if a committee were to overlook the concerns of, say, consumer groups, Parliament might be interested in knowing why. In this case, procedural and accountability concerns, far from being at odds with one another, would actually be mutually reinforcing.

How could such a proceduralization be brought about? A number of scholars have warned against the danger of “ossification” of administrative procedures through codification in a legislative act. It is fair to say that both the European Court of Justice and the Court of First Instance have displayed a growing awareness of the necessity to protect “process” rights such as the right to be heard and the duty to state reasons, when individual rights are directly

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29 Bradley, supra note 4, at 242.
30 See e.g. the rules procedure of the standing committee for foodstuffs, a consolidated version of which has been prepared by the Commission (doc. III / 3959 / 93 83/ 260 / 90-EN of 11 May 1993).
32 This would not prevent the Community legislator to foresee exceptions for some kinds of decisions: standard rules would apply only in the absence of specific procedural provisions in Community primary legislation.
33 This could be achieved by exploiting the potential of Internet. See in this respect the proposals put forward by Joseph Weiler (1997) “The European Union belongs to its citizens: three inmodest proposals”, ELRev., 22, 150, 153.
affected by Community decisions. However, the approach contemplated here is less defensive. It is not motivated as much by a concern for individual rights as by a desire to ensure greater openness and more public participation in committee decision-making. Court decisions are necessarily ad hoc, rendered in concrete cases; they are therefore not the best avenue for injecting new principles into decision-making processes. Moreover, the overall object of the exercise should not be forgotten. What matters for legitimacy purposes is not only that justice be done, but also that it be seen to be done. Put together, these considerations point in the same direction: the best way to introduce the principles discussed here would be through a framework act that would be adopted in the most solemn (visible) of manners and that apply to all committee proceedings.

The Need for a “Soft” Proceduralization

Turning now to the kind of procedural requirements that should be imposed on committees, it should be kept in mind that procedural requirements traditionally carry a twofold risk: that of imposing undue expense on rule-makers by encouraging legalism, and that of opening up the door to forms of aggressive judicial review, which may ultimately lead to judicial discretion replacing that of the administration.

The American experience is quite telling in this respect. The US Administrative Procedure Act provisions on rule-making are quite general. Agencies are obliged to give notice that they are contemplating new rules, provide an opportunity for the public to comment on draft rules, and furnish a statement of purpose with the final rule. These minimal requirements were not adopted with a view to curtailing agencies’ discretion; courts were merely allowed to strike down rules that were “arbitrary and capricious”. Yet, on the basis of these few provisions, some courts of appeal have radically transformed the rule-making process. Agencies have been ordered to engage a structured dialogue with interested parties, a dialogue which must be documented in rule-making proceedings. Statements of basis and purpose have been used by courts to provide an opportunity for the public to comment on draft rules, and furnish a statement of purpose with the final rule. These minimal requirements were not adopted with a view to curtailing agencies’ discretion; courts were merely allowed to strike down rules that were “arbitrary and capricious”. Yet, on the basis of these few provisions, some courts of appeal have radically transformed the rule-making process. Agencies have been ordered to engage a structured dialogue with interested parties, a dialogue which must be documented in rule-making proceedings. Statements of basis and purpose have been used by courts to provide an opportunity for the public to comment on draft rules, and furnish a statement of purpose with the final rule.

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control both the quality of the dialogue and the reasons given by agencies, so that

“[f]ar from having to demonstrate only that it has not been arbitrary and capricious, the agency must persuade the court that it has made the best rule that it possibly could.”

This evolution illustrates the fact that the borderline between procedure and substance is a thin one. Hence the question: by regulating the interface between comitology and interested parties, are we not opening the door to the legalization of comitology proceedings, leading to the development of adversarial proceedings within committees and judicial interference with committee choices? Will the development of legal disputes, some of which might simply serve the dilatory aims of adverse parties, not hamper decision-making?

Clearly, this prospect is alarming for the Union. Because of its nature as a consensus-based system, comitology would be likely to suffer even more than American regulatory agencies from excessive legalization since consensus-building among the experts would become more difficult. The increase in transaction costs might ultimately threaten the overall efficiency of the system. Thus, in the name of legitimacy, one would compromise the system’s ability to deliver good rules within reasonable time spans. That would be paradoxical, as the legitimacy of modern governance is as much a matter of outputs as of inputs. However, how real is the risk?

First of all, procedural rules of the kind contemplated above, rules that would require greater openness and transparency in committee proceedings, essentially provide for a wider variety of inputs before decisions are made. Decisions, however, would still be taken by committee members and therefore the quality of discussion among experts, which is said to be one of comitology’s positive achievements, should not change dramatically. Secondly, the emphasis should be strictly on procedures, and judicial review of the merits of comitology decisions should be excluded. Clauses that might be perceived by courts as an invitation to engage in substantive scrutiny -- such as the clause on "arbitrary


and capricious" rules in the US Administrative Procedure Act — should therefore be avoided.39

True, the American example has shown that the legalization of rule-making is more a product of judicial behaviour than of formal requirements. Courts may, if they so wish, exploit even the most lenient requirements to justify more aggressive scrutiny. At the European level, therefore, the real question is whether the European Court of Justice and the Court of First Instance are likely to follow the path of their US counterparts and use procedural requirements to monitor more closely the substance of comitology decisions. Although it is impossible to give a clear-cut reply, some points are worth mentioning.

First, would committees be exposed to judicial censure if they failed to comply with procedural requirements? The difficulty here stems from the fact that comitology committees do not formally decide but merely adopt an opinion which conditions the Commission’s margin of manoeuvre. Thus, presently, the only act against which an appeal could be lodged would be the Commission’s ultimate decision. However, recent developments in Community case law suggest that Community courts may be willing to accept that procedural flaws at earlier stages of an administrative proceeding, be it at national40 or at Community level,41 can lead to the annulment of the Commission’s final decision. In Technische Universitat Munchen, the University of Munich, which had applied for an exemption from customs duties on the import of an electron microscope, had not been given the opportunity to submit observations to the group of experts advising the Commission on the existence of an equivalent apparatus within the Community. Although the technical debate occurred, by the Commission’s own admission, exclusively within the expert group42 the Court of Justice considered that procedural flaws at earlier stages of the procedure could somehow be imputed to the Commission.43 The Court held that, although the applicable regulation did not provide for such a hearing, "the person concerned

40 Case T-364/94, France Aviation v. Commission, supra note 35.
41 Case C-269/90, Hauptsollamt München-Mitte v. Technische Universität München, supra note 34.
42 The Commission had indeed admitted that it always followed the opinions of the group of experts. See recital 21.
43 Nehl, supra note 35 at 108.

should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution..."44 Thus, if comitology procedures were to be codified, a similar reasoning might lead the Court to annul Commission decisions on the basis of procedural irregularities in committee deliberations.

Does it automatically follow that one would run the risk of unwanted judicial interference? This seems rather doubtful in the present circumstances. The ECJ has become a rather heterogeneous body. Not only are all nationalities of the Union represented therein, but judges are characterized by a wide array of professional backgrounds and (one might assume, given the way they are appointed) political preferences. This, combined with the consensual character of decision-making, renders judicial activism less probable than with smaller, more homogeneous courts, where judges’ preferences can more easily find their way into decisions. Secondly, the European Court of Justice has displayed a clear reluctance to censure the policy choices made by the political institutions, particularly in areas where they enjoy discretionary powers.45 This is not to say that the Court will never annul decisions of the Council or the Commission, but rather that as a rule, when it does so, its rulings appear more inspired by procedural considerations than by substantive concerns. This long-standing tendency has become, if anything, even more accentuated in recent years,46 leading occasionally to criticism of the Court for its unwillingness to question choices made by Community institutions.47 The Court’s jurisprudence on subsidiarity48 and that of the Court of First Instance on access to documents held

44 Case C-269/90, supra note 35 at para. 25, my underlining.
45 This tendency has been quite strong in the Court’s case-law on proportionality. In a case which concerned inter alia a decision of a management committee, the ECJ stressed that: "as the evaluation of a complex economic situation is involved, the Commission and the Management Committee enjoy, in this respect, a wide measure of discretion. In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion." (case 29/77, Roquette v. France, [1977] ECR 2545, recital 43).
by Community institutions\textsuperscript{49} give evidence of their reluctance to transform procedural requirements into an instrument of substantive review. Given this background, it would be somewhat surprising to see the Court engage in detailed scrutiny of committees decisions or even to impose an exacting dialogue with private interests.

Admittedly, proceduralization puts a premium on organizational and legal resources, which are unevenly distributed.\textsuperscript{50} This, however, should not be viewed as a decisive argument against more openness. Under the present system, characterized as we saw by the opacity and lack of accountability of comitology proceedings, “strong” interests already have access to information and are able to influence decision-makers, be they members of parliaments or bureaucrats, at national or European level.\textsuperscript{51} It is unlikely that the adoption of procedural rules would exclusively or indeed mainly favor such interests. At the same time, however, positive measures aimed at improving representation of diffuse interests, are needed to prevent proceduralization from being a mere “trompe l’oeil” and to ensure that it actually benefits European citizens at large.

Conclusion: Comitology Paradoxes

Comitology is a world of paradoxes. While it appears to be growing both quantitatively and qualitatively, comitology often is ignored in discussions on the legitimacy of European policy-making, still heavily focused on legislative procedures. The debate among the Council, Commission and Parliament on the proper role of committees is often conflictual; yet the day-to-day work of committees seems rather consensual. Notwithstanding a widespread disenchantment with the way the European policy process operates, each institution continues to seek to maximize its own influence. All appear relatively unconcerned with creating channels through which European citizens may voice more directly their views.

This contribution has pleaded for a radically different approach to comitology reform, in which interested citizens would be given a say in committee deliberations. Yet, the procedural avenue outlined here, with its emphasis on transparency and openness, should not be seen as an alternative to the political control exercised by the Council and the European Parliament. On the contrary, the emergence of a public debate on committee decisions might reinforce political control, thereby contributing to the emergence of a transnational public sphere.

Can enhanced legitimacy be obtained without at the same time threatening the efficiency of the present system? To be sure, this is a formidable problem. The proceduralization of committee work carries a twofold risk of excessive legalization and judicial interference. I have tried to show that given the great heterogeneity of the Community, the risk of judicial activism is less acute than in other systems. This is not to say that the problem should be overlooked. On the contrary, a systematic survey of means of avoiding these two evils should be undertaken. The purpose of legal procedures should be to ensure the fairness of the decision-making process, not paralyze it, nor serve as a Trojan horse for judicial policy-making. At the same time, in view of the widening gap between citizens and representative institutions, it is counterproductive to use dangers of that kind as a scarecrow in support of the status quo.


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