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# The European Parliament and Comitology: On the Road to Nowhere?

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**Abstract:** *The European Parliament has generally been deeply distrustful of the comitology system, primarily on the grounds that it allows the national administrations to undermine its supervisory role in the area of implementing legislation. Parliament has therefore sought to use the political, budgetary and jurisdictional means at its disposal to counteract the spread of comitology, or at least to promote the less intrusive forms of committee procedure. These initiatives have not, for the most part, been wholly successful; neither the interinstitutional agreements nor Parliament's arguments before the Court of Justice have produced the results it had hoped for. Parliament has been able, however, to use its Maastricht powers to influence the choice of committee procedure included in legislation adopted under codecision, and its budgetary tactics have forced the Commission to rationalise somewhat the annual expenditure on committees of all kinds and to bring a modicum of transparency into their operation. The imminence of the intergovernmental conference led to a suspension of hostilities towards the end of 1996.*

## I Introduction

The debate on comitology has in recent years been widened beyond the narrow confines of the supervisory procedures under which the Commission adopts delegated legislation.[1] Irrespective of whether the European Parliament (hereafter, 'Parliament') takes account of this wider context in formulating its positions, its action has tended to concentrate on the role, powers and activities of the supervisory committees, or, as they are described in its resolution of 26 October 1995, 'executive committees on Union activities'.[2] For this reason, the present paper necessarily also concentrates on supervisory committees; in this regard, as in its participation in the adoption of legislation generally, Parliament is obliged by the requirements of Community

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[1] See, for example, Dehousse *et al*, *Europe After 1992: New Regulatory Strategies*, EUI Working Paper LAW No 92/31 (1992); Pedler and Schaefer (eds) *Shaping European Law and Policy: the Role of Committees and Comitology in the Political Process*, EIPA 96/06 (1996), and Joerges, Ladeur and Vos (eds) *Integrating Scientific Expertise into Regulatory Decision-Making*, (Nomos, 1996).

[2] OJ 1995 C 308/133; other committees, such as those which advise the Commission, have nonetheless sometimes been affected by Parliament's budgetary initiatives (see section III, below).

*realpolitik* to defend its own institutional position at the same time as it seeks to represent the substantive interests of the electorate.

It is usual to consider Parliament as a stable rational entity which systematically seeks to adopt consistent positions on a given matter over a given period, like, say, the ECJ or the Commission. This practice, though convenient, can be misleading; Parliament has been known to adopt contradictory positions on the same subject within an embarrassingly brief time span. Furthermore, its decisions are on occasion influenced by factors which are not amenable to scientific justification or quantification, such as public opinion or institutional pride.[3] Nor is Parliament necessarily collegial in practice; various parliamentary groupings (the conference of Presidents, political groups, committees, and back-benchers) may each have different perspectives on both substantive and institutional issues, and a given position adopted by Parliament may only reflect the views of a particular group which has carried the day. On the issue of comitology, certain parliamentary committees are more virulently opposed to the presence of supervisory committees than others, and, globally speaking, back-benchers are more hostile to the comitology system than designated opinion leaders, such as rapporteurs, vice-presidents and political group chairmen.

Parliament has sought to combat what it sees as the menace of supervisory committees on three fronts, though with only a modest degree of success. For the purposes of presentation, its various initiatives may be classified as political, budgetary and legal. These different routes have been followed by diverse parliamentary organs and the plenary at various times, or even at the same time; it would be difficult to identify any institutional strategy, though its general attitude, particularly since the Single European Act, has been one of deep distrust, boiling over on occasion into barely disguised hostility.

## II Political Initiatives

### *A Resolutions and Legislative Amendments Pre-SEA*

Parliament's first resolution on the role of supervisory committees in the adoption of delegated legislation pre-dated by several months the Common Agricultural Policy regulations which brought the management committee procedure into the world. Based on unofficial information that the Council was intending to subject the exercise of the Commission's implementing powers in the sphere of the common agricultural policy to the assent of a new administrative body, a pre-emptive resolution of 20 December 1961 'protest[ed] energetically against any solution which would deprive the Commission of its Treaty powers', and requested the Council not to take any decision on the creation of new institutional organs without prior consultation of Parliament.[4] Though the solution adopted by the Council was less drastic than had been anticipated, Parliament was both peeved at the Council's failure properly to apply the consultation requirement (and powerless at the time to do anything about it[5]) and

[3] Its decision to proceed in 'Chernobyl', despite the unmistakable, if implicit, invitation from the Court to withdraw its action illustrates the latter (Case C-70/88 *European Parliament* v *Council* [1990] ECR I-2041.)

[4] OJ 72/62, 17 January 1962; it appears that the resolution was telegraphed, presumably to the Council, Bertram 'Decision-making in the EEC: the Management Committee procedure', 5 *CMLRev* 246, 248 (1967-68).

[5] See section IV below.

concerned at the scope of the powers which could as a result be exercised outside the normal consultation procedure under the guise of implementing legislation.[6] In its view, the absence of national parliamentary scrutiny of such measures justified, and required, a supervisory role for the European Parliament in respect of measures dealing with fundamental political questions, particularly when the implementing powers were exercised by the Commission.[7]

The matter of implementing powers was touched upon briefly in a resolution of 17 October 1967 on 'legal problems connected with consultation of the European Parliament'. This resolution advocated a right for Parliament to be consulted on all implementing texts which have 'an appreciable bearing on the legal, economic or political effect' of basic regulations, on pain of a breach of a fundamental procedural requirement.[8]

The most complete review of the Community procedures for the adoption of implementing legislation in the era preceding the Single European Act was the report prepared by Mr Jozeau-Marigné for the legal affairs committee in September 1968.[9] Apart from providing an inventory of the various committee procedures then in existence, the report reached a number of fairly unexceptionable findings on the compatibility with the Treaty of the delegation of implementing powers; in particular, the committee considered that the Council was entitled itself to exercise implementing powers and was under no obligation to delegate such powers to the Commission, and that the variety of procedures for adopting implementing measures was explained by the fact that Article 155 of the Treaty did not lay down any rules or principles in this regard. More ambitiously, the report sought to distinguish between implementing legislation which constitutes a direct application of the Treaty (defined as 'any legal act whose main object is to bring into effect a Treaty provision or principle'), and other implementing legislation ('any legal act whose main object is to lay down ways and means of bringing into effect a text implementing the Treaty but which has no appreciable bearing on its political, economic or legal effects'). In the committee's view, the Commission or Council could only adopt the former following proper consultation, failing which the legislation would be void.[10] Two categories of implementing legislation in particular were identified as *a priori* overstepping the bounds of simple implementation: general agricultural policy rules, and implementing legislation which established norms for the adoption of subsequent measures. To this list could be added implementing measures for the adoption of which unanimity or a qualified majority in the Council was required; the imposition of a more restrictive voting requirement than the simple majority rule established by Article 148(1) of the Treaty was said to create 'a very serious presumption that the acts to be adopted go beyond simple implementing measures.'[11]

The report also examined the functioning of the three main types of committee procedure. There were no objections in principle to advisory committees, though the legal affairs committee appears to have been referring primarily to committees

[6] Deringer Report for the Committee of Presidents on the Fifth General report on the activities of the EEC, EP Doc. 74/62, 5 October 1962, paras 141-143 and 148.

[7] *Ibid*, para 151.

[8] OJ 1967 268/7, and paras 22 to 29 of the accompanying Jozeau-Marigné Report, EP Doc. 110/67 of 6 August 1967.

[9] EP Doc 115/68 of 30 September 1968.

[10] *Ibid*, para 17.

[11] *Ibid*, paras 21 and 23.

appointed in various sectors of economic activity by the Commission, and comprising representatives of the professions concerned and consumer groups, rather than to supervisory committees with a formal consultative role. Noting that the Commission had never objected to the management committee procedure, which allowed representatives of the Member States to participate in the management of the CAP, and that in a six-year period the committees had adopted just five negative opinions, as against 1,034 positive opinions (with no opinion in 124 cases), the legal affairs committee concluded that this procedure did not endanger the freedom of action of the Commission, without reaching any explicit conclusion on its conformity with the Treaty.

Regulatory committees were described as 'institutionalizing cooperation between the Member States and the Commission in regulating an area which is already governed by a basic measure'; their opinions were described as having legal consequences on the subsequent procedure for the adoption of the implementing measures by the Commission. Rejecting views previously expressed by a number of other parliamentary committees, and by individual members in plenary debates, the legal affairs committee came to the following conclusions:

- the influence of the Member State representatives is no greater in the regulatory committee procedure than in the management committee procedure, in that the result of a disagreement between the committee and the Commission is the same, *viz.* that the power of adoption reverts to the Council;
- the Commission is not subordinate to the committee, as the Commission remains master of its proposal;
- the institutionalisation of such cooperation is acceptable, as precise limits on the respective powers of the partners are defined;
- the proliferation of such committees does not transfer powers from the Commission to the Council, as it is the latter which decides whether or not to delegate implementing powers to the former.

The legal affairs committee took the view that the Council would only fail to respect the Treaty if it were to confer on regulatory committees a true power of decision.[12] The committee did, however, propose that whenever the power to adopt an implementing measure reverted to the Council, no final decision should be taken until Parliament had been consulted.[13]

The resolution adopted by Parliament in plenary session on 3 October 1968 only partially reflects the breadth of the findings of the legal affairs committee.[14] It notes that only the Council and Commission can exercise implementing powers, that the delegation of powers to the Commission does not imply its subordination to the Council, and that the administrative organisation of the Commission offers the best technical conditions and guarantees that the Community interest is respected in the adoption of implementing legislation. The resolution repeats Parliament's view that it should be consulted on any implementing legislation which directly applies the Treaty, or where the committee disagrees with the Commission, and that the Council should vote by a simple majority. It also asserts that, while assisting the Community institutions to act in full knowledge of the facts, supervisory committees must only be

[12] *Ibid*, para 44.

[13] *Ibid*, para 45; the committee appears to have assumed that the Commission's solution would only be rejected when the importance of the problem exceeded simple management or the automatic implementation of rules already laid down in the basic act.

[14] OJ 1968 C 108/37.

accorded a consultative role, and must under no circumstances share the decision-making powers of the institution concerned.

Despite what was presumably intended to be a definitive statement of a considered position, drafted by the appropriate parliamentary committee, the comitology question refused to go away, particularly because not all of the other committees appear to have shared the cool assessment presented by Mr Jozeau-Marigné. In a plenary debate in January 1975, the Council was taken to task for reserving to itself the right to take a final decision, not only on matters of vital interest to the Member States, but also on technical matters. Speaking on behalf of the public health committee, Mr Walkhoff posited the existence of a clear alternative: 'either the interests involved are really vital, in which case the matters at issue are so important that this Parliament must be consulted on them, or they are in reality technical questions; then it is not necessary for the Council to reserve the decision for itself.'[15] In the same debate, another speaker questioned the legality of the so-called *contrefilet* included in the procedure of the Standing Veterinary Committee,[16] whereby the Council could by a simple majority either adopt a different decision or prevent the Commission adopting any measure; in his view, this contravened the rule, then contained in Article 149(1) EEC, that the Council could only amend Commission proposals acting unanimously.

The Parliament elected in the first elections of June, 1979 lost little time in putting comitology back onto the agenda. In a resolution of April 1980, in preparation for the appointment of a new Commission, Parliament opined that, as the Commission was 'the natural executive organ of the Community', advisory bodies 'must under no circumstances acquire powers other than the advisory powers assigned to them, which would involve transferring to the Council the executive responsibilities of the Commission', and proposed that a general regulation 'restore the existing bodies to their purely advisory capacity'.[17] In succeeding years, Parliament resorted to various tactics to eliminate 'unacceptable' forms of supervisory committee through its amendments to Commission proposals. These included:

- deleting the provisions involving a committee in the decision-making process, and stipulating that the Commission would take the necessary decisions alone;[18]
- substituting a committee of representatives of the economic sector concerned for one comprising government appointees;[19]
- downgrading the powers of the committee procedure proposed from management to advisory, with parliamentary consultation in case of a negative opinion from the committee;[20]
- including European Parliament observers in the composition of the committee.[21]

These were at best *ad hoc* reactions in individual cases rather than the application of a consistent policy. On the eve of the second elections, an attempt was made to define such a policy in respect of 'committees for the adaptation of directives to technical and

[15] EP Debates of 15 January 1975, OJ Annex No 185, at 103.

[16] See now procedure type III(b).

[17] OJ 1980 C 117/53; the resolution cites the report of the 'Three Wise Men' on the European Institutions of October 1979, which proposed a more extensive delegation of powers to the Commission as a means of reducing the Council's workload.

[18] Pre-accession aid to Portugal, OJ 1981 C 234/99.

[19] Community system for the conservation and management of fishery resources, OJ 1981 C 327/131.

[20] *Ibid*, Fishery conservation.

[21] Rules on the Committee of the European Social Fund, OJ 1983 C 161/48.

scientific progress'.[22] The resolution is posited on 'the general principle common to the laws of the Member States that the delegator should not interfere with the exercise of delegated powers'. Parliament considered that the 'legislative and consultative powers [of such committees] enable them to play an essential part in the legislative process', that the committees 'are not answerable to any democratically elected body at either Community or national level', and that 'the Commission should be able to exercise the powers delegated to it by the Council under Article 155, fourth indent, EEC Treaty untrammelled by the necessity to submit its draft measures to such committees'. As the committees under this view 'substitute in effect for the powers conferred by the Treaties' on the European Parliament, the remedy proposed was to provide Parliament with a *droit de regard* over all the measures which the Commission proposed to send to the committees, and an opportunity to give an opinion on the measures. The entire process would be subject to deadlines, of two months during which Parliament would indicate whether it wished to give an opinion and, if so, of a further three months for the delivery of the opinion. The Commission was requested to produce a report within a year on the follow-up to the resolution, while the parliamentary committees were instructed to prepare for 'future action by Parliament to bring the procedure of other regulatory committees into line with that envisaged in the present resolution'. Though neither of these requests appears to have borne fruit, in December 1984 an amendment implementing the 'Tyrrell procedure' was included in Parliament's opinion on a proposed directive on extraction solvents in foodstuffs.[23]

At present, Parliament appears to have adopted a more consistent line in its legislative opinions, and, particularly since the beginning of 1996, regularly proposes the substitution of an advisory committee procedure for that involving a regulatory or management committee. This approach is not confined to proposals under codecision, where Parliament can be sure of imposing its views if it so choses, but is also followed where the consultation and cooperation procedures apply.[24]

### *B The Comitology Decision and Beyond: the Era of Interinstitutional Agreements*

Within weeks of the signature of the Single European Act, Parliament was consulted on the proposal for a regulation which subsequently became known as the 'comitology decision' of 13 July 1987.[25] Significantly, the more moderate line proposed by the committee responsible,[26] which favoured the retention of the regulatory committee procedure, albeit with a certain degree of parliamentary involvement, was not followed by the plenary. In its final vote on 23 October 1986,[27] Parliament voted amendments to delete the regulatory procedure completely, to ensure that all draft implementing measures be tabled in Parliament on the day they are forwarded to advisory and management committees, and to provide for consultation of Parliament before any decision by the Council to substitute its decision for that of the Commission in the management committee procedure. Additional provisions sought to oblige the Council

[22] Resolution of 21 May 1984, based on a report of the legal affairs committee drawn up by Mr Tyrrell (EP Doc. 1-205/84).
[23] OJ 1985 C 12/150.
[24] See, for example, Parliament's first reading for a directive on ambient air quality, OJ 1996 C 166/67; see also Section III, below.
[25] COM(86)35 final of 3 March 1986 (OJ 1986 C 70/6); Council Decision 87/373/EEC, OJ 1987 L 197/33.
[26] Hänsch Report, EP Doc. A 2-78/86.
[27] OJ 1986 C 297/94.

to give precedence to the advisory committee procedure, particularly for the implementation of measures adopted under Articles 100a EEC (internal market), and 'financing decisions pursuant to Article 205';[28] to allow Parliament to initiate the conciliation procedure to examine the proposed inclusion of a committee procedure; to oblige the Commission to report to Parliament on the work of the committees; and to ensure that the procedures of existing committees would be brought into line with the new scheme.

The comitology decision itself was criticised, again preemptively, in a resolution of 8 July 1987,[29] as having taken no account of Parliament's demands for an improvement on the existing practice; the decision is described as 'an alarm bell demonstrating the manifest lack of political will on the part of the Member States to give practical effect to the objectives of the SEA' on the eve of its coming into force. While hinting at possible breaches of its prerogatives, Parliament resolved 'to do its utmost to cooperate constructively in implementing the SEA' and called upon the Council to do the same. This constructive cooperation did not, however, signal any acceptance of the decision itself; under guidelines adopted by the chairmen of the parliamentary committees which were subsequently approved by Parliament's Enlarged Bureau, plenary was urged systematically to delete regulatory committee procedures at first reading in favour of the management committee procedure, except for internal market measures under Article 100a where the advisory committee was to be preferred; 'when the subject matter is particularly important or sensitive', a full legislative procedure was to be proposed. Regulatory committee III(a) could be accepted exceptionally on second reading, except for internal market measures, for which procedure II(b) was the 'maximum acceptable compromise.' [30]

The parliamentary resolutions adumbrated above clearly had had little or no impact in either stemming the growth of comitology, or in obtaining for Parliament a degree of influence on the content of implementing legislation. The comitology decision prompted Parliament to try other forms of action; to wit annulment proceedings before the ECJ, the first such proceedings Parliament had ever sought to initiate (see further, section IV, below), and the conclusion of a number of inter-institutional agreements with the Commission.

Following up certain undertakings which the President of the Commission, Mr Delors, had given during the course of the debate on the comitology proposal, in December 1987 Lord Plumb, President of Parliament, proposed arrangements whereby Parliament would be notified of draft implementing measures. The proposal is couched in the following terms: '[w]ith the exception of routine management documents with a limited period of validity and documents whose adoption is complicated by considerations of secrecy or urgency, draft decisions relating to legislative documents will be forwarded to Parliament, for information, at the same time that they are forwarded to the committees in question, and in the same working languages'. The Commission's acceptance of the proposed arrangements was notified to Parliament by letter of 14 March 1988; Parliament had already added a new provision to its rules of procedure, effective from the entry into force of the SEA,

[28] See also Case 16/88 *Commission* v *Council*, discussed at section IV, below.

[29] OJ 1987 C 246/42.

[30] The guidelines, which had already been in force for some years, were recalled in the resolution of 13 December 1990 (OJ 1991 C 19/274).

charging the President to refer to the committee responsible any implementing measures or proposals tabled by the Commission.[31]

A similar agreement was concluded in July 1993 between the President of Parliament and the Commissioner responsible, Messrs Klepsch and Millan, to enable Parliament to follow the implementation of structural fund regulations.[32] Under this arrangement, Parliament is to receive Member State plans, the Community support frameworks and, on request, the operational programmes approved by the Commission. The Commission undertakes to 'take full account of the guidelines set by the EP for the implementation of Community initiatives', to 'take into consideration whenever possible' its requests regarding draft Community initiatives notified to the relevant committee, and to provide other information concerning pilot projects, studies and financial control. Draft Commission decisions concerning the detailed provisions regarding information and publicity on Structural Fund actions are also to be forwarded to Parliament.

The operation of such agreements depends primarily on the Commission's willingness and ability to keep Parliament informed of all the initiatives it takes with a view to the adoption of secondary legislation, subject to the listed exceptions. Doubts were soon raised in Parliament as to whether the Commission was, in fact, keeping its side of the bargain. According to figures compiled by Parliament's secretariat, 171 proposals were transmitted to Parliament from May 1989 to March 1992 under Plumb-Delors, though at the time it was estimated that the Commission was annually adopting around 400 measures involving the participation of comitology committees.[33] Furthermore, the proposals received in the reference period, which included the run-up to the single market and the implementation of the SEA generally, were concentrated in the fields of agriculture and the customs union, to the almost total exclusion of the other spheres of Community activity. The Commission was also criticised for failing to give any indication of the expected timing of a particular proposal, and on occasion transmitted the proposal to Parliament many weeks after the committee had received it.

Under these conditions, it is not surprising that during the first three years of operation of Plumb-Delors, Parliament had taken a position in plenary on just one of the 171 proposals, albeit apparently to some useful effect. Noting that a proposal for a Commission directive on infant formulae and follow-up milks did not include a number of Parliament's amendments, the resolution enjoins the Commission 'to restore fully to its proposal the amendments it accepted when Parliament delivered its opinion on the [original] proposal'.[34] The resolution also propounded the novel view that 'the new procedures . . . make it easier for the Commission to stick to its undertakings to Parliament, as it is now empowered to adopt the measures in question itself, subject only to the approval of a regulatory committee'.

Even after the adoption of a more robust budgetary approach to supervising committees in general in 1995 and 1996,[35] the Commission failed to dissipate parlia-

[31] Rule 53, now rule 81, OJ 1997 L 49/28.

[32] OJ 1993 C 255/19.

[33] An earlier resolution noted that only 48 draft implementing measures had been transmitted to Parliament in over two years, and that 'two-thirds of these concerned highly technical matters relating to trade nomenclature' (OJ 1991 C 19/274).

[34] Resolution of 19 April 1991, OJ 1991 C 129/226; the original proposal to the Council had, in fact, been replaced by a framework directive which allowed the Commission to adopt implementing directives.

[35] See section III, below.

mentary dissatisfaction. In the period from 1 July 1994 to 31 March 1996, only 166 draft implementing measures of unlimited duration (not concerning agriculture) out of a total of 491 adopted by the Commission had been transmitted to Parliament under the Plumb-Delors and Klepsch-Millan agreements.[36] Previous complaints on the flow of information and the lack of time imparted to Parliament to formulate its position on such draft measures as had been communicated to it were repeated. Despite their imperfections, the Parliament and the Commission agreed in their 1995 code of conduct to maintain both of these agreements 'pending the revision of the Treaties'.[37]

### *C Codecision and Comitology: Golden Opportunity or False Dawn?*

The inclusion in the Treaty on European Union of a form of codecision procedure for the adoption of a limited but important category of legislative measures presented Parliament with a, probably fortuitous,[38] opportunity to take a new initiative on the comitology question. Parliament's reasoning, as expressed in a resolution adopted in December 1993, was that 'the provisions of Article 189b EC imply full equality of Parliament and Council in the legislative procedure'; as the third indent of Article 145 EC refers only to 'acts which the Council adopts', this provision could not be applied to acts adopted under the codecision procedure.[39] It therefore called for the adoption of a 'line of conduct' for the adoption of implementing legislation based on acts subject to codecision. This proposal would allow the Council only to impose an advisory committee, and oblige the Commission systematically to inform Parliament of its legislative initiatives. The Council and Parliament were to be given a power of veto to be exercised jointly, though without suspensive effect, requiring the Commission to adopt a new decision to take account of guidelines laid down by the other institutions.

Parliament's position received a predictably frosty reception from the Council. In turn, this led to a breakdown in interinstitutional cooperation in the first fifteen months or so of the operation of the codecision procedure; Parliament refused to accept implementing procedures under which the decisional power could revert to the Council acting alone, while the Council refused any other solution. Thus, for example, in giving its second reading opinion on a common position for a directive on mechanical coupling devices of motor vehicles, Parliament sought to replace the regulatory committee by a new procedure providing for the consultation of both a Council committee and the competent parliamentary committee.[40] Following this consultation, either institution could propose to the other that the Commission decision be annulled, and in case of agreement the decision was considered annulled, though the amendment failed to specify the consequences of a failure to agree. The advisory committee procedure proposed in the common position on recreational craft was also amended to include the consultation of the Parliament, and an obligation on

[36] Working Document No. 1 on developments on the comitology dossier of the budgets committee, PE 216.965 of 30 April 1996.

[37] OJ 1995 C 89/71.

[38] Given the ambiguous legal situation which has arisen, it seems unlikely that the authors of the TEU even considered the question.

[39] OJ 1994 C 20/176; see also Blumann, 'Le Parlement européen et la comitologie: une complication pour la Conférence intergouvernementale de 1996' 32 *RTDE* 1, 8-11 (1996).

[40] OJ 1994 C 91/75.

 

the Commission to take the utmost account of its opinion.[41] Both directives were eventually adopted without any specific provision for the adoption of implementing measures.[42]

Disagreement on comitology is generally credited with responsibility for the first failure of a codecision procedure, concerning the application of open network provision ('ONP') to voice telephony. In its common position, the Council favoured a regulatory committee for the implementation of a number of significant aspects of the proposed directive; Parliament replaced this with an obligation on the Commission to consult the representatives of various interested parties, such as the telecommunications organisations, consumers and trade unions.[43] In the absence of an agreement on a joint text, the Council decided to confirm its common position in accordance with Article 189b(6), though, very properly, it delayed the formal decision for nearly two months until the end of June 1994, in order to enable the newly elected Parliament to take a position within the Treaty deadline; the first legislative act of the new Parliament was to reject the reconfirmed common position by an overwhelming margin.[44]

The ONP debacle may have had some effect in persuading the Council to look more favourably on the idea of an interinstitutional agreement on comitology within codecision. Negotiations were conducted throughout the autumn between the Council, the Commission and Parliament to break the deadlock, and in December 1994 agreement was reached on the text of a *modus vivendi*.[45] This provides that:

- the appropriate parliamentary committee be sent 'any draft general implementing act submitted by the Commission and the timetable for it';
- the Commission shall inform the parliamentary committee of any negative opinions delivered by supervisory committees, and notify the committee whenever it is obliged to submit a proposal to the Council;
- the Council shall only adopt such general implementing measures after giving Parliament a reasonable time to deliver an opinion, and 'taking due account of the European Parliament's point of view without delay, in order to seek a solution in the appropriate framework'[46] where this opinion is negative.

The agreement is expressed to be without prejudice to the positions of principle of the institutions concerned, and pending any revision to be discussed at the 1996 IGC.

Parliament's rapporteurs welcomed this as 'significant advance on existing practice as regards the involvement of the European Parliament' which would 'improve democratic accountability and transparency, and . . . help to prevent delays or deadlock on legislative texts'.[47] The plenary resolution approving the text adopted a more restrained tone, describing the agreement as 'a pragmatic and provisional means of dealing with the problems raised by the application of the procedure under Article 189b, on the understanding that a definitive and fully democratic solution to these problems must be found at the 1996 Intergovernmental Conference'.[48] The agreement

[41] *Ibid*, 79.
[42] Directive 94/20/EC, OJ 1994 L 195/1, and Directive 94/25/EC, OJ 1994 L 164/15, respectively.
[43] OJ 1994 C 44/93, 97.
[44] Council postponement, OJ 1994 C 205/237; rejection, OJ 1994 C 261/3.
[45] OJ 1996 C 102/1.
[46] It seems that Parliament interprets this as referring to the conciliation procedure.
[47] EP Doc A4-0003/95 of 12 January 1995, 16.
[48] OJ 1995 C 43/37.

was first applied in December 1994 by the conciliation committee considering the proposal for a directive on the maximum design speed of motor bicycles.[49]

If the first year or so of operation is anything to judge by, the *modus vivendi* has proved no more satisfactory than previous interinstitutional agreements on comitology, even as a 'short-term compromise designed to avert endless disputes between Parliament and the Council which were in danger of discrediting the codecision procedure in the period ahead of the Intergovernmental Conference'.[50] Not only does it leave the comitology system intact, and fail to put the Council and Parliament on an equal footing, but also, according to Parliament's rapporteurs, it does not work even on its own limited terms: the Commission has not established a proper structure for applying the *modus*, it does not supply sufficient information, nor transmit all the measures covered, nor allow Parliament sufficient time to adopt a position. The rapporteurs propose that the power to adopt implementing measures be vested in the Commission, possibly following an opinion from an advisory committee, that draft measures be deemed adopted in the absence of objections from either the Council or Parliament within a specified period, and that the lodging of such an objection would entail either a revision of the initial proposal or the presentation of a legislative proposal.

### *D Treaty Reform Proposals*

Parliament's regular initiatives on Treaty reform provide it with the opportunity to examine the comitology question in a wider framework than that which arises in considering individual legislative proposals. While advancing various solutions at different times to the problem, its opposition to certain forms of comitology procedure has been fairly constant.

In accordance with Article 28 of the Draft Treaty establishing the European Union of February 1984, the Commission would 'issue the regulations needed to implement the laws and take the requisite implementing decisions', while Article 40 would have left to each 'law' (adopted under a form of Parliament-Council codecision procedure) to determine the procedure under which implementing regulations and decision would be adopted.[51] In the run-up to the Maastricht intergovernmental conference, Parliament proposed retaining two options: an advisory committee procedure, and a variant of the management committee procedure, whereby a negative committee opinion would require that the full legislative procedure applied.[52] Neither form of supervision would apply to the implementation of the budget, said to be governed by Article 205 EC alone.

In its first attempt to adopt its position for the 1996 IGC, Parliament '[noted] with satisfaction' a Draft Constitution of the European Union annexed to a resolution of February 1994.[53] Article 34 of this fairly radical text provides that 'the Commission

[49] See Directive 95/1/EC, OJ 1995 L 52/1, Article 4 of which provides for a standard regulatory committee procedure.

[50] EP institutional committee, initial working document on the *modus vivendi*, PE 218.255 of 12 September 1996.

[51] OJ 1984 C 77/40

[52] OJ 1990 C 324/230-231; the enigmatic 'Justus Lipsius' has also called for the abolition of the regulatory committee procedure, as did the Commission in 1990 ('The 1996 Intergovernmental Conference' 20 *ELRev* 235, 264 (1995), and Bull. EC Supp 2/91, 117-118, respectively).

[53] OJ 1994 C 61/155.

shall have regulatory power with a view to the implementation of the laws of the Union and may . . . take individual measures with a view to the application of Union law. The Council may be made responsible by law for exercising the regulatory power in specific areas'. Parliament's own role in this regard was covered by the general power to 'exercise political supervision over the activities of the Union'. A more traditional approach was adopted in Parliament's resolution of May 1995, which called for the simplification of the existing system by abolishing the management and regulatory committee procedures, while allowing both Parliament and the Council a right to veto draft Commission measures, whereupon the Commission would either submit new implementing measures or initiate the relevant full legislative procedure.[54] This last position was repeated in its resolution of 13 March 1996 on the convening of the IGC and evaluating its progress.[55]

The Westerdorp Group report of December 1995 presaged little progress in this regard. Recognising that the *modus vivendi* had in effect put comitology on the IGC agenda, the Group outlined three positions:

- the establishment of a hierarchy of acts assigning executive power to the Commission, under the control of the Council and Parliament;
- the simplification of the present procedures, though preserving the Council's executive role, and
- the instigation of a single procedure, under which the Commission would act in consultation with national experts, subject to the right of the Council or Parliament to require the application of the full legislative procedure.[56]

The Group also noted a large majority 'in favour of simplifying the present committee procedure, which is already complicated and confused and will not survive beyond the next enlargement'.

## III The Budgetary Approach: 'MEPs batter at the door of the secret society'

The cost of running 'committees of a management, advisory and consultative nature' (sic) first came to Parliament's attention during its consideration of the draft general budget for 1983, probably because the Commission had estimated that an increase in expenditure of 31% over the 1981 figures would be required in 1983; pending an inquiry into the matter, Parliament entered 2m ECU earmarked for working groups and another 2m ECU destined for comitology committees in reserve chapter ten.[57] The inquiry revealed that the Commission had no centralised system of monitoring the activities of the committees, and that as a result their 'consultation activities are to some extent autonomous and no longer fully under the Commission's supervision.'[58] Parliament resolved to rationalise the committee system, though 'without damaging the consultation function which is virtually a traditional routine of the Commission and which has certain positive and beneficial aspects'. Reporting back to Parliament the following February on the activities of the committees in 1983, the Commission observed that the corps of 603 committees and working groups had been slimmed

[54] OJ 1995 C 151/65; in 1990, the Commission had proposed a 'power of substitution' for Parliament and the Council for regulations implementing a 'law' (Bull. EC Supp. 2/91, 117-118).

[55] OJ 1996 C 96/87.

[56] Paragraph 127 of the report.

[57] Remarks on Articles 250 and 251, OJ 1983 L 19/289.

[58] Resolution of 16 September 1983, OJ C 277/195.

down, in line with Parliament's wishes, to an altogether more presentable 132.[59] Parliament noted with satisfaction that the upward spiral in the number of committees and groups had been reversed, that 89 such bodies had been merged or dissolved and a further 43 mothballed, giving a reduction of 21%.[60] The Commission was urged to keep the matter of committees and working groups under review, and to keep proper minutes of all meetings, showing attendance, duration and opinions delivered.

The budgetary aspects of comitology have recently come to the forefront of Parliament's attention again. In adopting the 1995 general budget, it transferred 90% of the expenditure for both comitology and non-comitology committees to reserve chapter ten,[61] and requested the Commission to provide it with 'a complete list of all the decisions taken during 1994 by the different committees'.[62] The Commission responded swiftly, with a two-volume report, plus an addendum, totalling 1918 pages, and covering 355 committees under line A-2510 (comitology committees) and 69 committees operating under line A-2511 (other committees).[63] Parliament agreed to transfer a further 40% of the appropriations to the relevant lines in February 1995, and the remaining half in July.[64] In its report to plenary on the Commission's response to this initiative in July, the budgets committee noted that the information supplied had not been sufficient to enable the parliamentary committees concerned to evaluate whether the comitology committees had always acted within their mandate.[65] In some cases, it was not possible to determine how often certain committees had met, or what had been their opinion on the various Commission initiatives they examined. This was followed by a plenary resolution in October, which also noted that 'the inconsistency and lack of oversight puts in question the transparency required by the Commission on the application of its executive functions';[66] Parliament therefore called upon the Commission to improve the scope and quality of the information it collated on the activities of the committees, to include committees not covered by the budget lines in question and to provide details of meeting dates, the terms of the opinion given, the voting breakdown and the Commission follow-up in case of a negative opinion. The resolution also called for the committees to meet in public as a rule, 'unless a specific duly motivated decision is taken to the contrary and published in good time,' and to publish their agendas and minutes, as well as a declaration of the financial interests of their members.

Parliament kept up the pressure in December of that year, entering half of the expenditure for each type of committee in the reserve in the general budget for 1996.[67] In a letter to his opposite number in Parliament of 21 December 1995, the Secretary General of the Commission undertook to carry out a number of improvements in the Commission's supervision of the committees, to present Parliament with a note on their activities in 1995, to publish in the Bulletin an overall view of the types of committee and their role in Community policy-making, and to render decision-

[59] COM(84) 93 final,1.
[60] Resolution of 10 April 1984, OJ 1984 C 127/56.
[61] OJ 1994 L 369/450-453.
[62] OJ 1995 C 18/145, 148.
[63] Commission documents XIX/A7/0067/95 (vols. I and II) and XIX/A7/117/95 (addendum).
[64] Respectively, OJ 1995 C 89/1 and OJ 1995 C 249/26.
[65] Wynn report, EP Doc A4-0189/95.
[66] OJ 1995 C 308/134; the expression 'required *of* the Commission' would make more sense in the context.
[67] European Parliament, General Budget 96/96/Euratom, ECSC, EC, OJ 1996 L 22/456-459.

making simpler and more transparent.[68] The Commission refused to give any commitment on the question of the committees' meeting in public, or concerning the register of interests Parliament had requested, on the grounds of the Council's responsibilities in this regard. This limited response had a limited effect; Parliament refused to transfer the remaining 50% of expenditure appropriations to the relevant budget lines until the committee agendas and membership were rendered public; the Commission was reported to have taken 'unprecedented precautionary measures', such as not offering to reimburse the travel expenses of national officials attending committee meetings![69]

An agreement was reached in September 1996 between the Chairman of Parliament's budgets committee and the Secretary General of the Commission.[70] This provides that the Commission will 'make available to Parliament, in good time in advance of committee discussions, the annotated agendas for each meeting of management and regulatory committees', as well as the result of votes held; committee members other than officials will be obliged to declare that there is no conflict between their personal interests and their membership of the committee.[71] Representatives of Parliament or its committees may also request to attend the discussion of certain items at meetings of management or regulatory committees, and may publicise any refusal of admittance. On the basis of this agreement, Parliament decided to shelve the matter until after the IGC.[72]

## IV Proceedings Before the Court of Justice: an Echternacht Procession?[73]

Parliament's attempts to challenge the comitology system before the Court of Justice have been singularly, even spectacularly, unsuccessful. Through a combination of circumstances which can best be described as unfortunate, it has never been allowed to present argument before the Court on the compatibility with the Treaty of the supervisory committee mechanisms. Even its challenges to the adoption and application of such mechanisms in particular legislative acts have failed, though Parliament has succeeded in having an implementing directive of the Council annulled as *ultra vires*.

At the time when the first agricultural regulations establishing the management committee procedure were adopted, Parliament had no standing to take annulment proceedings before the Court of Justice, and so it could not have challenged the

[68] EP budgets committee working document No 1 on developments in the comitology dossier, PE 216.965 of 30 April 1996.

[69] 'MEPs hold hundreds of committees to ransom', *The European Voice* 19-25 September 1996; 'MEPs batter at the door of secret society', *The European* 31 October 1996.

[70] The 'Samland-Williamson' agreement, set out in paragraph 72 of Parliament's second reading resolution on the budget for 1997 of 24 October 1996 (OJ 1996 C 347/125); Parliament released the committee funding in early November.

[71] The veterinary scientific committee, which came under the spotlight during Parliament's inquiry into the Commission's handling of the BSE crisis, felt obliged to publish a press communiqué affirming its independence in November 1996, after allegations against one of its members (*Le Soir*, 20 November 1996).

[72] Para 72 of resolution of 24 October 1996 (OJ 1996 C 347/125).

[73] For a general introduction to comitology from the legal perspective, see, for example, Bradley 'Comitology and the Law: through a glass darkly', 29 *CMLRev* 692 (1992).

regulations even if it had been so minded.[74] The legality of the management committee procedure was not examined by the Court until 1970, in answering the request for a preliminary ruling in *Köster*:[75] the question was identified as concerning 'the compatibility of the Management Committee procedure with the Community structure and the institutional balance as regards both the relationship between institutions and the exercise of their respective powers'. Both the Commission and the Council submitted written and oral observations to the Court, as they were entitled to in accordance with Article 20 of the EEC Statute of the Court; Parliament was not then entitled to submit observations as of right.[76] While Parliament was still a decade away from seeking actively to participate in institutional litigation, the Court can hardly have been unaware of its direct interest in the question of supervisory committees, and indeed Advocate General Dutheillet de Lamothe relied heavily in his opinion on the 1968 report prepared by Mr Jozeau-Marigné.[77] The Court nonetheless did not invite Parliament, as it had on a previous occasion,[78] to give its views on a matter touching on its institutional position.

Given the terms of the Jozeau-Marigné Report and the resulting resolution, it seems unlikely in any case that Parliament would, in those far distant days, have formulated any major objection to the management committee procedure, though it might have raised the question of the Council's failure to consult it on such a fundamental aspect of the 1962 regulations.[79] It is also true that, in requiring that 'the basic elements of the matter to be dealt with [be] adopted in accordance with the procedure laid down' by Article 43 EEC, the Court's judgment came some way to meeting Parliament's demand that it be consulted on any secondary legislation which directly applies the Treaty.[80]

Parliament was similarly absent from the legal stage in *Tedeschi* v *Denkavit*, which is generally taken as having established the validity of the regulatory committee procedure.[81]

The most notorious episode in the saga is, of course, the Court's judgment of September 1988 on the admissibility of Parliament's annulment proceedings contest-

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[74] See now Article 173 EC; for the pre-TEU situation, see Bradley 'The Variable Evolution of the Standing of the European Parliament in Proceedings Before the Court of Justice', 8 *YEL* 27 (1988), and, from 1990, Case C-70/88 *European Parliament* v *Council* [1990] ECR I-2041.

[75] Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster, Berodt & Co* [1970] ECR 1161

[76] Article 20 was amended, with effect from 1 April 1995, to give Parliament the right to submit observations in the preliminary ruling procedure, where the act in question has been adopted under codecision (Council Decision 94/993/EC, OJ 1994 L 379/1).

[77] '[W]ho is, by a happy combination, both a parliamentarian and an excellent lawyer', [1970] ECR 1142-1143.

[78] In *Wagner* v *Fohrmann and Krier* the Court asked Parliament if it had an opinion on when its annual session came to an end, which was the main object of the preliminary ruling (Case 101/63 [1964] ECR 195, 198).

[79] The point had been raised in the Jozeau-Marigné report on consultation of Parliament, *loc. cit.* n 8, at 25; on reconsultation generally see, for example, Case C-21/94 *European Parliament* v *Council* [1995] ECR I-1827.

[80] Whether or not by coincidence, the notions of comitology as 'institutionalized cooperation' and of the Commission's unique technical capacity to follow market trends, used by the Court in *Köster* and *Rey Soda* (Case 23/75 [1975] ECR 1279, 1300), respectively, are both to be found in the Jozeau-Marigné report.

[81] Case 5/77 [1977] ECR 1555.

ing the validity of the 'comitology decision'.[82] Parliament's grounds for complaint were as follows:

- by reserving to itself the last word in most of the procedures, the Council had failed to respect the originating and autonomous implementing powers conferred on the Commission by virtue of the third indent of Article 145 EEC;
- by disregarding the powers of the Commission, the Council had infringed Parliament's prerogative of supervision of the Commission;
- by introducing variants to the management and regulatory committee procedures and adding provisions on safeguard measures, the Council had failed to respect its obligation to reconsult Parliament in cases of substantial modifications of the legislative text.

Somewhat unexpectedly, the Court concluded that 'the applicable [Treaty] provisions, as they stand at present, do not enable the Court to recognise the capacity of the European Parliament to bring an action for annulment';[83] the application was therefore dismissed without the Court's reaching any position on the conformity of the new comitology system with the Treaty. Not twenty months later, the Court changed its mind, holding that an annulment action at the suit of Parliament was admissible 'provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement'[84]. By this token, Parliament's annulment action against the comitology decision would have been admissible, at least in part; however, by the time of the Court's *volte-face*, Parliament considered that any such action would have been foreclosed.

The next proceedings arose from a long-standing political dispute on the implementation of the Community budget;[85] Parliament, and latterly the Commission, considered that the Council could not impose management or regulatory committees on the Commission in this area.[86] At the material time, the first paragraph of Article 205 EEC provided that '[the] Commission shall implement the budget . . . under its own responsibility and within the limits of the appropriations'. A 1987 Council regulation on research in the fisheries sector charged the Commission with implementing Community research programmes and Community programmes coordinating national research, *inter alia*, by concluding contracts with research centres, organising scientific meetings and collating and analysing the results; the Commission's decisions were subject to a management committee procedure. The Commission argued that the third indent of Article 145 EEC only governed its implementation of rules adopted by the Council, and could not be relied upon to justify any encroachment on its exclusive powers to implement the budget. By allowing the Council to adopt the implementing measure (in case of a negative committee opinion), the contested provision was also said to undermine Parliament's supervisory prerogatives in respect of the implementation of the budget, which only operated as against the Commission. In its intervention in support of the Commission, Parliament argued that, as the budget is not a rule laid down by the Council, neither the third indent of Article 145 EEC nor the fourth indent of Article 155 EEC was applicable. The adoption of implementing measures by the Council would seriously jeopardise the

[82] Case 302/87 *European Parliament* v *Council* [1988] ECR 5615.

[83] [1988] ECR 5615, at 5644.

[84] Case C-70/88 *European Parliament* v *Council* [1990] ECR I-2041, 2073; see now Article 173 EC.

[85] Case 16/88 *Commission* v *Council* [1989] ECR 3457.

[86] See Ehlermann and Minch, 'Conflicts between Community institutions within the budgetary procedure: Article 205 of the EEC Treaty' 1981 *EuR* 23

separation of budgetary powers ordained by the Treaty; this would also deprive Parliament of its supervisory jurisdiction over the particular measures.

Interpreting the Treaty provisions on both comitology (Articles 145 and 155) and the implementation of the budget (Articles 205, 206a and 206b) in the light of the Community's institutional system, the Court held that 'the Commission's power to implement the budget is not such as to modify the division of powers resulting from the various provisions of the Treaty which authorise the Council and the Commission to adopt generally applicable or individual measures within specific areas . . . and from the institutional provisions of the third indent of Article 145 and Article 155'.[87] A clear distinction could therefore be made between legislative and budgetary implementation, even where both were entrusted to the same institution, and where the adoption of an individual measure 'may almost inevitably entail the commitment of expenditure'. The autonomous nature of the Commission's power to implement the budget did not in any way preclude the Council's imposing a management committee procedure for (legislative) decisions involving budgetary spending. It followed from this conclusion that Parliament's supervisory powers, which only related to budgetary implementation, were in no way affected by committee supervision of such decisions.

The Court also reached a number of significant conclusions concerning the comitology system in general, though it is not clear from the case report whether these matters had been raised by the parties in argument. In particular, the Court held that:

- the third indent of Article 145 EEC 'expressly preserved' the Council's pre-existing right (*Köster*) to subject the exercise of implementing powers to 'certain procedures', though the Council was now bound to respect the procedures specified in Decision 87/373/EEC;
- under this provision 'the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision';
- the concept of implementation comprises both implementing rules and individual decisions.[88]

Parliament's next legal move sought to exploit this interpretation of Article 145 EC. In intervening in annulment proceedings by the Commission to contest the legal basis of the 1991 framework directive on waste,[89] it argued that the material scope of the directive would in effect by determined by decisions taken under the regulatory committee procedure, type III(a), provided for in Article 18 thereof, and in particular, decisions on the establishment and revision of the list of wastes, and the adaptation of the directive to scientific and technical progress.

Starting from the premise that the purpose of the new third indent of Article 145 EEC was to reinforce the position of the Commission as regards the adoption of implementing legislation, in the same way as the cooperation procedure was intended to strengthen parliamentary involvement in the legislative process,[90] Parliament argued that this provision imposed a general obligation on the Council to confer on the Commission the power to adopt implementing measures. Where the Council did so confer, it was further obliged not to subject the exercise of such power to conditions which deprived the conferment of its useful effect. In the regulatory committee procedure, the Commission's role is reduced to that of initiator, similar to that it enjoys in respect of primary legislation under the consultation procedure, where the support

[87] [1989] ECR 3457, 3486.

[88] *Ibid*, 3485-6.

[89] Case C-155/91 *Commission* v *Council* [1993] ECR I-939.

[90] As the Court had held in 'Titanium dioxide', Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, 2900.

of a qualified majority of the representatives of the Member States is also sufficient for the Commission's proposal to become law; to say in such circumstances that the Commission has a power of decision amounted to what Parliament called 'intellectual prestidigitation'. Parliament further argued that the decision to reserve was vested in the committee, not the Council, in violation of Article 4 EEC, that the reservation was permanent and not limited to 'specific cases', and that the grounds for such a decision to reserve were not stated in detail anywhere.

In the result, the indirect attack failed; the Court found that Parliament's plea concerning the annulment of Article 18 was based on 'grounds which are entirely unconnected with those relied upon by the Commission'.[91] As submissions of intervening parties are limited to supporting the submissions of one of the principal parties, it concluded that this part of Parliament's statement in intervention was inadmissible. It would of course still be open to Parliament to raise similar arguments in annulment proceedings which it initiates, where the admissibility of the arguments would not be in doubt on this ground. This line of attack would, however, face a different hurdle of admissibility laid down in Article 173 EC; Parliament would have to demonstrate that the action had been brought 'for the purpose of protecting [its] prerogatives'.

Given the difficulty of a frontal assault on the comitology system, in 1993 Parliament adopted the less ambitious target of establishing that the modification by the Council of the type of committee procedure after Parliament had given its opinion amounted to a substantial modification giving rise to the duty of reconsultation. Parliament drew support for its view from remarks by Advocate General Darmon in an earlier reconsultation case, to the effect that 'whether powers are to be conferred on the Council or the Commission . . . *is important as regards the institutional balance of* the Communities . . . Further consultation of the Parliament was consequently required on this point also'.[92] In adopting the 'TACIS' regulation, the Council had opted for a regulatory committee procedure, type III(a), in preference to the management committee procedure, type II(b), proposed by the Commission; Parliament was not reconsulted on this modification of the text of the proposal on which it had given its opinion shortly before. In annulment proceedings challenging the regulation, Parliament relied, *inter alia*, on a breach of the reconsultation obligation.[93] The Court agreed with Parliament that 'the choice of one type of committee or another, in so far as it involves different decision-making procedures and a different division of powers between the Commission and the Council, may have a decisive influence on the operation on the arrangements' provided for the exercise of implementing powers.[94] It went on to find, however, that the choice of a type III(a) committee rather than type II(b) was not a substantial modification: 'in this case the overall balance of the powers allocated to the Commission and the Council is not decisively affected by the choice between the two types of committee at issue so that the amendment to the Commission's proposal is not substantial'.

If this conclusion is to be read as implying that there is no substantial difference

[91] [1993] ECR I-939, at 969.

[92] Case C-65/90 *European Parliament* v *Council* [1992] I-4593, para 56, pp. 4612-4613; the Court upheld Parliament's application without dealing expressly with the point raised by the Advocate General.

[93] Case C-417/93 *European Parliament* v *Council* [1995] ECR I-1185.

[94] *Ibid*, paras 25 and 26, 1218.

between committee types II(b) and III(a),[95] then it is strange indeed. The judgment is singularly taciturn on the point; it may be that the Court was following the opinion of Advocate General Léger, who took the view that 'type II(a), type II(b) and type III(a) procedures differ from one another only on minor points, such as time limits and by virtue of the fact that, in the latter case the Council's decision is taken on the Commission's proposal'. He expressly concluded that there is no substantial difference between type II(b) and type III(a) committees,[96] though conceding that type III(b) was significantly different from these, in that the Council can block the adoption of any measure by a simple majority vote.

While it is obviously true that the III(b) procedure is substantially different from the other committee procedures mentioned, it is equally true that type III(a) is substantially different from either of the management committee procedures; the difference may even be precisely quantified, at 36 votes, being the difference in the level of Member State support the Commission requires in the management (26) and regulatory (62) committees, respectively, in order to adopt the implementing measures it wishes. Thus, Parliament's minor[97] triumph on the principle was unexpectedly reversed by an inexplicable application thereof to the situation in 'TACIS'.

The double whammy was completed two months later, when the Court rejected Parliament's challenge to a Commission regulation enabling it, under a comitology procedure, to permit the use of the 'organic' label for foodstuffs containing genetically modified micro-organisms ('GMMOs').[98] The 1991 Council regulation on organic foods allowed the use of the organic label for products containing ingredients of non-agricultural origin listed in Section A of Annex VI, and for products processed using certain non-organic substances listed in Section B of the same annex.[99] Annex VI was adopted by the Commission on 29 January 1993, in accordance with a regulatory committee procedure, type III(a), laid down in Article 14 of the 1991 regulation;[100] Section A.4(ii) allows the inclusion of '[m]icro-organisms genetically modified . . . if they have been included according to the decision procedure of Article 14', while Section B(ii) provides the same authorisation for the use of GMMOs as processing aids.

The principal ground on which Parliament had relied was that the Commission had failed to respect the terms of the basic regulation; it argued that, given the sensitive nature of the subject-matter, any decisions on the use of GMMOs in foodstuffs could only be taken by the Council, or by the Council and Parliament, and that there was nothing in the regulation to indicate the contrary. The Court found that 'no GMMOs are specifically included in the limitative lists of substances set out in Annex VI to the basic regulation', and noted that '[for] that reason, the Advocate General considered . . . that the contested provisions had no legal effect as far as the Parliament's claims

[95] One alternative would be to interpret the Court's Delphic finding as meaning that the scope or nature of the decisions which the committee was called upon to take were not such as to affect 'the overall balance of powers'; the Court had however explicitly recognized that the committee was 'required to play a significant role in the implementation of the TACIS programme' (p. 1218).

[96] Ibid., paras. 88 to 98 of the opinion, pp. 1204 to 1206.

[97] At most, the Council would only have had to reconsult Parliament before adopting the text definitively, with whatever committee procedure it wanted; the right of reconsultation is no veto, nor does it have the legal effects of a second reading in cooperation or, *a fortiori*, a second reading in codecision.

[98] Case C-156/93 *European Parliament* v *Commission* [1995] ECR I-2019.

[99] Council Regulation (EEC) No 2092/91, OJ 1991 L 198/1.

[100] Annex to Commission Regulation (EEC) No 207/93, OJ 1993 L 25/5.

were concerned'.[101] Without subscribing explicitly to this view, the Court went on to hold that 'the effective inclusion of GMMOs in the limitative lists contained in Annex VI cannot in any event be regarded as contrary to the provisions of the basic regulation', as this did not specifically prohibit the inclusion of such substances in foodstuffs labelled organic. Noting that the general rules controlling the use of GMMOs are laid down in other legislative provisions, the Court held that 'the effect of the reference to GMMOs in Annex VI . . . is not to lay down new rules permitting the use of those substances in organic farming. Such use presupposes both compliance with the procedures laid down by [Council Directives 90/219 and 90/220[102]] and the effective inclusion of those substances in the limitative lists contained in Annex VI.' In these circumstances, the Court concluded that the contested provisions were not *ultra vires* the basic regulation.

The Court's reasoning is suspect on a number of grounds. It ignores the fact that the regulation does not expressly *permit* the use of GMMOs, and its own finding in *Meroni* that '[a] delegation of powers cannot be presumed and even when empowered to delegate its powers the delegating authority must take an express decision transferring them.'[103] It also chose to ignore the large number of textual indications in the contested regulation and the basic regulation upon which Parliament relied and which argue against their use.[104] The Court's finding that the basic regulation does not deal with general rules on the protection of human health and the environment is beside the point; the mere fact that the use of a particular GMMO is authorised as safe is a minimum condition, and does not imply that it may without more benefit from the organic label, which concerns a specific form of food production. The basic regulation set out to create Community-wide consumer confidence in the organic label; not even the Commission sought to argue that the authorisation of GMMOs would boost such confidence. Indeed, notwithstanding its legal victory, the Commission appears to have had some doubts regarding the wisdom of this course; on the occasion of the Council's adopting Regulation (EC) 1935/95 modifying the basic regulation, the Commission agreed with the Council that 'the question of the use of genetically modified organisms in organic farming needed to be further explored and would be the subject of a report to be developed' (sic) 'by the Commission'.[105] It also seems likely from its legislative context that the basic regulation did not contain an express prohibition on GMMOs because it was unnecessary; under this view 'organic' foodstuffs containing GMMOs would quite simply be a contradiction in terms.

This is not to say that the Court is entirely insensitive to the necessity to protect Parliament's consultative prerogatives in evaluating whether implementing decisions are *intra vires*.[106] It has thus admitted annulment actions by Parliament to challenge the validity of implementing legislation adopted by both the Commission and the Council, even where it had no part to play in the adoption of the contested legislation. In the *GMMO* case, the Court held that '[in] so far as it criticises the fact that by

[101] Paras 22 to 27, [1995] ECR I-2019, 2048-2049.

[102] Concerning, respectively, the contained use of GMMOs and the deliberate release into the environment of GMOs; OJ 1990 L 117/1 and 15.

[103] Case 9/56 *Meroni* v *High Authority* [1957-58] ECR 133, 151.

[104] See further Bradley and Feeney, 'Legal Developments in the European Parliament' 15 *YEL* 283, 294-295 (1996)

[105] See answer to EP written question E-1306/96, OJ 1996 C 345/53.

[106] See, for example, Case 230/78 *Eridania* [1979] ECR 2749, 2764-2765; Case 46/86 *Romkes* I [1987] ECR 2671, 2686, and Case 203/86 *Spain* v *Council* [1988] ECR 4563, 4604.

adopting the contested regulation the Commission has exceeded its powers under the basic regulation, the action seeks to show an infringement of the prerogatives of Parliament resulting from the lack of competence on the part of the Commission to amend that basic regulation or from the Commission's misuse of powers'.[107] In June 1996, the Court struck down a Council directive purporting to implement an earlier Council directive on the marketing of plant protection products, on the grounds that it had 'specifically failed to observe one of the essential elements' of the basic directive.[108]

## V Some Provisional Conclusions

It is relatively easy to understand why Parliament should have been suspicious of, or even hostile to, the introduction of committees into the Community's decision-making process in the early 1960s. At the time, its supervisory powers were directed more or less exclusively to the activities of the Commission;[109] the subjection of the exercise of implementing powers to the supervision of committees of national officials, not provided for in the Treaty, was seen as eviscerating the role Parliament was intended to play in this regard. To add insult to injury, as it were, at a time when Parliament's own role in the adoption of primary legislation was limited to providing a non-binding opinion on a motley collection of policy matters, the committees were given significant formal powers to influence the outcome of the process for adopting secondary legislation. Parliament was also denied the possibility of enforcing respect of its rights of participation; in the unlikely event that a committee's consultation rights had not been (properly) respected on the other hand, the Member States were able to bring the matter before the Court of Justice.[110] The direct election of MEPs, and the conferral on Parliament of budgetary powers and more extensive legislative powers in certain areas, has not changed the fundamental elements of the equation. On the contrary, the well-documented decline of the Commission prior to its relaunch in the mid-1980s, and increasing concern about the secrecy surrounding the Community's decision-making in general, reinforced Parliament in its desire to 'do something' about committees.

Parliament's attempts to supervise or abolish comitology committees reflect the traditional, if not universally accepted,[111] notion that formal powers do have a bearing on the influence a particular body can exercise on a decisional process. Its own-initiative resolutions and legislative opinions under the consultation procedure concerning comitology, where its formal powers are minimal, have had no discernible influence on the behaviour of the Council, or even on the Commission, in this regard. The situation under the regime of the Plumb-Delors and Klepsch-Millan agreements is little better, where Parliament is essentially dependent on the diligence of the Commission. In effect, under these arrangements, the entity supervised has complete control over the implementation of the supervisory procedures; their satisfactory

[107] Case C-156/93 *European Parliament* v *Commission* [1995] ECR I-2019.

[108] Case C-303/94 *European Parliament* v *Council* [1996] ECR I-2943; of course, no issue of comitology arose directly in this case.

[109] Even now, the Council is not obliged by the Treaty to answer parliamentary questions, except in relation to Titles V and VI of the TEU.

[110] See, for example, Case 278/84 *Germany* v *Commission* [1987] ECR 1.

[111] Van Schendelen asserts that '[although] formal powers [of committees] can certainly be factors of influence, this is not necessarily or by definition so' (Pedler and Schaefer *op cit*, n 1, at 30).

 

application would require a degree of self-abnegation on the part of the Commission, particularly as regards the interpretation of the exemption clauses, not normally associated with political bodies. It is only where the codecision procedure applies that Parliament has tasted a heady draught of the power to influence legislative outcomes, including the choice of implementing mechanism; preferring not to jeopardise the entire codecision procedure for the sake of an institutional point, Parliament has now accepted a *modus vivendi* which promises little more than the proven failure of the earlier institutional agreements in this area.[112]

Parliament's budgetary initiatives in regard to the funding of Council and Commission committees may be deemed to have been moderately successful, at least on paper; as with comitology in codecision, the final outcome was put on hold pending the IGC. Holding back appropriations for committees for several months is, however, no solution to Parliament's main concerns regarding the adoption of implementing legislation. Depriving the Commission of funds for its committees would isolate it from a source of information and contact with the national administrations which is invaluable in the preparation of Community legislation, and with a little imagination means could probably be found to circumvent the suspension of committee funding for comitology committees.

The original Community institutions must each share some of the responsibility for the current state of comitology. In the first place, Parliament itself has not always drawn the logical conclusions from its stated opposition to the influence of these committees. In making himself the apologist for management and regulatory committee procedures, Mr Jozeau-Marigné paved the way for the extension of such procedures into all areas of implementing legislation and the proliferation of committee types, said on the eve of the coming into force of the Single Act to number over thirty. Even on its own terms, the reasoning of the Jozeau-Marigné report was flawed; in particular, the Commission's acceptance of supervisory committees and the paucity of negative opinions do not serve to demonstrate that the system is compatible with the institutional balance intended by the Treaty. Furthermore, the conclusion that a regulatory committee has no more influence than a management committee simply because in each case the power to decide can revert to the Council, though in effect adopted by the Court of Justice a generation later, ignores the fundamental importance of the conditions under which this reversion takes place and the difference in the margin of manoeuvre of the Commission under the respective procedures.

It is also true that Parliament has not always fully utilised the Treaty powers it does enjoy; in particular, if it really felt so strongly about certain committee procedures, it could have discouraged the Commission from proposing them by threatening a motion of censure.[113] A unanimous vote would then have been required for the Council to replace an advisory committee with something more sinister; it is difficult to believe that such unanimity would always have been forthcoming, even in the pre-SEA era. While Parliament did reject at least one Council common position in cooperation because the Council had opted for a regulatory committee III(b) rather than the advisory committee proposed,[114] Parliament's overall position might have

[112] The possibility that interinstitutional agreements may be attended by some legal effect arises clearly from the Court's judgment in C-25/94 *Commission* v *Council* [1996] ECR I-1469, 1510, though it is less clear to what extent this will apply to the various agreements on comitology.

[113] This technique was put into operation for the first time in February 1997, with a view to persuading the Commission to implement the recommendations of Parliament's BSE inquiry committee.

[114] See Bradley 'Legal Developments in the European Parliament', 12 *YEL* 505, 523 (1992).

been strengthened, in political terms, if it had been more consistent in its opposition to regulatory committees in particular. It does, however, on occasion deliberately opt for such a procedure [115] for what it deems sound political reasons, where national administrations are considered a better guarantor of an appropriate legislative outcome than the Commission.[116]

For its part, the Commission has made few significant attempts since the comitology system was instituted to respond to the concerns repeatedly voiced by Parliament in its resolutions and legislative opinions. It has consistently failed to keep Parliament properly informed about the activities of the committees, though proved quite forthcoming when transparency was forced upon it. While it is impossible to know with any certainty the effects of such a policy, unnecessary secretiveness may have led to a distorted, overblown idea of what comitology committees actually do, and fed Parliament's suspicions that they were up to no good. Nor was such secretiveness institutionally justified; the Commission was both entitled and obliged under the Treaty to report to Parliament on the activities of the Community, including those which took the form of delegated legislation. As recent events have shown, a little tightening of the budgetary screw does wonders for the Commission's loquacity. Concerning the comitology decision itself, for the Commission to propose the inclusion of the regulatory committee procedure, without proposing any legal restrictions or even guidelines as to the circumstances in which it could apply, appeared even at the time faintly masochistic, and has proven in retrospect to be a tactical error.[117] Thus, for example, its report of January 1991 on *Conferment of Implementing Powers on the Commission* is a litany of complaints at the manner in which the Council has used the comitology decision, which concludes that 'the present situation is such that it will indirectly jeopardise the very substance of the Community policies decided on by the Council and hamper the satisfactory operation of the single market.'[118] At the same time as it has been lamenting the Council's excessive recourse to regulatory committees, particularly in internal market legislation, however, the Commission has continued to propose this very committee procedure on a regular basis; according to recent statistical research, from July 1987 to July 1995, the Commission proposed III(a) committee procedures in no less than 22.8% of its proposals, and III(b) procedures in 1.1%.[119]

The Council has behaved very much as one might have expected; having conjured up comitology from the interstices of the Treaty, it acts as if, like Pygmalion, it is enamoured of its own creation.[120] It appears to have paid scant attention to

[115] See, for example, EP second reading for directives on large exposures of credit institutions (OJ 1992 C 377/108), capital adequacy (*ibid*, 114), investment services (OJ 1993 C 115/81), and its first reading proposal on waste packaging (OJ 1993 C 194/174).

[116] Parliament shared the hesitations of the relevant committee on the marketing genetically modified maize (OJ 1996 C 362/277), though this did not stop the Commission.

[117] 'The problems caused by Comitology ... appear upstream; too much time and energy is being lost in individual cases by interinstitutional quarrels as to which variant to choose out of the broad Comitology range'; Timmermans in Winter *et al* (eds) *Reforming the Treaty on European Union*, (Kluwer, 1996), 140.

[118] SEC (90) 2589 final, 10 January 1991, para. 38, 11; the report was compiled in accordance with Article 5 of the comitology decision.

[119] Dogan, 'Comitology: Little Procedures with Big Implications' 20 *West European Politics* 1997.

[120] For Parliament, the correct classical reference would presumably be Narcissus; on one occasion, it described the committees as having been 'set up [by the Council] as far as possible in its own image and likeness' (OJ 1986 C 297/94).

 

Parliament's preoccupations regarding comitology over the years, until the advent of codecision provided the latter with a certain leverage on the choice of procedure for implementation, and even that was short-lived. The same can be said of the concerns of the Commission and, as regards internal market legislation, the Member States; in the eight years the comitology decision has been in operation, more than half the committee procedures adopted by the Council have been regulatory, with 18.1% being type III(b).[121]

The Court has not (yet) examined the compatibility of comitology, as it is currently applied, with the new institutional balance created as a result of the Single Act and TEU; some of its earlier judgments in this area are a source of perplexity rather than enlightenment. However, its interpretation of the third indent of Article 145 EC might serve as a brake on the Council's resorting to restrictive comitology procedures without justification. Furthermore, the Court has recognised that the (simple) consultation of Parliament on a proposal 'is likely to affect the substance of the measure adopted';[122] *a fortiori*, the participation in a decisional process of a committee which, for example, can delay the adoption of a measure by simply failing to adopt an opinion, could hardly be said not to affect the substance of the measure, both as regards the proposal which is likely to be submitted in such circumstances and the content of the measure finally adopted. However, it is clear that any ruling of the Court which were to restrict the application of the comitology system so dear to the Council would in effect be subject to appeal, by way of a future IGC.

The underlying problem in this area is one that also affects the Community structures for the adoption of primary legislation,[123] which might be called the 'Walkhoff alternative';[124] either the matter regulated is genuinely important, in which case the policy decision should be taken by the legislator, or it is technical in character, in which case it may be left to the Commission, advised as need be by experts of whatever nationality or area of expertise it deems appropriate. While it is at least feasible to identify categories of primary legislation which require consideration by the legislator, it is not necessarily possible to foresee which implementing measures will present political problems which the legislator, rather than the executive, is better placed to resolve. It is in this perspective that Parliament has come round to the view that, rather than systematically participating in the adoption of implementing legislation, it should share with the Council a facility to take back the implementing powers; it would then fall to the legislator both to evaluate the political importance of a particular decision and, if need be, to take the decision itself.

It is 'in the nature of things', to borrow a phrase which has caused much head-scratching in comitology circles,[125] that any conclusions to the present paper should be

[121] Dogan, *loc cit*, n 119.

[122] Case 165/87 *Commission* v *Council* [1988] ECR 5545, 5562.

[123] It has been observed that the reforms of the TEU have given rise to a 'principle of inverse importance', whereby highly contentious legislative measures can be taken with simple consultation of Parliament, and others of frankly minor political importance attract the full weight of the codecision procedure; the principle is obviously not universally valid.

[124] See the text to footnote 15 above.

[125] In *Angelopharm*, the Court noted that the Committee on the Adaptation to Technical Progress of cosmetics directives 'must, in the nature of things and apart from any provision to that effect, be assisted by experts on scientific and technical issues delegated by the Member States' (Case C-212/91, [1994] ECR I-171, 211); this was not considered a sufficient reason to exclude consultation of the relevant Scientific Committee, though it was not the ground on which the Court decided that consultation of the latter committee was obligatory.

provisional in nature. Comitology committees are likely to remain an integral, and increasingly important, feature of the Community's decision-making process. Parliament is likely to remain suspicious that they undermine the value of its supervisory prerogatives over the Commission and encroach on its participation in the adoption of primary legislation, and view the cloak of secrecy which surrounds their activities as impairing the Community's fragile claim to democratic legitimacy, though its recent use of its new legislative and old budgetary powers has proved quite effective in certain respects. There are those who consider that any rearguard action against committees in a 'post-parliamentary democracy' is doomed to fail.[126] While some may view this a prospect with equanimity, Parliament's aversion to the phenomenon of comitology spans the entire period of its existence; there is little reason to think that hostilities, suspended for the duration of the IGC, will not be resumed should a solution not be found which is deemed satisfactory by, or at least acceptable to, the parties concerned.[127]

[126] See Andersen and Burns in Andersen and Eliassen *The European Union: How Democratic is it?*, (Sage, 1995) pp 227-251.

[127] A declaration to the Final Act of the Treaty of Amsterdam would invite the Commission to submit a proposal to amend the 1997 comitology decision.