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Delegated Legislation and the Role of Committees in the EC

Edited by
Mads Andenas
Alexander Türk

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Editors

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The aim of this series is to publish studies in the broad area of European Community Law and Comparative European Law. Each publication will provide an important and original contribution to the development of legal scholarship in its field and will be of interest to the legal practitioner, academic, government and Community official.

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INTRODUCTION

'Comitology' would perhaps evoke some form of obscure science to most people. In EU law it denotes an important law-making process. This process is important from a theoretical point of view, but it also has practical significance as a large proportion of EC legislation is adopted under the comitology procedures. In areas where the Commission has no Treaty based legislative powers, it can promulgate measures to implement EC law on the basis of delegation. The Council and the European Parliament can confer legislative powers to the Commission in areas where Article 251 of the EC Treaty applies. Council Decision 87/373 of 13 July 1987 (the Comitology Decision) lays down the procedures for the exercise of implementing powers conferred on the Commission. This Decision was replaced by a new Comitology Decision of the Council in June 1999. These procedures provide that the Commission has to consult committees. These committees consist of representatives of the Member States who assist and supervise the Commission in the adoption of implementation acts. The concept 'comitology' provides a short-hand reference to this system.

The practical relevance of comitology can be seen from the number of implementation acts adopted. The Council adopts around 400 legal acts each year. The Commission promulgates some 6 000 implementation acts. The vast majority of these acts are adopted in consultation with committees. It is estimated that around 20 000 civil servants are involved in the consultation process with the Commission in this area. The theoretical importance of comitology derives from the way in which principles relating to the delegation of legislative powers are applied. Parallel issues are regulated in the Member States' constitutional law. Other constitutional principles, such as the separation of powers, or administrative law questions deriving from the adoption of implementation rules through cooperation between civil servants of the Commission and civil servants from Member States, offer further perspectives for analysis.

It is not surprising that the academic interest in comitology has increased over the last few years. Initially of little interest to academics, more recent and highly politically controversial decisions by the Commission, adopted in accordance with the comitology procedures, have attracted the interest of political scientists and legal scholars. Such decisions include the ban on British beef or the approval of genetically modified foodstuffs. One expression of the interest in national legislatures is the recent publication by the House of Lords' Committee on European Communities of a report on the Commission proposal for the 1999 Comitology Decision.

This book is one outcome of a research programme of the Centre of European Law, King's College, University of London. Mads Andenas and Alexander Türk directed the programme. A research seminar entitled 'Delegation of Legislative Powers in the European Community: the Role of Committees' was held in London on 16 and 17 January 1998. The seminar brought together academics from political and legal science from a variety of

countries of the European Community in order to provide as diverse as possible a set of perspectives on the topic. This interdisciplinary approach is also reflected in the chapters in this book, most of which are based on papers delivered at the seminar.

The first part of this book is primarily devoted to a political science perspective on comitology. It contains a contribution by Professor Guenther Schaefer on the role of committees and comitology with the title 'Linking Member State and European Administrations'. This first chapter serves as a general introduction to the role committees play in the implementation of EC law. It gives a theoretical framework to the function of the multitude of committees. Professor Schaefer is Professor of Public Policy at the European Institute of Public Administration in Maastricht, the Netherlands. He has worked on comitology issues for many years. His contribution is the result of many years of research and of teaching civil servants who attend comitology meetings. He has co-edited R. Pedler and G.F. Schaefer (eds), *Shaping European Law and Policy. The Role of Committees in the Political Process* (Maastricht, 1996).

Annette Toeller's and Dr Herwig Hofmann's contribution 'Democracy and the Reform of Comitology' builds on these foundations by dealing with the underlying issue of the democratic legitimacy of the committee structure. Annette Toeller is a research assistant at the University of Hamburg and has published 'The "Article-19-Committee": The Regulation of the Environmental Management and Audit Scheme' in M.C.P.M. van Schendelen (ed.), *EU Committees as Influential Policy-makers* (Aldershot, 1998). Dr Hofmann has written 'Hierarchy of Norms in European Community Law', Annex III to J.H.H. Weiler, A. Ballmann, U. Haltern, H. Hofmann, F. Mayer, *Certain Rectangular Problems of European Integration*, Project IV/95/02, Directorate General for Research, European Parliament, Luxembourg, Volume II. He has also published *Normenhirarchien im Europäischen Gemeinschaftsrecht* (Berlin, 1999).

The second part of this book is concerned with a normative analysis in a legal tradition of the issue of delegation of legislative powers. The aim here is to explore the extent to which the national concepts of delegation of powers can contribute to a better understanding of the Community concept of delegation. Many concepts of national public law have influenced the formation of an independent concept of EC law. Even though the constitutional foundations might vary considerably, the problems faced are often similar. This is clearly demonstrated by the first contribution from Dr Georg Haibach. His chapter consists of a comparative perspective of the separation and delegation of legislative powers. It comprises not only the EC system but also covers some European countries and the USA. Dr Haibach is Lecturer of EC law at the European Institute of Public Administration in Maastricht, Netherlands. His publications include 'Comitology: A Comparative Analysis of the Separation and Delegation of Legislative Powers'

(1997) *Maastricht Journal of European and Comparative Law* 373 and 'Die Rechtsprechung des EuGH zu den Grundsätzen des Verwaltungsverfahrens' (1998) *Neue Zeitschrift für Verwaltungsrecht* 456.

The subsequent chapters deal with the delegation of legislative powers from the perspective of French, English and German law. Professor Etienne Picard's contribution on 'The Delegation of Legislative Powers in French Public Law' is of particular interest, as French public law has greatly influenced EC law. Professor Picard is Professor at the University of Paris I and Co-director of their Centre for the Advanced Study of European and Comparative Law. He is an expert in French and comparative public law. His publications include 'Citizenship, Fundamental Rights and Public Services' in M. Freedland and S. Sciarra (eds), *Public Services and Citizenship in European Law* (Clarendon Press, Oxford, 1998), pp. 83–98 and 'The Right to Privacy in French Law' in B. Markesinis (ed.), *Protecting Privacy*, The Clifford Chance Lectures, Volume Four (Oxford University Press, 1999), pp. 49–103.

French public law is known for its elaborate separation of competencies of the Parliament and of the executive. This arguably leaves little room for a delegation of legislative powers. English constitutional law on the other hand is noteworthy for its lack of separation of powers and its extensive use of delegated legislation. Adam Tomkins's chapter 'Delegated Legislation in the English Constitution' demonstrates that Parliament's concern is with effective scrutiny, a task which seems more and more difficult to achieve. Adam Tomkins is a Senior Lecturer in the School of Law at King's College London, where he has taught since 1991. He is a specialist in public law. His book, *The Constitution after Scott: Government Unwrapped* was published by Oxford University Press in 1998.

The German system of delegated legislation, presented by Alexander Türk in 'Delegated Legislation in German Constitutional Law', may be placed somewhere between the French and the English system. Like the English system, the German system does not provide for a genuine law-making competence for the executive. Legislation by the executive depends on an authorization from parliament. The German system does provide for a separation of powers. The problem posed by Parliament discharging its legislative function to the government is as real as in the English system. The German system in this respect relies less on political control by Parliament over the executive than in the English case, but more on the control exercised by the courts. In particular the Federal Constitutional Court has taken on the important task of ensuring that Parliament exercises at least its core legislative functions. Alexander Türk is lecturer for the DAAD at King's College London. His publications include 'Case Law in the Area of the Implementation of EC Law' in R. Pedler and G.F. Schaefer (eds), *Shaping European Law and Policy. The Role of Committees in the Political Process* (Maastricht, 1996) and 'The Commission Proposal for a Council Decision Laying Down the Procedures for the Exercise of Implementing Powers Conferred in the Commission and its Legal, Political and Practical

Implications' in House of Lords Select Committee on European Communities Committee, *Delegation of Powers to the Commission: Reforming Comitology* (London 1999).

The third part of this book focuses on the institutional perspective. Dr Georg Haibach's second contribution covers the institutional positions of the Council, the Commission and the European Parliament from a historical perspective. His chapter includes a discussion of the new Comitology Decision of June 1999. This is followed by another contribution from Alexander Türk on the role of the Court of Justice in the area of comitology. This is an often neglected aspect of the system. The final chapter is by Dr Adam Cygan and discusses the role of the UK Parliament in the scrutiny of EC legislation. The main emphasis of Dr Cygan's chapter is on legislative proposals made by the Commission to the Council as explained by the respective UK minister responsible. It becomes apparent that there is a lack of scrutiny of implementation acts as compared with the sophisticated approach adopted for legislative proposals, such as in the case of directives under the co-decision procedure with adoption by the European Parliament and the Council. The scrutiny of legislative proposals is based on an ex-ante approach, that is review before their adoption. Comitology acts, however, are subject to scrutiny ex-post, that is after their adoption. In this field Dr Cygan, now Lecturer of European Law at Nottingham University, has published *The United Kingdom Parliament and European Legislation* (Kluwer Law International, 1998) and 'The Scrutiny of EU Legislation After Maastricht' (1995) *King's College Law Journal* 38.

The fourth and final part of the book examines various areas of EC law. The chapter by Dr Christoph Demmke gives a practical insight into the environmental area. Dr Demmke, Senior Lecturer at the European Institute of Public Administration in Maastricht, Netherlands, has undertaken extensive research and teaching in the area of environmental law. His publications include C. Demmke (ed.), *Managing European Environmental Policy: The Role of the Member States in the Policy Process* (Maastricht, 1997).

The chapter on product safety by Dr Sabine Schlacke is concerned with the role of EC committees as an indispensable element of the harmonization of the administrative implementation of EC law. Dr Schlacke's publications include 'Foodstuffs Law and the Precautionary Principle: Normative Bases, Secondary Law and Institutional Tendencies' in C. Joerges, K. Ladeur and E. Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations* (Baden-Baden, 1997) and *Risikoentscheidungen im europäischen Lebensmittelrecht. Eine Untersuchung am Beispiel des gemeinschaftlichen Zusatzstoffrechts unter besonderer Berücksichtigung des europäischen Ausschusseswesens ('Komitologie')* (Baden-Baden, 1998).

The last chapter in this part is by Professor Josef Falke who discusses the area of standardization of EC norms, an area of increasing importance. His publications include 'Comitology. An Overview and First Empirical Results' in G.F. Schaefer and R. Pedler (eds), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (Maastricht, 1996), pp.

117–165 and J. Falke and G. Winter, 'Management and Regulatory Committees in Executive Rule-making' in G. Winter (ed.), *Sources and Categories of European Union Law* (Baden-Baden, Nomos, 1996), pp. 541–582.

The book is concluded by a note on the Commission proposal for the new Comitology Decision. This note was presented as evidence for Subcommittee E of the House of Lords' Committee on European Communities. This proposal, which resulted in a Comitology Decision adopted in June 1999, demonstrates that the discussion on comitology is of continuing interest to civil servants, political institutions and academics.

The editors would like to thank the following three institutions for their generous financial support for the research seminar: the Society of Public Teachers of Law, the Centre of European Law and the School of Law at King's College London who made it possible to take the research project further in this way. The editors would also like to thank Kim Feus for the translation of chapters 11 and 12.

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PART I:

A THEORETICAL PERSPECTIVE

CHAPTER ONE

LINKING MEMBER STATE AND EUROPEAN ADMINISTRATIONS – THE ROLE OF COMMITTEES AND COMITOLOGY

*by Dr Günther F. Schäfer**

A. INTRODUCTION

From most capitals of the Member States of the European Union, planes leave early in the morning every workday, carrying Member State civil servants to Brussels. After their arrival they rush to different buildings in the proximity of the Circle Schuman. Some go to Centre Prochette, the conference building of the European Commission, where some 20 different committees meet daily. Others go to the Justus Lipsius building of the Council of Ministers, where on average 12 to 15 working parties meet every day. On Wednesdays and Thursdays, the Committee of Permanent Representatives (COREPER) meets, and once or twice a week there is a meeting of the Council of Ministers where Member State civil servants also participate.

In the Council and the Commission much of the work of developing proposals for legislation, preparing their adoption in the Council and supervising their implementation and application is carried out by these committees. In the European Parliament, the Economic and Social Committee and the Committee of the Regions, committees, sections, or commissions also carry a heavy workload. In contrast to the committees at the Commission and the Council, which are composed mainly of representatives of the governments of the Member States, the members of the European Parliament, the Economic and Social Committee and the Committee of the Regions do the work themselves in their respective sub-groupings. It is in the committees at the Commission and the Council where the Member State and the European level interact most intensively, and it is

* Professor of Public Policy, European Institute of Public Administration, Maastricht.

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this interaction which will be the focus of this chapter. The committees active here may have different names and perform different tasks, but they have one thing in common: community level representatives join representatives of the governments of the Member States in the search for a compromise or a consensus about what should be done jointly to shape European policy and how it should be done.

Some 40 years ago a British political scientist, K. Wheare, wrote about British government and called it *Government by Committee*.¹ This title succinctly describes the system of governance that has emerged in the European integration process. Practically all of the types of committees that developed were not planned or envisaged when the Treaties were drafted, negotiated and signed. They came into existence in response to a need. Work had to be done and could be done by effectively linking the European with the Member State level. This could best be accomplished by using committees. This chapter describes the different types of committees, explains what these committees do, and tries to assess their importance in the proper functioning of the European policy system, particularly integrating Member State and Community administration.

First a typology of committees will be proposed, based on the role they play in the policy process. Secondly, some of the important aspects of the three major types of committees, and their role in the policy process, will be elaborated. Throughout, special attention will be paid to the links and interactions between the Member States and Community level administrations that have developed through the committee system. Finally, the importance of the committee system to the European system of governance will be evaluated and assessed.

B. THE THREE STAGES OF THE POLICY CYCLE AND THE THREE TYPES OF COMMITTEES: EXPERT COMMITTEES, COUNCIL WORKING PARTIES AND COMITOLOGY OR IMPLEMENTATION COMMITTEES

In political science the concept of the policy cycle has been developed as a good way of conceptualizing the political process in a political system.² The policy cycle differentiates between three stages: policy development, policy decision and policy implementation.

¹ K.C. Wheare, *Government by Committee: An Essay on the British Constitution* (Oxford 1955).

² Cf. W. Jann and E. Kronenwett, 'Handlungsspielräume und Entscheidungsfähigkeit des Staates am Beispiel der Implementation politischer Programme' (1978) 27 *Speyerer Arbeitshefte*; W. Jann, 'Kategorien der Policy-Forschung', (1981) 37 *Speyerer Forschungsberichte*; C. Böhrer et al., *Handlungsspielräume und Steuerungspotential der regionalen Wirtschaftsförderung*

During the policy development phase ideas for new policies, laws and regulations are developed, discussed, conceptualized, written down and eventually proposed to those who are in a position to make decisions. Policy development in national political systems involves primarily the government, its ministries, departments and agencies. Civil servants develop alternative possibilities, discuss the policy with the lobby and interest groups concerned and eventually draft a government proposal for a new law or policy. The involvement of lobbyists and organized interest groups in this process varies greatly from one political system to another. In some countries they often take the initiative and even submit draft proposals to the respective ministries. In other countries, formal channels of consultation and cooperation have been developed. In all countries the private sector is somehow involved in the process of initiating and developing policy. After a proposal for a new policy, law or regulation has been drafted by the government, it will be submitted to the national parliament for a decision.

At the European level, policy development is primarily the responsibility of the Commission. The Commission, however, does not have the necessary staff or expertise to develop proposals, which can subsequently find a consensus or qualified majority in the Council and in the European Parliament. It calls on the expertise found in the administrations of the Member States and on the scientific and technological know-how in universities, research centres and private and public sector interest groups in the Member States and at Community level. The Commission asks these experts to help in drafting and developing new proposals. The experts meet with Commission officials in what are generally referred to as expert committees.

At the national level, after a proposal for a new policy, law or regulation has been proposed by government, the national parliament will have to make a decision. This stage is referred to as the policy decision phase. Government proposals will be examined by parliamentary committees, hearings may be held and the government proposal modified and amended before it is adopted in a final vote as a binding rule or law.

At the European level the decision phase is largely the responsibility of the Council, where representatives — in the last analysis the ministers — of the Member State governments decide what is binding law, a regulation, a

(Cont.)

(Baden-Baden, Nomos Verlagsgesellschaft, 1982); F. Capotorti et al., *'L'application de la législation communautaire par les Etats membres'* (1984) 40 *Speyerer Forschungsberichte*; R.A.W. Rhodes, *European Policy-Making, Implementation and Subcentral Governments: A Survey* (European Institute of Public Administration, Maastricht, 1986); E. Windhoff-Heritier, *Policy-Analysis* (Frankfurt/Main-New York, 1987); H. Siedentopf and J. Ziller, *Making European Policies Work: The Implementation of Community Legislation by the Member States* (2 vols) (London, Sage, 1988); G.F. Schaefer, 'Committees in the EC Policy Process: A First Step Towards Developing a Conceptual Framework' in R. Pedler and G.F. Schaefer (eds), *Shaping European Law and Policy. The Role of Committees in the Political Process* (Maastricht, 1996), p. 3-23.