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**EXTERNAL PARTICIPATION IN THE EU  
ENVIRONMENTAL DECISION-MAKING  
PROCESS THROUGH THE EU ESTABLISHED  
INSTRUMENTS**

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*To husband Gedas and sons Emilis and Domantas*

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## **I CHAPTER**

### **INTRODUCTION**

Since its establishment, the European Union (thereafter EU) has gone through a long process of evolution, which has required repeated changes and adjustments. The EU has been enlarged a number of times, and it has gained more powers and responsibilities. As the previous governmental model was not judged effective or legitimate enough, new forms of governance were investigated and resorted to. Indeed, the EU is famous for its dependence on organized interests to achieve its goals; this “can be traced back to the lack of popular engagement with the EU, the need for consensus from decision making involving [twenty-eight Member States], the relative degree of isolation of the European Commission from other potential constituencies of support, and a chronic lack of resources in EU institutions relative to the substantive functions performed”.<sup>1</sup>

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<sup>1</sup> Justin Greenwood and Joanna Dreger (2013), “The Transparency Register: A European vanguard of strong lobby regulation?”, open access journal *Interest Groups & Advocacy* launched by Palgrave Macmillan, (2013) 2; published online 23 April 2013, p. 141.

In fact, external participation<sup>2</sup> in an organized form is identified as one of the new elements aiming to improve EU governance. The role of organised interests in the EU system is situated somewhere between participatory governance and attempts to stimulate the emergence of a European public sphere.<sup>3</sup>

While external participation is treated as a threat by some EU institutions, others consider it a way of get involved in the EU decision-making process and of achieving the best results in drafting and implementing EU legal acts. EU institutions claim that they are determined to be transparent for the benefit of civil society (the end receiver of policies and implementation), and that they are willing to involve actors into the policy forming process. In order to do that, an instrument regulating this involvement would need to be conceived.

The aim of this thesis is to discover whether the EU institutions are ready to accept more actors in policy making and in the legislation forming process. The analysis will be led through various EU instruments which are established for efficient involvement of external participants in the EU governance.

External participation may vary in different policy areas of the EU. For some policy areas, scientific expertise may be needed while for others, a more political participation is required. In addition, each area of the decision-making process may set its own rules for participation and reflect particularities, specific to that policy area. For this reason, the environment policy was chosen as a way to exemplify the types of external participation to be analysed in this research. Indeed, environmental decision-making in the EU was chosen as it was the first policy area

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<sup>2</sup> “External participant” is either a natural person who is not employed by an EU Institution and is not considered to be a civil servant. “External participant” may also be a legal entity, which does not have any legal obligations to EU Institutions. External participants represent their independent interests or expertise. The EU Institutions accept no responsibility or liability with regard to the information or advice provided by external participants.

<sup>3</sup> Eva G. Heidebreder (2012), “Civil society participation in EU governance”, *Living Reviews in European Governance* Vol. 7, No. 2 <<http://www.livingreviews.org/lreg-2012-2>> accessed 26 July 2013.

where binding legal instruments for access to information were implemented and where opportunities for external participation were granted.

The possibilities for external participation are analysed in the academic literature by various authors. Their positions and criticisms will be stated and investigated throughout the thesis. Some of these positions and questions are supported by EU laws and policies. The outputs of the analysis will be checked against the empirical research, where civil servants of the DG Environment of the Commission, national civil servants of the ministries of environment and external participants representing environmental NGOs, consultancies, universities and other stakeholders are targeted.

To begin with an overview of external participation in EU law and policies is provided. The discussion starts with the White Paper on European Governance, as this document can be considered to be a real starting point for policies on external participation in EU. It focuses mainly on establishing and implementing new forms of governance as well as non-legislative instruments to ensure efficient involvement of external participants in the EU decision-making process. The two methods, offered by the White Paper, are developed further: better involvement and more openness; and better policies and regulation. These two methods lead the discussion through the other chapters.

The second part of the research focuses on external participation in the comitology framework. This choice may seem incongruous. However, with comitology, the Commission is obliged to consult representatives of national authorities as well as external participants when drafting a legislative act. The analysis starts by reviewing the powers conferred over the Commission and is followed by a presentation of the importance of scientific and technical expertise in its daily work.

There, two types of external participation are distinguished – the external participation in the form of scientific and technical expertise from various NGOs, consultancies, political parties and other stakeholders and the representation of national authorities. While the latter is discussed in more details in the Chapter “External participation in the EU decision-making process through multi-level governance”, external participation in the form of scientific and technical expertise is discussed in the chapter on collection and use of expertise. It covers the implementing rules and procedures that determine how scientific and technical expertise should be collected and used in forming policies and drafting legislative acts. In cases where the scientific basis is insufficient or where some uncertainty exists, the Commission should be guided in its risk analysis by the precautionary principle (as analysed in the subsequent chapter).

The penultimate chapter on the Århus Convention focuses on two pillars – access to information and access to justice, as these are closely related to external participation. There, the parties that are eligible to get the relevant information evaluate it and in case of a breach can challenge both acts and omissions of the environmental legislation are identified.

The last part of the thesis aims to verify the points and arguments made in previous chapters by resorting to the empirical data that was collected during the observations, interviews and via the questionnaire.

## **II CHAPTER**

### **EU LAW AND POLICY ON PARTICIPATION IN EU GOVERNANCE**

#### **2.1. INTRODUCTION.**

“Governance is the capacity of human societies to equip themselves with systems of representation, institutions, processes and intermediary bodies in order to manage them by intentional action. This capacity of conscience (the intentional action), of organisation (the institutions and intermediary bodies), of conceptualisation (the systems of representation), of adaptation to new situations is a characteristic of human societies.”<sup>1</sup>

In the last fifty years, European integration has gone through a long process of evolution. A large section of the public feel that the European Union should deal more with their day-to-day concerns, instead of meddling too much in the minutiae of matters that naturally fall within the competence of the national and regional authorities.<sup>2</sup> This is partly because Member States, especially national governments, fail to explain how specific decisions are arrived at or there are cases when politicians deliberately mislead their electorate

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<sup>1</sup> N.Lebessis and J. Paterson, (2000), *Developing New Modes of Governance*, European Commission: Forward Studies Unit, Working Paper, p. 21, taken from Pierre Calame and Andre Talmant (1997), *L'Etat au Coeur: Le Mecanno de la Gouvernance*, Paris: Desclee de Brouwer, p.19.

<sup>2</sup> Commission, “Information and Communication Strategy for the European Union” (Communication) COM (2002) 350 final/2, 02 October 2002, p. 4.

in order to blame EU for costly, controversial and cumbersome decisions that they have decided on or requested themselves.

The situation described above shows the need for a change in the whole system of the EU, especially its governance. EU governance has become more complicated, and due to all the changes as well as institutional impact of globalisation it is constrained to applying “decentralisation”<sup>3</sup> to multi-level governance in territorial terms. Centralised governance has worked over the years as a successful model, but now it needs a wider and more complex approach as well as a more effective involvement of all the constituent parts, such as civil society, private organisations, experts and other external participants. Decentralised governance and external participation can ensure that decisions are taken in response to scientific as well as technical progress. Also, the policy-making process faces increased demands in terms of technical and scientific knowledge, which is not always available within EU institutions. The need for the scientific expertise and the technical aspects on collection will be analysed in more details in the Chapter on “Collection and use of expertise”.

S. Smismans defines two types of decentralism: vertical and horizontal.<sup>4</sup> Vertical decentralism indicates the processes and actions with regard to territorial decision-making levels. It favours the increased role of regional and local authorities as a form of legitimacy providing participation in European policy-making and focusing on elements of representation and subsidiarity in territorial terms. The intention to increase the legitimacy of EU institutions by focusing on territorial representation and by ignoring functional

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<sup>3</sup> “Decentralism refers to the respect of the autonomy of lower or smaller decision-making levels, the procedures privileging these decision-making levels (subsidiarity), and the involvement of these decision-making units in the case that policy-making is (partially) defined (and implemented) at a more central level.” in S.Smismans (2004), “The EU’s Schizophrenic Constitutional Debate: Vertical and Horizontal Decentralism in European Governance”, European University Institute, EUI Working Paper RSCAS No. 2004/32, p.1.

<sup>4</sup> *ibid* 1.

representation has led to a second concept – “horizontal decentralism”. This requires the involvement of interest groups, scientific expertise or civil society organisations in European decision-making process.

Vertical and horizontal dimensions make up the core elements in the analysis of participation in the EU decision-making process. The dimensions show the need for changes in present EU governance by increasing the role of local and national authorities instead of providing all the legitimate decision-making power to EU institutions. There is also a great demand of the increased role of scientific and technical expertise in the drafted decisions both at the EU and the national level.

The main two documents containing the policies, principles and rules for participation and representation are the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)<sup>5</sup> and the White Paper on European Governance (further in the text – the White Paper)<sup>6</sup>. These two documents shall not be understood as equal ones, though they are the main ones, implementing policies and legal regulation of the participation and representation at EU level.

The analysis of these two documents provides a clearer direction for further research on the interaction between the vertical and horizontal dimensions. They are also the core documents where the principles of participation and representation are formed and implemented in future EU policies and legislative acts. The Treaty of Lisbon sets the fundamental principles which define the level at which a decision-making process may take place – the EU or national level. It also enacts the four democratic routes, including the

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<sup>5</sup> Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326.

<sup>6</sup> White Paper: European Governance, COM (2001) 428 final.



consultation procedure.<sup>7</sup> In addition to these, the non-legislative initiative, the White Paper, will be discussed, concentrating mainly on the possible influence of external participants on EU governance. This part will cover the definition of external participation and its constituent parts and the responsibility of national administrations to involve external participants efficiently into the decision-making process at the early stage. This Chapter will also analyse EU communication and consultation policies which should be implemented as vital means for external inclusion and possibilities for participation. In later Chapters, the discussion will focus on the instruments adopted by the EU institutions on external participation in environmental decision-making.

## **2.2. EU PRINCIPLES AND POLICY DOCUMENTS ON EXTERNAL PARTICIPATION.**

While most of the attention of policy-makers was focused on issues of territorial representation and vertical decentralism, very few were concerned with the role of external participants in European policy – making. The reasons for integrating them into the debate on legitimacy of the European Union are explored below.<sup>8</sup>

First, external participants take an important part in the EU decision-making process. They ensure the vital technical and scientific knowledge in the context of the drafted decisions. External participation forms kind of a body where external scientific know-how might be accumulated through all the process. External participants are capable of changing

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<sup>7</sup> Meike Rodekamp and Dawid Friedrich (2013), „No Participation without Representation: Demands and Supplies on the Representativeness of European Civil Society Organizations“ (Workshop on representation in „Arena“ Oslo, Norway, January 2013).

<sup>8</sup> cf Smismans (n 3) 4.

membership in order to ensure that the most recent and top-level technical know-how is implemented into the decision-making process.

Second, they involve external interests, who are the lowest and the most effective link between local and national authorities and also the EU institutions in the end. External interests can ensure successful and effective implementation of the bottom-up decision-making procedure.

No approach should be privileged, but it is obvious that involvement as well as participation of different actors is needed at all levels of EU decision-making process. If in the past decisions were made mainly by the EU institutions, now the powers of decision-making are more structured and intertwined between different actors at different levels. However, the division of powers between the EU institutions and Member States is very clearly expressed where Member States are the key players. It means that the lead position in EU governance, policy shaping as well as legislation is taken by Member States, and this might be defined as direct or indirect involvement. Actors from different levels are also acknowledged as a constituent part in governance structure. It shows that the EU system accepts external participants, which do not belong to a traditional governance structure.

Nevertheless, both the Treaty of Lisbon and the White Paper are based on concerns regarding policy – making: a lack of policy effectiveness, poor implementation, aloofness of the political decision-making process and a lack of democratic legitimization.<sup>9</sup>

The analysis will be started with an overview of the two documents and the possibilities for external participants to get involved in the decision-making at all levels of the process. It is important to acknowledge the necessity of decentralisation of EU governance as well as the involvement of external participants as one of the component parts of the decision-

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<sup>9</sup> A. Heritier (2001), “The White Paper on European Governance: A Response to Shifting Weights in Inter-institutional Decision-Making”, The Jean Monnet Program: Max-Planck-Project group on Common Goods, Bonn, p.1.

making process. Only successful participation can ensure efficient and legitimate functioning of the whole system.

The discussion of EU legal and conceptual framework for external participation will continue with an overview of the White Paper on European Governance, which is believed to be the main non-legislative initiative implementing the principles of participatory and representative democracy as the fundamental principles of EU Governance. The analysis will focus mainly on the first intentions to improve and formalise an involvement of external participants by creating various policies and tools. This policy document, which is even not binding on Member States, was chosen intentionally to be analysed first. The White Paper was the real “constitutional text” and the initial point of policies which helped to start external participation.

#### *2.2.1. White Paper on European Governance.*

This document mainly focuses on establishing and implementing new forms of governance by including external participants and rearranging the powers of the Commission, which have been reviewed and discussed repeatedly by a number of academics when discussing various issues.

The White Paper offers four methods for change in reforming EU governance: it follows a less top-down approach, and complements the tools with non-legislative instruments, though only two of them, - *better involvement* and *better regulation*, - will be discussed.

The analysis will also focus on possibilities of better involvement of external participants in the decision-making process by ensuring a stronger interaction with regional

and local governments and civil society. The White Paper pays a lot of attention on establishing and developing measures and procedures for effective and timely participation of external participants via the implemented instruments and communication policy, as the quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result. It shall also bring more reliance in the EU institutions by bridging the widening gap between experts and bureaucratic institutions on one hand and civil society on the other.

The White Paper may be used as a benchmark for all further legislations – it was decided that all EU institutions would follow the principles covered in this document, as non-binding legal principles; furthermore, they do not create any obligation on Member States. It is also the first document where “the use of the concept of civil dialogue and civil society has been broadened and become part of the general legitimacy debate”.<sup>10</sup>

### *2.2.2. Fundamental Principles of Participatory and Representative Democracy in the Treaty of Lisbon.*

To start with, it shall be noted that the Treaty of Lisbon contains less than was planned in the Draft Constitution for Europe. While the White Paper highlighted the concept of the “participation” as a key principle of good governance, the Draft Constitution for Europe included in the text the principles of representative democracy and participatory democracy.<sup>11</sup> However, the principle of participatory democracy has disappeared from the wording of the

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<sup>10</sup> R. Goehring (2004), “Interest Representation and Civil Society Formation”, in: A. Warleigh and J. Fairbrass (eds.), *Integrating Interests in the European Union: The New Politics of Persuasion, Advocacy and Influence*.

<sup>11</sup> Draft Treaty establishing a Constitution for Europe, submitted to the president of the European Council in Rome [2003], Articles 45 and 46.

Treaty of Lisbon, though the idea of participation has been left the same. It can be grasped from the text of the Treaties, for example, that “every citizen shall have the right to participate in the democratic life of the Union”.<sup>12</sup>

Additionally, the Treaty of Lisbon does not implement any other legal provisions or tools to support the participatory and representative democracy. It only covers general competences and powers, conferred on the European Union, as well as the fundamental principles, which rule and govern the delegation of powers, the principles of conferral, subsidiarity and proportionality.<sup>13</sup> The fundamental principles are not directly used to ensure external participation, though they define the level at which a decision may be taken and the type of an action to be recommended.

The two principles, - the subsidiarity and the proportionality - will also be analysed in more details later in this Chapter as well as in the Chapter “External participation in EU decision-making process through multi-level governance”, concerning the established rules of the subsidiarity check by national parliaments, and the Chapters “Collection and use of expertise” as well as “Precautionary principle in collection and use of scientific expertise” on the use of the principle of proportionality.

#### *2.2.2.1. The Principle of Subsidiarity*

The principle of subsidiarity is usually applied when the EU does not have exclusive competence in the area in question. It states that “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed

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<sup>12</sup> Article 10 paragraph 3 TEU.

<sup>13</sup> Article 5 paragraph 1 TEU: „The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.”

action, be better achieved at Union level”<sup>14</sup> the EU shall act (“the actions of the European [Union] on the basis of the principle of subsidiarity concern not only Member States, but also their bodies, to the extent that these bodies possess their own legislative powers, conferred on them by national constitutional law”).<sup>15</sup> Based on the application of the subsidiarity principle, the Commission shall consult widely and, where appropriate, shall take into account the regional and local dimension of the action envisaged.<sup>16</sup> In cases of emergency, the Commission is allowed not to conduct such consultations.<sup>17</sup> However, there is very little information on what is considered to be a case of emergency. The new Protocol on the Application of the Principles of Subsidiarity and Proportionality<sup>18</sup> has introduced a new *ex ante* political monitoring mechanism for national parliaments which enables them to issue a reasoned opinion regarding compliance with the principle of subsidiarity for proposals of a legislative nature.<sup>19</sup> Still, it shall be noted that this right cannot be exercised over delegated or implementing acts, which are conferred on the Commission, - there is no instrument allowing national parliaments to check whether a detailed delegated act infringes subsidiarity. These limitations may be understood by reading together the two Protocols: the Protocol on the Role of National Parliaments in the EU<sup>20</sup> and the Protocol on the Application of the Principles of Subsidiarity and Proportionality, contained in the Treaty of Lisbon.<sup>21</sup>

It shall be noted that the Commission also admits a possibility for an assessment of subsidiarity either to get abridged (the EU action may be scaled back or discontinued if it is no longer justified because circumstances have changed) or expanded (the EU action, in line

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<sup>14</sup> Article 5 paragraph 3 TEU.

<sup>15</sup> cf Smismans (n 3) 4.

<sup>16</sup> Treaty of Lisbon (n 5) Protocol No. 2 Article 2.

<sup>17</sup> Though, there is no explanation available on the cases of emergency to be applied under this legal provision (author’s comment).

<sup>18</sup> Treaty of Lisbon (n 5) Protocol No. 2.

<sup>19</sup> cf Smismans (n 3) 13.

<sup>20</sup> Treaty of Lisbon (n 5) Protocol No. 1.

<sup>21</sup> Paul Craig and Gráinne de Búrca (2011), “Chapter 3. Competence”, *EU Law: Text, Cases and Materials* (fifth edition), Oxford University Press, p. 96.

with the provisions of the Treaty of Lisbon, may be expanded where circumstances so require).<sup>22</sup>

#### *2.2.2.2. The Principle of Proportionality.*

The principle of proportionality ensures that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties.<sup>23</sup> The EU's "action shall be as simple as possible and leave as much scope for national decision as possible, and should respect well established national arrangements and legal systems".<sup>24</sup> The principle of proportionality requires to evaluate whether the chosen option goes "beyond what is necessary to achieve the objective satisfactorily" and will the created "financial or administrative cost for the EU, national governments, regional or local authorities, economic operators or citizens" be minimised or commensurated.<sup>25</sup> Moreover, well-established national arrangements and special circumstances applying in individual Member States shall also be respected leaving as much scope for national decisions as possible.<sup>26</sup>

Even though it is difficult to disaggregate the two principles – subsidiarity and proportionality, national parliaments are not afforded a role in relation to the principle of proportionality – they are not able to proffer a reasoned opinion based on this principle.<sup>27</sup>

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<sup>22</sup> Impact Assessment Guidelines, SEC (2009) 92, p.23.

<sup>23</sup> Article 5 paragraph 4 TEU.

<sup>24</sup> Impact Assessment Guidelines (n 22) 29.

<sup>25</sup> *ibid* 30.

<sup>26</sup> *ibid*.

<sup>27</sup> Paul Craig and Gráinne de Búrca (n 21) 97.

### 2.2.2.3. *The Principle of Conferral*

The principles of subsidiarity and proportionality prompt that the origin of the decision-making lies within Member States and they have a power to decide if the issue goes to EU level or stays within the competence of each Member State. In order to grant the basis for Union's right to act on the principle of conferral, the identified problem needs to be linked to at least one article of the Treaties, and the objectives it sets out.<sup>28</sup> If the EU does not have exclusive competence in the area in question, the principles of subsidiarity and proportionality apply.

“The principle of conferral of powers is not only binding for the Union in relation to its Member States, but is also of relevance for the interinstitutional distribution of competences”, granting the institutions authority to take specific acts.<sup>29</sup> It is agreed<sup>30</sup> that the “principle of conferral of powers applies only in case of binding acts”. Article 288 TFEU enumerates the binding forms of acts and this enumeration creates a closed system of forms of secondary law.<sup>31</sup> In that context, it means that Member States confer powers on the EU only implemented by binding forms of acts. In such case the competence of Member States will be constrained to the extent stipulated by the legally binding act.

However, there are a number of other forms of actions covered by the Treaty of Lisbon, naming “provisions”, “rules”, framework programmes”, “general action programmes”, “programmes”, “guidelines”, “measures”, empowering the EU institutions to “determine”, to “decide”, to “fix”, or to “lay down”, which are not mentioned in Article 288

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<sup>28</sup> Impact Assessment Guidelines (n 22) 22.

<sup>29</sup> Franz Leidenmuehler (2010), “Is there a Closed System of Legal Acts of the European Union after the Lisbon Treaty? The Example of Unspecified Acts in the Union Policy on Environment”, *Vienna Journal of International Constitutional Law*, Vol. 4, No. 2/2010, p. 191-192, <[www.icl-journal.com](http://www.icl-journal.com)> accessed 1 August 2013.

<sup>30</sup> Christian Campbell (2005), “Article 249 TEC”, in *Smit & Herzog on The Law of the European Union*, Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel (eds.), published by Matthew Bender, (4 volume), p. 349.

<sup>31</sup> Franz Leidenmuehler (n 29) 192.



TFEU.<sup>32</sup> Still, Member States have not conferred power on the EU institutions to implement those various forms of actions. “When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question”.<sup>33</sup> It may be the case that even when an act is authorised in the primary law, it does not mean that it can be implemented in any other kind of form than those enumerated in Article 288 TFEU. In order for a legislative act to be binding on Member States it has to be in a form, enumerated in Article 288 TFEU. Otherwise such an act may even be excluded. The above defined forms of acts may only be accepted “in case of absence of a specific competence”.<sup>34</sup> It is interesting to note that the forms of documents which will be analysed later in the Chapter as the main documents implementing laws and policies for external participation are not enumerated in Article 288 TFEU either, though they may be referred to in the text of the Treaties.<sup>35</sup>

With the Treaty of Lisbon, the Commission has been granted the power to enact binding delegated acts or binding implementation measures under Articles 290 and 291 TFEU, as all the other types of acts may only serve the purpose of a self-commitment to EU institutions or they may function to govern Member State’s implementation measures.<sup>36</sup> Article 290 TFEU on “delegated” legislation will be discussed in more details in the Chapter “External participation through comitology” as it can be considered to be a legal instrument for external scientific expertise to get involved into the decision-making process conferred on the EU by Member States.

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<sup>32</sup> *ibid* 196-202.

<sup>33</sup> Article 296 paragraph 3 TFEU.

<sup>34</sup> Franz Leidenmuehler (n 29) 200.

<sup>35</sup> For example, “communications” are mentioned in the text of the Protocol No. 1 as one of the Commission’s consultation documents to be forwarded to national Parliaments (Article 1) (author’s comment).

<sup>36</sup> Franz Leidenmuehler (n 29) 201-202.

#### *2.2.2.4. The Principle of Proximity*

There is an additional principle to be analysed - Article 10 TEU also establishes the principle of proximity which stipulates that decisions must be taken as closely as possible to the citizens. This principle applies especially to the implementation of competences within the EU. This implementation should involve national and local administrations as effectively as possible, in order to bring the EU closer to its citizens. The Treaty of Lisbon does not really provide any procedures on how EU citizens should be represented or how the EU institutions should apply this policy. Only the transparency policy is described in Article 15 TFEU: “in order to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and agencies shall conduct their work as openly as possible”.

The European Union is open and determined to get closer to its citizens in order to create trust and interest in its institutions and policies, because “many people are losing confidence in a poorly understood and complex system to deliver the policies they want, as the Union is often seen as remote and at the same time too intrusive”.<sup>37</sup> This should be achieved by implementing the principles of good governance, which rest on active involvement of external participants.

The analysed fundamental principles ensuring the participatory and representative democracy at EU level reveal that the possibility of participating in the EU decision-making process is strongly linked to the competencies delegated to the EU based on the principle of conferral. If the area in question can be linked to at least one article of the Treaties, the basis for the EU to act is confirmed and its final result shall be embodied only in binding EU legal

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<sup>37</sup> White Paper on European Governance (n 6).

acts. If there is no granted exclusive competence on the issue, the principles of subsidiarity and proportionality shall be applied. The principles define the level at which a decision on the issue shall be taken, so it is a signpost for external participants where – at EU or at the national level, - the participation and involvement actions shall be targeted. The types of initiatives may also be indicated – they may vary from binding legal acts upon the principle of conferral to non-legislative initiatives (i.e. communications, general policies, recommendations, and strategy papers) which set out commitments for future legislative action. Later in the Chapter one of the main non-legislative initiatives – the White Paper on European Governance, - will be analysed. It will also cover a number of instruments, which were developed and implemented later based on this policy document with the aim to get as closely as possible to EU citizens.

### *2.2.3. Definition of External Participation.*

The involvement of external participants was proposed to include all those with an interest to represent or a contribution to make, thus enabling them to take part in the policy decision-making process.<sup>38</sup>

External participation is one of the core elements of better governance and successful involvement of civil society and interests groups, especially as most of involved interest groups play a significant role in preparing and monitoring decisions. It would be convenient to analyse the definition of external participation and its weight on decision-making process later in the research.

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<sup>38</sup> ibid 11: “[...] democracy depends on people being able to take part in public debate”.

First, the term “external participant” shall be explained and its role investigated. In general, there is no agreed definition of this term, as usually “external participants” are titled as experts, stakeholders, interest groups, scientists and etc. The term “stakeholder” is meant to encompass all of those who have a stake. Thus, “not only are the experts and bureaucrats from within the policy area traditionally associated with a particular issue included, together with those actors from civil society that a more enlightened regulatory approach might bring in, but also experts and bureaucrats from other policy areas, other disciplines which are understood to have a stake in the context of a policy process which acknowledges interdependencies.”<sup>39</sup> “Experts”, on the other hand, are consulted by policy makers, the media and the public at large to explain and advise on diverse issues.<sup>40</sup>

Experts may be frequently called upon to identify options, to tackle or prevent problems, or to assess impacts. Experts might also be called as “key actors of governance: either as proactive agenda – setters in their own right (top scientists, or experts in administration) or, more often, as “resources” (external advisers) for actors in government, business and civil society.”<sup>41</sup> They are also the ones which the EU institutions rely on regarding specialist expertise in anticipating and identifying the nature of the problems and uncertainties that the European Union faces. The obtained expertise helps to take decisions and to ensure that risks are explained clearly and simply to the public.<sup>42</sup> The provided short descriptions of different counterparts may also suggest the key functions and responsibilities, which are assigned to external participants.

The term “external participant” must be understood broadly here, that is, as shorthand for those areas of civil society usually excluded from involvement in policy decision-

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<sup>39</sup> N. Lebessis and J. Paterson (n 1) 22.

<sup>40</sup> Working Group 1B “Democratising expertise and establishing scientific reference systems” (Report) [May 2001], p.2.

<sup>41</sup> *ibid.*

<sup>42</sup> White Paper on European Governance (n 6) 19.

making.<sup>43</sup> In order to differentiate between the public and private sectors in this analysis, all non-civil servants participants will be called external participants. The list of participants who may get involved in the decision-making process is non-exhaustive. External participants are all legal, natural and private bodies that have a direct interest in the drafted, adopted and implemented decision. They are consulted as the interested parties outside the EU institutions. The definition of “external participants” does not include in-house “inter-service” Commission consultations or consultations directed to other European bodies as provided by Union law, and which will be covered in the Chapter “Collection and use of expertise”.

Another important issue related to the definition of “external participation” to be raised is that whatever kind of external participation a body chooses, the EU institutions prefer it to be in an organised form. Some of this issue will be discussed in the Chapters “Participation in environmental issues – primordial rights of external participants” and “External participation in the EU decision-making process through multi-level governance”. As an example, the most topical recent issue could be mentioned – the EU Citizens’ Initiative. In 2011 the EU Regulation<sup>44</sup> was enacted where it is implemented that “the organisers shall form a citizens’ committee of at least seven persons who are residents of at least seven different Member States” in order to register the proposed initiative to the Commission. It means that even the Citizen’s Initiative needs to be in an organised form – there has to be a formed committee in order to be allowed to register an initiative.

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<sup>43</sup> N. Lebessis and J. Paterson (n 1) 22.

<sup>44</sup> Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative, Article 3 paragraph 2.

#### *2.2.4. Role of External Participation.*

The role of external participants is limited by the fact that they may not be consulted on politically sensitive issues and cannot vote on the relevant decisions. The Parliament stated in its Resolution on the White Paper:<sup>45</sup> “[c]onsultation of interested parties [...] can only ever supplement and never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and the Parliament, as co-legislators, can take responsible decisions on the context of legislative procedures [...]”. It seems that the Parliament would never agree to give a vote to interested parties, because “the involvement of both the European and national parliaments constitutes the basis for a European system with democratic legitimacy, and that organised interest groups and civil society are “inevitably sectoral and cannot be regarded as having its own democratic legitimacy”.<sup>46</sup>

It might be due to the fact that interest groups and external participants in general are not granted democratic legitimacy and only the EU institutions and other administrative bodies named in the Treaty of Lisbon are conferred of such right by Member States. The conferred rights also require accountability which cannot be requested from external participants. Even though such a situation causes a tension between participatory and representative democracy, there are no intentions to change such a situation. On the contrary, the EU institutions seem to be trying to eliminate active external participation – the participatory principle has been withdrawn from the legal provisions of the Treaty of Lisbon, and, consequently, the framework of comitology committees has also been restrained by

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<sup>45</sup> European Parliament resolution No. A5-0399/2001 on the Commission White Paper on European governance (COM (2001) 428 - C5-0454/2001 - 2001/2181(COS)).

<sup>46</sup> European Parliament Resolution on the Commission White Paper on European Governance, A5-0399/2001, points 8 and 11a.

limiting the number of committees and the tasks attributed to the remaining ones.<sup>47</sup> It is believed that the Treaty of Lisbon has brought a number of changes in the procedures of comitology by opening the door for more external influence, though it is not intended for external participation at the drafting phase. Such a possibility is opened mainly to the Parliament both at the preparation and the vetoing process.<sup>48</sup>

The Commission intended at least to give a voice, but it also remained convinced that a legally-binding approach to consultation was to be avoided.<sup>49</sup> It had supported the Parliament's statement maintaining that it "was particularly keen not to grant civil society organisations a role which, either wholly or in part, was that of those holding political responsibility and who were elected by universal suffrage".<sup>50</sup>

Nevertheless, it was recognised that involvement of external participants was a key issue at all the stages of the decision-making process, especially at the drafting phase, and that only effective procedures could guarantee up-to-date and on-line technical and scientific information. The involvement of external participants in an organised form will be also discussed in more details in Chapters on "Collection and use of expertise" as well as in "External participation in the EU decision-making process through multi-level governance".

There is no doubt that making expertise more accessible is important, but this has to go hand-in-hand with other more fundamental changes, such as accountability and procedures to provide a "trace" of sources and uses of expertise, procedures to acknowledge minority views, involvement of "stakeholders" at early stage and better management of uncertainty.<sup>51</sup>

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<sup>47</sup> The more detailed analysis is provided in the Chapter on „External Participation through Comitology Framework“.

<sup>48</sup> A. Hardacre and M. Kaeding (2011), *Delegated and Implementing Acts. The New Comitology*, EIPA Essential Guide, version 2, p. 21.

<sup>49</sup> Commission, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission" (Communication) COM (2002) 704 final, p. 10.

<sup>50</sup> Commission, "European Governance" (Report) [2003], p.16.

<sup>51</sup> Working Group 1B (n 40) 14.

The management of uncertainty at the risk assessment level by including scientific expertise and advice into the decision-making process will be analysed in the Chapter “Precautionary principle in collection and use of scientific expertise”.

#### *2.2.5. The Forms of Participatory and Representative Democracy.*

The Treaty of Lisbon was expected to renew the institutional architecture as well as EU’s democratic foundations. For the first time in the history of EU treaty reforms, the Treaty of Lisbon includes “explicit provisions on democratic principles”<sup>52</sup>. Title II TEU incorporates the most important democratic statements – the democracy in EU is based on the principle of equality (Article 9) and it shall be embodied by means of representative democracy (Article 10).

The new Treaties still do not offer an integrated idea about democracy; they outline four possible democratic routes: electoral representation, direct democracy (European Citizens’ Initiative, Article 11 paragraph 4) or direct participation, functional representation (Article 11 paragraph 1)<sup>53</sup> and territorial representation.<sup>54</sup> Consultation is part of a direct participation, which is not yet a strong system, though a well-organised one.

The principles of representative and participatory democracy assure the democratic life of the European Union by providing a right for the “citizens to be directly represented at European Union level” as “every citizen shall have the right to participate in the democratic life of the Union”. To do so, the European Union binds itself to “give citizens and

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<sup>52</sup> Juan Mayoral (2011), „Democratic Improvements in the European Union under the Lisbon Treaty. Institutional changes regarding democratic government in the EU“, European Union Democracy Observatory (EUDO), Robert Schuman Centre for Advanced Studies, p. 1.

<sup>53</sup> Meike Rodekamp and Dawid Friedrich (n 7) 1-2.

<sup>54</sup> Sandra Kröger and Dawid Friedrich (2013), “Democratic Representation in the EU: Two Kinds of Subjectivity”, *Journal of European Public Policy*, 20, No. 2, p. 171-189.



representative associations the opportunity to make known and publicly exchange their views in all areas of the European Union action”,<sup>55</sup> “maintain an open, transparent and regular dialogue with representative associations and civil society”.<sup>56</sup> Article 11 paragraph 3 specifies an obligation to the Commission to carry out “consultations with parties concerned”. The wording of this legal provision seems to offer a consultative practice by following the democratic demand that “all those who are affected by a decision should also be included in the making of these decisions”.<sup>57</sup> This general rule was already implemented in 1974 by the Court of Justice of the European Union (thereafter CJEU) decision in the case *Transocean Marine Paint Association v. Commission*.<sup>58</sup>

Both, the obligation of the Commission to maintain a dialogue and a consultation with parties concerned, will be discussed in more detail in the sub-chapter “Communication and consultation policy” later in this Chapter.

Direct participation introduces the instrument of citizens’ initiatives at EU level, demanding a support of “not less than one million citizens who are nationals of a significant number of Member States” for an initiative. This innovation was put into practice by the Regulation,<sup>59</sup> adopted by the Parliament and the Council. It seems as if EU has tried to discover another role for its citizens beyond their function as the electorate for the first time in the EU Treaties.

The second democratic route is territorial representation, which is formed from “Member States, represented in the Council of the European Union and the European Council, and also, with subnational authorities, in the Committee of the Regions”, which is

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<sup>55</sup> Treaty of Lisbon (n 5) Article 11 paragraph 1.

<sup>56</sup> *ibid* Article 11 paragraph 2.

<sup>57</sup> Meike Rodekamp and Dawid Friedrich (n 7) 6.

<sup>58</sup> Case C-17/74 *Transocean Marine Paint Association v Commission* [1974] ECR I-1064, §15: “the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known” (“a person” here is referred to “an undertaking”).

<sup>59</sup> Regulation 211/2011 (n 44).

“intertwined with electoral representation and is delimited through the Council’s supranational character”.<sup>60</sup> It can also be named as a “multi-level” representation, which will be covered in more details in the Chapter “External participation in the EU decision-making process through multi-level governance”.

The functional representation shall be highlighted as an example of how the two fundamental principles of representation and participation are combined – collective actors gain participatory access to the policy process upon the condition that they are representative”,<sup>61</sup> referring to “representative associations” in Article 11 TEU. There is no specification on what is meant by “representative associations”, which is mentioned twice in Article 11, though the wording itself “points to the need for associations to somehow prove their representativeness” or even demand for “organizational representativeness”.<sup>62</sup> In the Communication<sup>63</sup> on consultation of interested parties the Commission argues that “belonging to an association is another way for citizens to participate actively, in addition to involvement in political parties or through elections”. It shall also be specified that reference of EU institutions to the participation of collective actors, rather than individuals, is quite ambiguous and necessitates the conceptualization of non-electoral forms of representation.<sup>64</sup> On the other hand, this reference explains better the decisions of the EU institutions on issues analysed in other chapters, as for example, in the Sub-chapter “Access to justice in environmental matters” in Chapter “Participation in environmental issues – primordial rights of external participants”.

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<sup>60</sup> Meike Rodekamp and Dawid Friedrich (n 7) 6.

<sup>61</sup> *ibid* 2.

<sup>62</sup> *ibid* 8; and Stijn Smismans (2012), „Interest Representation in the EU, Is There Any? A Top-Down Perspective“ in *The Challenge of Democratic Representation in the European Union*, edited by Dawid Friedrich and Sandra Kröger, Houndmills: Palgrave Macmillan, p. 209-225.

<sup>63</sup> COM (2002) 704 final (n 49) p. 5.

<sup>64</sup> Meike Rodekamp and Dawid Friedrich (n 7) 7.

#### *2.2.5.1. Involvement of external participants.*

The new reform mainly focuses on electoral representation, which could be named as the fourth democratic route. The Treaty of Lisbon establishes that the Parliament is composed of representatives of EU citizens,<sup>65</sup> which links with the idea that “citizens are directly represented at Union level in the European Parliament”<sup>66</sup> and political parties shall express the will of citizens of the EU.<sup>67</sup> Additionally, a new form of institutionalization of democracy has been implemented in the Treaty of Lisbon – a number of new rights and powers have been conferred to the national parliaments.<sup>68</sup> However, there are doubts whether the increased role of national parliaments will “strengthen the parliamentary dimension of the EU’s multilevel structure and enhance the democratic legitimacy of EU dimensions”.<sup>69</sup> Additionally, it is important to make place for the participation of external interests in the decision-making process at the national level as governments of Member States constitute the most decisive legislative organ with the most important executive function. On the one hand, national authorities are in a great demand of external data and scientific or social opinion on an issue in the same way as the EU institutions. So, national authorities might be keen to involve local and regional representatives in forming a national position on the issue to be represented at EU level. In such case, electoral representation gets interlinked with functional representation, which is analysed in more details later in the Chapter.

On the other hand, interest groups, which are active and well represented at EU level, will be forced to relay information or lead debates in Member States to influence the drafted national position or EU policies and legislative framework to be integrated into national legal

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<sup>65</sup> Treaty of Lisbon (n 5) Article 14 paragraph 2.

<sup>66</sup> *ibid* Article 10 paragraph 2.

<sup>67</sup> *ibid* Article 10 paragraph 4.

<sup>68</sup> Treaty of Lisbon (n 5) Article 12 (TEU) and Protocol 1, Protocol 2.

<sup>69</sup> Meike Rodekamp and Dawid Friedrich (n 7) 5.

system. “This debate needs to be encouraged, and can only take place if the policy-making process is seen to be relevant and to add value to the legislative process in individual Member States”.<sup>70</sup>

The EU does not want to bind itself, and most EU official procedures do not mention external participation. The Commission and other involved EU institutions do not take the responsibility to create a well functioning system of access for citizens, but “democratic institutions and the representatives of the people, at both national and European levels, can and must try to connect Europe with its citizens” as “this is the starting condition for more effective and relevant policies”.<sup>71</sup> The first steps have been taken and the EU has issued consultation papers on participation of experts and interest groups in the decision-making process. This document was also mentioned in the White Paper as a tool aiming for a higher involvement with the creation of a consultation policy. It was already stressed that this policy cannot be achieved by legal rules and that most of civil servants as well as external lobbyists are against regulation of their practice. Still, the first attempts saw the implementation of the European Transparency Register. It was decided that the best way to formalise this policy was to establish standard rules to be followed. It was believed that the standards would improve the representation of civil society organisations and structure their debate with the EU institutions.<sup>72</sup>

Member States should also be actively involved in this consultation policy by establishing a more systematic dialogue with representatives of regional and local governments by bringing greater flexibility into EU implementation and by taking into

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<sup>70</sup> Commission, “Communicating Europe in Partnership” (Communication) COM (2007) 568 final [2007], p. 10.

<sup>71</sup> White Paper on European Governance (n 6) 1.

<sup>72</sup> *ibid* 17.

account regional and local conditions at an early stage of policy shaping.<sup>73</sup> The White Paper states that involvement of regional and local level in preparing their position on different issues of EU policy is the responsibility of national administrations. Each Member State should use the most appropriate instruments for consultation when discussing EU decisions and implementing EU policies with a territorial dimension. It is especially important, as the Protocol on Application of the Principles of Subsidiarity and Proportionality<sup>74</sup> imposed an obligation on the Commission to consult widely before proposing legislative acts (Article 2) and enhanced the role accorded to national parliaments. However, the legal aspects of multi-level governance and the possibility on external participation in this context will be analysed in more details in the Chapter “External participation in the EU decision-making process through multi-level governance”.

The analysis provided above shows that external participants are not guaranteed participation in the decision-making process, but that there is an attempt to involve civil society organisations as well as other external participants in the drafting process of new policy measures. It is obvious that the mechanism for decision-making from conception to implementation in the EU institutions is more or less developed, but there is a big gap in the consultation of external participants. It is confirmed that the responsibility for involvement of external participants should not be shifted only to the EU institutions. Member States and their national administrations should also get actively involved by ensuring participation of local and regional interests in decision-making process. They could also create a culture of consultation and accumulation of up-to-date information bearing in mind the fact that their role in the EU decision-making process has drastically increased.

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<sup>73</sup> *ibid* 4.

<sup>74</sup> Treaty of Lisbon (n 5) Protocol No. 2.

### 2.3. CONSULTATION AND COMMUNICATION POLICY AND STRATEGY.

It is recommended that both the EU institutions and Member States communicate more actively with the general public on European issues. “The Commission also considers that communication on European issues is the responsibility of all those involved in the EU decision-making process”.<sup>75</sup> It is one of the core requirements, implementation of which guarantees the needed reform of European Governance.

Consultation is considered to be a part of direct participation. It is a well-organised process with a well established technical tool, even though the opinions and outputs of the consultation do not have much influence as yet over the decision-making process at EU level. Depending on the issues at stake, consultation is intended to provide opportunities for input from representatives of regional and local authorities, civil society organisations, undertakings and associations of undertakings, the individual citizens concerned, academics and technical experts, and interested parties in third countries.<sup>76</sup>

What is needed is a reinforced culture of consultation and dialogue; a culture which is adopted by all the EU institutions and which associates particularly the Parliament in the consultative process.<sup>77</sup> Ensuring successful participation and involvement of external participants, diversity of different actors and interests groups has to be acknowledged. It has to ensure “the fair treatment of all Member States from the largest to the smallest [...] and provide a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic

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<sup>75</sup> COM (2007) 568 final (n 70) 4.

<sup>76</sup> COM (2002) 704 final (n 49) 4.

<sup>77</sup> White Paper on European Governance (n 6) 16.

representation, European and national, at the level of the Council and European Parliament, together with Union's legislature."<sup>78</sup>

First of all, it is necessary to address the question of "how European issues can be brought systematically into the public eye and their relevance made tangible to civil society".<sup>79</sup> In order to involve civil society and external participants successfully into the problem-solving and the decision-making procedure, the European Union has to accept the different political systems with their specific forms of interest mediation, the equal value of different cultures, structural differences in ideas, identities, interests, institutions, problems, knowledge, status, power and etc.<sup>80</sup> The described differences can be a positive potential for legitimate and effective decisions in the European governance, ensuring relevance of European policy to the concerns of civil society at every level.<sup>81</sup>

The Commission has put a lot of efforts in implementing the first steps towards a reinforced consultation culture, as earlier experts and/or scientists were invited on a random basis whenever expertise was needed for a drafted decision. Setting standards and guidelines on how an expert advice should be collected and external participants involved into the decision-making process guarantees the inclusion of more stable scientific knowledge into the decisions drafted, as well as forms a valuable expert group which could be used whenever it is needed. However, the set guidelines and standard rules do not provide legitimate assurance that participating experts will be allowed to provide its input till the end result is achieved; as the Commission does not oblige itself to assure that they would take into account the advice

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<sup>78</sup> *ibid* 8.

<sup>79</sup> N. Lebessis and J. Paterson (n 1) 28.

<sup>80</sup> Ch. Landfried (2005), "Difference as a Potential for European Constitution Making", European University Institute, EUI Working Paper RSCAS No. 2005/04, p.3.

<sup>81</sup> Jacques Derrida (1992), *Das andere Kap. Die vertagte Demokratie. Zwei Essays zu Europa*. Frankfurt: Suhrkamp, p. 16.

provided. There is a risk that eliminating participants in the middle of the process, the provided technical solution might be lost or changed when other participants are involved. The process might become cumbersome, and if the provided scientific and/or technical advice is not monitored to the very end, loss of information, varying interpretations at different drafting phases and etc. might give negative results.

In order to avoid those risks, the EU institutions have attempted to create a more transparent and effective system, which was discussed in the White Paper. As the efficiency directly depends on the information, the priority is set on development of a communication policy. The Communication policy is developed in two directions – one covers national authorities and regional participants (which will be discussed in more details in the Chapter “External participation in the EU decision-making process through multi-level governance”), another – experts and scientific knowledge through the whole EU (those issues will be covered in the Chapters “External participation through comitology” and “Collection and use of expertise”). Those two sections have to be supported by a number of other issues, such as providing access to information and documents in official languages, guaranteeing systematic dialogue and establishing a multi-level partnership/governance.

#### *2.3.1. Communication on Minimum Standards for Consultation.*

The Commission asserts that creating a culture of consultation cannot be achieved by legal rules. A number of official documents in which the relation between mainly the Commission and an organized civil society are framed in the language of participation have been issued. In the Discussion Paper<sup>82</sup> on non-governmental organisation the Commission has

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<sup>82</sup> Commission, “The Commission and non-governmental organisations: building a stronger partnership” (Discussion Paper) COM (2000) 11, p.4.



acknowledged for the first time the contribution of the NGOs in fostering a more participatory democracy both within European Union and beyond. Based on the discussion paper itself and the feedback received, this initiative was developed further. In December 2002, the Commission adopted the communication on "General principles and minimum standards for consultation of interested parties",<sup>83</sup> which sets up a coherent and flexible framework for consultation of stakeholders, including NGOs. The Commission clarifies that organizations, which seek to contribute to EU policy development, must follow the principles of openness and accountability and be ready to disclose "which interests they represent" and "how inclusive that representation is",<sup>84</sup> having in mind that the Commission favours "the need for a proper balance, where relevant, between the representatives of [...] wider constituencies".<sup>85</sup> The more detailed analysis of this communication is provided in the Chapter "Collection and use of expertise".

### *2.3.2. Information and Communication Policy and Strategy for the European Union.*

Thus, in order to ensure the transparent and efficient participation of external participants in the policy-shaping process a communication policy of the Commission and the other EU institutions<sup>86</sup> had to be established. The Communication Policy promotes efforts to deliver information at national and local level, making use of networks, grassroots, organisations and national, regional and local authorities, where possible.

The Commission has adopted both communication and consultation policy, as identified in the White Paper. The latter is strictly used by the Commission's civil servants.

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<sup>83</sup> COM (2002) 704 final (n 49).

<sup>84</sup> *ibid* 17.

<sup>85</sup> *ibid* 20.

<sup>86</sup> Commission, "A new framework for co-operation on activities concerning the information and communication policy of the European Union" (Communication), COM (2001) 354 final.

This document is quoted in all other policies and linked to the consultation initiatives and practical guidelines of EU. However, the consultation and communication policy themselves cannot exist on their own; access to documents, access to information and similar issues must be taken into account. On the other hand, as it was already mentioned in the analysis of the White Paper, that it is one of the obligatory conditions for the public to have access to reliable information on the European issues and be able to scrutinize the policy process on its various stages.

Another element to be mentioned with regard to consultation and communication is access to information presented in a way that is adapted to local needs and concerns, and available *in all official languages*.<sup>87</sup> The need for reliable information and communication on ongoing issues has become one of the priority issues in the EU. Without relevant information, the EU institutions will not be able to provide effective and timely policies, and deliver what is needed on the basis of clear objectives, and the public will not be able to evaluate the achievements or the decisions taken. The Communication Policy is also one of the constituent elements in order to implement one of the five principles – “*openness*”,<sup>88</sup> proposed in the White Paper.

In order to develop an informed debate on the future of Europe along the lines of the White Paper, a certain amount of advance planning is required to raise citizens’ awareness and associate them in an active and positive manner.<sup>89</sup>

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<sup>87</sup> “The definition and development of the main messages must be expressed in the language of general public: effective communication must always be seen in terms of general public rather than of the institutions”, in Commission, “An Information and Communication Strategy for the European Union” (Communication) COM (2002) 350 final/2, 02/10/2002, p. 13.

<sup>88</sup> “Five principles proposed in White Paper on European Governance: openness, participation, accountability, effectiveness and coherence”. White Paper on European Governance (n 6) 10.

<sup>89</sup> Economic and Social Committee on the “Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions entitled a new framework for cooperation on activities concerning the information and communication policy of the European Union” (Opinion) (2002/C 48/25) [2002], p.109.

The objective of this Communication Strategy is to “generate awareness and combat ignorance and apathy so as to lay a firm foundation for the management of public life, a clearly understood form of governance between the European Union and its citizens”.<sup>90</sup> After two years of further development of the Communication Strategy, the objective has changed slightly: “to improve perception of the European Union and its Institutions and their legitimacy by deepening knowledge and understanding of its tasks, structure and achievements and by establishing a dialogue with its citizens”.<sup>91</sup>

Member States and the EU institutions are enabled to develop a set of messages on each topic as part of an overall process, which “cannot be reduced to the mere provision of information: it must convey a meaning, facilitate comprehension, set both action and policy in a real context, and prompt dialogue with national public opinion so as to enhance the participation of the general public in the great European debate”.<sup>92</sup> The messages to be prepared and disseminated should be acknowledged as priority ones not just by the European Union but also by the general public. They are usually set on different topics, and essentially act as a collective memory, crystallising knowledge at a given point and acting as a basis for future action.<sup>93</sup> It also includes raising the quality of the European public debate, associating the public in the European decision-making, listening to the public and their concerns more attentively, and the methodical, consistent rebuilding of EU’s image.<sup>94</sup>

On the other hand, “[c]onsulting those who will be affected by a new policy or initiative and those who will implement it is a Treaty obligation, [...] [as it] helps to ensure

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<sup>90</sup> COM (2002) 350 final/2 (n 87) 10.

<sup>91</sup> Commission, “Implementing the information and communication strategy for the European Union” (Communication) COM (2004) 196 final, p.3.

<sup>92</sup> COM (2002) 350 final/2 (n 87) 10.

<sup>93</sup> N. Lebessis and J. Paterson (n 1) 26.

<sup>94</sup> COM (2004) 196 final (n 91) 3.

that policies are effective and efficient, and it increases the legitimacy of EU action from the point of view of stakeholders and citizens”.<sup>95</sup>

The development of the Communication Strategy means that the communication should be targeted “at two distinct levels, using different messages and appropriate tools”.<sup>96</sup> dialogue should be prepared in a certain way, as civil servants of the EU institutions are already reasonably informed, whereas dialogue with the general public must be understandable for those who are uninterested and unfamiliar with the European Union. “In addition, information and messages must be geared to local realities, languages, perceptions and to specific interests and concerns of various target groups”, who are “selected in accordance with the communication plans negotiated with Member States on each of the priority topics agreed on”.<sup>97</sup> It is suggested, that alongside an open and public consultation specific efforts should be made in order “to ensure that all relevant stakeholders are both aware of and able to contribute to the consultation”, as an open consultation may not “provide a fully representative picture of opinions” due to uneven possibility for interest groups “to take part in consultations or express their views with the same force”.<sup>98</sup>

Without active support from national and regional authorities, the EU institutions will not be able to get their messages across to or engage with the general public. In order to spread the formed messages as effectively as possible, the cooperation with Member States must operate at three levels: *inter-institutionally*, where the EU institutions set the thematic priorities for information and lay down joint guidelines on EU information and communication leaving freedom for Member States to decide whether to join it; in the various

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<sup>95</sup> Impact Assessment Guidelines (n 22) 19.

<sup>96</sup> COM (2002) 350 final/2 (n 87) 16.

<sup>97</sup> *ibid.*

<sup>98</sup> Impact Assessment Guidelines (n 22) 20.

aspects of *decentralisation*, by shifting of communication obligations from EU institutions to outside experts and Member States via the memorandum of understanding; and in the partnership with civil society by distributing the end opinion of the debated decisions, which have to go through all levels of communication.<sup>99</sup>

The follow-up and implementation of the discussed communications had several weaknesses – there was a continuous fragmentation of communication activities and they were too focused on financial issues rather than on dialogue and proactive communication; the majority of formed messages reflected political priorities were not necessarily linked to citizens' interests, needs and preoccupations.<sup>100</sup>

#### *2.3.2.1. Action Plan to Improve Communicating Europe.*

After the last three policy documents on information and communication, the Commission has adopted “three other initiatives centred on listening, communicating and “going local”.”<sup>101</sup> The Action Plan<sup>102</sup> was set “to improve communicating Europe by the Commission”<sup>103</sup> and to re-arrange the use of internal communication resources. First, it aimed to listen to EU citizens by allowing expressing their opinions so that the Commission could understand their perceptions and concerns. The research function was presented as a fundamental element of the “listening process”, through the analysis of Eurobarometer and other surveys’ (data-banks, impact studies, research on audiences and ad-hoc studies)

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<sup>99</sup> COM (2002) 350 final/2 (n 87) 21.

<sup>100</sup> Communication to the Commission - Action plan to improve communicating Europe by the Commission, 20 July 2005, p. 3.

<sup>101</sup> COM (2007) 568 final (n 70) 3.

<sup>102</sup> Action plan to improve communicating Europe by the Commission (n 100).

<sup>103</sup> Commission, “Policy and Strategy” (Communication)  
<[http://ec.europa.eu/ipg/basics/policy/index\\_en.htm#section\\_8](http://ec.europa.eu/ipg/basics/policy/index_en.htm#section_8)> accessed on 10 September 2013.

results.<sup>104</sup> The newly presented strategic principles aimed to ensure more effective and selective communication in EU by listening to EU citizens through the analysis of various research results, information relays and consultations. Nevertheless, the Commission did not identify whether it could be considered as one of the mechanisms of an active participation of civil society.

#### *2.3.2.2. The Plan-D for Democracy, Dialogue and Debate*

The Plan-D<sup>105</sup> dovetailed with the Action Plan and created a long-term framework for citizens' dialogue, "where citizens are given the information and the tools to actively participate in the decision making process and gain ownership of the European project". The Commission indicated in the Plan-D that as part of the communicating process it had improved its consultation on major initiatives by issuing Green and White Papers as well as arranging internet consultations over the whole range of citizens' panels and targeted focus groups. It underlined "the national character of the debate but also recommend[ed] a structured feedback process and a series of possible initiatives to be taken at the [Union] level".<sup>106</sup>

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<sup>104</sup> Action plan to improve communicating Europe by the Commission (n 100) 8.

<sup>105</sup> Commission, "The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate" (Communication) COM (2005) 494 final.

<sup>106</sup> *ibid* 11.

### 2.3.2.3. *White Paper on a European Communication Policy*

And the White Paper on a European Communication Policy<sup>107</sup> supported a two-way communication involving active public participation of citizens with a “going local” approach. Consultation, as a standard practice, which is limited to specific policy initiatives and to an open dialogue on various views and concerns to be expressed has been underlined. Participation democracy is implemented through a right to express views, be heard and have the opportunity for dialogue with the decision-makers.

Later communication policies and strategies were mainly focused on the use of state-of-art internet technology to actively debate and advocate the Commission’s policies, which had become an important opinion-forming forum of debate on the internet.<sup>108</sup> Additionally, the Commission planned to innovate its web and digital communications to keep pace with citizens' expectations as well as exploiting the potential of new technologies.

### 2.3.3. *Consultation Instruments and Procedures.*

On the other hand, the consultation is one of the Commission’s duties according to the Treaties and it helps to ensure that proposals put to the legislature are sound. Nevertheless neither the EC Treaty nor the Treaty of Lisbon has included any general provision that obliges EU institutions to consult external representatives prior to making decisions.<sup>109</sup> Despite the set

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<sup>107</sup> White Paper on a European Communication Policy, COM (2006) 35 final, 1 February 2006.

<sup>108</sup> Communication to the Commission - *Communicating about Europe via the Internet: Engaging the citizens*, SEC (2007) 1742, 21 December 2007.

<sup>109</sup> Josefin Almer and Matilda Rotkirch (2004), *European Governance – An Overview of the Commission’s Agenda for Reform*, Swedish Institute for European Policy Studies,

obligation “[i]n the fields of cohesion, environment and rural development policies, managing authorities must meet minimum communication requirements”.<sup>110</sup>

Article 2 of the Protocol No. 2<sup>111</sup> implies that “the Commission shall consult widely” before proposing the legislative acts. Article 1 of the Protocol No. 1<sup>112</sup> defines consultation documents of the Commission – Green and White papers and communications. However, “a general approach on how to undertake such consultations has not existed. Instead, consultation has been based on a variety of traditions and each of the Directorate Generals has had its own mechanisms and methods for consulting its respective sectoral interest groups”.<sup>113</sup>

The Commission already consults interested parties through different instruments, such as Green and White Papers, Communications, advisory committees, business test panels and *ad hoc* consultations. It helps to arbitrate between competing claims and priorities, and assists in developing a long term policy perspective by shaping a more effective policy, based on early consultation and past experience. Better consultation and involvement will allow consider much more critically the demands from the EU institutions and from interest groups for new political initiatives.

A better informed public increasingly questions the content and independence of expert advice that is given, which guarantees the transparency of the primary information sources. The European Union is required to apply the precautionary principle and play its role in *risk assessment and risk management*.<sup>114</sup> This part of the decision-making is one of the main ones as it involves national administrations via the multi-level partnership/ governance. Risk assessment can only be trusted to experts and technocrats with a scientific and technical

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<<http://www.sieps.se/en/publikationer/european-governance-an-overview-of-the-commissions-agenda-for-reform-20041u>> accessed on 4 September 2013, p. 30.

<sup>110</sup> COM (2007) 568 final (n 70) 5.

<sup>111</sup> Treaty of Lisbon (n 5) Protocol No. 2.

<sup>112</sup> Treaty of Lisbon (n 5) Protocol No. 1.

<sup>113</sup> Josefin Almer and Matilda Rotkirch (n 109) 30.

<sup>114</sup> The application of the precautionary principle will be discussed in the Chapter “Precautionary principle in collection and use of scientific expertise”.



background. However, the last decision regarding risk assessment and management is usually taken by a participant with political authority.

#### *2.3.3.1. Guidelines on Collection and Use of Expertise.*

The Commission has already adopted *general principles and minimum standards for consulting non-institutional interested parties*<sup>115</sup> on the major policy initiatives it proposes, and *guidelines on collection and use of expert advice*<sup>116</sup> to provide for the accountability, plurality and integrity of the expertise used. The consultation guidelines set the main principles on how external participants can be involved into the decision-making process and ensure that all relevant parties are properly consulted and the triggered input from external parties is used for the shaping of a legislative proposal prior to a decision of the Commission. The guidelines define the involvement of interested parties through a more transparent consultation process, provision of general principles and standards for consultation to help the Commission to rationalise its consultation procedures and to promote mutual learning and exchange of good practices within the Commission.<sup>117</sup> “Under this definition, both specific consultation frameworks already provided for in the treaties, consultation requirements under international agreements and decisions taken in a formal process of consulting Member States comitology procedure are excluded”.<sup>118</sup> This Communication will be discussed in more detail in the Chapter “Collection and use of expertise”.

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<sup>115</sup> COM (2002) 704 final (n 49).

<sup>116</sup> Commission, “Collection and use of expertise by the Commission: principles and guidelines. Improving the knowledge base for better policies” (Communication) COM (2002) 713 final.

<sup>117</sup> COM (2002) 704 final (n 49) 3-4.

<sup>118</sup> Josefin Almer and Matilda Rotkirch (n 109) 34.

#### 2.3.3.2. *Communication on Interactive Policy Making.*

The Commission has also adopted a *Communication on Interactive Policy Making (IPM)*,<sup>119</sup> as one of the consultation tools, which aims to improve governance by using the internet for collecting and analysing reactions in the marketplace for use in the European Union's policy – making process. It aims to use modern technologies to allow both Member States administrations and EU institutions to understand the needs of citizens and other external participants. This tool can also be used by the Commission for internal communication, internal surveys, website user surveys, preparation of events and conferences etc. IPM may assist in developing policies “by allowing more rapid and targeted responses to emerging issues and problems, improving the assessment of the impact of policies (or the absence of them) and providing greater accountability to citizens”.<sup>120</sup>

#### 2.3.3.3. *Code of Conduct.*

The culture of consultation should be achieved by *a code of conduct* that sets minimum standards, which shall reduce the risk of the policy-makers just listening to one side of the argument or particular groups getting privileged access on the basis of sectoral interests or nationality. An established culture of consultation might further lead to partnership arrangements, and may convince the Commission to involve external participants on a more regular basis. It is believed that the code of conduct for consultation, which also structures the EU's relationship with civil society, identifies responsibilities and improves accountability for all partners. On the other hand, the Commission encourages interest groups to establish their

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<sup>119</sup> Communication on Interactive Policy Making (IPM - COM (2001) 1014), 3 April 2001.

<sup>120</sup> Interactive Policy Making - < [http://ec.europa.eu/yourvoice/ipm/index\\_en.htm#IPM\\_Open\\_Source](http://ec.europa.eu/yourvoice/ipm/index_en.htm#IPM_Open_Source) >, accessed on 4 September 2013.

own mechanisms for monitoring the process, so that they can see what they can learn from it and check that they are making an effective contribution to a transparent, open and accountable system.<sup>121</sup> The idea of a code of conduct was introduced in the White Paper and later re-introduced again by the Green Paper on European Transparency Initiative.<sup>122</sup> However, neither of documents addressed in detail “the issues of how such a code should be drawn up and exactly how it would be monitored in practice”.

An established culture of consultation might further lead to partnership arrangements, and may convince the Commission to involve external participants on a more regular basis. It is believed that the code of conduct for consultation, which also structures the EU’s relationship with civil society, identifies responsibilities and improves accountability for all partners. On the other hand, the Commission encourages interest groups to establish their own mechanisms for monitoring the process, so that they can see what they can learn from it and check that they are making an effective contribution to a transparent, open and accountable system.<sup>123</sup> The idea of a code of conduct was introduced in the White Paper and later re-introduced again by the Green Paper on European Transparency Initiative.<sup>124</sup> Though neither of documents addressed in detail “the issues of how such a code should be drawn up and exactly how it would be monitored in practice”.

The Commission has even opted for self-regulation in this area by inviting interested parties to adopt their own voluntary codes of conduct, implementing the following features: to act in an honest manner and always declare the represented interests, to avoid dissemination of misleading information and to avoid any form of inducement in order to obtain information

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<sup>121</sup> White Paper on European Governance (n 6).

<sup>122</sup> Communication from the Commission - Follow-up to the Green Paper 'European Transparency Initiative', COM (2007) 127 final, 21 March 2007, p.5.

<sup>123</sup> White Paper on European Governance (n 6).

<sup>124</sup> COM (2007) 127 final (n 122) 5.

or to receive preferential treatment.<sup>125</sup> However, there are already cases of misdemeanour reported in relation with voluntary codes of conduct. Additionally, it seems that only consultants have applied this intention, while lobbyists and other groups of interest representatives have not considered it to be applicable. Again, a notion to put in place a compulsory code of conduct, as the Parliament has applied in its practice for all seeking accreditation, has been raised. It may soon become a reality if the obligatory registration, which is analysed in the next sub-chapter, will be implemented.

#### *2.3.4. European Transparency Register.*

In an effort to give a further boost to the transparency of the EU decision-making process, the Parliament and the Commission have launched a joint, public European Transparency Register which provides more information on those who seek to influence European policy,<sup>126</sup> - in other words, a new EU lobby register was launched. This Register was established to ensure that the EU institutions interact with various external participants in a constant and legitimate manner. The Register was intended to provide information on the participants aiming to influence the EU decision-making process and on the level of resources to be invested in these activities.<sup>127</sup>

The Transparency Register incentivises mainly the provision of information about lobbying organisations rather than separate individuals, even though the FAQ, prepared by the

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<sup>125</sup> Green Paper on European Transparency Initiative, COM (2006) 194 final, 3 May 2006, p. 9.

<sup>126</sup> <[http://ec.europa.eu/transparency/index\\_en.htm](http://ec.europa.eu/transparency/index_en.htm)> accessed on 23 July 2013.

<sup>127</sup> <<http://ec.europa.eu/transparencyregister/info/about-register/whyTransparencyRegister.do?locale=en>> accessed on 25 July 2013).

Joint Transparency Register Secretariat,<sup>128</sup> explains that “all organisations and self-employed individuals engaged in “activities carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and decision-making processes of the EU institutions” are expected to register”.

It is believed that the main incentive for joining the Register is to get the EP accreditation. Another potentially strong incentive is that the EU institutions may restrict participation in meetings of organisations which have not registered themselves, especially where the views of key stakeholders over the details of a specific policy are in a variety of consultative forums.<sup>129</sup>

It can be assumed that this Register may represent a possibility to get *actively* involved in an EU decision - making and implementation process, as other means and instruments discussed in the later Chapters “External participation through comitology” and “Collection and use of expertise”, are mainly established for a possible *passive* involvement. By joining the Register, a registered participant gains the right to get into the EU Parliament meetings at its own discretion as well as to get involved in selective consultation meetings at the Commission and get consultation alerts for nominated policy fields. Of course, active participation also includes some passive participation – the search engine of the Register “permits a limited number of data fields to be examined and cross-referenced, with the selection of enquiry fields seemingly driven mainly by the needs of EU institutions to identify consultees”.<sup>130</sup> The chosen external consultees can presumably be invited to the forming of a defined policy and/or legislative act or share expertise in the relevant policy area. It is worth

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<sup>128</sup> Joint Transparency Register Secretariat; (2012), Transparency register: Frequently asked questions, <[ec.europa.eu/transparencyregister/info/openFile.do?fileName=faq\\_en.pdf](http://ec.europa.eu/transparencyregister/info/openFile.do?fileName=faq_en.pdf)>, version 2, 4 October 2012 (accessed on 26 July 2013), p. 2.

<sup>129</sup> Justin Greenwood and Joanna Dreger (2013), “The Transparency Register: A European vanguard of strong lobby regulation?”, open access journal *Interest Groups & Advocacy* launched by Palgrave Macmillan, No. 2; published online 23 April 2013, p. 148.

<sup>130</sup> *ibid* 143.

noting that entries on the Register also draw think tanks, research and academic institutions, representatives from public authorities, not only commercial practitioners.

The Register came into force in June 2011, although it is believed to have a large number of shortcomings due to its voluntary nature.<sup>131</sup> The Parliament has expressed its position on a mandatory register, due to the fact that “many of the largest lobbies in Brussels simply don’t sign up; law firms appear to be boycotting the register (some who signed up last year have since withdrawn once pressed to reveal their clients); there is very weak oversight and enforcement of the register, and the Commission relentlessly spins the myth that the register is a success simply by virtue of the number of new organizations continuing to join”.<sup>132</sup>

#### *2.3.4.1. Legal basis to establish a system of compulsory registration.*

The Commission favours a voluntary register, as it believes that there is no legal base for a mandatory register in the EU Treaties.<sup>133</sup> However, professor M.Krajewski<sup>134</sup> has substantiated that mandatory and binding lobby regulation can be adopted through the ordinary legislative procedures, on the basis of Article 298 TFEU,<sup>135</sup> and followed, by a binding EU regulation or directive. It is reasoned that due to the fact that the Register itself

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<sup>131</sup> Markus Krajewski (2013), A Legal Study on “Legal Framework for a Mandatory EU Lobby Register and Regulations”, on behalf of the *Kammer für Arbeiter und Angestellte für Wien (AK)* (the Vienna Chamber of Labour).

<sup>132</sup> Will Dinan (2013), “A Risky Register”, published on Spinwatch – Public Interest Investigations on 22 June 2013 at <http://www.spinwatch.org/index.php/issues/more/item/5506-a-risky-register> accessed on 26 July 2013.

<sup>133</sup> Friends of the Earth Europe (2013), article on “ALTER-EU: Legal framework for a mandatory EU lobby register”, published on 18 June 2013 at [http://www.foeeurope.org/legal\\_framework\\_mandatory\\_lobby\\_register180613](http://www.foeeurope.org/legal_framework_mandatory_lobby_register180613) accessed on 25 July 2013.

<sup>134</sup> Markus Krajewski (n 131).

<sup>135</sup> Article 298 paragraph 1 TFEU: “In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration”; paragraph 2: “[...] the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end”.

was established by Inter-Institutional Agreement<sup>136</sup> between the Parliament and the Commission, which is “binding on the institutions and can, therefore, have similar factual binding effects on lobbyists if they interact with the respective EU organs”.<sup>137</sup>

Nevertheless, it shall be noted that the legal basis for lobbying under Article 298 TFEU is limited only to lobbyists who target the EU institutions engaged in administrative tasks, i.e. it refers to all administrations at the European level. This includes the organs most associated with executive and legislative power, namely the Council, the Commission and the Parliament, but also all agencies and other independent institutions engaged in administrative tasks.<sup>138</sup> However, if an external participant targets other tasks, for example, legislative or general policy-making, these activities will be outside the competence implemented by Article 298 TFEU. In such case the doctrine of implied powers may be applied.<sup>139</sup>

The doctrine of implied powers, developed by the CJEU,<sup>140</sup> held that the Union had powers not only expressly laid down in the Treaty but also to be implied from express provisions, which is subject to extremely restrictive criteria.<sup>141</sup> “It is only exceptionally that such powers are recognised by case-law and in order to be so recognised, they must be necessary to ensure the practical effect of the provisions of the Treaty or the base regulation at issue”.<sup>142</sup> This position was argued by Mr. Trabucchi,<sup>143</sup> stating that it is not even considered

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<sup>136</sup> Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ L 191, 22 July 2011, p.29.

<sup>137</sup> Markus Krajewski (n 131) 6.

<sup>138</sup> *ibid* 7-10, 15.

<sup>139</sup> *ibid* 15.

<sup>140</sup> Case C-22/70, *Commission of the European Communities v Council of the European Communities* (AETR), [1971] ECR I-263, § 15-16: “[15] To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions. [16] Such authority arises not only from an express conferment by the Treaty—as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions”.

<sup>141</sup> Case C-244/81 *Klöckner-Werke AG v Commission of the European Communities* [1983] ECR I-1453, Opinion of AG Reischl, p.1501.

<sup>142</sup> Case T-240/04 *French Republic v. Commission* [2007] ECR II-4035, paras 37.

that “the recognition of powers of action conferred on the [Union] is necessary, not generally to attain the objectives of the Treaty, as this rule provides, but more precisely for the correct exercise of powers specifically conferred on the [Union] in determined sectors”.

Another extension of competences and the possibility to implement binding regulations comes in via the special procedure mentioned in Article 352 TFEU. This Article is “usually employed if the treaties neither explicitly nor implicitly confer a competence on the EU, but its activities are nevertheless required to attain an objective mentioned in the treaties”.<sup>144</sup> This interpretation may be contested on the grounds of subsidiarity by national parliaments, as the flexibility clause entails an exceptional use of EU legislative power.<sup>145</sup> Indeed the German Federal Constitutional Court has already raised concerns with the scope of this Article: it has stipulated that the exercise of any such competence constitutionally required ratification.<sup>146</sup> As Article 352 TFEU not only establishes a competence for action for the European Union but at the same time relaxes the principle of conferral, it may be considered as a threat to most Member States’ constitutions.

## 2.4. CONCLUSIONS.

The aim of this Chapter was to review the EU legal and policy basis for external participation. The analysis commenced with the White Paper on European Governance as this is the real “constitutional text” and a starting point for external participation. Even though this document is just a consultation paper of the Commission, which is not binding on Member

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<sup>143</sup> Case C-8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] ECR I-897, Opinion of AG Trabucchi.

<sup>144</sup> Markus Krajewski (n 131) 12.

<sup>145</sup> Weatherill, Stephen; (2005), “Better Competence Monitoring”, 30 Thomson/ Sweet and Maxwell: European Law Journal p.23.

<sup>146</sup> German Federal Constitutional Court, BVerfG, 2 BvE 2/08 from 30.6.2009, Absatz-Nr. (1 - 421), [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html), paras 326–328.



States and other bodies, it was a great support to start external participation. The principle of participation was not retained in the Treaty of Lisbon though originally it was introduced in the Draft Constitution for Europe. It means that the primary legislation has left a legal gap on participatory legislation as well as external inclusion in the decision-making process.

The White Paper recommends implementing a number of various instruments for involvement of external participants as well as scientific and technical knowledge into the decision-making process at the EU level. There is a myriad of communications, policy documents, and initiatives in this domain, the variety of which strikes. An attempt was made to cover only the main documents, directly interlinked to participation and external involvement at the EU level, though it shall be admitted that there is a real danger of confusion and contradiction with such a number.

The analysis in this Chapter has also revealed that the consultation culture is not adequately formed when discussing EU decisions and implementing EU policies in order to listen and learn from external experience. The Commission welcomes efforts to take into account local and regional knowledge and conditions as the latter can make it difficult to establish one set of rules that covers the whole EU, without tying up the legislation in excessive complexity. The Commission has left the participation at regional and local level for national responsibility. Due to different communication and consultation practices in national administrations, participation might differ in the same drafted implementation measures. It might lead to distrust in decision-making process and possibility to be involved.

Also, the choice of voluntary registration in the European Transparency Register may not serve the purpose to ensure constant, legitimate and necessary quality of democracy interaction between the EU institutions and external participants. Due to its voluntary nature, this instrument does not seem to ensure the efficient monitoring of external interests engaged

in activities aiming at influencing the EU decision-making process. It neither ensures involvement of all coherent participants in forming a defined policy and/or legislative act or share expertise in the relevant policy area. Favouring a non-legal rules may be interesting but it is at variance with what happens in many countries and Member States.

The subsequent Chapter will analyse the possibility for external actors both at regional and local levels, possessing credible and politically sensitive information, to get involved in the decision-making process with the Commission.

### **III CHAPTER**

#### **EXTERNAL PARTICIPATION THROUGH COMITOLOGY**

##### **3.1. INTRODUCTION.**

The preceding Chapter “EU law and policy on participation in EU governance” analysed the need for a change in EU Governance by reforming multi-level governance and involve more actors, such as civil society, private organisations, experts and other external participants. Not only has the demand for technical expertise increased in the EU decision-making process, but the involvement of external participants ensures confidence in the final outcomes. This is particularly important as these outcomes are implemented by local and regional authorities.

Consequently, key documents on involvement of external participants acknowledge their importance in the future decision-making process. The instruments that regulate the organisation of external expertise in the EU decision-making process are analysed in more details in the Chapters “Collection and use of expertise” and “Precautionary principle in collection and use of scientific expertise”. However, even though external participation and

comitology may not proceed from the same rationale, the new system of implementation of EU law and policies is a way for the expression of external participation.

There are considerable speculations in the EU, regarding the origin and functions of committees and the powers that are delegated to them. The organisation of committees and their influence in the decision-making procedure has changed over time. While comitology committees had gained in power and influence over time, the Treaty of Lisbon has changed significantly “the theory and practice of the delegation of implementing powers to the European Commission”, “in terms of procedure, legal basis and institutional balance”.<sup>1</sup>

Originally, comitology committees were established to enable Member States to control the implementation of the Commission. Comitology committees did not aim to involve external participants. There are no directly implemented provisions allowing external participants to be joined to the decision-making process. However there are phases in the decision-making process when external expertise is required by the Commission. Those instances will be also discussed in more details below.

First, this Chapter provides a short historical overview of rulemaking in the EU. It is followed by the explanation of the creation of comitology, the procedures and delegation of some functions to the newly established bodies. The focus then shifts to a detailed evaluation of the approach to rulemaking in the Treaty of Lisbon. The second part of the Chapter covers the implementation of the supporting measures, such as the Comitology Register and the Annual Report. The third and last part of the Chapter analyses the typology of comitology committees and their main participants.

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<sup>1</sup> A. Hardacre and M. Kaeding (2011); *Delegated and Implementing Acts. The New Comitology*, EIPA Essential Guide, version 2, p. 4.

### 3.2. DEFINITION OF COMITOLOGY COMMITTEES.

Looking at the history of comitology committees, it could be argued that they were established in response to dramatic needs, thereby achieving a unique status. Historically, the use of committees by the Union institutions dates back to the 1960s, when the Council, urgently needing to reduce its workload in implementation of the Union's agricultural policy, decided to delegate certain discretionary powers to the Commission.<sup>2</sup> National bodies resisted delegations of power to the Commission, however committees of national representatives were established; these were to be consulted prior to any implementation decision.

The expression of comitology committee was chosen on purpose, as the etymology of the modern word 'committee' goes back to the Latin verb *committere*,<sup>3</sup> which means – “bringing together, coming to blows, and making a start”.<sup>4</sup> The special characteristic of people brought together in a so-called committee, is usually their outstanding knowledge or *expertise*, formed by academic training or professional experience; moreover they are not recruited as individuals, but as *representatives* of some social group, faction, party, sector, region, country or other constituency.<sup>5</sup>

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<sup>2</sup> C. Bertram (1967), “Decision-making in the E.E.C.: The Management Committee Procedure”, 5 *CML Rev.*, p. 246 – 264; P. Schindler (1971), “The problems of decision-making by way of the management committee procedure in the European Economic Community”, 8 *CML Rev.*, p. 184-205; and H. Schmitt von Sydow (1973), “Die Verwaltungs – und Regelungsausschussverfahren der Europäischen Wirtschaftsgemeinschaften”.

<sup>3</sup> M.P.C.M. van Schendelen (1998), “Prolegomena to EU Committees as Influential Policymakers”, in M.P.C.M. van Schendelen (eds.), *EU Committees as Influential Policymakers*, Ashgate, p. 3.

<sup>4</sup> “The common notion is that different people are brought together to do something. In the course of time, this general notion acquired two specific elements. The people, who were brought together, possess some special characteristic: an outstanding strength, ability, status or knowledge. And they are subordinate or “committed” to some higher authority such as the king, the parliament or the people. In the past, the concrete manifestations of these two elements have varied much within societies.” M.P.C.M. van Schendelen (n 3) 3.

<sup>5</sup> H.F. Pitkin (1972), *The Concept of Representation*, University of California Press, Berkeley.

One of the core aims of comitology committees is to meet “at times unexpected, functional demands of an ever-expanding European Union for technical information and expertise.”<sup>6</sup> Beyond expertise and technical knowledge, committees need to respond to other demands,<sup>7</sup> - institutionalisation,<sup>8</sup> specialisation<sup>9</sup> and representation.<sup>10</sup> The demands could be achieved with the help of “effective and efficient [Union] decision-making, to ensure the continuing presence of Member States within the [Union] decision-making process and to include the views of socio-economic parties”.<sup>11</sup> It leads to a definition that committees are: “institutionalised groups of specialised and representative people”.<sup>12</sup>

There is also one more reason for the creation of committees – they gather interests, experience and opinions of persons, who are usually highly specialised. The collected

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<sup>6</sup> Gunther F. Schaefer (1996), “Committees in the EC Policy Process: A First Step towards Developing a Conceptual Framework” in R.H. Pedler and G.F. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, Maastricht, European Institute of Public Administration, p.3-38.

<sup>7</sup> J. Alt and A. Alesina (1996), “Political economy: an overview” in R.E. Goodin and H.D. Klingmann (eds.), *A New Handbook of Political Science*, Oxford University Press, Oxford,.

<sup>8</sup> “Institutionalisation” means that comitology committees are considered to be legal bodies, which do not interfere with the Community’s institutional structure, even though they are not foreseen by the Treaties and it was feared that this body might distort the established institutional relationship between the Commission and the Council. However, in order to ensure the principle of the institutional balance it needs to accommodate the recognition of transnational governance structures between the Community and the Member States, which leads to an increased and reinforced role of committees. To conclude, comitology committees are part of the EU institutions to be consulted on issues delegated by the Council and/or the Commission. In Ellen Vos (1999), “EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation“, *EU Committees: Social Regulation, Law and Politics*, Christian Joerges and Ellen Vos (eds.), Hart Publishing: Oxford-Portland, p. 23 - 34.

<sup>9</sup> “Specialisation” means that each comitology committee as well as the appointed members specialise in specific issues, defined by secondary legislation. Delegated tasks are quite narrow in the area and require specific knowledge, so the proposed measures have to have a scientific basis, to take account of the most recent scientific and technical research and the provided advice is based on excellence, independence and transparency. It shows that the consulted comitology committees have to possess very specific and narrow experience, which can be relied to be received at any relevant moment. In Ellen Vos (n 8) 30-39.

<sup>10</sup> “Representation” means that members of comitology committees usually come from national administrations or other established governmental agencies and represent interests of a separate Member State or the interests of civil society (“Member State” for the purpose of the institutional provisions refers only to government authorities of the Member States and does not include the governments of the regions or autonomous communities). Representation might be also applied to specific area of interests or to part of EU public. Representatives participate in the EU decision-making process and provide a position of the represented part in the drafted decision. In Ellen Vos (n 8) 35.

<sup>11</sup> Gunther F. Schaefer (n 6) 3-38.

<sup>12</sup> M.P.C.M. van Schendelen (n 3) 25-37.

expertise is considered to be the most important tool in helping EU politicians and civil servants to reach successful results.

Consequently the European Union committee system aims to fulfil:<sup>13</sup>

- 1) the need of an ever higher level of technical, scientific, legal and political expertise in policy-making which is required by the growing complexity of the regulation of contemporary society;
- 2) the need for efficient vertical co-ordination between the different levels of governance outside a hierarchical organisation of command and control; and for horizontal coordination, communication and deliberation between Member States.

Committees do not form a separate European institution with decision-making powers, and they are not mentioned in the Treaty of Lisbon. All the more, all committees assisting and counselling the Commission do not have its own administration, budget, archive or premises, or an address of its own. “They have turned into a unique, “freewheeling transnational structure”, with its own merits as deliberative forums, but also without a clear legal structure or form”.<sup>14</sup> The same issue was endorsed in the case *Rothmans*,<sup>15</sup> where the CJEU decided that comitology committees “do not have their own administration, archive, or premises, or even an address, and as such cannot be regarded as constituting “another [Union] institution or body”, or to fall within the third-party categories established by the authorship rule”.<sup>16</sup>

Committees help to create a policy for the European internal market, involving a plethora of policy objectives, regulatory techniques, specific structures of governance and

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<sup>13</sup> Daniel Gueguen and Caroline Rosberg (2004), “Comitology and other EU committees and expert groups. The hidden power of the EU: finally a clear explanation”, European Public Affairs Series, p.15

<sup>14</sup> R. Nickel (2005), “Participatory transnational governance”, *EUI Working Paper LAW No. 2005/20*; p. 23;

<sup>15</sup> Case T-188/97 *Rothmans International BV v Commission of the European Communities* [1999] ECR II-2463;

<sup>16</sup> Joanne Scott and David M. Trubek (2002), “Mind the Gap: Law and New Approaches to Governance in the European Union” in the *European Law Journal*, Vol. 8, No. 1, p. 12;

perceptible legitimacy problems. They also “shape policy and play a significant role in contributing to the formulation and adoption of binding rules”.<sup>17</sup> In the EU legal order, committees are expected to transform “strategic interaction into deliberative problem-solving”,<sup>18</sup> and exert a real influence in the shape of final legislation that will be applicable in all Member States. On the other hand, the committees and expert groups are entrusted with the implementation of the final legislation at national and/or regional level. At EU level, the decision-making institutions and the Commission, have to design regulations for their decentralised application, while anticipating and overcoming difficulties in ensuring uniform implementation and compliance.

The committee system can be characterised as a form of action through which the Union executes long-term policy goals. It is clear that the practical shape of the committee depends on the tasks associated with market integration; of course, these can change over time. As a result, the committee structure itself must remain supple and have a flexible internal structure that can meet the ever changing demands of performance capacity which the EU institutions place upon it. Finally,<sup>19</sup> the committee system is, without doubt, a specific form of Union governance, or of market management, which carries enormous “constitutional” significance, what was already discussed in the Chapter “EU law and policy on participation in EU governance”.

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<sup>17</sup> Gunther F. Schaefer (n 6) 3-38.

<sup>18</sup> C. Joerges and J. Neyer (1997), “Transforming Strategic Interaction into Deliberative Problem-solving: European Comitology in the Foodstuffs Sector” 4 *JEPP*, p. 609-625; C. Joerges and J. Neyer (1997), “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology” (1997: 278) 4 *JEPP*, p. 609 – 625; J. Neyer (1997), “Administrative Supranationalität in der Verwaltung des Binnenmarktes: Zur Legitimität der Komitologie” 20 *Integration*, p. 24-37.

<sup>19</sup> C. Joerges (1999), “Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance”, *EU Committees: Social Regulation, Law and Politics*, Christian Joerges and Ellen Vos (eds.), Hart Publishing: Oxford-Portland, p. 9.



And finally, the term “comitology” shall be defined, which is described as the structure being “transformed from a stage in a para-legislative process focused on the European Commission to a building block of networked deliberation – by diverse groups of experts concerned with concrete problems and responding to the interventions of a concerned public – found at nearly every stage in framework making and revision”.<sup>20</sup> Comitology committees, possessing the power to review proposals for the Commission’s exercise of delegated regulatory powers provide a “good illustration of a new pattern in [EU] law, which is to give national agencies greater discretionary powers, but to combine this form of decentralisation with cooperation mechanisms designed to create a partnership among the national agencies, but also between the national agencies and the Commission”.<sup>21</sup>

The definition of core elements and delegated functions of comitology committees would help in identifying the ways where committees can affect drafted decisions, in ways that non-committee decision-making processes cannot. As the core elements of committees are people and their outstanding knowledge and expertise, any form of specialised knowledge in shaping a policy and formulating binding rules shall be integrated in the EU decision-making process. Institutionalised or organised form of external expertise shall meet the core criteria of a committee and be considered as the most important tool in helping EU politicians and civil servants. “Comitology was the response, allowing Member States a real input into the making of implementing measures, thereby exerting some control over the Commission and having an institutionalized forum through which to debate their contending views”.<sup>22</sup> It shall be noted that the academic literature does not discern the origin of this expertise – it is

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<sup>20</sup> Charles F. Sabel and Jonathan Zeitlin (2008), “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, in *European Union Journal*, Vol. 14, No. 3, p. 279;

<sup>21</sup> D. Geradin and P. Pettit (2004); *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*; Jean Monnet Working Paper 01/04 (NYU School of Law);

<sup>22</sup> Paul Craig (2012); *EU Administrative Law*, 2<sup>nd</sup> edition, Oxford University Press, p. 137.

equally effective whether it needs to come from national representatives or external individual expertise.

The further study will analyse which mechanisms and implemented tools comitology committees root their influence in.<sup>23</sup>

### **3.3. POSITIONING OF COMITOLOGY COMMITTEES IN THE EUROPEAN INSTITUTIONAL STRUCTURE.**

The Council has delegated certain implementation powers to the Commission to provide independent right of decision. However, some of the comitology committees, having stronger decision-making powers, are believed to distort the institutional balance of powers within the Community. The principle of institutional balance requires that each EU institution exercises its powers with due regard to the powers of the other institutions.<sup>24</sup> As implementation powers are delegated to the Commission under the principle of institutional balance, national influence is no longer guaranteed. As Member States strive to restore their influence, they promote committees of national representatives within the Union; consequently, the latter accommodates transnational governance structures.

This analysis addresses merely the most significant stages in the development of both the rulemaking and comitology framework in EU, in order to lay the foundations for the analysis of external participation through the system of comitology thereafter.

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<sup>23</sup> Thomas Gehring (1999); “Bargaining, Arguing and Functional Differentiation of Decision-making: the Role of Committees in European Environmental Process Regulation“, *EU Committees: Social Regulation, Law and Politics*, Christian Joerges and Ellen Vos (eds.), Hart Publishing: Oxford-Portland, p.196.

<sup>24</sup> Case C-70/88 *Parliament v. Council (Chernobyl)* [1990] ECR I-2041.

### 3.3.1. Stages in the Historical Development of Comitology

This presentation of the historical development of comitology will be divided into two parts – one will detail the historical development of rulemaking, while the second will analyse the evolution of the rules for the implementation of the relevant secondary legislation.

#### 3.3.1.1. Conferral of Powers.

Over the last 60 years, the Treaties established a balance between the institutions and assigned specific roles and powers to each one. Though, the “delegation of implementing powers to the European Commission was not foreseen in the original Treaty of Rome in 1957”,<sup>25</sup> the “European Union relied to a large extent on the delegation of implementing powers to the European Commission”, by “setting up hundreds of committees to oversee the way that the Commission makes use of these powers”.<sup>26</sup> The Council therefore held a monopoly over the elaboration and implementation of comitology. This was challenged by both the Commission and the Parliament; while the Commission considered comitology to impinge upon the independent exercise of its executive functions, the Parliament wanted to play a role in the comitology process.<sup>27</sup> The latter issue will be discussed in more details in the next sub-chapter.

Consequently, each of the institutions had to exercise its powers with due regard to the powers of the other institutions. Under Article 164 of the EEC Treaty the CJEU had to be

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<sup>25</sup> A. Hardacre and M. Kaeding (n 1)5.

<sup>26</sup> Thomas Christiansen and Mathias Dobbels (2012); “Comitology and delegated acts after Lisbon: How the European Parliament lost the implementation game”, *European Integration online Papers (EioP)*, Vol. 16, Article 13, <<http://eiop.or.at/eiop/texte/2012-013a.htm>> accessed 20 August 2013, p. 2.

<sup>27</sup> Joint Study *The Treaty of Lisbon: A Second Look at the Institutional Innovations* (prepared by CEPS, EGMONT and European Policy Center, September 2010), <[www.epc.eu/documents/uploads/pub\\_1150\\_epc\\_egmont\\_ceps - treaty of lisbon.pdf](http://www.epc.eu/documents/uploads/pub_1150_epc_egmont_ceps_-_treaty_of_lisbon.pdf)> accessed 16 April 2012, p.87.

able to maintain the institutional balance, which could be done by reviewing the prerogatives of the institutions by the means of appropriate legal remedies.

According to the EC Treaty, the original law-making powers were vested in the Council, while the Commission only had powers of surveillance and implementation. However, the CJEU held that there was no basis in the EC Treaty provisions governing the institutions (Articles 189, 145, 155) for the view that all original law-making powers were vested in the Council.<sup>28</sup>

The Commission is allowed to implement secondary measures, but it has to consult comitology committees in accordance with the procedures, deadlines and voting rules set out in the basic legislative instrument. In short, the Council gave the impetus for the system of comitology committees. The first time the CJEU officially recognised the existence of the comitology committee and acknowledged their functions in the EU decision-making process was in the *Westzucker* case.<sup>29</sup> The CJEU held that one of the aims of the management committee procedure was to enable the Commission to prepare its implementing measures in close cooperation with the national authorities charged with the management of the rules concerned. Therefore it was normal that Member States should emphasize their interests within this framework. The Commission was to mediate in order to resolve the conflicts of interests and protect the general interest.

Little by little, the EU institutions started to accept comitology committees as a constituent part of the system. However, the delegation of powers and independent responsibility for the implementation measures came only after years of proving their abilities. Indeed the know-how possessed by the comitology committees is not equalled by the EU institutions themselves due to high demand on technical and scientific data.

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<sup>28</sup> Cases C-188-190/90 *France, Italy and UK v. Commission* [1982] ECR I-2545.

<sup>29</sup> Case C-57/72 *Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 323.

Furthermore, the first legal provision giving a basis to comitology, - Article 202 of the EC Treaty, - also specified that the Council may impose “certain requirements” to be contained in the procedures laid down by the Council in advance. So the standard procedures, which governed the implementation power of the Commission and also the work of these committees, were known as the committee procedures decisions. Although article 202 of the EC Treaty was considered to be the main legal basis for comitology, they could be traced back to the Commission’s launched strategy “New Approach to Technical Harmonization and Standards”.<sup>30</sup> The strategy mentioned only the harmonization of trade barriers, under Article 36 of the EC Treaty, and limited itself to drafting legislative essential safety requirements and imposing technical standards, to be produced by the European standardisation bodies. To do so, a new instrument, which could accelerate the decision-making procedure, had to be introduced.<sup>31</sup> Obviously, this could be achieved through the Commission, especially as it already had the necessary implementation powers, in other words – the Commission was responsible for the implementation of Union legislation.<sup>32</sup> It only had to establish a committee

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<sup>30</sup> Council Resolution to a New Approach to Technical Harmonisation to Standards [1985] OJ C 136/1.

<sup>31</sup> C. Joerges (1992), “The New Approach to Technical Harmonization and the Interests of Consumers: Reflections on the Necessities and Difficulties of a Europeanization of Product Safety Policy“ in R.Bieber, R.Dehoussé, J.Pinder and J.H.H.Weiler (eds.), *One European Market? A Critical Analysis of the Commission’s Internal Market Strategy* Baden-Baden, p. 157-225; R.H. Lauwaars (1992), “The ‘Model directive’ on Technical Harmonization” in R.Bieber, R.Dehoussé and J.H.H.Weiler (eds.), *One European Market? A Critical Analysis of the Commission’s Internal Market Strategy* Baden-Baden, p. 157-173 and E.Vos (1997), “Market Building, Social Regulation and Scientific Expertise: An Introduction” in C.Joerges, K-H Ladeur and E.Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations* Baden-Baden, p. 127-139.

<sup>32</sup> Article 202 of the EC Treaty: “To ensure that the objectives set out in the Treaty are attained, the Council shall, in accordance with the provisions of this Treaty: [...] – confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.”

procedure.<sup>33</sup> The genesis of comitology “was closely tied to the search of an ad hoc solution for the difficulty of regulating the economic and social life of the [Union] while relying exclusively on legislation”.<sup>34</sup>

The question of interpretation is the most difficult one when it comes to the development of comitology committees: decisions were challenged in the CJEU to establish the range of considerations that committees were allowed to take into account. In the *Zuckerfabrik Franken* case,<sup>35</sup> the Commission’s Regulation went beyond the wording of the basic Regulation, including in its area of application, products which were not mentioned in the basic Regulation. However, the CJEU ruled that the Commission was authorized to enact all the measures that were necessary or appropriate for the implementation of the basic Regulation. These measures cannot be contrary to the basic legislation or to the implemented legislation adopted by the Council, but they are expected to be justified only in the specific framework of the principles of a common organisation of the market.<sup>36</sup> So, the CJEU concluded that the Commission was authorized to interpret the provisions within the set limits, - as none of the Council Regulations contained a precise definition of these concepts – so long that it respected the legislative aim. The concept of detailed rules for the application of the basic Regulation had to be given a wide interpretation. Since the general rules for the implementation had been adopted by the Council, it followed that the Council intended to refer to the Commission the determination of all other implementation rules.<sup>37</sup>

The CJEU held that the participation of the management committee in the decision-making procedure was legitimate because the committees did not have any decision-making

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<sup>33</sup> E. Vos (1999), “EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation”, *EU Committees: Social Regulation, Law and Politics*, Christian Joerges and Ellen Vos (eds.), Hart Publishing: Oxford-Portland, p.24.

<sup>34</sup> Thomas Christiansen Mathias Dobbels (n 26) 6.

<sup>35</sup> Case C-121/83 *Zuckerfabrik Franken v Hauptzollamt Würzburg* [1984] ECR 2040.

<sup>36</sup> Case C-22/88 *Vreugdenhil and Others v Minister van Landbouw en Visserij* [1989] ECR 2075.

<sup>37</sup> Case C-57/72 (n 29).

powers of their own: in the end it is always the Commission or the Council that adopts the formal decision.<sup>38</sup> On the other hand, the CJEU held that the basic elements of a particular area should be adopted according to a specific procedure contained in Article 37 of the EC Treaty, as only the exercise of executive competence can be delegated.<sup>39</sup>

Once the Council laid down essential rules governing the matter in its basic Regulation, it could delegate general implementing powers to the Commission, without having to specify the essential components of the delegated power. Consequently, a provision drafted in general terms provided a sufficient basis for the Commission to act.

Summarising the above analysis, the Commission has struggled through to strengthen its position among other institutions in the decision-making process. At the very beginning, the Council was vested with the right of law-making power, and the Commission only had implementation power. Over the years this position has evolved. Earlier on it was mentioned that the Commission could not oblige Member States to lay down the essential rules, which are not under the control of the Council. But the analysis has showed that as the Council can confer upon the Commission wide powers of discretion and action the Commission became empowered to do that.

However, the procedure established in the EU Treaty had to be followed if the essential provisions in the legislative acts were being amended or repealed. When adopting implementation measures, it was enough for the Commission to get the delegated powers from the Council. It had to follow the concept of wide interpretation and not to interfere with the essential elements in the legislative acts. All the other measures were left to the

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<sup>38</sup> Case C-25/70 *Einfuhr – und – Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.* [1970] ECR 1161.

<sup>39</sup> E. Nieto (2005), “The strengthening of the Commission Competencies by the Constitutional Treaty and the Principle of Balance of Power”, European University Institute, Robert Schuman Centre for advanced studies, No. 2005/03, p. 6 – see also G. Haibach (2002), “Separation and delegation of legislative powers: a comparative analysis”, in M. Andenas and A. Turk (eds.), *Delegated legislation and the Role of Committees in the EC*, Kluwer Law, p.58.

Commission. But in order to fulfil the delegated tasks, the Commission needed to follow the set rules and procedures. This issue will be analyzed in later three sub-chapters on legal background and the involvement of comitology committees into the decision-making procedure. It will analyse the new changes implemented by the Treaty of Lisbon.

Additionally, the Commission wished to be less “hampered by comitology”<sup>40</sup> in forming the legislative framework decisions. The temporary Committee of Inquiry into BSE has remarked in its report that “[by] virtue of opaqueness, complexity and anti-democratic nature of its workings, the existing system of comitology seems to be totally exempt from any supervision, thereby enabling national and/or industrial interests to infiltrate the [Union] decision-making process. The phenomenon is particularly serious where public health protection is at stake”.<sup>41</sup> The Commission’s intention to have greater autonomy over secondary rules may be traced back to the Maastricht Treaty, where it aimed to propose a hierarchy of norms for the EU, with a distinction being drawn between primary laws and secondary acts.<sup>42</sup> “The Commission’s mantra that implementation is a natural part of the executive function over which it should naturally have autonomy is premised ultimately on contentious assumptions about the meaning of those very concepts, implementation and executive function.”<sup>43</sup>

The White Paper on European Governance proposes to reform the work of comitology, leaving only essential aspects of policy-making to the Council and the Parliament

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<sup>40</sup> A. Heritier (2001), “The White Paper on European Governance: A Response to Shifting Weights in Inter-institutional Decision-Making”; The Jean Monnet Program: Max-Planck-Project group on Common Goods, Bonn; p.2.

<sup>41</sup> Temporary Committee of Inquiry into BSE (Rapporteur: Manuel Medina Ortega), *Report on alleged contraventions or maladministrations in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and national courts* (A4-0020/97), A I part I.4.18.

<sup>42</sup> C. Bergstrom (2005), *Comitology, Delegation of Powers in the European Union and the Committee System*, Oxford University Press, p. 212-217.

<sup>43</sup> Paul Craig (n 22) 137.



on the one hand, while leaving all the details to the executive on the other. Despite the broad acknowledgment of “non-legislative” approaches and support of such innovations as framework directives, partnerships, greater participation by civil society in policy formation through “civil dialogue”, and wider use of the social dialogue, The White Paper on European Governance does not accept comitology in any detail by proposing a new approach to regulation enforced by independent regulatory agencies or through framework directives that would be implemented exclusively by the Commission.<sup>44</sup> All preferred approaches either promote uniformity or give the Commission a central role in policy making by proposing a wide range of policy instruments, including EU regulations, and suggests that the Commission or regulatory bodies under its jurisdiction should enjoy responsibility for executing policy and legislation through the adoption of implementing measures.<sup>45</sup> It proposes the abolition of regulatory and management committees.<sup>46</sup>

This issue was also raised in the Working Group on Simplification:<sup>47</sup> which proposed the simplification of some committee procedures, in particular, the procedure of regulatory committees. However, Member States were not willing to grant the necessary degree of power “to provide answers to the issues of practical and normative choice left outstanding by the primary regulation”.<sup>48</sup>

Still the Commission has achieved its intentions to “dismantle the Comitology regime, at least insofar as it entailed management and regulatory committees”.<sup>49</sup> This will be

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<sup>44</sup> Joanne Scott and David M. Trubek (n 16) 15.

<sup>45</sup> *ibid* 16.

<sup>46</sup> European Governance – a White Paper COM (2001) 428 final, (2001/C 287/01), Executive summary; p.31.

<sup>47</sup> Working Group IX on Simplification (Final Report) [2002] CONV 424/02, p.12.

<sup>48</sup> Paul Craig (n 22) 137.

<sup>49</sup> *ibid* 124.

discussed in more details in the sub-chapter on the new legal implementations introduced by the Treaty of Lisbon.

#### *3.3.1.1.1. First Comitology Decision.*

The *First Comitology Decision* was the first attempt to legalise the Council's intentions to vest the powers of implementation of essential measures to the Commission. It was stipulated in Article 145 EEC that "the Council should confer on the Commission, in the acts adopted by the Council, powers for the implementation of the rules which the Council laid down, and that it could impose certain requirements in respect of the exercise of these powers", unless the Council provided reasons as to why it should reserve specific implementing power to itself.<sup>50</sup>

Before the adoption of the Council Decision 87/373/EEC,<sup>51</sup> the EU institutions tried to resolve some of the procedural difficulties by introducing some challenges in the CJEU. At the beginning it was believed that the inclusion of comitology committees was contrary to the EC Treaty as this kind of body was not mentioned therein and might compromise the institutional balance.<sup>52</sup> The CJEU decisions<sup>53</sup> were the first steps towards the adoption of the original Comitology Decision. This Decision consolidated the three classical procedures

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<sup>50</sup> *ibid* 115.

<sup>51</sup> Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 197, 18 July 1987.

<sup>52</sup> Case C- 25/70 (n 38).

<sup>53</sup> "The Commission was already allowed to involve comitology committees in the decision-making procedures. If no opinion was delivered or if the measures proposed were not in accordance with the Commission's opinion after consulting a Standing Committee, the Commission had to submit the proposal to the Council. The Council had to adopt such measures by a qualified majority. In other circumstances, the Commission could adopt it itself, except when the Council had voted by a simple majority against such measures. There was a query, that when the Council votes against the Commission's proposal by a simple majority, it might lead to an indefinite extension of the national provisional measures. The Court held that this procedure did not have an effect of paralysing the Commission, since the latter still had the possibility of issuing any other measure which it considered appropriate. Only the Court did not make it clear, whether the Commission should table its new proposal before the Committee and start the procedure from the beginning, or whether it should submit a new proposal directly to the Council." Case C-5/77 *Carlo Tedeschi v. Denavit Commerciale Srl* [1977] ECR 1555.

which had grown out of established Union practice, supervising the implementing powers delegated by the Council to the Commission by advisory, management and regulatory committees (the safeguard procedure was not often used), with the management and regulatory committee procedures being further subdivided into (a) and (b) versions.

The advisory committee's procedure is designed to give the Commission a possibility to consult a committee. Under the advisory procedure, the Council is not involved, as the Commission has the power to invite members of an advisory committee and take the utmost account of the committee's decision, later it must inform the committee of the manner in which its opinion has been taken into account. In some cases the advisory committee procedure must be used when the management or regulatory committee procedures are not or are no longer considered appropriate. Therefore, the power of participating representatives is low and the opinion is not binding for the Commission.

The management committee procedure is very similar to the advisory procedure, only the following differences could be identified. The management committee procedure is more complex: the Commission is obliged to invite representatives of Member States; the Council has more significant power, as in cases when the committee members do not provide an opinion, the Council is obliged to make a decision by a majority voting. However, in cases when neither management comitology committees, nor the Council can take a decision, the Commission is obliged to do that.

The regulatory committee procedure is to be used for measures of general scope designed to apply, update or adapt essential provisions of the basic instruments. Regulatory and safeguard comitology committee procedures are very similar to the management ones. So, to conclude it is possible to state that in some cases, when the Council cannot take a decision

by majority, the Commission is delegated with significant power to do that. However, comitology committees do not possess such powers yet.

### *3.3.1.2. Reaction of Other EU Institutions – Second Comitology Decision.*

The Parliament expressed concerns over the comitology regime early on. From the very beginning, the Parliament “had been very much on the side lines of the legislative process, with only a bare right to be consulted where the Treaty so provided”.<sup>54</sup> The rise of comitology committees limited the Parliament’s capacity to control the Commission. The Commission and the Council could not ignore the Parliament anymore. “The TEU took the process further, with the creation of the co-decision procedure and this was followed by the expansion of the areas to which the procedure applied, coupled with modifications of the procedure so as to further strengthen the role of the European Parliament therein”.<sup>55</sup>

Following a Declaration attached to the Amsterdam Treaty calling for a new comitology Decision, the Decision 87/373/EEC was replaced in 1999 by the *Second Comitology Decision*.<sup>56</sup> This streamlined the comitology structure by reducing the types of committee to three: advisory, management and regulatory (the safeguard procedure was still in the legislation, but in practice it was not used), each of which was chaired by a Commission representative. The choice of procedure was laid down in the “basic instrument”, which referred to the primary EU legislation relating to the particular policy area in question.<sup>57</sup>

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<sup>54</sup> Paul Craig (n 22) 116.

<sup>55</sup> *ibid.*

<sup>56</sup> Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L 184.

<sup>57</sup> Select Committee on the EU, 31<sup>st</sup> Report “Reforming Comitology”, House of Lords, Session 2002-2003.

Advisory committee was essentially advisory *by default*. The Commission had the strongest power against Member States. Member States were often represented by experts in the particular field, who together delivered an opinion. Although the Commission was required to “take the utmost account of the opinion delivered by the committee” (Article 3) and inform the committee how this had been done, but it was not legally bound to follow the committee’s opinion. An advisory committee was more formal and better accepted in the EU decision-making process.<sup>58</sup> Advisory committees in most cases consisted of civil servants, who specialized in specific policy and implementation areas. These civil servants usually did not have much decision-making power either at national level, or in the EU decision-making process.

In the management committee procedure the Commission had more constraints. Member States were usually represented by civil servants, who again delivered an opinion on the Commission’s draft within an agreed time limit. If an opinion was positive (or not provided at all), the Commission could adopt the proposal. However, a management committee had the power to block the Commission’s proposal if a qualified majority so voted.

Under the regulatory committee procedure, the Commission got the least power. Depending on the importance of the proposals, the regulatory committee was generally composed of top civil servants. Given the greater importance of the measures considered by these committees, the proposal had to be adopted by a qualified majority, after the European Parliament exercised its right of scrutiny. If it could not muster a majority, the Commission was required to submit immediately to the Council a proposal relating to the measures to be taken, and to inform the Parliament (if it fell under the co-decision procedure). If the

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<sup>58</sup> “According to the legal base, the committee has the power to “oblige the Commission to consult it on any matter within its competence”. Rules of procedure of Advisory Committee on Agriculture.

Parliament considered the measure *ultra vires* and if the basic instrument was subject to co-decision, the Commission needed to inform the Council of the position.

The *Second Comitology Decision* showed that the Commission still retained significant powers in the decision-making process. In light of the comitology committee procedures adumbrated above, it was possible to argue that the established committees helped the Commission in taking the final decision, but did not implement the drafted measures independently; in fact, powers of implementation were not normally given to established committees: the legislation merely indicated that the Commission ought to be assisted by a committee composed of representatives of Member States. However, with the regulatory committee procedures the Commission had to take into account the opinion of committee members. Gaining more power, the national representatives could block the draft decision, which meant the extension of the procedure for an indefinite period. The Commission, for its part, tried to find the best solution to help speed the process up. It checked the “temperature” in Member States in order to prepare different scenarios for final adoption. However, if the decision was not taken by a qualified majority in a comitology committee, the Council had four options to deal with it and in extreme cases, after following all the regulated procedures the final decision might be taken by the Commission. Again, the power of decision if the relevant institutions could not agree on the draft was left with the Commission.

### *3.3.1.3. Transparency and Information on Comitology – Third Comitology Decision.*

The *Second Comitology Decision* was not long-lived. After three years the Commission adopted the Council Decision 2006/512/EC.<sup>59</sup> The *Third Comitology Decision*

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<sup>59</sup> Council Decision No. 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [2006] OJ L200/11.

introduced “a new type of procedure for the exercise of implementing powers, *the regulatory procedure with scrutiny*, which allow[ed] the legislator to oppose the adoption of draft measures where it indicat[ed] that the draft exceed[ed] the implementing powers provided for in the basic instrument, or that the draft [was] incompatible with the aim or the content of that instrument or fail[ed] to respect the principles of subsidiarity or proportionality”.<sup>60</sup>

The inclusion of a new procedure enabled the legislator, in the context of the existing EC Treaty, to provide a horizontal and satisfactory solution to the Parliament’s wish to scrutinise the adoption of “quasi-legislative”<sup>61</sup> measures implementing an instrument adopted by co-decision.<sup>62</sup> Additionally, the *Third Comitology Decision* was designed to improve information transmission to the Parliament by providing that the Commission informed on a regular basis of committee proceedings, especially in the framework of the Regulatory Procedure with Scrutiny; transmitted documents related to activities of committees; and whenever it transmitted the Council measures or proposals for measures to be taken.

The procedures under the Regulatory Procedure with Scrutiny were similar to regulatory committee’s procedures; however, the decision-making process was much more scrutinized. This procedure was used in cases, where measures of general scope were

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<sup>60</sup> ibis preamble § 2.

<sup>61</sup> “Under this procedure, all draft implementing measures will go through a Committee stage and then a supervisory stage in which they are sent to both the European Parliament and the Council. If either institution objects to the draft, the Commission must present a legislative proposal, present a new draft, possibly modified in which case the procedure begins again or withdraw its draft measures. The powers of the main institutions are also changing under the new quasi-legislative procedure: the Council will not be able to adopt the measures itself and the Parliament will not be able to object to implementing measures on *ultra vires* grounds. The Commission gains more power – immediate adoption and application of implementing measures on grounds of urgency is allowed, with a right of objection from the both legislative branches”. “Proposed elements of a Revised Council Decision Laying down the Procedures for the Exercise of Implementing Powers”, intended to the Friends of Presidency (Comitology) Working Group from the Council of the European Union [2005] No. 15334/05.

<sup>62</sup> Statement by the European Parliament, the Council and the Commission concerning the Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006/512/EC) [2006] OJ C255/01.

designed to amend non-essential elements of a basic instrument adopted in accordance with procedures referred to in Article 251 EC Treaty.<sup>63</sup>

It stipulated that if the Commission could not find a consensus with the committee, the drafted measures had to go to the Council, which decided if they could be adopted the way they were drafted. If the Council envisaged the proposed measures, they still needed to be verified by the Parliament. The procedures also let the Commission adopt the measures without an opinion from the committees or reactions from the legislature.<sup>64</sup> The executive responsibilities of the Commission under the new Regulatory Procedure of Scrutiny, allowed dealing with the objections from the Parliament or the Council. This did not exclude the Commission's consultation of committees made up of Member States' representatives who were experts on the matters in question.<sup>65</sup>

In cases of urgency regarding health protection, safety or environmental issues, the Commission in accordance with the opinion of the Committee could adopt the measures and implement them immediately, respectively communicating the implemented measures to the Council and the Parliament. If the two institutions opposed the measures, the Commission needed to repeal them, replacing the provisional measures only when that definite instrument came into force.<sup>66</sup>

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<sup>63</sup> Council Decision 2006/512/EC (n 59) Article 1, §2.

<sup>64</sup> "The regulatory procedure must allow the Commission to assume full responsibility for adopting executive measures, after having solicited the opinion of the Committee of Representatives of the Member States, whilst enabling the European Parliament and the Council to oversee the executive role. This means that, in the event of a disagreement between the Commission and one branch or both branches of the legislative authority, the Commission must be able, depending on the case and taking account of the positions of the European Parliament and the Council, to either present a proposal in accordance with the procedure in Art. 251 of the Treaty, or adopt the original draft of measures. The Commission shall inform the legislator of the action it intends to take on the latter's objections and of its reasons for doing so." Amended proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (presented by the Commission in accordance with Article 250 (2) of the EC Treaty), 2002/0298 (CNS) [2004] COM (2004) 324 final, p.6.

<sup>65</sup> "The advisory procedure should therefore be the standard procedure for executive measures in the sense of the word mentioned above, such as those implementing financial support programs. The management procedure is no longer applicable for implementing instruments adopted by the co-decision procedure." ibis preamble §8.

<sup>66</sup> Council Decision 2006/512/EC (n 59) Article 5a, § 6.



To summarise, the *Third Comitology Decision* was implemented in order to focus on advisory procedure “whenever the executive measures have an individual scope or concern in the procedural arrangements for implementing basic instruments”<sup>67</sup> and regulatory procedure “whenever the executive measures are designed to implement fully the essential aspects of the basic instrument or adapt certain other aspects of it.”<sup>68</sup> There was no management procedure left in the amended version.

The implemented Procedure with Scrutiny did not provide much delegated powers to comitology committees. To look at it from the perspective of comitology committees, only in cases when the Parliament opposed the drafted measures, “the Commission need[ed] to submit the Committee an amended draft of the measures or present a legislative proposal on the basis of the Treaty”.<sup>69</sup> In other cases, the Commission was allowed to act on its own discretion within the delegated powers.

#### *3.3.1.4. Modus Vivendi Right extended into the Right of Scrutiny.*

The *First Comitology Decision* failed to resolve a brewing controversy between the Union institutions. In particular the Commission and the Parliament were upset to see the regulatory committee procedure (especially in its *contre-filet* variant) included in the Decision notwithstanding their vehement protests. Subsequent to its unsuccessful attempt to attack the validity of the Comitology Decision before the CJEU,<sup>70</sup> the Parliament formally requested the Commission to be informed of all Commission proposals submitted to advisory, management

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<sup>67</sup> COM (2004) 324 final (n 64) Article 1, §1.

<sup>68</sup> *ibid.*

<sup>69</sup> Council Decision 2006/512/EC (n 59) Article 5a, § 3(c) and §4 (f).

<sup>70</sup> Case C-302/87 *European Parliament v Council of the European Communities* [1988] ECR 5615.

or regulatory committees, which resulted in the adoption of the “Plumb-Delors” agreement.<sup>71</sup> Although its initial judicial and political campaign against the regulatory committee procedure had failed, the Parliament was soon supplied with an opportunity to oppose the use of regulatory committee procedures. Once legislative powers were granted with the co-decision procedure (compulsory for *inter-alia* Community acts under Article 100a EC) by the Treaty of Maastricht,<sup>72</sup> the Parliament argued that Article 145 paragraph 3 of EC Treaty did not apply to measures adopted jointly by the Parliament and the Council, but only to acts derived solely from the Council.<sup>73</sup> The Council was finally forced to negotiate with the Commission and Parliament, which resulted in the conclusion of a *modus vivendi* in December 1994.<sup>74</sup> Under this *modus vivendi*, the Commission is obliged to forward copies of draft measures sent to comitology committees to the appropriate parliamentary committee. The *modus vivendi* contains one important additional element: the Council is obliged to consult the Parliament should a committee fail to reach an agreement, and the Commission is forced to refer a proposal to the Council.

Consequently, the Bilateral Agreement establishes different role for the European Parliament.<sup>75</sup> Firstly, it organises a right of information, which guarantees:

- 1) receiving, at the same time as the members of the committees and on the same terms, the draft agendas for committee meetings, the draft implementing measures submitted to the

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<sup>71</sup> F. Jacobs and R. Corbett, M. Shackleton (1992), *The European Parliament* London, 1994:234.

<sup>72</sup> K. St C. Bradley (1992), “Comitology and the Law: Through a Glass, Darkly” 29 *CML Rev*, p. 693 – 721.

<sup>73</sup> Resolution of the Parliament, (1994) OJ C 20/176. See also the 1993 De Giovanni Report of the Committee on Institutional Affairs on questions of Comitology relating to the entry into force of the Maastricht Treaty, Doc. A3-417/93, PE 206.619/fin.

<sup>74</sup> *Modus vivendi* between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty [1996] OJ C 102/1.

<sup>75</sup> Point 3 of the Bilateral Agreement between the European Parliament and the Commission: “consider the following agreements superseded and thus of no effect in so far as they themselves are concerned: the 1988 Plumb/Delors agreement, the 1996 Samland/Williamson agreement and the 1994 *modus vivendi*” [1996] OJ C 102.

- committees under basic instruments (Article 251 of the EC Treaty), voting results and summary records of the meetings and lists of the authorities to which the persons designated by Member States to represent them belong (point 1);
- 2) forwarding information, at the request of the relevant parliamentary committee, specific draft measures for implementing basic instruments.

The right under the *modus vivendi* was suspended, but instead the Parliament was guaranteed the *right of scrutiny* pursuant to Article 8 of Decision 1999/468/EC. Accordingly, before formal adoption of the draft measures for implementing a basic instrument, the European Parliament may indicate in a resolution within a month from receiving the final draft, that a basic instrument adopted under the procedure provided by Article 251 of the EC Treaty exceeds the implementing powers provided for in that basic instrument. In this case the Commission needs to re-examine the draft measures and to inform the European Parliament of the action it intends to take.

The right of the Parliament was limited to the possibility of checking the drafts, where the Commission exceeded its delegated powers.

The *Third Comitology Decision* – the Council Decision 2006/512/EC<sup>76</sup> clearly regulated the Parliament’s right to scrutinize the adoption of “quasi-legislative” measures implementing an instrument adopted by co-decision. It meant that whenever the Commission consulted comitology committees, especially in cases where the measures of general scope sought to amend non-essential elements of a basic instrument, it needed to submit the drafted measures to the Council and the Parliament for scrutiny.

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<sup>76</sup> Council Decision 2006/512/EC (n 59).

The right of scrutiny has been retained to the Parliament and now also the Council in the new Implementing Acts Regulation No. 182/2011. “Where a basic act is adopted under the ordinary legislative procedure, either the European Parliament or the Council may at any time indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act“ under the right of scrutiny.<sup>77</sup> Either legislator may pass a non-binding resolution, which confirm a „limited (but not to be neglected) right of scrutiny“.<sup>78</sup> Though all the efforts to enhance its own role in the new comitology system (demands had included observer status, a right of opposition, full access to information, including on voting behaviour, and a case-by-case alignment of the *acquis*)<sup>79</sup> have been declined due to the lack of „insight and will to engage into crucial aspects of the comitology file, leaving the Commission and member states to determine the outcome to a large extent“.<sup>80</sup>

### 3.3.1.5. *Involvement of External Expertise.*

This part aims to analyse the strengthened competencies of the Commission in the Treaty of Lisbon and its consequences for the institutional structure of EU. The Commission is granted the right of initiative, the responsibility for the implementation of EU policy, of Council laws and regulations for the budget.<sup>81</sup> The new Treaty also increases the delegated powers of the Commission with the creation of two new legal instruments: delegated and

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<sup>77</sup> Article 11 TFEU.

<sup>78</sup> A. Hardacre and M. Kaeding (n 1) 20.

<sup>79</sup> Thomas Christiansen Mathias Dobbels (n 26) 15.

<sup>80</sup> *ibid* 19.

<sup>81</sup> E. Nieto (n 39) 5.

implementing acts.<sup>82</sup> There is an intention that the two resulting acts are mutually exclusive and have different legal names. However, the TFEU does not clearly differentiate the two categories of acts nor provide a clear guidance on when either instrument ought to be applied. It seems that “the provisions on delegated acts are clearly formulated in terms of scope and consequences while the implementing acts article is defined on the basis of the rationale behind it, i.e. the necessity for uniform conditions to apply”.<sup>83</sup> So the institutions are likely to argue over undefined terms in Articles 290 TFEU and 291 TFEU, and the CJEU will be the one called upon to adjudicate on the appropriate classification of a proposed use of delegated authority.<sup>84</sup>

#### *3.3.1.5.1. Delegated Acts.*

Article 290 TFEU “allows the legislator to delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act”. It is referred to in the terminology as “delegated acts” (Article 290 paragraph 3).<sup>85</sup> The set criteria are cumulative – if either of these conditions is not met, this Article may not be applied.<sup>86</sup> “This provision does not require the adoption of any binding instrument of secondary legislation to ensure its implementation; it is sufficient in itself and contains all the elements required by the legislator for defining, case by case, the scope, content and practical arrangements for delegating power”.<sup>87</sup> And the CJEU remains

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<sup>82</sup> Consolidated version of the Treaty on the Functioning of the European Union, Council of the European Union [2012] 6655/7/08 REV 7, Articles 290 and 291

<sup>83</sup> Thomas Christiansen Mathias Dobbels (n 26) 8.

<sup>84</sup> Joint Study *The Treaty of Lisbon* (n 27) 103.

<sup>85</sup> Commission, “Implementation of Article 290 of the Treaty on the Functioning of the European Union” (Communication) [2009] COM (2009) 673 final, p. 2.

<sup>86</sup> *ibid* 4.

<sup>87</sup> *ibid* 2.

competent on the basis of Article 263 TFEU to deal with any violation of the conditions established in the decision to delegate.

#### 3.3.1.5.1.1. *Definition of “delegated acts”.*

It is interesting to note that in the Constitutional Treaty “delegated acts” (non-legislative acts of general application) had been called “delegated regulations”. It may be just a semantic change, though some authors do not “exclude the likelihood that some delegated acts will be quasi-legislative in nature”.<sup>88</sup> Or it may be the case, which was already discussed in the Chapter “EU law and policy on participation in EU governance”, that “non-legislative” acts may simply refer to the defined instruments, which do not meet the definition of a legislative act, set in Article 288 and Article 289 paragraph 3 TFEU.

“Such non-legislative acts can supplement or amend certain non-essential elements of the legislative act, but the legislative act must define the objectives, content, scope, and duration of the delegation of power”.<sup>89</sup> The Treaty of Lisbon also lays down the limits of delegation providing that delegated power cannot affect the essential elements of the legislative acts<sup>90</sup> as well as the Commission may never adopt a delegated act relating to a measure of an individual nature.<sup>91</sup> The CJEU has already defined the term “essential elements of the legislative acts” as entailing “provisions which are intended to give concrete shape to the fundamental guidelines of [Union] policy”.<sup>92</sup>

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<sup>88</sup> Joint Study *The Treaty of Lisbon* (n 27) 91.

<sup>89</sup> Paul Craig (n 22) 125 – 126.

<sup>90</sup> Article 290 TFEU.

<sup>91</sup> COM (2009) 673 final (n 85) 4.

<sup>92</sup> Case C-240/90 *Federal Republic of Germany v. Commission of the European Communities* [1992] ECR I-5423, §37.

“Delegated” acts “would flesh out the detail or amend certain elements of a legislative act, under some form of authorisation defined by the legislator. This would be in cases where the legislator felt that essential elements in an area, as defined by it, necessitated legislative development which could be delegated, although such delegation would be subject to limits and to control mechanism to be determined by the legislator itself in the legislative act”.<sup>93</sup> However, Article 290 does not contain any provision referring to the procedure by which the Commission adopts a delegated act.<sup>94</sup> It shall be noted that the “powers delegated may range from rules on the technical and detailed elements which develop a legislative act, to the subsequent amendment of certain aspects of the legislative act itself”.<sup>95</sup> So, it is one of the major innovations implemented by the Treaty of Lisbon that the “legislator is free to set the objectives, scope, duration and the conditions to which the delegation is subject in each and every legislative act”.<sup>96</sup> It is believed that delegated acts “will be subject to more interinstitutional discussions much earlier in the legislative process given that the objectives, scope, duration and the conditions to which the delegation is subject can change in every legislative act”.<sup>97</sup>

This category of legislation has been created to deal with sensitive matters where the legislators are granting extra powers to the Commission for the sake of speed and efficiency, getting extra control in return.<sup>98</sup> Even though the definition of the delegated acts is very similar to the Regulatory Procedure with Scrutiny, which was introduced by the Decision 2006/512/EC,<sup>99</sup> the scope of the delegated acts as well as other important details are not identical. The Commission has strictly highlighted that “the similarity of the criteria does not

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<sup>93</sup> Working Group IX on Simplification (n 47) 9.

<sup>94</sup> COM (2009) 673 final (n 85) 6.

<sup>95</sup> Working Group IX on Simplification (n 47) 10.

<sup>96</sup> A. Hardacre and M. Kaeding (n 1) 13.

<sup>97</sup> *ibid* 14.

<sup>98</sup> *ibid* 12.

<sup>99</sup> Council Decision 2006/512/EC (n 59).

mean that they will be implemented in exactly the same way” and any automatic duplication shall be avoided.<sup>100</sup> Despite the terminological similarities between the Regulatory Procedure with Scrutiny and Article 290 TFEU delegated authority, the overall use of the Regulatory Procedure with Scrutiny is influential on the implementation of Article 290 TFEU.<sup>101</sup> However, there are also some distinctions between the two. The 2006 Comitology Decision only implemented the right of opposition for “all or nothing – the European Parliament or the Council had to oppose the entire Commission proposal for delegated authority, even if only an aspect of the proposal was considered objectionable”,<sup>102</sup> while Article 290 TFEU also includes a power to revoke the delegation.

#### 3.3.1.5.1.2. Conditions on “delegated acts”.

Though, the freedom to set “the objectives, content, scope and duration”<sup>103</sup> and “the conditions to which the delegation is subject”<sup>104</sup> shall be “explicitly defined”. Legislators have also insisted on the delegation of powers to the Commission to be clear, precise and detailed.

Conditions on “delegated acts” also cover the established “control mechanism” at the legislator’s disposal. Article 290 TFEU specifies “the two conditions to which the legislator may subject the delegation of power: firstly, the right to revoke the delegation of power, and secondly the right to express objections, that is the right of opposition”.<sup>105</sup> This would mean that the Council and the Parliament have the power to object to an individual delegated act on any grounds whatsoever (the right of objection or the *ex ante* control) or the right to revoke

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<sup>100</sup> COM (2009) 673 final (n 85) 3.

<sup>101</sup> Joint Study *The Treaty of Lisbon* (n 27) 95-96.

<sup>102</sup> *ibid* 96.

<sup>103</sup> Article 290 paragraph 1 TFEU.

<sup>104</sup> Article 290 paragraph 2 TFEU.

<sup>105</sup> COM (2009) 673 final (n 85) 7.



the delegation altogether (the *ex post* control).<sup>106</sup> It is believed<sup>107</sup> that the *ex ante* control will be difficult for the Council and the Parliament to monitor and enforce. It may be due to the fact that they may lack the knowledge and the time for the exercise of regulatory choices. The *ex post* control, - the revocation of delegation – might be useful as an ultimate weapon, though the veto power is crucially dependent on understanding the relevant measure.<sup>108</sup> If the Parliament and the Council lack the knowledge on the issue, they will prevent the entry of the delegated act into force without being able to propose an amendment. The Council “clearly has neither the time nor expertise to perform this task unaided”.<sup>109</sup> The Parliament may develop such expertise by creating more advisory committees to get information on the issue without relying on informational resources coming from comitology committees as there will not be any. Both the institutions may consult advisory committees, which will operate in an informal way between the major institutional bodies.

Though, the specified controls are not mandatory, and they will only operate if they are written into the legislative act.<sup>110</sup> Pursuant to the legislation, the list seems to be an exhaustive one, and the Commission may only include the two rights in its legislative proposals for the basic legislative acts.<sup>111</sup> The two rights of much greater control were granted after the requirement to obtain an opinion for the Commission was abolished and a system of a comitology committee was eliminated.

Though, in “theory, nothing in Article 290 TFEU forbids the use of comitology as a form of control mechanism”.<sup>112</sup> However, “Article 290 TFEU makes no mention of such committees and because the Comitology procedures would create an imbalance between the

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<sup>106</sup> A. Hardacre and M. Kaeding (n 1) 14.

<sup>107</sup> Paul Craig (n 22) 128.

<sup>108</sup> *ibid* 129.

<sup>109</sup> *ibid*.

<sup>110</sup> COM (2009) 673 final (n 85) 7-8.

<sup>111</sup> Joint Study *The Treaty of Lisbon* (n 27) 93.

<sup>112</sup> *ibid* 105.

Council and the European Parliament within Article 290, which is formally, built on institutional parity between the two bodies in relation to control over delegated acts”.<sup>113</sup> For the time being, Member States have clearly refused to use comitology under Article 290 TFEU. The Council and the Parliament require the Commission to make use of expert advisory committees, a recommendation with which the Commission is almost certain to comply.<sup>114</sup>

One more issue shall be noted regarding the implementation of Article 290 TFEU – is the right of scrutiny for the Council and the Parliament that is not expressly mentioned in the text of the TFEU, though it stemmed from the principle of transparency implemented in Article 15 TFEU.<sup>115</sup> It seems that the present wording of the legislation and the formal positions of the institutions on implementation of the Article 290 TFEU contemplates only the use of *ex post* control based on the right of revocation. Though the right of scrutiny is expressly implemented in the Implementing Acts Regulation<sup>116</sup> under Article 291 TFEU, which enables both legislators, the Parliament and the Council to pass a non-binding resolution whenever it is believed that the Commission has exceeded the implemented powers provided for in the basic act.

So far, only the delegation of powers between the EU institutions has been presented. There is nothing referring directly or indirectly to external participation or representation. However, the Commission has expressed its intention to consult systematically experts from the national authorities of all Member States where preparatory work requires any new

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<sup>113</sup> Paul Craig (n 22) 126.

<sup>114</sup> Joint Study *The Treaty of Lisbon* (n 27) 105.

<sup>115</sup> *ibid* 94.

<sup>116</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55/13, 28 February 2011.

expertise.<sup>117</sup> As soon as the provisions are set in a legislative text, the relevant expert group(s) needs to be established to assist the Commission in drafting the delegated acts.<sup>118</sup> The preparatory work is intended to be carried out in order to ensure, “first, that from a technical and legal point of view the delegated acts comply fully with the objectives laid down by the basic instrument and, second, that from a political and institutional point of view everything possible is done to avoid any objections being made by Parliament or Council”.<sup>119</sup> The Commission may also form new expert groups by making it public via the register of expert groups or conduct any research, analysis, hearings and consultations required.<sup>120</sup> Though, it shall be made clear that these experts will have only a consultative rather than institutional role in the decision-making procedure.

The Commission’s intention to consult *national* experts have raised contentions, as a majority of Member States in the Council wanted the inclusion of a recital stating the obligation to consult national experts in the preparation of delegated acts.<sup>121</sup> The Commission considered it inadequate, as, “first, it would give the impression that the Council was trying to introduce comitology through the backdoor by adding a formal deliberating stage with national experts before the submission of the delegated act, and, second, not all delegated acts might actually require expert input in the preparation stage”.<sup>122</sup> The Parliament could have consented to this recital if its own experts were also included. In the end, the word “national” was deleted from the contentious recital, implying that any expert could be consulted. Though, in practice it seems still to give rise to some discrepancies, as “when the Commission adopted its first delegated acts on the regulation concerning energy efficiency labeling, a row

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<sup>117</sup> COM (2009) 673 final (n 85) 6.

<sup>118</sup> A. Hardacre and M. Kaeding (n 1) 14.

<sup>119</sup> COM (2009) 673 final (n 85) 6.

<sup>120</sup> *ibid* 7.

<sup>121</sup> Thomas Christiansen and Mathias Dobbels (n 26) 9.

<sup>122</sup> *ibid*.

between Council and Commission erupted, because the Commission had consulted national experts together with other experts. A number of Member States in the Council reacted by stating that the Commission should invite member state experts *separately* and *after* they consulted other experts”.<sup>123</sup> The more detailed analysis on the disaggregation of the representatives of Member States that serve on the committees from those who are involved in the Council’s activities will be provided in the next part of the Chapter.

Officially there is a legal basis for the Commission to invite external experts whenever there is a need for an expert input in the preparation phase, though it seems that there is a lack of trust from the Council “in delegating powers to the Commission without the control member states used to have under the old comitology rules”.<sup>124</sup> Even though the old comitology committees have been abolished, in some policy areas new agencies were created “to accord the Member States significant decisional autonomy on such bodies”, where “Member States dominate the organizational structure of these authorities”.<sup>125</sup>

#### 3.3.1.5.2. *Implementing Acts.*

Member States are primarily responsible for adopting the necessary measures of national law to implement legally binding EU acts,<sup>126</sup> if, the competence is delegated to the EU institutions.<sup>127</sup> Implementing acts are of general application. If there is a need for “uniform conditions”,<sup>128</sup> the Commission is authorised to adopt implementing acts, but

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<sup>123</sup> *ibid* 17.

<sup>124</sup> *ibid*.

<sup>125</sup> Paul Craig (n 22) 127-128.

<sup>126</sup> Article 291 paragraph 1 TFEU.

<sup>127</sup> Article 4 paragraph 1 TEU.

<sup>128</sup> Article 291 paragraph 2 TFEU.

subject to overall control by Member States.<sup>129</sup> Article 291 TFEU designates the power for the Commission to implement the legislative acts, which “are presumably intended for technical measures that are considered necessary for giving effect to “legally binding Union acts””.<sup>130</sup> The granted power is purely executive and the intervention of the Commission is not optional but compulsory.<sup>131</sup>

As it was already identified, the control has to be exercised by Member States, and that neither the Council nor the Parliament are conferred a direct role on the comitology committees.<sup>132</sup> Though, both legislative bodies may have access to information about the process. Article 291 paragraph 3 TFEU does not stipulate any legal provision providing a role for the Parliament and the Council to control the Commission’s exercise of implementing powers. Such control can only be implemented by Member States and the rules and general principles concerning mechanisms for such control shall be laid down in advance. The exercise of control is implemented by representatives of Member States serving on the new comitology committees.

The new Regulation separates the representatives of Member States on comitology committees from those on the Council. This approach differs from the one under the previous comitology regulation. It is not yet clear how this separation will work out in practice, though it is assumed that “the ministers that represent the Member States on the Council may well take a keen interest in the appointees from their respective states that serve on the new Comitology committees”.<sup>133</sup> Usually working parties in the Council “consist mainly of civil servants representing the Member States but in many cases a Member State is not represented

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<sup>129</sup> COM (2009) 673 final (n 85) 3-4.

<sup>130</sup> Joint Study *The Treaty of Lisbon* (n 27) 98.

<sup>131</sup> COM (2009) 673 final (n 85) 3-4.

<sup>132</sup> Proposal for a Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2010] COM (2010) 83 final, p. 3.

<sup>133</sup> Paul Craig (n 22) 132.

by only one person but by several, although only one person is allowed to be the spokesperson for his or her country. Usually at least two persons are present per Member State – one from the permanent representation and one from the relevant ministry – but it is also common to find civil servants present from other administrative bodies in the Member States, such as agencies and regional and local government”.<sup>134</sup> Additionally, it shall be noted that some Member States may ask a person from the permanent representation also to be present during the comitology committee meetings on the issue and report back the outcome. This person is usually provided with all the relevant information and is required to send back a detailed report after the meeting takes place. Again, it proves that the separation of the representatives of the two committees is not easily made. It is admitted<sup>135</sup> that the very same person can be present in expert groups, comitology committees and working parties, which is especially true with smaller Member States.

“Thus, it is difficult to believe that Member State representatives in the Council will not discuss, brief, and consult their representatives on the Comitology committees on the policy position that should be taken on important implementing acts”.<sup>136</sup> Most often the results of committee voting are mirrored the voting on the Council. It might be the reason, why some of Member States in the Council reacted on the Commission’s decision to consult national experts together with other experts instead of inviting national experts separately and after the external consultation. The Council aims to withstand the impact on the drafting of a legislative act as it used to be under the old comitology regime.

With regard to the implementation of Article 291 TFEU, a regulation of the Council and the Parliament is required to be implemented in order to lay down the new comitology

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<sup>134</sup> Torbjörn Larsson (2007), “Committees and the nature of deliberative supranationalism in the EU”, in *The Role of Committees in the Policy-process of the European Union: Legislation, Implementation and Deliberation*, edited by Thomas Christiansen and Torbjörn Larsson, Edward Elgar Publishing, p. 33.

<sup>135</sup> *ibid* 36.

<sup>136</sup> Paul Craig (n 22) 133.

procedures. The new Regulation was published in the Official Journal on 28 February 2011.<sup>137</sup> The new procedures, laid out in the new Regulation, will be analysed in a separate sub-chapter on “Fourth Comitology Regulation” later in the text.

In conclusion, it shall be noted that there are difficulties in the division of the two types of acts – delegated and implementing ones, - since very different controls apply. “The rationale for the divide was to distinguish between secondary measures that were “legislative” in nature, delegated acts, and those that could be regarded as more purely “executive”, implementing acts”.<sup>138</sup> The Commission suggests<sup>139</sup> that the key distinguishing feature is that implementing acts execute the legislative act without amendment or supplementation. This explanation seems to constrain the division of the application of the two.

For example, if the Council and the Parliament decide that a secondary measure does not supplement the legislative act by adding any “new” non-essential element - Article 291 can be used. Though, “they might in other instances find that the relevant article in the legislative act is less definitive, the conclusion being that while it has provided sufficient guide as to essential principles, the secondary measure has nonetheless supplemented it by the addition of “new” non-essential elements, the conclusion being that Article 290 must be used”.<sup>140</sup> The division of the delegated and implementing acts as well as the normative foundation for the differential controls is not clear. There is also another issue to be tackled in this case – the “time problem”. Based on the implemented procedures, it is not possible to tackle whether a secondary measure falls into the category of delegated or implementing acts until it is made. It is due to the legal provision, allowing “until the committee delivers an

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<sup>137</sup> Regulation 182/2011 (n 116).

<sup>138</sup> Paul Craig (n 22) 134.

<sup>139</sup> COM (2009) 673 final (n 85) 4.

<sup>140</sup> Paul Craig (n 22) 135.

opinion, any committee member may suggest amendments and the chair may present amended versions of the draft implementing act<sup>141</sup>. “This may take the measure from the category of delegated to implementing act, or vice versa<sup>142</sup>. There is also a risk that the EU institutions may be tempted to categorize secondary measures under a certain type in order to maximize their control. The Council may seek to categorize the measures as implementing acts, due to the fact that the representatives of Member States have an opportunity for formal and detailed input into the making of the measure on comitology committees. The Parliament may press for more measures to be included within the category of delegated acts, as this legal provision contains the veto power.<sup>143</sup>

As for external participation, such legal provisions will create a number of various advisory committees by the Council and most probably by the Parliament pursuant to Article 290, „in order to enable the institutions to decide whether they should exercise their veto power, and there is no formal mechanism for such committees to be known or listed<sup>144</sup>. It shall be noted that those committees and their membership will be distinct from the ones created under Article 291 TFEU.

#### *3.3.1.5.3. Fourth Comitology Regulation.*

Implementation of Article 291 TFEU required a regulation to lay down the new comitology procedures. The new Implementing Acts Regulation<sup>145</sup> came into force on 1 March 2011. The previously established committees remain in place though only two procedures are left to be operated under. Pursuant to Article 4, advisory procedure has been

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<sup>141</sup> Regulation 182/2011 (n 116) Article 3 paragraph 4.

<sup>142</sup> Paul Craig (n 22) 135.

<sup>143</sup> *ibid* 135-136.

<sup>144</sup> *ibid* 136.

<sup>145</sup> Regulation 182/2011 (n 116).



retained in exactly the same form as it was used in the previous Comitology legislation – it is to be used except when the examination procedure is mandated. Though, the management and regulatory procedures were abolished. Instead, a new examination procedure was introduced (Article 5). The Regulatory Procedure with Scrutiny has been replaced by Article 290 TFEU, and was discussed in the sub-chapter “Delegated Acts”.

The common provisions, implemented in Article 3, are applied to both – advisory and examination procedures. The Commission continues to be assisted “by a committee composed of representatives of the Member States [...] and chaired by a representative of the Commission”.<sup>146</sup> The *Fourth Comitology Regulation* proposes a possibility to implement acts within a comitology committee, empowering „any committee member [to] suggest amendments and the chair [present] amended versions of the draft implementing act [...] [and] inform the committee of the manner in which the discussions and suggestions for amendments have been taken into account“. <sup>147</sup> The same possibility is also implemented in the appeal procedure: „until an opinion is delivered, any member of the appeal committee may suggest amendments to the draft implementing act and the chair may decide whether or not to modify it“. <sup>148</sup> This procedure increases the powers of the representatives of Member States in comitology committees as they can amend the proposed implementing acts until the final opinion is delivered. <sup>149</sup>

The advisory procedure shall be used for all other implementing measures, except those measures with general scope and with a potentially great impact (for those measures the examination procedure shall be used). Under the advisory procedure, the Commission is free

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<sup>146</sup> ibid Article 3 paragraph 2.

<sup>147</sup> ibid Article 3 paragraph 4.

<sup>148</sup> ibid Article 6 paragraph 2.

<sup>149</sup> Joint Study *The Treaty of Lisbon* (n 27) 99.

to decide whether or not to carry out the proposed measure, but must "take the utmost account" of the committee's opinion before deciding.

The examination procedure is applied for the adoption of implementing acts of general scope and other implementing acts, in particular, relating to programs with substantial implications; the common agricultural and common fisheries policies; the environment, security and safety, or protection of the health or safety, of humans, animals or plants; the common commercial policy; and taxation.<sup>150</sup> Although this Regulation is enacted for implementation of Article 291 TFEU, the definition of “implementing measures of general scope” may cause some misunderstandings, as Article 290 TFEU implements the power to the Commission to adopt “non-legislative acts of general application”.<sup>151</sup> The TFEU implements two separate procedures under the separate legal provisions, so it may be confusing as the formula bears very close similarities.

The voting system of the examination procedure is also left the same as the old regulatory procedure. The Commission needs to get a qualified majority to be able to adopt the Implementing Act, as it is implemented in Article 16 paragraph 4 TEU.<sup>152</sup> There are two possible cases – if the Committee adopts a positive opinion or delivers “no opinion” (the committee is not able to get a qualified majority for or against), the Commission is able to adopt the implementing act, unless “that act concerns taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures; the basic act provides that the draft implementing act may not be adopted when no opinion is delivered or when a simple majority of the committee members opposes

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<sup>150</sup> Regulation 182/2011 (n 116) Article 2 paragraph 2.

<sup>151</sup> Joint Study *The Treaty of Lisbon* (n 27) 100.

<sup>152</sup> Regulation 182/2011 (n 116) Article 5 paragraph 1.

it”.<sup>153</sup> In the listed cases the Commission may either reconsider and resubmit a modified draft implementing act to the same committee or forward it to the appeal committee for further deliberation. The same constraints will be applied if the Committee delivers a negative opinion.<sup>154</sup>

The Commission’s flexibility may also be constrained by the right of scrutiny granted to the Parliament and now the Council,<sup>155</sup> which enables to pass a non-binding resolution, if either of the legislators believes that “a draft implementing act exceeds the implementing powers provided for in the basic act”.

The appeal committee<sup>156</sup> is a new creation in the Implementing Acts Regulation. The same provisions on the membership of the committee shall be applied – it shall have one representative from each Member State and the committee shall be chaired by the Commission.<sup>157</sup> It is empowered to vote changes, to accept the text or to reject the amended draft implementing act. It is believed that “referral to the Council has been replaced by an Appeal Committee that is the Council in everything but name”.<sup>158</sup> It is believed<sup>159</sup> “to be a replica of COREPER, but chaired by the Commission”. The Appeal Committee was created for the Council to have a political body for controversial or sensitive issues.<sup>160</sup>

Those are the two main new procedures, though the Regulation has also implemented two other possibilities – for exceptional cases (Article 7) and immediately applicable implementing acts (“urgency procedure”) (Article 8). If there is a risk of creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests, the

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<sup>153</sup> *ibid* Article 5 paragraph 4.

<sup>154</sup> *ibid* Article 5 paragraph 3.

<sup>155</sup> *ibid* Article 11.

<sup>156</sup> *ibid* Article 6.

<sup>157</sup> *ibid* Article 3 paragraph 2.

<sup>158</sup> A. Hardacre and M. Kaeding (n 1) 15.

<sup>159</sup> Thomas Christiansen and Mathias Dobbels (n 26) 16.

<sup>160</sup> A. Hardacre and M. Kaeding (n 1) 18.

Commission is allowed to adopt a draft implementing act where it needs to be adopted without delay, though it must be immediately submitted to the Appeal Committee to find a qualified majority. The immediately implementing acts shall be adopted “on duly justified imperative grounds of urgency”. Implementing acts, adopted under Article 8, shall remain in force for a period not exceeding six months.

### *3.3.2. Differences between Comitology secondary legislation.*

The aim of this sub-chapter is to highlight the biggest changes and explain why they were applied during the evolution of the Comitology secondary legislation. The analysis shows the main differences between the enacted legal acts and what the end results are.

Overall new Implementing Acts Regulation have simplified “the use of comitology by providing for a standard comitology system with two exceptions for implementing measures of general scope and measures that require urgent application”.<sup>161</sup>

- *The retained and new procedures.* The Commission has retained the advisory procedure unaffected, though the other two procedures – management and regulatory – were replaced by an examination procedure. The safeguard procedure, even though it was still left in the *Third Comitology Decision*, was not believed to be functioning. It was mainly initiated for the temporary measures to be adopted in relation to emergency situations endangering human health and safety.<sup>162</sup> The safeguard procedure was replaced by the regulatory procedure with scrutiny, which implemented additional measures regarding urgent matters of health protection, safety or environmental issues. The new Implementing

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<sup>161</sup> Joint Study *The Treaty of Lisbon* (n 27) 101.

<sup>162</sup> E. Vos (n 8) 45.

Acts Regulation has completely abolished the safeguard procedure, as it also establishes Immediately Applicable Measures, which may be adopted “on duly justified imperative grounds of urgency”. The new instrument with scrutiny, which was implemented by the *Third Comitology Decision*, will continue to exist as a procedure in committees, albeit one that will be removed by the end of 2014.<sup>163</sup>

- *Standardisation of Rules of Procedure.* The *Second Comitology Decision* stipulated that each committee shall adopt its own rules of procedure on the basis of Standard Rules of Procedure, which shall be published in the Official Journal. Having regard to Regulation No 182/2011, and in particular Article 9 paragraph 1 thereof, the already existing committees shall adapt their rules of procedure to the standard ones.<sup>164</sup> The individual rules of procedure shall be adopted by a simple majority, on a proposal from the chair of the committee. Where necessary, existing committees must adapt their rules of procedure to the new standard rules.<sup>165</sup> The standardisation of this procedure was done by leaving a wide interpretation power in this area and allowing the committees to apply different procedures. It brought both freedom and confusion when following the activities of committees, as they were allowed to change or exclude some of the provisions. Even so, the standard rules aim to harmonize the procedures, ensuring that the proposals will be discussed and accepted/rejected in the same way in all committees. The accepted rules of procedure have to be strictly followed. However, the Standard rules of procedure also give some freedom in regulating some of the procedures (for example, working languages in a committee).

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<sup>163</sup> “The Commission has committed itself, in a statement to the Parliament, to (1) finalise an alignment scrutiny exercise by the end of 2012 and (2) finalise the legislative exercise replacing RPS (Regulatory Procedure with Scrutiny) with Delegated Acts by the end of the current Parliamentary term in 2014”. A. Hardacre and M. Kaeding (n 1) 15.

<sup>164</sup> Standard Rules of Procedure for Committees adopted by the Commission on 12 July 2011, OJ C 206/11.

<sup>165</sup> Commission, “Working of committees during 2011” (Report) SWD(2012) 394 final, COM (2012) 685 final, p. 4-5.

- *The obtained powers of the Parliament and the Council.* The Parliament has also “called for a right of objection for both Council and the Parliament that would be binding on the Commission”.<sup>166</sup> The Parliament did not get a role in the new Implementing Acts Regulation as well as no binding right of objection except a non-binding right of scrutiny. This right was retained by Parliament and now is extended to the Council (Article 11) either legislator can adopt a non binding resolution at any time if it believes that the draft Implementing Act exceeds the implementing powers provided for in the basic act.<sup>167</sup> In such a case, the Commission will review the draft measure in question and will explain to the European Parliament and the Council what it intends to do.<sup>168</sup>
- *European Parliament’s “droit de regard”.* Before the entry into force of the Treaty of Lisbon, the Parliament was also demanding an observer status in the committees, full information on voting behaviour of Member States, and a case-by-case alignment of the *acquis*.<sup>169</sup> The Parliament did not get the observer status. “Article 291 of the Treaty provides that the Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers”.<sup>170</sup> It means that with regard to implementing acts, Member States controlled the Commission, not the Council or the Parliament. The Parliament has also lost its *droit de regard* provided for in Article 10 of the Implementing Acts Regulation, which the Commission names as “incompatible with

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<sup>166</sup> Thomas Christiansen and Mathias Dobbels (n 26) 13, 15-16.

<sup>167</sup> A. Hardacre and M. Kaeding (n 1) 17.

<sup>168</sup> Commission, “Comitology: new rules for Commission's implementing powers” (Press Release) [2010] IP/10/1735 < [http://europa.eu/rapid/press-release\\_IP-10-1735\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-1735_en.htm?locale=en) > accessed 27 August 2013.

<sup>169</sup> Thomas Christiansen and Mathias Dobbels (n 26) 13, 15-16.

<sup>170</sup> COM (2010) 83 final (n 132) 3.

Article 291”.<sup>171</sup> It means that the legislators do not have the power to suspend the decision-making process based on the right of information, granted by Article 10.

- *External participation is still not regulated.* In all the committee procedures it is specified that the Commission is assisted by committees of Member States representatives, but there is no reference to participation by external participants. Also the Decisions fail to lay down provisions on the openness of committee activities. Greater transparency could be ensured by the publication of the dates of the meetings and agenda, as well as the committee members, whilst open (“enlarged”) meetings could be organised with interested parties.<sup>172</sup>
- *Comitology implementation measures.* As far as transparency is concerned, the Comitology Decision II lists and the Comitology Regulation IV retains a number of instruments: a continued use of the existing Register of Comitology of the European Commission (Article 10); a list of all committees, assisting the Commission with its implementation task (Article 10 (1a)); an annual report on the working of committees (Article 10 (2)). The Commission has also aimed to maintain a commitment to transparency by extending Article 15 of the TFEU transparency rights to comitology proceedings.<sup>173</sup> The commitment to transparency shall be governed by the principles and conditions on public access to documents and the rules on data protection applicable to the Commission implemented by the Regulation (EC) No 1049/2001.<sup>174</sup> The same rules and principles shall be applied to comitology committees.

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<sup>171</sup> *ibid* 5.

<sup>172</sup> E. Vos (n 8) 45.

<sup>173</sup> Joint Study *The Treaty of Lisbon* (n 27) 102.

<sup>174</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43, published on 31 May 2001.

### 3.4. IMPLEMENTATION OF SUPPORTING MEASURES FOR COMITOLOGY COMMITTEES.

There is a clear need for more transparency and access to committee documents. Furthermore, the manner in which committees are composed and/or operate often depends solely on the “goodwill” of the EU institutions, and in particular upon that of the Commission which possesses the administrative leeway to disrupt committee activities.<sup>175</sup>

In order to implement successfully all the planned executive powers, the EU institutions need also to implement a number of supporting measures. One instrument, introduced in the *Second Comitology Decision* and retained in the later secondary comitology legislation, is the *Comitology Register*.<sup>176</sup> This should help follow the flow of information between MEPs, Commission civil servants as well as external participants. The *Comitology Register* is also tightly linked to the Regulation No 1049/2001<sup>177</sup> regarding public access to EU documents. Though it shall be noted that the *Comitology Register* is distinct from the *Register of Commission documents*<sup>178</sup> which contains other Commission’s documents (COM, C and SEC series). As some documents might contain sensitive, political or personal data, the EU institutions are obliged to adopt measures to secure the flows of sensitive information. It will be discussed in the second part of this sub-chapter.

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<sup>175</sup> E.Vos (1999), *Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies*, Oxford, p. 131-184.

<sup>176</sup> Comitology Register - <<http://ec.europa.eu/transparency/regcomitology/index.cfm>> accessed 15 April 2013.

<sup>177</sup> Regulation 1049/2001 (n 174).

<sup>178</sup> Register of Commission Documents - <http://ec.europa.eu/transparency/regdoc/index.cfm?CFID=182618&CFTOKEN=71998068&jsessionid=950428846d8dfaefcc53692f3d2743253455TR> accessed 15 April 2013.



### 3.4.1. Comitology Register.

The Register of Comitology of the Commission is a web-based instrument, which executes the Commission's legal obligation, resulting from the Council Decision 1999/468/EC.<sup>179</sup> This gives a public access to a register of reference information on the documents relating to the work of comitology committees that the Commission transmits to the Parliament and now the Council as of the commencement date of the Implementing Acts Regulation. The new application, having an internal and an external interface, establishes an integrated system, which, simultaneously, replaces the existing procedures for transmission of documents to the Parliament and the Council and creates a public register and a repository.

The Register was to be set up by 2001, but became operational only in December 2003, covering transmitted documents from 1 January 2003.

The Register also contains a repository of the documents sent to the Parliament. This gives external users direct access to such documents, provided they are not excluded from the repository.<sup>180</sup> The obligations concerning transmission of documents to the Parliament and the Council rise from the same Council Decision 1999/468/EC.<sup>181</sup> However this Decision does not define all details or modalities. This obligation has been retained in the later Comitology secondary legislation, which was already discussed in preceding parts of this Chapter.

Article 7 (3) of the *Second Comitology Decision* sets out the documents emanating from the comitology committees. These documents are subject to mandatory routine

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<sup>179</sup> Council Decision 1999/468/EC (n 56) Article 7 paragraph 5, being retained in Regulation 182/2011 (n 116) Article 10.

<sup>180</sup> It is available on the *Comitology Register* website under the sub-menu "old comitology register", <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.archive&NewSearch=1>, accessed on 5 September 2013.

<sup>181</sup> Article 7 paragraph 3.

transmission to the Parliament<sup>182</sup> and now the Council<sup>183</sup> under the new Implementing Acts Regulation, especially:<sup>184</sup>

- 1) (draft) meeting agendas of comitology committees;
- 2) the draft implementing acts on which the committees are asked to deliver an opinion;
- 3) the final draft implementing acts following delivery of the opinion of the committees.

Additionally, the *Comitology Register* makes accessible to the public more documents than it is requested to: draft implementing acts submitted to committees,<sup>185</sup> the results of voting; summary records of the meetings and the lists of authorities representing the Member States and where relevant, other related documents, which are discussed at Committee meetings. Of course, the Parliament and the Council shall also have access to this information whenever it is required by the rules.

#### *3.4.1.2. Restricted transmission*

The Register includes, by definition, reference information on all comitology documents that are transmitted to the Parliament, except documents that are formally classified “EU CONFIDENTIAL” and/or higher “EU SECRET” / “EU TOP SECRET”. Commission Decision 2001/844/EC<sup>186</sup> amended by Decision 2006/548/EC of 2 August

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<sup>182</sup> Communication from the President (in agreement with Vice-President Wallstrom), Register of Comitology Operational Instructions regarding the introduction and use of the register and repository of comitology documents, transmitted to the European Parliament [2005] C (2005) 348.

<sup>183</sup> Regulation 182/2011 (n 116) Article 10 paragraph 3.

<sup>184</sup> *ibid* Article 10 paragraph 4.

<sup>185</sup> Where, in some cases, these are not yet made public, only the reference thereto is provided (Comitology Register website: <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=FAQ.FAQ>), accessed 5 September 2013.

<sup>186</sup> Commission Decision No. 2001/844/EC of 29 November 2001 amending its internal Rules of Procedure (notified under document number C (2001) 3031) ECSC, Euratom [2001] OJ L 317.

2006<sup>187</sup> contain the “Commission security rules”. According to these, documents may be classified as “EU RESTRICTED” and higher. The documents, described in this paragraph, are sent or made available to the Parliament and now the Council, but they appear in the register only if the author has given its consent.

Even without formal classification, documents may contain sensitive information and data, related to issues of public security, personal and commercial interests, defence and military matters. These documents are sent to the Parliament and the Council under specific procedures, which preserve confidentiality between the institutions. It is for the responsible Commission service to take position, on a case-by-case basis whether such documents should be made publicly available in accordance with the exemption clauses “clauses of confidentiality” of Article 4 of Regulation (EC) No 1049/2001, and they may not be directly accessible via the repository. Comitology documents which have not been sent to the Parliament and the Council do not appear via the repository.

One should mention Article 4 of Regulation No 1049/2001 that provides exceptions to protect specific interests, decision-making process and third party documents. Since a disclosure of implementing measures and supporting documents at the time of transmission to Member States and the Parliament may “impede the proper functioning of the committee”, Article 4 paragraph 3 specifies that direct access can be postponed until the committee has delivered its formal opinion on the draft measure or issue.<sup>188</sup>

After final adoption by the Commission, most implementing measures that were considered confidential in their draft form during the committee procedure are finally made publicly accessible via the *Register of Commission documents*.

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<sup>187</sup> Commission Decision No. 2006/548/EC of 2 August 2006 amending Decision 2001/844/EC, ECSC, Euratom [2006] OJ L 215/38.

<sup>188</sup> “It is recalled that the services have at any time the facility to grant and withdraw access to a document which is uploaded via the internal application in the public register and repository.” C (2005) 348 (n 182).

### *3.4.2. Annual Report on the work of Comitology committees.*

Article 10 paragraph 2 of the Implementing Acts Regulation stipulates that the Commission has to present an annual report on activities of comitology committees. All the reports are structured in a similar way:

- 1) general comments regarding the comitology system, consisting of the short description on comitology committees and their institutional context, the Parliament's right of scrutiny, referrals to Council and wider developments. The last available annual report<sup>189</sup> also has a separate part on the new comitology procedures, implemented by the Implementing Acts Regulation;
- 2) horizontal overview of activities provides information on number of committees and types of procedures including number of meetings and figures on the formal delivered opinions by the committees and implementing measures adopted by the Commission.
- 3) an Annex provides more detailed statistical information on activities by sectors.

The aim of the supporting measures to be implemented was requested both by the EU institutions and the external participants, as for many years it was not clear what kind of information was available to comitology committees and how it was used in the drafted measures. If, for instance, the European Parliament's committees as well as their working documents were accessible to the public, the Commission's comitology committees did not publish their working documents and meeting dates. During the interviews, some of the civil servants stated that as the decisions were not yet adopted there was no position to be

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<sup>189</sup> COM (2012) 685 final (n 165) 2-5.

published; also, the drafted measures might create a lot of speculations and do more harm than good. However, sometimes comitology committees were buried in such secrecy that other EU institutions were not able to follow their work. As a result, the Commission was forced to implement the regulated supporting measures to ensure some transparency in the decision – making process.

### **3.5. TYPOLOGY OF COMITOLOGY COMMITTEES.**

In this part a classification of different comitology committees' types will be provided. The classifications are based on theoretical models, which were extracted from academic literature. Moreover, it shall be noted that a comitology committee, established by a unit, may cover the characteristics of all of the described types. An attempt was made to keep the structure as simple and effective as possible.

#### *3.5.1. Comitology committees structure according to decision-making phases.*

The first typology will be provided according to three phases: drafting, adoption and execution or implementation.<sup>190</sup> At different phases, different committees are involved.

##### *3.5.1.1. Drafting phase.*

At this stage the consultation of different committees is not compulsory, but participants of the committees often have the most influence over the decision. The assisting

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<sup>190</sup> Daniel Gueguen and Caroline Rosberg (n 13) 25.

bodies, which may take the form of expert groups or sub-groups, might be appointed if provided for in procedural measures or on an *ad hoc* basis. Before the final submission of the draft legislative proposal, the Commission works with three main bodies: advisory committees, scientific committees and expert groups. Those committees do not vote – it is enough to submit the final decision for the Commission to decide. Scientific committees might be asked to adopt their report at a plenary meeting by a majority.

However, the committees, the consultation of which is not compulsory, might also be influential due to the following reasons:

- 1) many of the committees are created by an official decision and are thus officially involved in the drafting;
- 2) since the Commission's consultative committees and expert groups are involved at the earliest stage of the EU policy-making, they can potentially influence the outcome considerably;
- 3) the members in these committees and groups are supposed to be top-experts<sup>191</sup> (this affirmation was also confirmed by the CJEU),<sup>192</sup> respected for their specialisation. They tend to issue highly credible technical and political advice.

In general, the higher the draft progresses in the hierarchy, the more difficult it is for interested parties to have their views taken into account.<sup>193</sup>

The level of influence also depends on the committees themselves, as well as on the adopted approach. If the committee does not succeed in becoming powerful, it can enjoy other kinds of benefits:

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<sup>191</sup> "Top-expert" is identified as an individual, having widely accepted knowledge and/or experience in some area. The person might deal with sensitive and quite secret information, which is necessary to be incorporated into the drafted measures. Usually it is expected, that the provided technical and/or scientific advice of a top-expert is up-to-date and highly credible and does not need to be questioned during the decision-making process (author's comment).

<sup>192</sup> Case C-269/90, *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5495.

<sup>193</sup> Daniel Gueguen and Caroline Rosberg (n 13) 32.

- 1) the committees bring together people with a common specialised interest from different countries, i.e. different administrations or sectors. There they can exchange views and experiences, and try to form collective opinions;
- 2) also, membership in one of these committees or groups provides an excellent opportunity to monitor other parties involved and to find out about their position (particularly the Commission).

To summarize, it is possible to state that members of comitology committees, involved in the drafting phase of decision-making process, can be influential only if they possess scientific and technical knowledge that is credible and politically sensitive.

#### *3.5.1.2. Adoption phase.<sup>194</sup>*

When the Commission adopts the legislative proposal formally, the decision-making power lies with the Council and the European Parliament. The Economic and Social Committee (ECOSOC) also participates in the decision-making process as a consultative body. The same goes for the Committee of Regions (CoR), which participates as a simple advisory body.

In order to influence the decision-making at this phase, a participant has to be a recognised expert. It is not enough to be a representative of a Member State; an expert has to be known at the EU level. It is of no use to conduct political lobbying at this level before the adoption. The adoption phase requires pure technical and/or scientific knowledge in order to ensure successful implementation of legislative acts. By possessing the required technical

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<sup>194</sup> *ibid* 33.

and/or scientific information it is possible to influence the final decisions. Political influence is done at two other phases.

#### *3.5.1.3. Implementation phase.*

It should be repeated once more, that powers of implementation are not normally given to established committees, the legislation merely indicates that the Commission shall be assisted by a committee composed of representatives of Member States: it is most uncommon for legislation to name a particular committee to exercise the relevant powers.<sup>195</sup> Secondly, implementation procedures are specific to individual sections of EU legislation, and various activities authorised by a single piece of legislation may be subject to different implementation arrangements involving different committees of national experts.<sup>196</sup> Thus, it is not possible either to identify what committee is likely to exercise the implementation function in relation to an individual piece of legislation, nor to identify the legislation for which an individual committee is responsible.<sup>197</sup>

The Implementation phase is regulated by legislation and also committees at this stage cannot escape judicial review. It is also worth noting that comitology committees working at the implementation phase have also to deal with drafting issues. The provided implementation measures in a secondary legislation have to be drafted according to credible and up-to-date information. So, the different phases sometimes cannot be distinctly separated as they intervene with each other.

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<sup>195</sup> Council Directive No. 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing [1993] OJ L340, p.21.

<sup>196</sup> Council Regulation No. EC/517/94 of 7 March 1994 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific community import rules [1994] OJ L67, p.1.

<sup>197</sup> Rhys Dogan (2000), *A cross-sectoral view of comitology: incidence, issues and implications*, in Thomas Christiansen and Emil Kirchner (eds.) "Committee governance in the European Union", Manchester University Press, p.47.



### *3.5.2. Binding nature of consultation of comitology committees.*

Committees can be divided between those that must be consulted when drafting EU legislation, and those that do not have to be consulted.<sup>198</sup> Depending on the weight of their opinion, the first category of committees can be further subdivided into advisory or examination committees. This classification can be easily traced, as the distinction between the committees is regulated in Comitology Decisions and the newly enacted Implementing Acts Regulation. On the other hand, it will not be absolutely true to say that consultation of advisory committees should be disregarded. As shown earlier, the opinion provided in advisory committees may be influential, if the representative members possess credible and up-to-date information. Experience and knowledge are in high demand at this level, and although their consultation is not compulsory, the Commission takes usually the advice given into account.

### *3.5.3. Level of influence of comitology committees.*

Another suggested classification of comitology committees was offered by D. Gueguen and C. Rosberg<sup>199</sup> in the drafting phase, but it could also be applied to other already discussed phases. This classification is also used in the empirical research, which differentiates the influence of the comitology committees and groups, which may vary on the scale from 0 to 10, 0 being no influence and 10 very influential.

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<sup>198</sup> Such a division is adhered to in the Community budget.

<sup>199</sup> Daniel Gueguen and Caroline Rosberg (n 13) 30.

- 1) *Committees with importance 0-3.* Some of the established comitology committees are not very influential in the drafting phase. They are mainly set up to advice and express opinions on the relevant policy. The advisory comitology committees are supposed to discuss matters for which the Commission has asked an opinion. They can also propose that the Commission consults them on matters within its competence. The comitology committees do not vote at the end of discussions. Sometimes the meetings of such committees might be counterproductive due to the following reasons:
  - a) the distribution of power within the Committee is unbalanced – it might belong to one of the interest groups, forming majority in a comitology committee;
  - b) there might be no dialogue between the members in a comitology committee – the producers do not want to listen to consumers and vice versa. This might produce totally fragmented opinions, often contradictory, sometimes conflict.
- 2) *Committees with importance 3-7.* A comitology committee might be more influential, if more important actors meet. Most of those groups consist of representatives from the infrastructure, national regulation groups-, consumer-, trade unions-, university-, NGO representatives and etc. Those groups are not highly influential when it comes to drafting proposals but they are very important forum for meeting stakeholders, creating networks and finding information. More than advisory groups, they are forums for reflection. Their discussions and conclusions constitute a good basis for proposals and decisions of the Commission.
- 3) *Committees with importance 7-10.* Depending on which policy area these Committees cover, their opinions carry different weight. Expert groups are seen as having more

influence than advisory committees since they meet more frequently and may offer the Commission more than plain expertise. By involving a member within them, associations and companies enhance their ability to influence future legislation and also take part in shaping it.

The distinction between comitology committees based on their level of influence does not mean that advisory committees belong to the first group and regulatory ones, especially the legalised regulatory committees with scrutiny, to the third level. However, sometimes advisory committees can acquire more influence if it becomes clear that the issue debated is linked to the environment, health or safety.

### **3.6. COMMISSION RELATIONS WITH EXTERNAL PARTICIPANTS.**

In general, there are currently no general laws or legally-binding provisions in effect that could safeguard the participation of interest groups, NGOs, or other social actors in the law-generating processes under the supervision of the Commission.

“Behind the formal structures of the EU we find a vast number of informal structures and procedures without which the EU would not function at all”.<sup>200</sup> Such a complex informal system is needed to compensate the shortages in the formal one. The main weakness is the lack of existence of a people from whom the EU system could deduce its input legitimacy (or procedures) to be followed by the government in its decision-making capacity allowing the public to participate in.<sup>201</sup> If you cannot bring people in you can try to bring everyone else instead. “And this is precisely what the vast system of committees and groups try to do,

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<sup>200</sup> T. Christiansen and S. Piattoni (2003), *Informal Governance in the European Union*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar.

<sup>201</sup> Torbjörn Larsson (n 134) 16, 37.

bringing together different kinds of experts, civil servants, politicians, interest representatives and other persons with status and authority and getting them to agree on European policies”.<sup>202</sup>

At this stage it would also be important to include general information on the constituent parts of comitology committees. It was already mentioned that the established comitology committees are in high demand due to their scientific and/or technical knowledge and powers to represent the position of each Member State on the drafted measures, which will be implemented in national legislation. For this reason, the Commission forms *ad hoc* working groups, scientific committees, invites experts or other stakeholders.

Whilst some committees consist of Member States’ representatives (hereafter, the comitology committees), others constitute forums for interest groups or independent experts. The members of established groups as well as organisations, representing individuals and/or structured interests, under the umbrella of comitology committees are collected under this list, which is not exhaustive:

- 1) *civil servants* – usually appointed by Member States to represent national interests;
- 2) *civil servants from Directorates-General (DGs)* in the Commission other than that under which the expert groups is placed;
- 3) *civil servants from the responsible Directorates-General*. It shall be noted that civil servants from the Commission are not officially allowed to participate in the comitology committee’s work. They do all the drafting work, collect scientific data, consult the public on different issues and provide the final document for the comitology committee to vote

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<sup>202</sup> *ibid* 37.

on. The only official civil servant, who can participate in the comitology committees meetings, is the chairman of the committee, but he/she is not allowed to vote;

- 4) *“real” or scientific experts* (e.g. EEA);
- 5) *“negotiating” experts*;
- 6) *experts, nominated by Member States* – high-level governmental experts;
- 7) *experts*, originating from the specialised state agencies or from functioning governmental departments;
- 8) *representatives of NGOs*;
- 9) *representatives of public organisations*;
- 10) *representatives of private organisations*;
- 11) *representatives of trade unions*;
- 12) *representatives of SMEs*, usually belong to associations, but sometimes might participate as an individual body, if the discussed decision has direct influence on the exercised activity;
- 13) *stakeholders* (regional, national and international);
- 14) *ad-hoc groups* (usually set on temporary basis);
- 15) *interest groups* (industry, commerce, consumer and environment, which as well might be EU and non-EU);
- 16) *consultation forums* (ad-hoc working group involving different interested parties);
- 17) *competent bodies* (Member States representatives);
- 18) *politicians*;
- 19) *union leaders*.

The provided list does not present all the possible participants in the EU decision-making process. Some of them might belong to a couple of defined bodies at the same time, as well as be invited into different consultative bodies or expert groups. The only possible restriction in participation in different groups is avoidance of conflict of interests, which might be important in some cases.

Many groups were established to develop appropriate experience and create contact networks. Now the Commission faces another dilemma – how to make all the established expert groups continue to provide scientific advice, but at the same time guarantee their monitoring and efficient management. Some of them have delivered what they were mandated for and have been closed; others have been re-structured or merged with other expert groups in order to address overlapping issues. The need for expertise is always in high demand, but it changes constantly, so the expertise needs to be updated and monitored all the time. Members of expert groups are changing constantly, as recent solution may be replaced on the basis of new expertise to provide new scientific alternatives. Consequently, there is a continuous rotation of people.

Experts usually steer early deliberations on policy direction and help Member States to regain control over all agenda setting, as well as influencing not only the negotiation process but also the design of the directive. They are also trusted to check all the technical issues and provide their competent advices on decisions, which cannot be comprehensively examined and decided by the overworked and over-tasked Commission.

### 3.6.1. Types of representation of national interests.

This issue is not related directly to the issue of external participation, however, it is important to investigate how national civil servants participate in the work of the committees: as national *government representatives*, *independent experts*, or *supranational actors*.

To start with it shall be noted that the “national representatives on the committees are usually bureaucrats or technocrats with experience in the relevant area”.<sup>203</sup> Usually, they are not related to politicians and they bring deliberative perspective to the issues.<sup>204</sup> Nonetheless, it has to be cautioned that committee members might be unaware of “the profound political and moral choices involved in their determinations and of their shared bias”.<sup>205</sup>

It is important to consider the types of national representation in the comitology framework through various perspectives.

From the perspective of *loyalty*, civil servants remain loyal to their national government institutions,<sup>206</sup> if they act as government representatives. “[T]rue representation occurs only when the representative acts on explicit instructions from their constituents”.<sup>207</sup> Consequently, domestic civil servants act as ‘government representative’ when attending EU committees. According to this concept of representation, EU committees are intergovernmental arenas for negotiation between sovereign nation states, mediated through their delegates. If the representative evokes roles that deviate significantly from the

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<sup>203</sup> Paul Craig (n 22) 121.

<sup>204</sup> *ibid.*

<sup>205</sup> J. Weiler (1999); “Epilogue: “Comitology” as Revolution – Infranationalism Constitutionalism and Democracy”, in C.Joerges and E.Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Hart Publishing, p. 347.

<sup>206</sup> J. Trondal and F. Veggeland (2003), “Access, voice and loyalty: the representation of domestic civil servants in EU committees” *Journal of European Public Policy*, 10:1, p.61.

<sup>207</sup> H. F. Pitkin (n 5) 146.

‘government representative’ role, the representative may be recalled, either permanently or temporarily.<sup>208</sup>

From the *supranational* perspective, representatives are seen as experts with a great deal of behavioural discretion at their disposal. A supranational role involves identifying oneself as an ‘EU participant’ or as an ‘EU committee participant’. Intensive participation on comitology and/or expert committees creates likelihood that the representatives evoke into supranational and sectoralized role perceptions.

From the *realistic* perspective, “committees are the products of a general strategy of national administrations to construct and extend channels for their own participation, i.e. to establish access and exert influence in the political space”.<sup>209</sup> And they “are seen as a natural extension of national administrations which are, in turn, vital elements in making and keeping decisions acceptable to EU citizens. National administrations are necessary to preserve the only legitimate “institutional balance”.<sup>210</sup> It is logic to expect a confrontation between national and EU administrations, which might influence conflictual voting and aims to shift responsibility from the committee level to the Council, which is seen as preserving national interests.

From a *federalist* perspective, it is feared that “powerful committees of national civil servants would be seen as serving national interests only and thus constituting a major obstacle to a proper federal institutional balance which alone could guarantee efficient, effective and legitimate European policies”.<sup>211</sup> Based on this claim that national administrations represent legitimate rights based on national constitutional principles and on national parliamentary sovereignty and “the style of inter-administrative bargaining within

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<sup>208</sup> J.A. Christophersen (1986), *Representant og velgere*, Department of Political Sciences, University of Oslo.

<sup>209</sup> Wolfgang Wessels (1990), “Administrative Interaction”, in William Wallace (ed.), *The Dynamic of European Integration*, London: Pinter; p. 229-241.

<sup>210</sup> *ibid* 211.

<sup>211</sup> *ibid* 212.



these committees will be structurally unable to solve the problems of the [EU]”, EU citizens are against the search for more power to such committees.<sup>212</sup>

From a *neo-functional* perspective, national civil servants are involved in the integration process, which might result in shifting “their loyalties, expectations and political activities towards a new centre whose institutions possess or demand jurisdiction over the pre-existing national states”.<sup>213</sup> This theory states that in the near future, comitology committees might be among the first ones to be abandoned, as they would be replaced by the EU administrations and their officials, who would get the *de facto* decision-making power shifting out of national control.

From the *functionalist* perspective, comitology committees shall focus on functional “problem-solving” rather than political “bargaining”,<sup>214</sup> by reaching an agreement based on common analysis from which the best solution to a problem could be deduced. It is believed that this kind of committee should be delegated strictly to experts; - no generalists or legal advisers should be allowed to participate.

From an *erosion* perspective, national bureaucracies use this complex system for their self-interests in order to establish a network. “Comitology committees are thus seen as significant indicators for the strengthening of the administrative hold of any government, and they are frequently used as an effective means to escape both the parliamentary control and judicial review to which national administrations are normally subjected”.<sup>215</sup> The interaction style within the committees is formal and procedural; however it is hostile to anyone – political authorities, interest groups, other bureaucratic “rivals” or European parliamentarians.

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<sup>212</sup> *ibid.*

<sup>213</sup> Ernst B. Haas (1968), *The Uniting of Europe*, 2<sup>nd</sup> edition; Stanford CA: Stanford University Press;

<sup>214</sup> Fritz W. Scharpf (1988), “The joint decision trap: lessons from German federalism and European integration”, *Public Administration* 66; p. 229-278;

<sup>215</sup> Andreas Buckner, Christian Joerges, Jürgen Neyer and Sabine Schlacke (1996), “Social regulation through European committees: an interdisciplinary agenda and two fields of research”, in Robin H. Pedler and Guenther F. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, Maastricht: European Institute of Public Administration; p. 39-60.

It is believed that participating civil servants from such multi-level administrations betray their governments and populations. “The individual citizen is confronted with a multi-layer functional set-up which can neither create loyalty nor establish any kind of solidarity”.<sup>216</sup>

From the perspective of *the governance school*, even being at a secondary level of decision-making, comitology committees have an important power for collective decision implementation for taking of binding decisions “beyond the state”.<sup>217</sup> They offer “new insights into the dynamics of European governance and would therefore indicate a change in the relationship between the European society of states and European civil society”.<sup>218</sup> If comitology committees could increase their power in the self-governance of networks, allowing civil servants to be more embedded in networks of social groups as spokespeople. Alternatively, they could become an extension of unilateral steering by government, however limiting interaction with other NGOs.

From a *fusion* perspective, comitology committees are seen as “indicators of a process by which national governments and administrations, (...) public and private actors, increasingly merge public resources from several levels of the state”.<sup>219</sup> Comitology committees might help to form a partnership encompassing all relevant levels of Member States’ administration, including national, regional and local levels. The growing networks of mixed administrations is a good indicator of the broad horizontal and vertical merging of political systems, which could imply into the final result a joint management of the whole policy cycle, i.e. also in those phases where either the Commission or Member States originally had exclusive powers.<sup>220</sup>

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<sup>216</sup> Wolfgang Wessels (n 209) 215.

<sup>217</sup> *ibid* 216.

<sup>218</sup> Andreas Buckner, Christian Joerges, Jürgen Neyer and Sabine Schlacke (n 215) 46.

<sup>219</sup> Wolfgang Wessels (n 209) 216.

<sup>220</sup> *ibid* 217.

The above described types of representation of national interests distinguish the most common participation types at the comitology committees level. It may be either an attempt to extend channels of participation of national authorities at EU level or to serve national interests in powerful committees of national civil servants. Generally, the participation of national representatives is treated as a representation of a body and a representative is expected to be loyal to the represented body. Though, there might be rare circumstances where a national civil servant becomes an external participant. In such cases a representative shall be seen as an expert with a great deal of behavioural discretion at his/her disposal. And on the contrary, some national bureaucrat may take advantage of the comitology committees framework for their self-interests in order to establish a network by escaping both the parliamentary control and judicial review, which they are normally subjected at the national level.

The intensity of EU participation for civil servants in sessions of councils, as well as in meetings of comitology committees, occupies a huge amount of time, including the time needed for preparation and following the work back at home. “In addition to those directly involved, other civil servants of national governments also take part in the decision preparation and implementation within the ministry”.<sup>221</sup> This fact shows that the participation demand at EU level becomes more intense and might be considered a major part of the evolving political system. On the other hand, it seems that “national procedures for the Council preparations and the demand for participation in the sessions of the Council indicate a special mistrust between national departments and ministries”.<sup>222</sup> Considering the number of civil servants involved in all phases of EU policy, through internal procedures in capitals, by

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<sup>221</sup> *ibid* 222.

<sup>222</sup> *ibid*.

establishing offices in Brussels, and by close collaboration, national administrations have considerably developed their ability to compete with other administrations.<sup>223</sup>

Keeping comitology committees involved, the Commission staff tends to make positive proposals. Participants of comitology committees do not want to rely on politicians, so ministers are kept out of the dealings between administrators, which satisfy the Commission civil servants, who pay more attention to formalities rather on their business-minded colleagues in the administrative committees. On the other hand, many civil servants are not aware of the exact legal nature of their committee, as they seem to participate in meetings in different phases of EU policy cycle, and that different forms of committees on the same topic follow one another without formal change.<sup>224</sup>

Civil servants are not the only actors trying to move to Brussels. Political leaders (heads of state and government) are also becoming “professional Europeans” and have often intervened directly as “ultimate decision-makers” in work normally done by the Council. Comitology committees might become overruled by higher and more specialised administrative and political levels, whenever issues become politicised.<sup>225</sup>

Even though there are numbers of discussions regarding the low power of influence of comitology committees, through their complex and sometimes hidden participation, it could be argued that administrative interactions with national civil servants, in several different forms, have increasingly played a major role in preparation, decision-making and implementation, without real threat to be replaced by the EU administrative bodies. However these actors, interested in EU affairs, should consider a bigger investment in order to obtain access and influence. The demands, which comitology committees put on national administrations, helps to Europeanize this kind of group of actors, which might be treated as

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<sup>223</sup> *ibid.*

<sup>224</sup> M.P.C.M. van Schendelen (n 3) 34.

<sup>225</sup> Wolfgang Wessels (n 209) 226.

an extension of national government and administration, and not a straightforward abolition of its influence. Participants of comitology committees are confronted with different actors and at the same time national civil servants have to convince colleagues with different political and administrative cultures as well as different interests.<sup>226</sup>

### 3.6.2. *Expert Groups and Other Similar Entities*

*Expert groups or consultative groups* assist the Commission in its many functions. “An expert group can be almost anything, ranging from just a few members with very special knowledge to a very complex structure with several subgroups, sometimes including hundreds of persons from almost every walk of life”.<sup>227</sup> They are used to help to prepare new legislation to be drafted by the Commission, to coordinate and facilitate an overview of different policy areas, to implement the adopted legislation and to exchange experience and information.

Involvement of experts was also confirmed by the CJEU. In 1990 the CJEU approved the participation of “group of experts” for the first time.<sup>228</sup> It was based on the fact, that Member States did not have the information necessary to assess whether instruments of equivalent scientific value were manufactured in the Union, the applications in question were to be forwarded to the Commission. The Commission then needs to consult Member States and if they give a negative opinion, it has to place the matter before a “group of experts”. This group has to comply with the duty to examine carefully and impartially all the relevant factual and legal aspects of each case. The Commission, on the other hand, shall have the power of

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<sup>226</sup> Wolfgang Wessels (1985), “Community bureaucracy in a changing environment”, in J. Jamar and W. Wessels (eds.), *Community Bureaucracy at the Crossroads*, Bruges: College d’Europe, p. 8-36.

<sup>227</sup> Torbjörn Larsson (n 134) 34.

<sup>228</sup> Case C-269/90 (n 192).

appraisal in order to fulfil its tasks and be able to prove that the group is composed of individuals possessing the necessary technical knowledge in the relevant scientific field.

#### 3.6.2.1. *Types of Expert Groups*

Depending on the advice sought, expert groups might be categorized into various types. For example, Horizontal Rules for Commission Expert Groups<sup>229</sup> establishes three expert groups, namely a *formal expert group*, which is set by a Commission Decision; *informal expert group*, which is set up by a Commission service with the agreement of the Secretariat General; and *other similar entity* (or a consultative entity) which was not set up by the Commission or its services, the role of which is the same as, or similar to, that set out in Rule 3 and for which the Commission services ensure administrative and financial management”.<sup>230</sup> It shall also be noted that an expert group must comprise of at least six members and must meet more than once.

Based on the influence, four other types may be distinguished – *senior officials group* (consisting of one or two high-level officials from each of Member States; in some cases the national permanent representations may be required to send an expert); *umbrella groups* (if five or six Member States have an interest on the issue, they form an umbrella group and invite other Member States, where the initiative is discussed and a general approach is decided on); *expert groups* (composed of representatives from Member States, industry, interest groups and NGOs; these work on a draft proposal, amend or produce new legislation)

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<sup>229</sup> Communication from the President to the Commission on Framework for Commission Expert Groups: Horizontal Rules And Public Register [2010] C (2010) 7649 final.

<sup>230</sup> Rule 2 of the Horizontal Rules of Commission Expert Groups (Annex).

and *sub-groups* (if some of the subjects are too sensitive or require more meetings for extensive discussions).<sup>231</sup>

Due to their technical and/or scientific expertise, basic and extended knowledge on many specialised topics, external experts, scientists and experienced civil servants, lobbyists and other interests usually serve as providers of up-to-date technical advice. The Commission and the established committees are the recipients of the technical or scientific advice, on which they can base their political interests to be finally adopted. The other reason for setting up expert groups is the fact that the Commission needs strategic information regarding the political situation in Member States, i.e. it wants to know “what the political opinion is on these topics in the Member States and what degree of resistance proposals are likely to meet, if any”.<sup>232</sup> And the most enigmatic reason is that “since many expert groups emerge as the result of skilful and intensive pressure from outside the Commission, the agenda may have been “confiscated” by outside interests, leaving the Commission to perform the function of a secretariat putting together ideas and thoughts formulated by others”.<sup>233</sup> And one more reason shall be highlighted – “the weight of the arguments and the collected knowledge of the issue are of greater importance here than later on in the process, [so] the Commission needs allies with good ideas and prospects in order for the expert groups to be able to open the door for interests which may not always have a strong position in other phases of the decision-making process in terms of economic resources, members or votes”.<sup>234</sup>

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<sup>231</sup> Torbjörn Larsson and Jan Murk (2007), “The Commission’s relations with expert advisory groups”, in *The Role of Committees in the Policy-process of the European Union: Legislation, Implementation and Deliberation*, edited by Thomas Christiansen and Torbjörn Larsson, Edward Elgar Publishing, p. 79-80.

<sup>232</sup> N. Nugent (2003), *The Government and Politics of the European Union*, 5<sup>th</sup> edition, Basingstoke: Macmillan, p. 131.

<sup>233</sup> Torbjörn Larsson and Jan Murk (n 231) 89.

<sup>234</sup> *ibid.*

The distinctions between comitology committees and expert groups shall be highlighted as the following ones – “the expert or consultative group/committee does not necessarily consist of national officials” and another important point is that “expert groups [are] normally used only for entities that the Commission may set up and dismiss of its own accord” either on a temporary or a permanent basis.<sup>235</sup> There is a deficiency regarding this freedom of the Commission – “[a]nyone in charge of setting up committees or groups will have unlimited possibilities to use this to his/her advantage to influence the outcome of the committee or group by deciding on who is going to chair the committee or group, who will be its members, who is going to be the secretariat, and so on”.<sup>236</sup> Therefore, expert groups are better described as a place for finding a consensus rather than a control mechanism for the Commission. The Parliament members seem not to be invited into the work of expert groups.

In conclusion, it shall be admitted that expert groups are mainly the only one possibility for external participants to get involved into the EU decision-making process at the earliest stage. Experts and civil servants from Member States are actually seen as representatives or semi-representatives of national bodies, though there are groups where independent experts, interest groups and other stakeholders may be included with equal status. Though, it has to be made clear that it is the sole responsibility of the Commission to draft the proposal.

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<sup>235</sup> *ibid* 66.

<sup>236</sup> *ibid* 73.



### **3.7. CONCLUSIONS.**

This Chapter has mainly focused on the possibility for external participants to get involved into the EU decision-making process. The powers are not directly delegated to members of comitology committees – the committees are rather established to control the Commission over the conferred powers to implement delegated and implementing acts. Even though it is believed that comitology committees have the highest potential in attracting technical and scientific knowledge, this power is not implemented in the discussed primary and secondary legislation and mainly executed on an ad hoc basis.

Earlier the analysis has showed that the EU governance faces the demand to apply decentralisation and involvement of external participants in order to get the EU closer to its citizens. In order to make them effective and integrant part of the EU institutions, comitology committees have to have some of the delegated powers in the decision – making process. At the very beginning, implementation of essential measures of basic instruments was delegated to the Commission. However, over a period of time, Member States demanded to be involved and they gained some decision-making powers by participating in comitology committees. By law, this participation was limited to civil servants, but external participants with highly credible expertise were also involved in this process due to a high demand for technical and scientific knowledge.

The second part of the Chapter has presented the kind of comitology committees that are established and has listed the constituent parts that are essential to ensure their mission in the decision-making process. There the most important element of comitology committees is its ability to provide credible scientific knowledge. In addition, the level of influence

delegated to members of comitology committees often determines whether the advice given will be taken into account.

The main elements and conclusions of this analysis are carried into the next chapter, where empirical results are analysed. The observation of comitology committees and the interviews of some of their members are used to decide whether in practice comitology committees do need technical and scientific expertise when drafting implementation measures. It will also be called upon to assert whether comitology committees are sensitive to political issues when they deal with the implementation of essential elements. Finally, it will help test the accuracy of the typology of comitology committees adumbrated above.

## **IV. CHAPTER**

### **COLLECTION AND USE OF EXPERTISE**

#### **4.1. INTRODUCTION.**

The comprehensive analysis of various forms of participation and representation in the EU decision-making process, discussed in previous chapters, have identified the possibilities for external participants to get involved into the process and the procedures to be applied. The aim of this chapter is to analyse a new kind of participation, which mainly involves scientific expertise and know-how to be involved into the EU decision-making process as the main forte of the discussed participation. As it was already discussed in the earlier chapters, it is vitally important for the European Institutions to collect and process as much up-to-date information as possible in order to exploit the most appropriate expertise and sound knowledge at all stages of the EU policy – making. All the implemented changes in the enlarged European Union force the society to face with the challenge of finding its proper place where knowledge, in particular science, technology and innovation, are indispensable.<sup>1</sup>

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<sup>1</sup> In 2001 Eurobarometer survey (an opinion poll “Europeans, science and technology” was conducted at the Commission’s request in the fifteen Member States in 2001) results showed that 72% of the respondents said

It is also very important to establish a debate on the relationship of science<sup>2</sup> and technology with society<sup>3</sup> and Europe's citizens in order to be able to take the most efficient decisions and be competitive in the global market, which is crucial for policies to be based on the best available knowledge, as well as to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.<sup>4</sup>

At present, EU Institutions have established a number of channels for feeding advice from experts into science-based policy development: a well-structured system of scientific committees, a variety of international and European mechanisms in policy areas to be complemented by *ad hoc* arrangements according to the nature, urgency, or state of the knowledge of the issue to be addressed, different layers and forms of advisory structures at national level. Within this framework a distinction can be made between collective, formal advice provided by identified committees or advisory groups and established by policy-makers, and scientific information, provided by individuals or organizations outside any formal process, which might assist formal advisory groups if the taken decision has stuck in the process.<sup>5</sup>

The need for expert advice has been enhanced by the new comitology legal provisions, to be more precise, Article 290 of the Treaty of the Functioning of the European Union,<sup>6</sup> allows the legislator to delegate to the Commission the power to adopt non-legislative acts of

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they would like politicians more frequently to use expert advice in making their choices, however the same survey also shows that Europe's citizens do not always have a very positive perception of science and technology, as science and technology are changing their lives too quickly.

<sup>2</sup> "Science" includes all public and private activities of a scientific and technological nature, including social sciences. Commission, "Science and Society Action Plan" (Communication) COM (2001)714 final, p.4.

<sup>3</sup> "Society" covers all citizens and their associations, as well as businesses and public authorities." *ibis*.

<sup>4</sup> *ibid* 3.

<sup>5</sup> *ibid* 21.

<sup>6</sup> Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) [2010] OJ C 83, volume 53.

general application to supplement or amend certain non-essential elements of a legislative act,<sup>7</sup> and the adopted acts are referred as “delegated acts”. “The Commission intends to carry out the preparatory work it considers necessary in order to ensure (...) that from a technical and legal point of view the delegated acts comply fully with the objectives laid down by the basic instrument”.<sup>8</sup> “Once provisions for a Delegated Act are in a legislative text it will be necessary to identify the relevant expert group(s) assisting the Commission in drafting the Delegated Acts”.<sup>9</sup> On the other hand, “the Commission intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted”.<sup>10</sup> The Commission aims at using the already possessed expertise, as well as forming new expert groups at the need<sup>11</sup> only for a consultative role without any legal power in the decision-making process.<sup>12</sup>

Having in mind this new turn in the constructed comitology structure, it should be highlighted the importance of expertise (of a scientific and technological nature) in general, the influence of which in the decision-making process would be analyzed in more detail in this chapter.

Another important issue, the analysis of which is also included into the context of this Chapter, is the use of precautionary principle. As this is quite a novel principle “as a precept of administrative law”,<sup>13</sup> and the first usage of it was mainly referring to interpretation of the

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<sup>7</sup> Commission, “Implementation of Article 290 of the Treaty on the Functioning of the European Union” (Communication) [2009] COM (2009) 673 final, p. 2.

<sup>8</sup> *ibis* 6.

<sup>9</sup> A. Hardacre and M. Kaeding (2011), *Delegated and Implementing Acts: the New Comitology*; EIPA Essential Guide, version 2, p. 14.

<sup>10</sup> COM (2009) 673 final (n 7) 6.

<sup>11</sup> For example, in the specific area of financial services, the Commission has committed itself to continuing to consult experts appointed by the Member States in the preparation of its draft delegated acts, in accordance with its established practice. Declaration 39 annexed to the Final Act of the Intergovernmental Conference that adopted the Lisbon Treaty [2008] OJ C 115, 350.

<sup>12</sup> “However, it should be made clear that these experts will have a consultative rather than an institutional role in the decision-making procedure”. COM (2009) 673 final (n 7) 7.

<sup>13</sup> Paul Craig (2012), *EU Administrative Law*, Oxford: Oxford University Press, p. 641.

EU legislation, which makes the principle applicable in the environmental field. This principle is intended to be applied “where there is uncertainty as to the existence or extent of risks”<sup>14</sup> and scientific uncertainty exists or additional scientific findings are needed to be substantiated in the decision-making process.

The aim of this chapter is to evaluate the need of scientific knowledge and expertise in the EU institutional decision-making process and enactment of legally binding rules, examine the procedures of an external participant to be able to offer the possessed expertise for the already established legal bodies and various EU instruments. The earlier provided analysis has showed that EU Institutions as well as other public bodies are in high demand of scientific knowledge, the collection possibilities of which will be provided in this chapter.

The first section of the chapter comprises of a short overview of the evolution of the need to involve scientific expertise into political decision-making process as an aftermath of the BSE crisis. The crisis has showed that there is a lack of an individual as well as institutional responsibility, which has led to administrative difficulties and the way the crisis situation was solved. It could be identified that the acknowledgement of importance of scientific expertise is the basis for further legal and political developments regarding an involvement and use of external expertise in the EU decision-making process and sound administration, which is going to be asserted in the following parts of this chapter.

The second part is based on the analysis of different political and legal instruments, which have followed the establishment of the need to involve the scientific expertise in most of EU legislations as well as political decisions. As the scientific advice is aimed to be

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<sup>14</sup> Case C-180/96 *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [1998] ECR I-2265, § 99.

obtained from the work of scientific committees, the Commission has established the Scientific Steering Committee, which was further developed into the European Food Safety Authority, having more authority in the scientific decision-making process, European regulatory agencies, under the framework of which the European Environment Agency has been developed. The analysis will also cover the transition of legal responsibility on the created scientific bodies.

The third part of the chapter will mainly focus on the evolution of the decisions of the Commission in regards to collection and use of the scientific expertise. This is followed by the analysis of the Commission political and legal policies on collection and use of scientific expertise, covering the main documents, such as the Action Plan regarding science and society dialogue in EU, the guidelines from the Commission on the collection and use of expertise by the Commission and related ones.

The future perspective of the possibility for external scientific expertise to be involved in the EU decision-making process will be evaluated based on the provided analysis.

#### *4.2. Evolution of the Need for Scientific Expertise.*

After the British government announced on 20 March 1996 that a novel fatal disease in humans had emerged,<sup>15</sup> which imposed the EU-wide ban on UK beef exports on 27 March 1996, the EU has embarked on a process of reforming the administrative organization of the EU, including the setting-up of a new regulatory agency, the European Food Safety Agency, and a commitment to the more effective use of scientific information.<sup>16</sup> The aftermath of the

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<sup>15</sup> Erik Millstone and Patrick van Zwanenberg (2002), "The Evolution of Food Safety Policy-making Institutions in the UK, EU and Codex Alimentarius", *Social Policy and Administration*, Vol. 36, No. 6, p. 593.

<sup>16</sup> Keith Vincent (2004), "Mad Cows" and Eurocrats – Community Responses to the BSE crisis", *European Law Journal*, Vol. 10, No. 5, p. 499.

crisis has led to various institutional review procedures, for example, pointing out the problems of having a number of different authorities competent in the area of agriculture, animal health, and public health protection, which had created administrative difficulties, leading to the lack of the individual or institutional responsibility of the Council of the European Union and the European Commission.<sup>17</sup>

The temporary Committee of Inquiry into the BSE has been established by the European Parliament, which in its report<sup>18</sup> has noted that most of the problems of the European Commission's taken actions, in particular that during the BSE crisis, were, first, related to trying "to follow a policy of downplaying the problem, despite a wide variety of discussions in scientific bodies"<sup>19</sup> and, second, "there being no possibility of the European Commission consulting "independent, multidisciplinary advisory committees".<sup>20</sup>

Only the BSE crisis made the Union to pay more attention to scientific committees, "that where the [Union] has been forced to deepen its activities in the field of risk regulation, it has also been faced with a concurrent need for an increased scientific expertise. This has in turn led to an increasing reliance upon the *ad hoc* scientific committees set up by the Commission for the very purpose of providing it with technical information and expertise. It might be deduced that where the Commission has set up a scientific committee to ensure that its measures have a scientific basis, to take account of the most recent scientific and technical research, and to ensure that only measures are adopted which are necessary to protect human health, the Commission is obliged to consult this committee."<sup>21</sup> In Parliament's Resolution<sup>22</sup> it

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<sup>17</sup> *ibid* 506.

<sup>18</sup> Temporary Committee of Inquiry into BSE (Rapporteur: Manuel Medina Ortega), *Report on alleged contraventions or maladministrations in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and national courts* [1997] (A4-0020/97).

<sup>19</sup> *ibid* A I part I.4.2.

<sup>20</sup> *ibid* A I part I.4.7.

<sup>21</sup> Christian Joerges, K.-H. Ladeur and Ellen Vos (eds.) (1997), *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations*, Baden-Baden.

<sup>22</sup> Parliament Resolution on the results of the Temporary Committee of Inquiry into BSE [1997] OJ C 85/61.



was stipulated that scientific committees must be consulted in the cases laid down by Union legislation – especially on issues which affect consumer health and safety should be preferred.<sup>23</sup> First, it would ensure that the scientific advice resorted to is based on the principles of excellence, independence and transparency which are explicitly adhered to by Decision 97/579/EC, and is not dependent on an *ad hoc* approach of the Commission. Second, this would enable the Commission to fulfill its obligation under the new text of Article 100a (3) inserted by the Amsterdam Treaty (renumbered Article 114 (3) of TFEU)<sup>24</sup> to take account of “any new development based on scientific facts”.

The following events as well as a collection of critical reports<sup>25</sup> on the “perceived failings of the administrative system of the EU after the “BSE crisis”<sup>26</sup> has led the European Parliament to establish a Committee of Independent Experts or “Wise Men”. It was “delegated” the European Parliament’s supervisory mission, which was not constituted under any precise institutional regulations and had *a priori* no formal investigative power.<sup>27</sup> The reason why this committee was created was mainly based on the “failure of formal audit and control mechanisms and the vague ethical responsibility of the Commission – not clearly defined in [Union] law – show the indefinite and scattered nature of the norms and values that regulate [Union] public life. They also prove the flexibility of institutional innovation within the EU”.

A second justification for the creation of the Committee can be found in the *technical* (mismanagement) and *ethical* (fraud and nepotism) responsibilities of the Commission, which are not well defined in community law and are difficult to identify by the EU control

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<sup>23</sup> Ellen Vos (1999), “EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation”, *EU Committees: Social Regulation, Law and Politics*, Christian Joerges and Ellen Vos (eds.), Hart Publishing: Oxford-Portland, p.38.

<sup>24</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83, volume 53.

<sup>25</sup> P.P.Craig (2000), *The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organization*, 6:2 ELJ, p. 98-116.

<sup>26</sup> Keith Vincent (n 16) 504-505.

<sup>27</sup> First Report of the Committee of Independent Experts, Articles 1.2.2. and 1.2.3.

institutions. The role of the Committee of Independent Experts was therefore not to judge, in the judicial sense of the word, nor even to find any political responsibility – Union law makes ample provisions for both cases – but to define a new form of responsibility based on a common core of standards of proper behaviour – in the absence of specific rules or codes of conduct.<sup>28</sup>

Although difficult to prove, the independence of the Committee of Independent Experts was limited by the involvement of their members in national politico-administrative systems. As various studies on the European Parliament and the Commission have shown,<sup>29</sup> the work of the Committee of Independent Experts is marked by dual dialectics between independence form, and dependence on, the national governments. But, on the other hand, it was confirmed that “the experience of the Committee of Independent Experts reveals that the legitimacy of democratic control in the EU is no longer in the hands of political representatives. It comes from experts and “wise men” who define the standards of sound administration – as they act primarily as judges of how efficient political processes are”.<sup>30</sup> The conclusions of the Committee of Independent Experts therefore demonstrate that the legitimacy of the experts, who are empowered to tell EU citizens how EU should work, now prevails over that of the members of the Parliament who are elected to represent them. Entrusting experts – whether they are “wise men”, central bankers or civil servants – with the smooth running of democracy directly addresses the problem of their accountability to elected representatives.

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<sup>28</sup> *ibid* Article 1.5.2.

<sup>29</sup> C. Lequesne (2000), “The European Commission: a balancing act between autonomy and dependence”, in K. Neunreither and A. Wiener (eds), *European Integration after Amsterdam, Institutional Dynamics and Prospects for Democracy*, Oxford: Oxford University Press, pp. 36-51.

<sup>30</sup> R. Dahl (1994), “A Democratic dilemma: system effectiveness versus citizen participation”, *Political Science Quarterly*, 109 (1).

#### *4.3. Administrative Instruments, established for Collection of Scientific Expertise.*

The above provided analysis has defined that EU Institutional bodies are obliged to consult scientific committees, which are established under the auspices of the European Commission, for a needed scientific advice. However, the performed analysis has showed the weakness of the existing system on collection of scientific advice – it was implemented mainly on *ad hoc* basis, whenever specific technical and scientific information was needed to be implemented into a specific decision-making process. This part of the chapter will cast a glance on the development of institutional bodies, established specifically for obtainment and processing of scientific data to be continuously used in EU institutional work.

The initial response of the European Commission to the reported criticism came in its Communication on Consumer Health and Food Safety.<sup>31</sup> First, the European Commission, aimed to inform all the interested parties of the action being taken “to reinforce the manner in which it obtains and makes use of scientific advice”. Second, “the core of a new political departure [is] based on three general principles”,<sup>32</sup> namely:

- first, that responsibility for legislation should be separate from that for scientific consultation;
- second, that responsibility for legislation should be separate from that for inspection;
- third, that there should be greater transparency and more widely-available information throughout the decision-making process and inspection measures.

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<sup>31</sup> Commission, “Consumer Health and Food Safety” (Communication) COM (1997) 183 final.

<sup>32</sup> *ibid* 3.

The Commission intended to reinforce three complementary instruments: scientific advice, risk analysis, and control, as a platform for an effective policy implementation.<sup>33</sup> Scientific advice was mainly planned to be obtained from the work of the scientific committees. In relation to the provision of a scientific advice, the European Commission has established the Scientific Steering Committee under the Commission Decision 97/404/EC and 97/579/EC,<sup>34</sup> which were replaced and repealed by the Commission Decision 2008/721/EC<sup>35</sup> setting up Scientific Committees in the field of consumer safety, public health and the environment. The committee was established by responding to the criticisms of a systematic failure to possess sufficient scientific advice when responding, in this case, to the initial stages of the BSE crisis in the UK.<sup>36</sup> The members of the Scientific Committees may be “appointed on the basis of their expertise and consistent with this a geographical distribution that reflects the diversity of scientific problems and approaches, notably in Europe”,<sup>37</sup> - they are chosen following rigorous assessment of their scientific excellence in their field of competence. Their independence is guaranteed through the strict application of declarations of interests.<sup>38</sup>

The Scientific Committees may draw the EU Commission’s attention to a specific or emerging problem falling within their remit, which they consider may pose an actual or potential risk,<sup>39</sup> however, the final result would only be submitted as a scientific opinion of

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<sup>33</sup> *ibid* 6.

<sup>34</sup> Commission Decision 97/404/EC of 10 June 1997 setting up a Scientific Steering Committee, OJ 1997 L 169/85 and Commission decision 97/579/EC of 23 July 1997 setting up Scientific Committees in the field of consumer health and food safety, OJ 1997 L237/18 (both amended by Commission Decision 2000/443/EC of 18 May 2000 amending Decision 97/404/EC of 10 June 1997 setting up a Scientific Steering Committee and Decision 97/579/EC of 23 July 1997 setting up scientific committees in the area of consumer health and food safety [2000] OJ L179/13).

<sup>35</sup> Commission Decision No. 2008/721/EC of 5 August 2008 setting up an advisory structure of Scientific Committees and experts in the field of consumer safety, public health and the environment and repealing Decision 2004/210/EC [2010] OJ L 241/21.

<sup>36</sup> Keith Vincent (n 16) 510-511.

<sup>37</sup> Commission Decision 2008/721/EC (n 35) Article 3.

<sup>38</sup> Commission, “White Paper on Food Safety” COM (1999) 719 final, paragraph 22.

<sup>39</sup> Commission Decision 2008/721/EC (n 35) Article 2, paragraph 7.

particular relevance in cases laid down by Community law.<sup>40</sup> For its part, the Scientific Committees, acting on their own initiative and in agreement with the Commission, may decide to set up thematic workshops in order to review data and scientific knowledge on particular risks or on broad risk assessment issues<sup>41</sup> or invite associated members, other scientific advisors from the Pool, specialised external experts from other Community bodies that they consider to have the relevant scientific knowledge and expertise, to contribute to their work.<sup>42</sup>

It was highlighted that a sound, timely, rapid and flexible scientific advice is required by the EU Commission, however, the created Scientific Committees, on the continued lack of capacity in the system to deal with crisis, could only manage an effective scientific opinion by putting on hold other issues.<sup>43</sup> The solution to this issue was proposed by the creation of an independent European Food Authority (EFA), however leaving risk management, comprising legislation and control under the supervision of the Commission, “if it is to discharge the responsibility placed upon it under the Treaties”.<sup>44</sup> EFA has been seen to become the most authoritative body within the created scientific administrative networks,<sup>45</sup> though a new Regulation on the general principles and requirements of food law was formed.<sup>46</sup> The new Regulation has established the European Food Safety Authority,<sup>47</sup> setting out the mission, which includes “the provision of scientific advice and scientific and technical support for the [Union’s] legislation, collecting and analysing of data to allow the characterisation and monitoring of risks which have a direct or indirect impact on food and food safety, the

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<sup>40</sup> *ibid* Article 2, paragraph 1.

<sup>41</sup> *ibid* Article 2, paragraph 5.

<sup>42</sup> *ibid* Article 7.

<sup>43</sup> Keith Vincent (n 16) 513.

<sup>44</sup> White Paper on Food Safety (n 38) paragraph 33.

<sup>45</sup> *ibid* paragraph 55.

<sup>46</sup> Regulation 178/2002/EC of the European Parliament and of the Council of 29 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L 31/1.

<sup>47</sup> *ibid* Article 1.

provision of scientific opinions which will serve as the scientific basis for the drafting and adoption of [Union] measures.”<sup>48</sup>

The established scientific institutional bodies were partly complemented by regulatory and even operational EU-level committees and agencies, as well as privileged expert and scientific expertise, which have been congregated around the European Commission.<sup>49</sup> One more [Union] body, intended partly for collection and management of scientific advice, which should be analysed in this context, is an autonomous (regulatory) agency. It is established under the Commission and the Council auspices, some of which have executive, regulatory, and management tasks and are composed of both European civil servants – and some nationals on secondment.<sup>50</sup> The need was also supported by the European Commission<sup>51</sup> flagging the fact that “in its view there was (in addition) a need for more independent and autonomous structures in the form of European regulatory agencies that would be delegated with certain specific (discretionary) regulatory functions”, where “regulatory” does not necessarily mean inaction of legal acts or binding legal norms – it might “involve measures of a more incentive nature, such as co-regulation, self-regulation, recommendations, referral to the scientific authority, networking and pooling good practice, evaluating the application and implementation of rules etc.”<sup>52</sup> However, in 2002 the European Commission has defined the concept of European Regulatory Agencies, which sets that the agencies are “required to be actively involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector”.<sup>53</sup>

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<sup>48</sup> *ibid* Article 22.

<sup>49</sup> Deirdre Curtin (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford University Press, p. 135.

<sup>50</sup> *ibid* 146.

<sup>51</sup> European Governance: a White Paper, COM (2001) 428 final, Brussels, 25.7.2001, p. 24.

<sup>52</sup> Commission, “The operating framework for the European Regulatory Agencies” (Draft Interinstitutional Agreement) COM (2005) 59 final, p.4.

<sup>53</sup> Commission, “The operating framework for the European Regulatory Agencies” (Communication) COM (2002) 718 final, p. 4.

Agencies were separated from the Commission and the Council with a formed internal management structure, which is equated to some degree of agency independence, though it does not necessarily follow that agencies are de facto independent from their primary “principals”. Though, “an actual transfer of responsibility might be considered to have taken place, de facto, from the Commission to the agencies in question, albeit with the explicit approval of the EU legislator”.<sup>54</sup> This statement should not be understood directly, as to the CJEU’s case-law in *Meroni*<sup>55</sup>, only some degree of delegation, but under restricted conditions, is allowed. The Commission uses *Meroni* case legal principles to defend unity and integrity of the executive function under its responsibility, in order to retain the institutional balance principle ensuring unity and integrity of the executive function as well as avoiding the danger of excessive Member States influence through membership in the administrative or the regulatory board.<sup>56</sup>

Pursuant to the *Meroni* case-law, “the following conditions would apply for the admissibility of the transfer of sovereign powers to subordinate authorities outside of the [EU] institutions”<sup>57</sup>: a delegating authority cannot confer on another body powers different from those possessed by the delegator under the Treaty and not subject to the same duties; and it’s not possible to delegate power involving a wide margin of discretion between many different objectives and tasks, so shifting responsibilities and escaping continuing oversight – in particular the obligation to state reasons and judicial control of decisions.<sup>58</sup> Additionally it

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<sup>54</sup> Deirdre Curtin (n 49) 162.

<sup>55</sup> Case 9/56 *Meroni & Co. Industrie Metallurgiche S.p.A. v. High Authority of the ECSC* [1958] ECR 133; Case 10/56 *Meroni & Co. Industrie Metallurgiche S.p.A. v. High Authority of the ECSC* [1958] ECR 157.

<sup>56</sup> Giulio Napolitano (2008), “*European Regulatory Agencies (ERA) in Network Industries and the “Meroni doctrine”*” (conference, European Parliament, 24-01-2008).

<sup>57</sup> Christian Joerges, Harm Schepel and Ellen Vos, (1999); “The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardisation under the “New Approach””; European University Institute Working Paper LAW No. 99/9; p. 15.

<sup>58</sup> *ibid* 15; and Giulio Napolitano (n 56).

should be noted that accountability should be retained as well as institutional balance between the EU institutions must not be distorted.

If the established agencies were not subject to the constraints and protections offered in the treaties<sup>59</sup> – there was no direct remedy and no access to justice for individuals to challenge the decisions of such agencies as they were “not one of the bodies referred to in Article 230 EC, whose acts may be challenged”,<sup>60</sup> the situation has been completely changed by the entrance into force of the Treaty of Lisbon,<sup>61</sup> where the CJEU shall “review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties”.<sup>62</sup> Making the analyzed regulatory agencies responsible for their taken decisions, provides the affected individuals more trust in those institutional bodies, as any negligence or erroneous decision might be redeemed by a judicial remedy and access to justice.

There is no sense to analyze all the established regulatory agencies in the EU in a more detailed way, as the main participation and/or representation principles would be the same, however it would be valuable to overview one of the regulatory agencies, directly related to environmental policy and its implementation – the European Environment Agency, dealing with environmental issues and which could be treated as one of the EU instruments, established partly for collection and obtainment of scientific and other kind of data, involving external experts as well as national bodies from each Member State, which are entrusted with the task of cooperating with the Agency. The previously made overview of the EU regulatory agencies explains the administration of the created bodies, which is similar to comitology committees, as well as the transfer of powers, requiring to be “actively involved in exercising

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<sup>59</sup> Deirdre Curtin (n 49) 162.

<sup>60</sup> Case T-133/03 *Shering – Plough Ltd. v. Commission and the EMEA*, Order of the Court of First Instance, 5.12.2007, § 16.

<sup>61</sup> Treaty of Lisbon (n 6).

<sup>62</sup> Article 263 TFEU.



the executive function by enacting instruments which contribute to regulating a specific sector”, the legality of which will be reviewed by the CJEU. The regulation of responsibility has impelled the transfer of powers from national authorities to EU level.

The establishment of the European Environment Agency was not due to an aftermath of the BSE crisis, the consequences of which were described earlier in the chapter. The need has evolved from the increasing Union concern for environmental protection resulted in four action programmes, each of which has highlighted some concerns and important issues, i.e. the Second Environmental Action Program sought to encourage compliance by establishing a decentralized information system that would enable member states to access a range of data sources to obtain the necessary information; the Third Environmental Action Program established the goal to obtain consistent and comparative information on the state of the environment and natural resources (implemented through CORINE program), followed by the Fourth Program, which identifies the need for better research on the environment, better environmental impact assessments, wider access to environmental information, and increased efforts regarding public education on the environment.<sup>63</sup>

The European Environment Agency is considered to be a “second – generation agency emerged in the mid-1990s in the context of the completion of the internal market. This agency was more sophisticated in institutional/management terms and was entrusted on the whole with tasks of a scientific/technical nature”.<sup>64</sup>

The main objective of the EEA is to provide member states with “objective, reliable, and comparative environmental information which will enable the [Union] and the Member States to take the requisite measures to protect the environment, to assess the results of such

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<sup>63</sup> Gerard V. Curtin, Jr. (1991), “Regulation 1210/90: Establishment of the European Environment Agency”, *14 Boston College International and Comparative Law Review*, Volume 14, Issue 2 *Symposium on European Community*, 1 August 1991, p. 321.

<sup>64</sup> Deirdre Curtin (n 49) 148; (the subject of the sentence was changed into singular by the author).

measures and to ensure that the public is properly informed about the state of the environment”.<sup>65</sup> The tasks of the Agency are covered in Article 2 of the Regulation 1210/90, authorizing the Agency to: (1) collect, process, and analyze the data of priority areas of environment; (2) provide the Commission with information that it needs to successfully carry out its tasks of identifying, preparing and evaluating measures and legislation in the field of environment; (3) draw up expert reports on the quality, sensitivity and pressures on the environment; provide uniform assessment criteria for environmental data applicable to all member states; and (4) encourage improved harmonization of environmental measurement methods.<sup>66</sup>

The Regulation also implements that institutions or other organizations from each Member State, which are entrusted with the task of cooperating with the Agency,<sup>67</sup> will function as the Agency’s basic information sources. It is also foreseen that an entrusted institution should be in a position to conclude an agreement with the Agency to act as a topic centre of the network for specific tasks in a precise geographical area.

The Agency’s management board consists of one representative from each Member State and two representatives from the Commission.<sup>68</sup> Concerning scientific expertise, the European Parliament may designate two scientific personalities particularly qualified in the field of environmental protection.<sup>69</sup> However, this intention was treated as a struggle of the European Parliament for voice, significantly shaping the politics of agency design.<sup>70</sup> The

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<sup>65</sup> Council Regulation 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network (amended twice by Council Regulation (EC) No 933/1999 of 29 April 1999 and by Council Regulation (EC) No 1641/2003 of 22 July 2003), OJ L120/1 (1990), preamble point No. 5.

<sup>66</sup> Gerard V. Curtin, Jr. (n 63) 325.

<sup>67</sup> Council Regulation 1210/90 (n 65) Article 4 paragraph 4.

<sup>68</sup> *ibid* Article 8 paragraph 1.

<sup>69</sup> *ibid*.

<sup>70</sup> Deirdre Curtin (n 49) 150.

European Parliament has often fought for this right to designate members of the Management Boards, alongside the Member States and other EU institutions (Council and/or Commission).

The Agency itself might be assisted by a scientific committee, made up of nine members particularly qualified in the field of environment, which shall deliver an opinion to the management board. It should be noted that the participation on board is strictly limited to the parties mentioned in the regulation, however environmental data supplied to or emanating from the Agency shall be made accessible to the public as well as to third countries.<sup>71</sup> There is no other information how external participants could provide their possessed scientific know-how or expertise.

There is also a discussion on the lack of powers, attributed to the Agency, as it remains limited to an advisory and collection role rather than to an active enforcement body.<sup>72</sup> “One of the major shortcomings of the EEA is its lack of monitoring powers.”<sup>73</sup> The Agency cannot control the way Member States apply or interpret environmental directives. This function can only be conferred on the Commission by the Parliament and the Council, and the latter cannot delegate its powers to external independent bodies. This issue is discussed in more details in the Chapter “External participation through comitology”.

Even though the CJEU has jurisdiction over the contract provisions, concluded by the Agency, however the Agency cannot bring the Member State, which has misapplied or misinterpreted a directive, against the CJEU.<sup>74</sup> Though, it is suggested that under Article 7, the EEA has a legal personality, and it may have the ability to bring suit against a Member State as though it were a private individual.<sup>75</sup> However, pursuant to the TFEU, only the

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<sup>71</sup> Council Regulation 1210/90 (n 65) Article 6 and Article 19.

<sup>72</sup> Gerard V. Curtin, Jr. (n 63) 326-327.

<sup>73</sup> *ibid* 328.

<sup>74</sup> Council Regulation 1210/90 (n 65) Article 18.

<sup>75</sup> Gerard V. Curtin, Jr. (n 63) 328.

Commission is entitled to take offending Member States before the CJEU following the implemented procedures.<sup>76</sup>

One more issue to be highlighted, is that even though the European Environment Agency is a legally separate institution, it does not necessarily follow that the agency is de facto independent from the Commission and the Council and able to exercise decision-making autonomy within its mandate.<sup>77</sup> It was found that the DG Environment in the Commission has tried to influence the running of the European Environment Agency in the past on matters which “have gone well beyond legitimate differences of view as to the EEA’s priorities and the way in which it interprets its mission”.<sup>78</sup>

#### *4.4. Commission Policies on Collection and Use of Scientific Expertise.*

Some authors believe<sup>79</sup> that scientific experts and their provided advice have been treated<sup>80</sup> as being risky due to a number of different reasons. The risk might be related to the fact that an advice may be provided by small closed groups of scientific experts including drawn from industries and the firms whose products are regulated; another risk factor is that there is no clear separation between regulation and sponsorship; policy-makers are keen to hide behind the expert scientific advisors, even though those decisions necessitated political rather than purely scientific judgments; none of the scientific analyses are subject to peer review; it is believed that scientific uncertainties are typically understated, glossed over or concealed, and the taken decisions are based on incomplete, uncertain and equivocal

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<sup>76</sup> Article 258 TFEU.

<sup>77</sup> Deirdre Curtin (n 49) 156.

<sup>78</sup> Institute of European Environmental Policy and European Institute of Public Administration (2003), *Evaluation of the European Environment Agency: An IEEP/EIPA study. A final report to DG Environment* (August 2003), paragraph 4.6.2., p. 61.

<sup>79</sup> Erik Millstone and Patrick van Zwanenberg (n 15) 593-609.

<sup>80</sup> The past time is used as the analysis provided is based on the *status quo ante* the BSE crisis and the aftermath results (comment of the author).

evidence. The list of the reasons might be continued. Those reasons, as well as the not listed ones, might have urged the Commission to take some actions to be implemented in this field. Especially in the wake of the BSE crisis, when the issue of the Commission's credibility was at stake,<sup>81</sup> as policymakers, regulators, and, increasingly, scientists are no longer believed.<sup>82</sup>

#### *4.4.1. Science and Society Action Plan.*

First of all, the Commission has decided to implement an action plan<sup>83</sup> regarding science and society dialogue in EU, focusing on scientific and education culture in Europe, bringing science policies closer to citizens and putting responsible science at the heart of policy making in order to provide both scientific and democratic legitimacy.

The three mentioned policy areas, especially the third area, where it aims to put responsible science into policy making, will be discussed further in the Chapter in order to see their input on science and society in Europe. It is understood that science and society dialogue, and bringing responsible science policies closer to outside society as well as to policy- and decision-making is not possible without active cooperation with the EU Member States, and third countries, and international organizations, involving numerous players: local and regional public authorities, the general public, civil society, industry and others. "The catalyst" role is foreseen for the EU Commission, using all the means available at the EU level and especially its research policy instruments,<sup>84</sup> and with an additional obligation in

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<sup>81</sup> Commission, "Consumer Health and Safety. Consumer confidence in the legislative activities of the EU is conditioned by the quality and transparency of the scientific advice and its use on the legislative and control process" (Communication) COM (1997) 183 final, p. 17.

<sup>82</sup> Ragnar Lofstedt and Robyn Fairman (2006), "Scientific Peer Review to Inform Regulatory Decision Making: A European Perspective", *Risk Analysis: an International Journal*, Volume 26, No. 1, p. 28.

<sup>83</sup> COM (2001) 714 final (n 2).

<sup>84</sup> *ibid* 5.

order to make this initiative work – it is expected that Member States as well as external participants will support the EU Commission’s decisions in a joint, coordinated approach.

The first pillar of the Commission’s action plan is based on *scientific and education culture in Europe*. It is highlighted that in order to make the present scientific and technological progress understandable for citizens of the EU, they will need to have information that is understandable and of a high quality, as well as ready access to this specific culture.<sup>85</sup> This role should be referred to media, researchers, research institutions, and especially to universities, which should be capable of communicating and engaging in debate the public on scientific issues in a comprehensible professional manner.

In a knowledge society, democracy requires citizens to have a certain scientific and technical knowledge as part of their basic skills,<sup>86</sup> which have to be implemented with application of the open coordination method on the three priority objectives concerned: the development of skills for the knowledge society, access to information and communication technologies for all; and increased recruitment to scientific and technical disciplines.<sup>87</sup> Apart from this general knowledge, Europe needs a pool of scientists to ensure socio-economic development, who additionally have a strong background in project management, law and communication areas.

The second pillar of the action plan is based on *bringing science policies closer to citizens*. Science and technology activities first of all should centre on the needs and

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<sup>85</sup> *ibid* 6.

<sup>86</sup> „Basic skills“ is a package of skills and competencies individuals need to flourish in today’s society, and which should have been developed by the end of obligatory schooling or training, but can be augmented through lifelong learning. Commission, “Concrete future objectives of education and training systems” (Report) and “Making a European Area of Lifelong Learning a Reality” (Communication) COM(2001) 678 final.

<sup>87</sup> COM (2001)714 final (n 2) 9.

aspirations of Europe's citizens to a greater extent. A regular flow of information to the public from experts is not in itself enough to enable people to form an opinion. A true dialogue must therefore be instituted between science and society: consensus conferences,<sup>88</sup> citizens' juries,<sup>89</sup> national and regional consultations, on-line forums, participative foresight programmes and etc.,<sup>90</sup> which aim to provide a space for scrutiny and informed debate on important issues of public concern, bringing together the public, interest groups and policy makers. This kind of communication must be supported at all levels: European (involves close cooperation between a wide range of stakeholders from research organizations, public authorities, media, citizens, civil society, enterprises and etc.), national, regional and local (when the issues raised are of direct interest to citizens – environment, sustainable development, health, safety, urban transport and etc.).

Moreover, it is not enough to keep the public informed, they must be given the opportunity to express their views in the appropriate bodies. It could be done through systematic and structured participation through EAGs (expert advisory groups), advisory bodies as well as institutional bodies (comitology committees, agencies and similar). Ad hoc arrangements such as platforms, workshops or other dialogue mechanisms are also used to enable interested parties to express their views, however, they need to be widened and deepened to systematically include other sectors of civil society at all stages.<sup>91</sup> One of the possibilities for the civil society as well as other external participants to get involved in environmental decision-making process is implemented by the Århus Convention, which is

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<sup>88</sup> "Consensus conferences" usually spark a debate between experts and citizens on new subjects where regulation does not, as yet, exist.

<sup>89</sup> "Citizens' juries" usually seek to guide the decision-making process for which the form of "end solution" has already been defined.

<sup>90</sup> COM(2001)714 final (n 2) 12.

<sup>91</sup> *ibid* 14.

analysed in the Chapter “Participation in environmental issues – primordial rights of external participants”.

The responsible institutions should also consider a possibility to allow the public to observe certain expert meetings, particularly on sensitive policy issues, as well as to promote an informed and structured debate between policy-makers, experts and interested parties (e.g. workshops, consensus conferences and etc.); however it should be restricted during any part of the meetings dealing with confidential information. The common guidelines, prepared by the European Commission also foresee that the “sharing of information must safeguard the legitimate interests of third parties. In particular, scientific data provided by business operator may not be used to the benefit of another applicant (...), unless provided by law or by the data owner himself”.<sup>92</sup>

Science and society dialogue also covers the specific needs of women to be represented in science. If society as a whole is to better understand and identify with developments in science and technology, specific measures must be taken to address both the under-representation of women in science, and the lack of attention paid to gender differences within research.<sup>93</sup> For this specific purpose, the Commission has taken a decision<sup>94</sup> relating to gender balance within committees and expert groups established by it (it should be striven that groups are composed of at least 40 percent of each sex).

Monitoring progress in the field of gender equality can be achieved with application of the following key policy objectives: increasing the number of women in science; reducing

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<sup>92</sup> Common guidelines on practical arrangements for the sharing of scientific data between the Scientific Committees and panels of European agencies and the Scientific Committees of the Commission (version revised by DG SANCO following a consultation of the Commission legal service), Health and Consumers Directorate – General, European Commission, Brussels, 10 November 2008, p. 3.

<sup>93</sup> COM (2001) 714 final (n 2) 15.

<sup>94</sup> Commission Decision No. 2000/407/EC of 19 June 2000 relating to gender balance within committees and expert groups established by it [2000] OJ L 154/34.



both horizontal segregation (whereby women are concentrated in certain sectors or disciplines) and vertical segregation (whereby women tend to be in lower hierarchical positions); eliminating pay gaps; and ensuring fairness and equity.<sup>95</sup>

And the third pillar implements “*putting responsible science at the heart of policy making*”. Innovation improves quality of life, and is essential for economic growth, which can bring concerns and questions, as well as the risk of new hazards and dangers to our environment, health and lifestyle. Most policies have a scientific and technological dimension and decisions must be supported by transparent, responsible opinions based on **ethical approach**, in order to help identify and assess the posed risks, as the rapid pace of scientific and technological progress can give rise to serious ethical questions of concern to all Europeans. It is vital important to make research functional and clearly supported as European society is a rich cultural tapestry, made of divergent ethical, religious, historical and philosophical backgrounds.<sup>96</sup>

This initiative could be achieved through a more systematic information facility on ethical issues in science, providing access, in various languages, to information on legislation, codes of conduct, best practices, and debates taking place in different European countries.

An open dialogue should be established between NGOs, industry, the scientific community, religions, cultural groups, philosophical schools and other interested groups, stimulating an exchange of views and ideas on a range of critical issues, such as the ethical impact of new technologies on future generations, human dignity and integrity, “infoethics” and sustainability.<sup>97</sup> This could also help to raise awareness among researchers on the ethical

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<sup>95</sup> COM (2001) 714 final (n 2) 16.

<sup>96</sup> *ibid* 18.

<sup>97</sup> *ibid* 19, action 30.

dimension of their activities, including research integrity and the key elements of European legislation, conventions and codes of conduct.

#### *4.4.2. Guidelines on the Collection and Use of Expertise.*

One of the documents, which were created as a respond to the identified need as well as the aftermath of the crisis, was the White Paper on European Governance – it committed itself to publish “guidelines on collection and use of expert advice, (...) which could form the basis for a common approach for all Institutions and Member States”.<sup>98</sup> These guidelines were set and started to be applied from 1 January 2003<sup>99</sup> and they are not legally binding. It means that the guidelines cannot be applied to the formal stages of decision-making as set in the primary legal acts. “Therefore, both formal legislative procedures and the formal exercise of the Commission’s implementing powers with the assistance of “comitology” committees are excluded”.<sup>100</sup> The activities of comitology committees as well as the use of their produced expert advice is regulated by different legal acts (which are obligatory in order to use the provided scientific advice) and applied rules, which are already discussed in the Chapter “External participation through comitology”.

Further in the text the identified guidelines will be analysed, emphasizing the actions decided to be applied whenever the Commission’s departments collect and use advice of experts coming from outside the responsible department. The delivery of advice from various external sources (it is considered to be external as soon as it goes out of the responsible department) should be done strictly following the set guidelines, especially when such advice

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<sup>98</sup> White Paper on European Governance (n 51).

<sup>99</sup> Commission, “Collection and use of expertise by the Commission: principles and guidelines. Improving the knowledge base for better policies“, (Communication) COM (2002) 713 final.

<sup>100</sup> *ibid* 7.

forms a major input to a sensitive policy question.<sup>101</sup> Additionally, the weaknesses and limitations of the set system will be highlighted due to the already invoked practice.

The described guidelines also stress the importance of the core principles, which should follow the activities of the Commission whenever they collect and use expert advice.

First, the Commission should ensure that the sought advice is of high **quality**, which is distinguished by three determinants: excellence, the extent of acting in an independent manner and pluralism. The quality of scientific expertise is based on the excellence of scientists and taking into account of indicators such as the number and impact of refereed publications as well as possession of practical knowledge. It is also highlighted in the guidelines the importance of endorsement of the excellence of scientists by the judgement of peers, which is believed<sup>102</sup> to be important in the EU institutions decision making process. Experts should also be expected to act in an independent manner by minimising “the risk of vested interests distorting the advice proffered by establishing practices that promote integrity, by making dependencies explicit, and by recognising that some dependencies – varying from issue to issue – could impinge on the policy process more than others”.<sup>103</sup> And the final determinant of quality – pluralism – should be implemented via “diversity of viewpoints, resulting from differences in scientific approach, different types of expertise, different institutional affiliations, or contrasting opinions over fundamental assumptions underlying the issue (...) as well as different geographical, cultural and gender perspectives”.<sup>104</sup>

Other factors may also be mentioned, which are considered to be important, such as geographical, cultural and gender perspectives,<sup>105</sup> however, they might also have negative result, having in mind that “scientists may be picked because of where they come from rather

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<sup>101</sup> *ibid.*

<sup>102</sup> Ragnar Lofstedt and Robyn Fairman (n 82) 29.

<sup>103</sup> COM (2002) 713 final (n 99) 9.

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

than based on scientific expertise that they can bring to the table” or operating gender quotas “with the expectation that no less than 40 percent of experts will be either male or female”, as well as having in mind that “the selection process of those scientists who participate is not via peer nominations (...) but, rather, scientists are asked to apply via advertisements in select publications to possibly take part in the scientific committees”.<sup>106</sup>

A selection jury composed of members of the Scientific Steering Committee (which co-ordinates the scientific committees)<sup>107</sup> will give “preference” to candidates:<sup>108</sup> professional experience in the field of consumer health and more specifically in the areas covered by the field of consumer health and more specifically in the areas covered by the field of competence of the committee concerned; experience in risk assessment; experience in delivering scientific opinion at national or international level; professional experience in a multidisciplinary and international environment; attested scientific excellence; experience in scientific management.

The guidelines do not clearly specify how the qualification and experience of a chosen scientist should be defined. Also it does not provide advice on the need to involve a person in a decision-making process with a deep scientific knowledge in a specific area, but also being able to manage the provided tasks, communicate the possessed or acquired scientific knowledge both to outside interested parties, as well as to internal authoritative bodies, interrelate its core scientific field with related other areas and similar.

Second, the Commission should be **open** in seeking and acting on advice from experts. In order to ensure openness, transparency is the key instrument to do that. “Transparency is required, particularly in relation to the way issues are framed, experts are

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<sup>106</sup> Ragnar Lofstedt and Robyn Fairman (n 82) 29.

<sup>107</sup> Commission Decision No. 97/404/EC setting up a Scientific Steering Committee [1997] OJ L 169/85.

<sup>108</sup> These criteria laid down by the Commission in the Call for expressions of interests for the post of member of one of the Scientific Committees, as published on the Internet: [http://europa.eu.int/comm/dg24/health/sc/call\\_en.html](http://europa.eu.int/comm/dg24/health/sc/call_en.html) (accessed on 26/11/2004 - this site is not valid any more).

selected, and results handled. It also implies a strategy for proactive communication in which the Commission should constantly seek ways to better publicise and explain its use of expertise to interested parties and the public at large.”<sup>109</sup> Additionally the Commission should take all the responsibility for its initiatives without striking a wrong note that it hides behind expert advice. It must be capable of justifying and explaining the way expertise has been involved, and the choices it has made based on advice. However, there might be cases when openness might be detrimental to the quality of advice or even damage the legitimate interests of those concerned with the process. Nevertheless, each case should be analysed separately by keeping transparency for reasons for not being open.

And a third core principle to be followed is **effectiveness**. Implementation of this principle covers methods for collection/obtainment and usage of expert advice which aims to use limited resources effectively by weighing short-term costs against anticipated longer-term gains. “This means that arrangements for collecting and using expertise should be designed in proportion to the task in hand, taking account of the sector concerned, the issue in question, and the stage in the policy cycle. (...) In any case, a system of routine monitoring, evaluation and review will be needed to help improve methods on a continuous basis. Such a system should focus both on process and outcome. (...) This needs to be done with an active participation of the Commission departments, the experts, and interested parties, having in mind that these different stakeholders may not judge effectiveness using the same criteria.”<sup>110</sup>

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<sup>109</sup> COM (2002) 713 final (n 99) 9.

<sup>110</sup> *ibid* 10.

The White Paper on European Governance identifies five action lines regarding expertise:<sup>111</sup>

- 1) *an inventory network on expertise* – improving access to and transparency of the sources by providing continuity over time and ensuring that “institutional memory” is maintained within the administration. The Commission has compiled an inventory of comitology committees, consultative bodies, civil society organisations and as a second step, it has planned to involve the establishment of a network of inventories of EU bodies providing expert input into the EU policy making;
- 2) *guidelines on expert advice* – the product was prepared by the Commission’s services, with early consultation of other EU institutions, Member States and a variety of providers and users of expertise. The guidelines aim at identifying the issues requiring expertise and enhancing openness and transparency, accountability and plurality as well as quality in the way experts are selected and expert advice is used;
- 3) *procedures to guarantee access and participation* – in order to ensure effective decision - making procedure, open meetings of committees where expert advice is provided or special hearing should be organised, and regular access to publications of expert advice and of any evidence used for policy formulation, evaluation and etc. should be guaranteed;
- 4) *“extended peer review”* – knowledge used for policy-making and public debate should not only be excellent from a scientific point of view; it also needs to be “socially robust”, responding to policy, social, economic needs or concerns;

*and integrated procedures for risk governance* – risk governance takes not only risk assessment and risk management, but also risk identification, evaluation and communication, by involving all actors.

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<sup>111</sup> Working group 1B “Democratising expertise and establishing scientific reference systems” (Report), May 2001, p. 15–25.

The Commission has set internal guidelines to be applied by the Commission departments, so it means that the required actions are applicable providing expertise and know-how only to the EU institutions. It does not oblige EU civil servants to apply the same rules and actions in cases of initiated public debates or other sensitive issues arising.

It should also be noted that the actions to be taken are only of a voluntarily origin and they are not obligatory for the civil servants to be applied. The rules sound to be easy-to-do way to get external know-how to be applied in the EU policies. On the other hand, the question remains, however, whether the Commission has put its primary attention on the scientific peer-review process, i.e. to ensure that the process is transparent, efficient, and of high quality.<sup>112</sup>

In order to formalise the incoming expertise and knowledge from external sources, a heap of stages of planning this procedure should be implemented, or at least be followed.

*Planning procedure.* Even though it is agreed by lots of academics as well as by civil servants themselves that maintaining an adequate level of in-house expertise is quite expensive, however a minimum level is still required in order to be able to organise, collect and monitor external expertise, as well as in order to act as an “intelligent customer” of external advice. This could be solved if external “peers” could be convened to help to select suitable experts.

The three principles should be reinforced as the basis of the good performance of the scientific committees is the excellence of their members, their independence and the transparency of the provided advice.<sup>113</sup>

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<sup>112</sup> Ragnar Lofstedt and Robyn Fairman (n 82) 29.

<sup>113</sup> COM (1997) 183 final (n 81) 6.

If departments lack an adequate level of expertise, internal sources (other departments' resources) should be used first, then it is advised to invite national experts on detachment to play a role and only at the very outside cases external expertise should be invited. Before involving external advice, the pertinent knowledge accumulated in European research programmes, relevant information tools as well as the institution's own knowledge-base readily available in an understandable form should be evaluated. Regarding this need, the European Commission has established common guidelines<sup>114</sup> on the sharing of scientific data between the scientific committees, agencies and other EU institutions. The common interest of the established agencies, scientific committees/panels is to improve cooperation in order to develop synergies and share knowledge. The need to exchange the possessed data and/or scientific knowledge especially arises when a scientific committee/panel has to assess a substance which is being, or has already been considered by another scientific body (particularly important, if the scientific body is coming to conclusions or recommendations which are different from those of the previously published ones or it is planned to make evaluations of the same substance for different users).<sup>115</sup>

Policy issues that require expert advice should be identified as early as possible and also an evaluation of an effect to the institution's "corporate memory" and perceived independence should be carried out. If to consider the matter of making the process more cost-effective, the inviting institutions should check if the information on previous expert input is relevant to the issue in question been exchanged, and if the arising issues could be grouped in order to avoid unnecessary duplication of experts. And taking the final decision, the inviting institution has to make sure that the inclusion of external expertise would enhance the credibility of the process. However, the already discussed common guidelines "do not

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<sup>114</sup> Common guidelines on sharing of scientific data (n 92).

<sup>115</sup> *ibid* 2.



concern the exchange of information and relation with third countries or with Member States and their agencies and are without prejudice to the requirements, criteria and arrangements in that respect”.<sup>116</sup>

It should be noted that the advised planning procedure is formed in a way an internal expertise and the possessed knowledge-base is preferred against external expert advice. Following this procedure, the external expertise is only sought in cases when internal expertise is verified, national experts on detachment, related knowledge accumulated in European research programmes, EU institutions’ own knowledge-base and other resources are checked, only then external expertise is invited. This policy might have a couple of shortages, i.e. inviting only national experts on detachment might be limited to choice, as the actual competence in certain instances can actually be found in third countries, for example, Japan or the United States. Keeping in mind the urgency of the needed expertise in some cases (i.e. the already discussed BSE crisis case), this procedure might take too long until the non-possessed internally expertise can be found and acquired.

Additionally, having in mind the fundamental changes, implemented by the Treaty of Lisbon, the Commission is simply allowed to use another form of group for discussions rather than comitology committees (Delegated Acts regime), i.e. expert groups (the Commission will still need to consult with Member States) and EU agencies, by abolishing comitology committees. If participation of external participants in decision-making was very limited under the “old comitology system”, the new changes ensure the increase of the number of actors involved, meaning that information will be more accessible<sup>117</sup> and possibility to get involved in the decision-making process will be more feasible.

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<sup>116</sup> *ibid* 3.

<sup>117</sup> A. Hardacre and M. Kaeding (n 9) 20.

*Preparation for the collection of expertise.* First of all the manner of involvement of experts should be identified (in-house, consultancy, expert group, conference, individual approach and etc.). Secondly, the criteria for selection (e.g. level of academic achievement or practical experience) should also be set. The determinants for selection could be urgency, complexity and sensitivity of the policy issue. It should be noted that this step is taken only in such cases, if the consultation of specific scientific committees was not foreseen under existing legislation.<sup>118</sup>

The scope and objective of the experts' involvement, and the questions they will address, should have all the facets of the problem been correctly analysed, different sectors and disciplines been involved, and be set out clearly on the framed questions and underlined assumptions.<sup>119</sup> Therefore, it should also be estimated the science's position towards environmental risks – if science has a poor proficiency in predicting environmental risks, or if avoidance of certain types of environmental harms is very important to society, decision-makers shall take those circumstances into account in making their best judgement resolution of uncertainty. The decision itself shall be made by giving due weight to important environmental values, risk aversion, limitations in knowledge and concerns about ecosystem fragility.<sup>120</sup>

One of the most important steps in this part of collection of expertise is to decide who should be involved in the scoping exercise to determine the range of expertise required: whether it is enough only to involve internal participants, or would it be beneficial to invite external participants from different disciplines and sectors.<sup>121</sup>

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<sup>118</sup> COM (2002) 713 final (n 99) 11.

<sup>119</sup> *ibid.*

<sup>120</sup> Richard B. Stewart (2001), *Environmental Regulatory Decision Making under Uncertainty*, University College London Symposium on the Law and Economics of Environmental Policy, September 5-7 2001, p.26;

<sup>121</sup> COM (2002) 713 final (n 99) 16.

However, the European institutions are not bound by an external scientific advice, what was also supported in the General Court’s decision – “the [Union] institutions took the conclusions and recommendations in the various reports from international, [Union] and national bodies into account only as supplementary material”.<sup>122</sup> It was acknowledged that the provided scientific advice did not provide the primary justification and the only opinion used for the EU’s ban was the committee’s opinion.

Having in mind that the Commission is advised to keep the minimum level of in-house expertise due to its effectiveness versus costs, it might be hard to fill the gap in knowledge or organize a further research to tackle significant gaps in knowledge due to limited resources and possible limited knowledge-base to be able to take a well-timed and up-to-date scientific decision. This is especially important for assessment the risks on different policy issues, ensuring that all plausible hazards are considered and reflected in questions put to experts – the in-house expertise have to possess sufficient knowledge to be capable to evaluate in order to ensure that if a broad-based approach is chosen, resource limitations might increase and another challenge should be taken into account that the final results might be hard to monitor and use for future references. Especially if the chairing institution decides to involve multiple experts through interactive and collegial discussions within carefully constituted expert panels, where multidisciplinary and multi-sect oral groups encourage a cross-fertilisation of ideas, stimulate debate and lead to sharpened opinions, as well covering a position, where adherents to different schools of thought as well as those with “maverick” views enter a dialogue and are represented among the experts.<sup>123</sup>

The EU Institutions seek to hold an optimum level of in-house expertise; however as a condition for success it is also necessary to be able to have contacts with external experts. The

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<sup>122</sup> Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR II-3376, § 304.

<sup>123</sup> COM (2002) 713 final (n 99) 15-16.

required knowledge might range from natural or social sciences scientific assessment up to controversial aspects where expertise is expected to state what is unknown or uncertain with differing degrees of probability. The provided expertise might also differ depending from which source it originates – academic, possessing practical knowledge or those who have direct stakes in the policy issue. None the less it is also important that interested parties and the public in general are convinced that the taken decisions chosen from some options are sound.<sup>124</sup>

A completely different situation has been noticed in practice. For example, Lord Lucas in his speech<sup>125</sup> has “identified the requirement by politicians and government for a “single clear recommendation” from expert committees as a factor that ensures that only those from within the accepted middle-ground of science were invited onto committees”. It means that politicians and governments expect a decision to be based on consensus, which might exclude extremes or innovative views.<sup>126</sup>

However, the inviting Institution should also have possibility to withdraw or exclude the involved external experts in policy shaping procedure due to a possible conflict of interest or possible affection by an eventual policy decision. Analysis of practical situations and application of the above described guidelines, have showed that “experts have been drawn from government, academia and industry, though not from organizations representing consumers. In many cases industrial scientists have been drawn from the same industries and firms whose products were regulated. Members of the expert advisory committees who were not directly employed by industry could, and often did, act as paid consultants to the

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<sup>124</sup> *ibid.*

<sup>125</sup> L. Lucas (1999), “Speech on organophosphates in the House of Lords” on 24 June 1997, reported in Hansard.

<sup>126</sup> Ragnar Lofstedt and Robyn Fairman (n 82) 27.

companies whose products they were evaluating, even though those links were often not disclosed”.<sup>127</sup>

On the other hand, it has been identified that a consideration of the circumstances, where it is appropriate to withhold the identity of experts in order to protect them against undue external pressures or to protect the legitimate interests of those concerned with the process, should be taken into account.

*Involvement of experts.* After all the provided discussion, it seems obvious that experts are needed to reassure, warn and shed the light for consumers on complex and often controversial issues arising on a day-to-day basis. As the decision is taken to involve experts, the record of the terms of reference and the main contributions of different experts or groups of experts should be maintained.

The EU institutions, consulting experts, and with help of the involved experts should determine whether the assembled expertise covers the topics to be addressed and whether sufficient pertinent background information and data are available and ensure that there is a clear understanding of the mandate and the tasks assigned.<sup>128</sup> It needs also to be considered what actions should be taken if conflicts of interest emerge and some of the involved experts might leave the group.

When experts start working, the internal responsible staff of the EU Institutions have to be ready to deal with any modifications to the suggested work plan due to any recent scientific developments or other unanticipated issues, e.g. due to a change in the plan because the formed expert group is able to perform only part of the proposed work or even go beyond the framed issue. Inviting Institutions need to evaluate its human resources in order to arrange

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<sup>127</sup> Erik Millstone and Patrick van Zwanenberg (n 15) 597.

<sup>128</sup> COM (2002) 713 final (n 99) 12.

all the necessary administrative issues related to the proposed changes or to make other arrangements be made to investigate the questions not covered. It also needs to be decided what actions should be taken if experts need additional data or information – whether this information should be provided by the EU Institutions or experts are expected to seek and collect the missing information themselves by expanding the attributed tasks.

The above provided information is based on the guidelines, prepared by the Commission. However, again, there is quite a lot of faulty practice in reality. It has been identified, that “[e]xpert advisory committees, at all levels of governance, often judged dossiers of information that were mainly or entirely assembled by the companies whose products were being judged.”<sup>129</sup> There were also problems with the property of the information, which most often was the property of the companies concerned, and due to that in most cases it was refused to be published or disclosed.

Even though it is advised to make the main documents, associated with the use of expertise on a policy issue and especially the data on the advice taken, available to the public, making sure that all commercially sensitive information is suitably protected, however, there are no implemented actions for risk communication if the possessed information gets disclosed and unintended negative has or might have influence on public.

However, the guidelines have not provided any advice on the proper use of a received scientific expertise by the politicians and staff of the EU institutions. It was noticed<sup>130</sup> that “decisions about the scope of risk assessments, i.e. which kinds of effects to deem as risks and which to exclude or discount, and about the trade-offs between risks and benefits were frequently taken within scientific committees and misrepresented as purely scientific,

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<sup>129</sup> Erik Millstone and Patrick van Zwanenberg (n 15) 596.

<sup>130</sup> *ibid* 600.

ministers and officials could, and did, hide behind the advice of the scientists, displacing responsibility for policy to committees of experts”.<sup>131</sup> Therefore, it is targeted that decision-makers acted as representatives of society, by making their best estimation of the probability distribution for the uncertain risk in question through a process that invites public and expert input and making explicit and public the relevant uncertainties and the bases for the regulators’ determinations.<sup>132</sup>

There is a risk to misrepresent policy decisions as “having been based on, and only on, “sound science”, while in practice they might be based on implicit and covert economic and political considerations and judgements”.<sup>133</sup> However, Christian Joerges advocates that market integration and risk regulation cannot be left to scientific and market actors alone but require political guidance.<sup>134</sup> Actually, “in many cases the expert groups avoid discussing and handling issues that are extremely controversial; the push is not to reach an agreement at all costs if there are heavy political commitments involved”.<sup>135</sup>

There is also a niche to abuse the formed situation for the benefit of EU officials – expert committees might sometimes be set up in ways favouring particular policy outcomes, and later construing the provided scientists’ decisions as if they are purely scientific and independent judgements. It is also noticed an “increasing reliance of the [Union] legislator on private standard-setting organizations” by delegating regulatory competencies<sup>136</sup> to some very specialised sectors. The delegation of regulatory decision-making powers to private-law bodies “completely outside of the institutional processes laid down in the EU Treaty, with no

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<sup>131</sup> C. Hood, H. Rothstein and R. Baldwin (2001), *The Government of Risk: Understanding Risk Regulation Regimes*, Oxford: Oxford University Press.

<sup>132</sup> Richard B. Stewart (n 120) 23.

<sup>133</sup> Erik Millstone and Patrick van Zwanenberg (n 15) 599.

<sup>134</sup> C. Joerges and J. Neyer (1997), “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology” 3 *ELJ*, p. 273-299.

<sup>135</sup> Torbjörn Larsson (2007), “Committees and the nature of deliberative supranationalism in the EU”, in *The Role of Committees in the Policy-process of the European Union: Legislation, Implementation and Deliberation*, edited by Thomas Christiansen and Torbjörn Larsson, Edward Elgar Publishing, p. 35.

<sup>136</sup> Christian Joerges, Harm Schepel and Ellen Vos (n 57) 5.

institutional link or framework ever having been laid down for them”.<sup>137</sup> As the origins and nature of a scientific decision differ from regulation in a number of fundamental ways,<sup>138</sup> the taken decisions may not even meet the rule of law, and be biased towards private interests rather than yield “public interest”. On the other hand, legal decision-making is made by officially elected and publicly accountable officials, and any delegation of rulemaking power should be traceable to the superior source of legitimacy.<sup>139</sup>

On the other hand, it may happen, those in highly adversarial regulatory proceedings, experts other than the ultimate decision makers (for example industry experts and environmental advocacy experts, experts from different disciplines and backgrounds) may hold sharply opposed views as to the nature and extent of the uncertainty and the decision to be made.<sup>140</sup>

The prevailing majority opinion might lead to favouring a limited group of powerful, well-organised, well-funded and professionally represented actors in any given policy area, representing often quite narrow interests. This might result a situation where it is easy for European action to be portrayed as not being properly accountable and as lacking legitimacy.<sup>141</sup> Due to the legitimacy crisis of the EU institutions and of the Commission in particular, the involvement of interest groups and civil society has become part of the Commission’s attempt to legitimate itself and its functions. It includes contacts with private

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<sup>137</sup> *ibid* 25.

<sup>138</sup> “Law” is not an adequate institution to set technical specifications that are dynamic enough to adapt to, rather than block, technological change, and flexible enough to open, rather than close off, markets. Standards depend on market mechanisms to be accepted, rather than on the threat of sanction. Standards are produced in consensus of market players, not with the backing of political majority will. Standards operate on the assumption of quality, the high levels of safety, are a marketing argument rather than an imposed obligation. Perhaps most importantly, standards bodies draw from a pool of relevant knowledge and expertise that lawmakers can only dream of”. *ibid* 28-29.

<sup>139</sup> *ibid* 36-38.

<sup>140</sup> Richard B. Stewart (n 120) 24.

<sup>141</sup> R. Baldwin and M. Cave (1999), *Understanding Regulation: Theory Strategy and Practice*; Oxford: Oxford University Press, chapter 6; and Ellen Vos (2002), “The Rise of Committees” *European Law Journal*, Volume 3 Issue 3, p. 210-229.



firms, its interaction with scientific experts or with national administrations in order to avoid forming of cartels of representation and consultation, exerting a covert stranglehold on key stages of policy process.<sup>142</sup>

There is always a risk of balancing between an attempt to involve as many participants as possible into the decision-making process, and an attempt to avoid dominance of narrow interests. In order to ensure the best involvement of external participants in the decision-making process, the question of accountability needs to be addressed. The goal is to open up policy-making in order to make it more visible and understandable for ordinary people and more acceptable for those, concerned with the decisions, because with higher involvement comes greater responsibility. The legitimacy of decision-making today depends on the involvement and participation, as well as on the transparency of decisions. First of all, the EU institutions should work on “a general policy of transparency”, with a more systematic use of range of media, especially information technology, and on “a general policy of inclusion” which could guarantee the systematic involvement of representatives of all affected interests at all stages of the policy process from the framing of problems to the evaluation and revision of policies.<sup>143</sup>

There are some suggested solutions to the described examples of the already noticed faulty practice. One of the main suggestions to this situation – to separate regulation from sponsorship,<sup>144</sup> for example, it is expected scientific advisors to be entirely independent of commercial and industrial interests or whether such links remain – to be more transparent than hitherto. Expert advisors are expected to be “independent”; however nobody knows upon whom they may previously have been dependant. They might be independent of commercial

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<sup>142</sup> N. Lebessis and J. Paterson (2000), *Developing New Modes of Governance*, European Commission: Forward Studies Unit, Working Paper, p. 22.

<sup>143</sup> *ibid* 30.

<sup>144</sup> Erik Millstone and Patrick van Zwanenberg (n 15) 602.

interests; however, it should be ensured that scientists are independent also of political pressures from politicians and officials.<sup>145</sup>

Another issue, which is not much discussed in the published guidelines – the ways in which scientific advice should be procured. Following the EU legislation on public procurement, most of the above suggested actions might be considered to be illegal. On the other hand, if a collection in the form of consultancy work (studies following open calls for tender) is chosen, a consultation of interested parties on the framing of the questions and underlying assumptions, particularly on sensitive issues, might not be considered appropriate due to public procurement legal procedures.

#### *4.5. Use of Scientific Expertise in Decision-making Process.*

It is emphasized by the General Court that the consultation with the relevant scientific committee is mandatory,<sup>146</sup> given that the Commission cannot assess for itself the safety or efficacy of the product, consultation is necessary to give the Commission the scientific evidence from which it could make a reasoned opinion.<sup>147</sup>

Additionally, it needs to show how input from experts has been taken into account by explaining it in the explanatory memorandum, or in an annex to the proposal and also informing experts of the outcome of the process to which they have contributed. However, the CJEU has supported the general principle, that “the measures (...) need not be completely consistent with the scientific advice and the absence of such advice or the fact that it is inconclusive cannot prevent the Council from adopting such measures as it deems necessary

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<sup>145</sup> *ibid* 604.

<sup>146</sup> Cases T-74, 76, 83, 84, 85, 132, 137 and 141/00 *Artegodan GmbH v. Commission* [2002] ECR II-4948, § 198.

<sup>147</sup> Paul Craig (n 22) 651.

for achieving the objectives,”<sup>148</sup> which means that the authoritative institutions do not always need to possess full available scientific data to make a decision.

The Commission is also obliged to put stating that “all Commission legislative proposals respect all the fundamental rights concerned in the course of normal decision-making procedures”. Consequently, it has decided that “any proposal for legislation and any draft instrument to be adopted by it would, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter of Fundamental Rights of the European Union”.<sup>149</sup>

On the other hand, not all decisions, taken by an expert advisory committee and approved by the Commission, might be also approved by the CJEU. For example, notwithstanding the decisions of the Commission, which have been taken based on the opinion of an expert advisory committee that the drugs should be taken off the market acknowledging a new consensus in the medical community that the drugs should no longer be prescribed, the General Court has decided that “the competent authority makes a detailed acknowledgment that it had incorrectly assessed a medicinal product”, which had to be justified “only where a new potential risk or the lack of efficacy is substantiated by new, objective, scientific and/or medical data or information”.<sup>150</sup> The General Court’s decision in this case was upheld by the CJEU<sup>151</sup> “principally because under the relevant EU legislation the Commission did not have the competence to make the contested decisions”.<sup>152</sup>

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<sup>148</sup> Case C-405/92 *Établissements Armand Mondiet SA v. Armement Islais SARL* [1993] ECR I-6176, § 31.

<sup>149</sup> Commission, “Compliance with the Charter of Fundamental Rights in Commission legislative proposals: *Methodology for systematic and rigorous monitoring*” (Communication) COM (2005) 172 final.

<sup>150</sup> Gary E. Marchant and Kenneth L. Mossman (2005), *Arbitrary and Capricious. The Precautionary Principle in the European Union Courts*; published in Great Britain by International Policy Press, a division of International Policy Network; p. 33; and Case T-74/00 *Artegodan GmbH and others v. Commission of the European Communities* [2002] ECR II-4945, § 194.

<sup>151</sup> Case C-39/03 P *Commission v. Artegodan GmbH and Others* [2003] ECR I-7885.

<sup>152</sup> Paul Craig (n 22) 650.

The control over the decision-makers was asserted in an earlier General Court's decision – "the [Union] judicature may be called upon to review, first, the formal legality of the CPMP's scientific opinion and, second, the Commission's exercise of its discretion".<sup>153</sup> Though, the asserted control is not unconditional – the General Court cannot substitute its view with the one, provided by the relevant scientific committee, - "it is only the proper functioning of the CPMP, the internal consistency of the opinion and the statement of reasons contained therein [as well as a comprehensible link between the medical and/or scientific findings and its conclusions] which are subject to judicial review".<sup>154</sup> The General Court may request to prove references of the relevant scientific committee "to the main reports and scientific expert opinions on which it relies and to explain, in the event of a significant discrepancy, the reasons why it has departed from the conclusions of the reports or expert opinions supplied by the undertakings concerned".<sup>155</sup>

It should also be noted that the European Commission might refuse to follow the provided scientific advice. For example, in Pfizer's case<sup>156</sup> the General Court had rejected an argument of the applicant that the contested Regulation was tainted by factual errors.<sup>157</sup> It found that the Commission and the Council have not ignored the findings of the scientific committee; nevertheless they have not accepted the final conclusions, as they may disregard the conclusions drawn in the committee opinion, even though, in some places, it relies on certain aspects of the scientific analysis in the opinion.<sup>158</sup> This finding was further explained by the General Court, justifying on grounds of principle relating to the political responsibilities and democratic legitimacy of the Commission, by the Parliament's political

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<sup>153</sup> *Artegodan* cases (n 150) § 198.

<sup>154</sup> *ibid* § 200.

<sup>155</sup> *ibid*.

<sup>156</sup> Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR I-2211, §200-201.

<sup>157</sup> Paul Craig (n 22) 648.

<sup>158</sup> *Pfizer* case (n 156) § 200.

control. The members of scientific committee, although they have scientific legitimacy, have neither democratic legitimacy nor political responsibilities. Scientific legitimacy cannot be treated as a sufficient basis for the exercise of public authority.<sup>159</sup>

However, this decision was harshly criticized as it did not accord sufficient weight to the expert scientific opinion. “The line between the political responsibility of the institutional decision-makers and the scientific tasks of the expert committee can be difficult to maintain. Though, it is neither defined “whether the political institutions have sufficient alternative material to base their judgment on when they choose not to follow the committee’s opinion”.<sup>160</sup>

It is also worth noting that General Court has hold that neither the Commission, nor the Council have an obligation to undertake a second consultation if a new study comes out after a scientific opinion has been provided to the competent authorities, since the legislation confers a discretion<sup>161</sup> on the Commission and any judgments taken in that regard do not constitute authority. The obligation to carry out of further studies following the granting of authorization may be adopted only for objective and verifiable reasons that are in particular where in the present state of scientific knowledge the applicant cannot provide comprehensive information on the efficacy and safety of the medicinal product in question under normal conditions of use.<sup>162</sup> However, the General Court has allowed the withdrawal of a marketing authorization only where a new potential risk or the lack of efficacy is substantiated by new, objective, scientific and/or medical data or information.<sup>163</sup>

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<sup>159</sup> *ibid* § 201.

<sup>160</sup> Paul Craig (n 22) 666.

<sup>161</sup> It is analysed in the Chapter “Precautionary principle in collection and use of scientific expertise”.

<sup>162</sup> *Artegodan* cases (n 150) § 190.

<sup>163</sup> *Artegodan* cases (n 150) § 194.

In *CEVA* case<sup>164</sup> the Commission has refused to approve veterinary medicinal products, which were confirmed by a positive opinion from the Committee for Veterinary Medicinal Products, claiming that “a high level of human health protection may be achieved only if assessments made by committees such as the CVMP are balanced by the competent institutions against all the scientific information available, taking into account scientific uncertainty, consumers' concerns, ethical or moral considerations or other legitimate factors and the precautionary principle”. In this case the CJEU has decided that the Commission acted unlawfully by refusing to follow an advice of its own expert scientific committee.<sup>165</sup>

This position was also supported in another General Court’s decision, where it has stated that “the Commission set up [the scientific committee] specifically with the aim of ensuring that [Union] legislation is founded on objective and sound scientific findings”.<sup>166</sup> The main aim of the established scientific committee is to provide a thorough advice in order for “the [Union] institutions [to] show, first, that the contested regulation was adopted following as thorough a scientific risk assessment as possible, (...) and, second, that they had available, on the basis of that assessment, sufficient scientific indications to conclude, on an objective scientific basis”.<sup>167</sup> “Just like the Commission with regard to the content of the draft decisions agreed upon by committees of scientific experts with the explicit and detailed technical expertise in a given area,<sup>168</sup> one cannot easily imagine that the Council is in a position to second-guess or change the content of detailed and specific negotiations with a third state”.<sup>169</sup>

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<sup>164</sup> Case T-344/00 *CEVA Sante Animale SA and Pharmacia Entreprises SA v. Commission* [2003] ECR II-255, § 66.

<sup>165</sup> *ibid* § 101-102.

<sup>166</sup> *Pfizer* case (n 156) 269.

<sup>167</sup> *ibid* § 165.

<sup>168</sup> *Artegodan* cases (n 150).

<sup>169</sup> *Deirdre Curtin* (n 49) 160.

## 4.6. CONCLUSIONS

The designed policy documents are mainly intended for identification of the need as well as collection of technical and scientific advice. They were drafted in order to formalise the procedure of obtainment of scientific expertise and use of it in further decision-making process. However, the described procedures were only implemented in the soft law and no further developments have been noticed after. The guidelines are only of recommendatory nature and the EU institutions are obliged to apply them in their everyday practice – these policy documents are not obligatory for EU Member States or other bodies. It seems to be agreed that scientific expertise is vital for the EU decision-making; however the practice of scientific participation and the amount as well as the level of scientific interference has been left as an optional alternative to be decided in order to make a final regulatory or political decision by EU institutional authorities.

The Commission stated that regarding the reorganization of the work of the obtainment and use of scientific expertise “[it] will concentrate efforts to build a reliable and flexible structure which shall enable high quality and independent scientific advice, to ensure transparency and consideration of the scientific advice in the legislative activities of the [Union] Institutions”.<sup>170</sup> However, the development of systems to provide scientific advice, are closely related to an obligation to use “risk analysis”. “The use of risk analysis by the European Commission in assessing the need for legislative or administrative action involves the European Commission in the evaluation of large quantities of complex and often contradictory scientific data”.<sup>171</sup> Decision makers are constantly faced with dilemma of balancing the freedom and rights of individuals, industry and organizations with the need to

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<sup>170</sup> COM (1997) 183 final (n 81) 11.

<sup>171</sup> Keith Vincent (n 16) 511.

reduce the risk of adverse effects to the environment, human, animal or plant health. There are quite a lot of discussions, both in the EU and international arena, that in cases of scientific uncertainty, science cannot dictate decisions, however it must remain a foundation of any precautionary measure.<sup>172</sup>

The analysis of this Chapter has showed that the EU institutional structure acknowledges, especially after the BSE crisis, the importance of up-to-date scientific expertise in the legitimate decision-making processes. However, there are still quite a lot of weaknesses by attempting to formalize it and apply in everyday practice. Scientific expertise might be one form of possible external participation, which allows professional advice to be implemented in regulatory decision-making process. However, as it was stated by the Commission, the core of a new political departure towards the new policy, should be clearly based on the three general principles, which state that legitimate responsibility should be separated from scientific advice and the latter should be made transparable and widely-available. The core principles are followed in the drafted guidelines and policies; however the scientific participation itself is still applied on *ad hoc* basis. The guidelines on collection and use of expertise have comprehensively described how it should be included into the decision-making process; however those were the only documents which have tried to legitimate the possible external participation.

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<sup>172</sup> Christine Noiville (6 June 2010), *Science in Precautionary measures: A synthesis of ECJ and WTO case law*, CNRS, p. 1.



## **V. CHAPTER**

### **PRECAUTIONARY PRINCIPLE IN COLLECTION AND USE OF SCIENTIFIC EXPERTISE**

#### **5.1. INTRODUCTION.**

The previous Chapter “Collection and use of expertise” has analysed the political and legal instruments, which have followed the establishment of the need to involve scientific expertise in most EU legal activities. It has defined the ways both external and in-house expertise shall be obtained in the decision-making process and an obligation to use it in the taken decisions. At a certain point, the Commission must make a judgement on the advice and views it has received, whether to seek yet further advice, to commission further research or to make a provisional proposal in line with the precautionary principle.<sup>1</sup> The use of the precautionary principle under the set requirements, which will be discussed in more details later in the Chapter, is dependent on available scientific knowledge, which is not always available at the in-house level. “When a scientific process is at issue, the competent public

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<sup>1</sup> Commission, “The collection and use of expertise by the Commission: principles and guidelines: Improving the knowledge base for better policies“ (Communication) COM (2002) 713 final, p.19.

authority must, in compliance with the relevant provisions, entrust a scientific risk assessment to experts who, once the scientific process is completed, will provide it with scientific advice”.<sup>2</sup> It is not specified whether this advice ought to be internal or obtained from external sources, as it is analysed in the Chapter “Collection and use of expertise”. Though, the sought scientific advice has to be based on the principles of excellence, independence and transparency, and it is assumed to be an important procedural guarantee which ensures the scientific objectivity of the measures adopted and preclude any arbitrary measures.<sup>3</sup>

In cases, where the scientific basis is insufficient or some uncertainty exists, the EU Commission should be guided in its risk analysis by the precautionary principle,<sup>4</sup> which is one of the key elements for risk management, as it as intervention goes to the heart of regulation of hazardous activities and their place in society, giving full weight to economic, social and environmental factors. “Absence of evidence of risk” should never be confused with, or taken as, “evidence of absence of risk”.<sup>5</sup> Clearly care is needed in making judgments on whether there is a good reason to believe that harmful effects might occur, and on the extent of scientific uncertainty.

There is no crucial discussion on whether scientific expertise should be implemented into a regulatory decision-making process. However, the normative procedure becomes more and more complicated; more unknowns need to be covered in order to assess the need for legislative or administrative action and also the need for inclusion of supportive expert advice. One of the main factors, especially in the area of environmental policy, to be used in evaluating a large quantity of complex and in most cases contradictory scientific information, is risk analysis based on the precautionary principle. As decision-making increasingly takes

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<sup>2</sup> Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR I-2211, § 157.

<sup>3</sup> *ibid* § 159 and 172.

<sup>4</sup> Commission, “Consumer Health and Food Safety” (Communication) COM (1997) 183 final, p. 20.

<sup>5</sup> Interdepartmental Liaison Group on Risk Assessment, *The Precautionary principle: policy and application*, September 2002, p.7;

place at the [Union] level and since risk regulation is recognized as being a matter which requires flexible and speedy decision-making, this principle becomes the foundation for the taken decisions to be based on, if there is a lack of information or a doubt that the provided obligatory scientific advice is not fully examined or there is a risk of adverse effect.

The analysis of the Chapter begins by a review of the development of the precautionary principle, which has become of increased importance in the EU law. On the one hand, the precautionary principle is recognised as a main principle of the EU policy, though, on the other hand it is still used in a concealed form.

It will cover constituent parts of the precautionary principle and the set guidelines on the application, which were confirmed by the [Union] judicature. The further analysis will be extended into the evolution of this principle into the general principle of EU law and the implemented freedom for decision-makers to acknowledge that they “do not know” what shall be the right decision to be ruled upon. The analysis will also cover the obligation of the EU institutions to involve scientific independent expertise into the risk assessment stage and the procedures to be applied to it. It will also focus on the possibilities for external participants to define the regulatory or market failure (potential danger) where a public intervention may be necessitated in order to provide reliable and cogent information to be decided upon. The final part of the chapter will deal with the criticism the application of this principle needs to manage.

## 5.2. HISTORY AND DEFINITION OF THE PRECAUTIONARY PRINCIPLE.

In academic literature, as well as primary legal sources, there are various definitions of the precautionary principle, which are often similar in form and substance, yet they contain seemingly minor wording differences with potentially major policy implications.<sup>6</sup> The most noteworthy and extraordinary observation could be highlighted – even the judicial system of the EU has not attempted to define the precautionary principle in its decisions.<sup>7</sup>

The precautionary principle has its beginnings in German national law, where in 1970s the “Vorsorge” (a foresight) principle was developed into a fundamental principle of German environmental law (balanced by principles of economic viability), based on a belief that a society should seek to avoid environmental damage by careful forward planning, blocking the flow of potentially harmful activities.<sup>8</sup> Later, the idea of the developed “foresight” principle was implemented into a number of international environmental agreements and treaties both over Europe and in international arena.<sup>9</sup> “At international level, recognition of the precautionary principle has been a long process, starting with the 1982 World Charter for Nature”.<sup>10</sup> Later on, the principle was developed and introduced in international statements of environmental policy and in 1984 it was introduced at the First International Conference on Protection of the North Sea.<sup>11</sup>

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<sup>6</sup> Gary E. Marchant and Kenneth L. Mossman (2005), *Arbitrary and Capricious. The Precautionary Principle in the European Union Courts*; published in Great Britain by International Policy Press, a division of International Policy Network; p. 10.

<sup>7</sup> “After a detailed analysis of more than sixty EU judicial opinions through February 2004, none of the opinions attempts to define the precautionary principle (with perhaps one exception)”. ibis 31.

<sup>8</sup> J. Tickner, C. Raffensperger and N. Meyers (2000), *The Precautionary Principle in Action: A Handbook*; Science and Environmental Health Network, p. 2.

<sup>9</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 5.

<sup>10</sup> Opinion of the Economic and Social Committee on “Use of the precautionary principle“ (2000/C 268/04) [2000] OJ C 268, p. 8.

<sup>11</sup> J. Tickner, C. Raffensperger and N. Meyers (n 8) 2.

In the 1990s most academics could not define the precautionary principle and called it in general “an idea”.<sup>12</sup> More recently, even though there is no universally accepted definition, the Rio Declaration on Environment and Development<sup>13</sup> was the first source to define the precautionary principle, as an urge “where there are threats of serious or irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation”. Right on the spot, it is worth mentioning that the suggested definition is limited only to “environmental degradation”, without suggesting other areas for application, such as public health and similar, and it does not impose any affirmative duty to act – it simply states that uncertainty shall not preclude the possibility of regulation.<sup>14</sup>

In 1998 this principle with a similar content was defined in the “Wingspread statement” – “when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically”, however the definition, suggested in this legal source, makes no mention of economic considerations and the content of the statement is broader than in the previously mentioned definition, applying to actions that would harm either the environment or human health and imposing a positive obligation to act.

It is also worth denoting that there are various models of the precautionary principle to be accepted worldwide, e.g. the EU has accepted a “political” model of the precautionary principle under which uncertainty is a normative principle that triggers precaution, and, in

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<sup>12</sup> *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations* (1997), C. Joerges, K.H. Ladeur and E.Vos (eds.); O. Godard, (1997), “Social Decision-Making under Conditions of Scientific Controversy, Expertise and the Precautionary Principle”, Baden-Baden: Nomos Verl.-Ges., p.65.

<sup>13</sup> Rio Declaration on environment and development, made at UNCED 1992, ISBN 9 21 100509 4.

<sup>14</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 12.

comparison, the U.S. model is based on “rationalist” weighing of probabilities and the costs and benefits of various alternatives.<sup>15</sup>

There is a lot of discussion on the two versions of the precautionary principle, introduced by R.B.Stewart,<sup>16</sup> who suggests separating the precautionary principle into the weak version and the strong one. The “weak” version asserts “that uncertainty regarding the adverse environmental effects of an activity should not automatically bar adoption of measures to prohibit or otherwise regulate the activity”, though it always sets up a threshold or a margin of safety, and once it gets triggered, a regulation cannot be denied. However, just the existence of uncertainty regarding risks does not make a mandatory or distinct basis for imposing regulatory controls.<sup>17</sup>

The “strong” version asserts “that uncertainty provides an affirmative justification for regulating an activity or regulating it more stringently than in the absence of uncertainty”, what means, that whenever there is an uncertain but serious risk of harm “the activity in question should not be undertaken at all until it is proven to be safe by the proponent of activity”. Following this version, regulation is mandatory, and regulatory compliance costs are not included as a factor to be considered in the regulatory decision.<sup>18</sup>

This position has been demurred as it was “paralysing, forbidding all courses of action, including inaction”.<sup>19</sup> Sunstein<sup>20</sup> maintained the balance between the level of risk and the type of the chosen regulatory decision, having a possibility to consider the “entire range of

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<sup>15</sup> Tim O’Riordan, James Cameron and Andrew Jordan (eds.) (2001), *The Evolution of the Precautionary Principle*, in Reinterpreting the Precautionary Principle.

<sup>16</sup> Richard B. Stewart (2001), *Environmental Regulatory Decision Making under Uncertainty*, University College London Symposium on the Law and Economics of Environmental Policy, September 5-7 2001, p.7.

<sup>17</sup> *ibid* 9.

<sup>18</sup> *ibid* 1, 9-10.

<sup>19</sup> Cass R. Sunstein (2003), *Beyond the Precautionary Principle*, University of Pennsylvania Law Review, Vol. 151:1003, p. 1018-1029; and Paul Craig (2012), *EU Administrative Law*, Oxford University Press, p. 661.

<sup>20</sup> Cass R. Sunstein (n 19) 1014, 1054, 1057-1058.

possibilities”. It is believed that the EU has adopted the weaker version of the precautionary principle.

Further in the text, the constituent parts of the precautionary principle as well as the main principles of its application will be analysed endeavouring to understand the use of this principle in the EU policies, activities and legislation.

### 5.3. OBJECTIVE AND SCOPE OF THE PRECAUTIONARY PRINCIPLE.

The TFEU itself does not define the constituent components of the precautionary principle – it has been left to the community institutions to define and apply the precautionary principle. The obscurity, regarding the application or decision-making, including reliance on the precautionary principle, is challenged in the Courts of the EU, when EU regulators are forced to explain and justify the meaning of the precautionary principle.<sup>21</sup>

In 1999 the Council asked the Commission “to be in the future even more determined to be guided by the precautionary principle in preparing proposals for legislation and in its other consumer-related activities and develop as priority clear and effective guidelines for the application of this principle”.<sup>22</sup> That was a good impetus for the European Commission to try defining and explaining a possible definition of the precautionary principle in the issued Communication on the precautionary principle in 2000, covering “those specific circumstances where scientific evidence is insufficient, inconclusive or uncertain and there are indication through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal

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<sup>21</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 29-30.

<sup>22</sup> Use of the precautionary principle (n 10) 6.

or plant health may be inconsistent with the chosen level of protection”,<sup>23</sup> which “requires intervention to maintain the high level of protection chosen by the EU”.<sup>24</sup>

It shall be noted that “the precautionary principle is relevant only in the event of a potential risk, even if this risk cannot be fully demonstrated or quantified or its effects determined because of the insufficiency or inclusive nature of the scientific data”, and “under no circumstances be used to justify the adoption of arbitrary decisions”.<sup>25</sup>

Another issue to be highlighted is the variation of types of risks subject to the precautionary principle. In one opinion, it was stated that “the [Union] must take action even in cases where there is not an existing, but a potential risk to the environment”.<sup>26</sup> In this opinion, the frame of defining a risk is broadened up to a potential risk. In another opinion, the Advocate General states that “the objective of the precautionary principle is to protect the environment, as well as human life and animal and plant life, when no concrete threat to those resources has yet been demonstrated but initial scientific findings indicate a possible risk”,<sup>27</sup> i.e. the type of risk is also widened up to a possible risk, but not a “defined”, “existing” or similar type of risk. This opinion was supported in another CJEU’s decision, where it was stated that if “there is scientific uncertainty, a risk assessment cannot be required to provide the [Union] institutions with conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality”.<sup>28</sup> Furthermore, “where there is scientific uncertainty as to the existence or extent of risks to human health, the

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<sup>23</sup> Commission, “The precautionary principle” (Communication) COM (2000) 1 final 9.

<sup>24</sup> United Nations Educational, Scientific and Cultural Organisation, World Commission on the Ethics of Scientific Knowledge and Technology (COMEST); *The Precautionary Principle*; March 2005, p. 13;

<sup>25</sup> COM (2000) 1 final (n 23) 13.

<sup>26</sup> Case C-318/98 *Fornasar and others v. Italy* [2000] ECR I-4813, Opinion of AG Cosmas § 33.

<sup>27</sup> Case C-236/01 *Monsanto Agricoltura Italia SpA v. Presidenza del Consiglio dei Ministri* [2003] ECR I-8166, Opinion of AG Alber, § 108; and Gary E. Marchant and Kenneth L. Mossman (n 6) 34.

<sup>28</sup> Case C-192/01 *Commission v. Denmark* [2003] ECR I-9693, Opinion of AG Mischo, § 102; Case T-334/07 *Denka International BV v. Commission of the European Communities* [2009] ECR II-4205, § 116.



[Union] institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent”.<sup>29</sup>

The constituent parts of the precautionary principle may be distinguished between the political decision to act or not to act, which is linked to the factors triggering recourse to the precautionary principle; as well as to the decision how to act, defining the measures resulting from application of the precautionary principle.<sup>30</sup>

The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment (based on the existing body of scientific and statistical data), risk management (a process, which weighs policy alternatives in consultation with interested parties and selects appropriate prevention and control options)<sup>31</sup> and risk communication (an exchange of information at all stages of risk analysis between all interested parties)<sup>32</sup>. The utmost attention will be paid for the analysis of risk assessment, which is considered to be a scientific process, further in the text.

In the *Pfizer* case<sup>33</sup> the General Court has defined a risk which must be assessed when the precautionary principle is applied. The “risk” associated with the product, the reality and the seriousness of which are in dispute, is the possibility that the use of a specific product will give rise to adverse effects on human health. It constitutes a function of the probability that the use of a product or a procedure will adversely affect the interests protected by the legal order, implemented by EU legislation, because of the insufficiency, inconclusiveness or imprecision of the results of the studies conducted, comprising the need to assess the degree of probability of a certain product or procedure having adverse effects on human health and

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<sup>29</sup> Case T-334/07 (n 28) §116; Case C-180/96 *United Kingdom v. Commission* [1998] ECR I-2265, §99; Case T-13/99 (n 2) §139.

<sup>30</sup> COM (2000) 1 final (n 23) 12.

<sup>31</sup> Paul Craig (n 19) 663.

<sup>32</sup> *ibid.*

<sup>33</sup> Case T-13/99 (n 2) § 136-138.

the seriousness of any such adverse effects should the risk materialise<sup>34</sup> or there is a likelihood of the risk is such that the best available scientific advice cannot assess the risk with sufficient confidence to inform decision-making<sup>35</sup> and due to that there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern<sup>36</sup> where the EU Commission considers that the Union has the right to establish the level of protection by applying the precautionary principle.

For example, “in the domain of human health, the existence of solid evidence which, while not resolving scientific uncertainty, may reasonably raise doubts as to the safety of a substance, justifies, in principle, the refusal to include that substance”.<sup>37</sup> The defined risk is a constituent part of the risk assessment, which is believed to be a scientific process, in its turn, entails hazard identification, hazard characterization, and appraisal of exposure and risk characterisation.<sup>38</sup>

However, the CJEU has held that the precautionary principle requests “to prevent, reduce, and, in so far as is possible, eliminate from the outset, the sources of pollution or nuisance by adopting measures of a nature such as to eliminate recognised risks”.<sup>39</sup> Here, the definition of risk is limited to a “recognised” risk. This opinion seems to be supported in another case,<sup>40</sup> where the General Court has stated that “the precautionary principle can therefore apply only in situations in which there is a risk, notably to human health, which, although it is not founded on mere hypotheses that have not been scientifically confirmed, has not yet been fully demonstrated”. It suggests that the precautionary principle can be applied in

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<sup>34</sup> Case T-13/99 (n 2) § 147-148; Case C-77/09 *Gowan Comercio Internacional e Servicos Lda v. Ministero della Salute*, 22 December 2010, §76; Case C-343/09 *Afton Chemical Limited v. Secretary of State for Transport*, 8 July 2010, § 61.

<sup>35</sup> Interdepartmental Liaison Group on Risk Assessment (n 5) 2.

<sup>36</sup> COM (2000) 1 final (n 23) 9.

<sup>37</sup> Case T-326/07 *Cheminova A/S and Others v. Commission* [2009] ECR II-2685, §166; Case T-334/07 (n 28) §116; Case T-229/04 *Sweden v. Commission* [2007] ECR II-2437, §161.

<sup>38</sup> (2000) 1 final (n 23) 13.

<sup>39</sup> Case C-318/98 (n 26) § 37

<sup>40</sup> Case T-13/99 (n 2) § 146.

cases in which a risk has to be not only recognised, but also “scientifically confirmed” possibly not “fully demonstrated”. This position was also supported in another CJEU’s decision, claiming that the “real risk” needs to be “sufficiently established on the basis of the latest scientific data available at the date of the adoption of such decision”.<sup>41</sup> Anyways, “[j]udges repeatedly insist that decisions must be based on a prior scientific assessment/ on a risk assessment ground for if zero-risk can be a political choice, it cannot be a scientific basis”.<sup>42</sup> Even though there can be an objection that a thorough risk assessment is not possible due to a scientific uncertainty, “[CJEU] and WTO both answer that scientific uncertainty is rarely high enough to prevent from carrying out a risk assessment and rarely affects the capacity to reach concrete decisions, especially as it is always possible to adopt provisional measures, without having to take a yes or no immediate and final decision”.<sup>43</sup>

So far, there are two constituent parts defined regarding the precautionary principle – the potentiality of the risk and the risk to be assessed in the decision-making process. Possessing this information, the political decision whether to act or not shall be triggered. It shall take into account the potentially negative effects of a phenomenon through a thorough scientific examination of the data relevant to the risks. It shall be followed by the scientific evaluation of the potential adverse effects, including the extent of possible damage, persistency, reversibility and delayed effect, having in mind the possible scientific uncertainty existing in relation to each of these components.<sup>44</sup> However, it shall be kept in mind, that uncertainty itself does not justify regulation of an uncertain risk.<sup>45</sup>

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<sup>41</sup> Case C-192/01 (n 28) §48.

<sup>42</sup> Christine Noiville (2010), *Science in Precautionary Measures. A Synthesis of ECJ and WTO case law*, CNRS, 6 June 2010, p. 3.

<sup>43</sup> *ibid* 4.

<sup>44</sup> COM (2000) 1 final (n 23) 13.

<sup>45</sup> Richard B. Stewart (n 16) 28.

The CJEU has maintained that “a correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of processing aids, and secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research”.<sup>46</sup>

The third constituent part of the precautionary principle is an obligation to obtain scientific evidence to base the political decision on. Thus, in a situation in which the precautionary principle is applied, a risk assessment cannot be required to provide the [Union] institutions with conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality.<sup>47</sup> It is acknowledged that it is not possible in all cases to complete a comprehensive assessment of risk.<sup>48</sup> “If it was necessary to wait until the research was completed before adopting such measures the precautionary principle would be rendered devoid of purpose”.<sup>49</sup>

It shall be kept in mind that “the precautionary principle does not replace or challenge a rational, scientific procedure. It can be implemented only if scientific data show serious risk, and the measures adopted must include new evaluations to permit their adaptation”.<sup>50</sup>

Though the EU Institutions are required to carry out technical and scientific assessment, based on their responsibility,<sup>51</sup> and especially needs to be noted that it needs to be

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<sup>46</sup> Case C-333/08 *European Commission v. French Republic*, 28 January 2010, §92; Case C-77/09 (n 34) §75; Case C-236/01 (n 27) §113; Case C-192/01 (n 28) §51; Case C-41/02 *Commission v. Netherlands* [2004] ECR I-11375, §53; Case C-343/09 (n 34) § 60.

<sup>47</sup> Case T-13/99 (n 2) §142.

<sup>48</sup> COM (2000) 1 final (n 23) 13.

<sup>49</sup> Case T-177/02 *Malagutti-Vezinhet SA v. Commission of the European Communities* [2004] ECR II-3495, §54; Case T-13/99 (n 2) §142, 386-387.

<sup>50</sup> Christine Noiville, Frederic-Yves Bois, Philippe Hubert, Reza Lahidji, and Alain Grimfeld (2006), “Opinion of the Committee for Prevention and Precaution about the Precautionary Principle”, *Journal of Risk Research*, Vol. 9, No. 4, June 2006, p. 292.

<sup>51</sup> Case T-13/99 (n 2) § 154.

done before any preventive measures are taken.<sup>52</sup> Further in the reasoning, the General Court defines a scientific risk, which needs to be evaluated while applying the precautionary principle: “a scientific risk assessment is commonly defined, at both international level [...] and [Union] level [...], as a scientific process consisting in the identification and characterisation of a hazard, the assessment of exposure to the hazard and the characterisation of the risk”.<sup>53</sup> It was also complemented by the CJEU in the *Gowan’s* case<sup>54</sup> that a comprehensive assessment of the risk to health shall be based on the most reliable scientific data available and the most recent results of international research.

However, a preventive measure cannot be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified.<sup>55</sup> It follows that “a preventive measure may be taken only if the risk, although the reality and extent thereof have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken”.<sup>56</sup> In the *Monsanto* case<sup>57</sup> the CJEU held that if dangers are identifiable a more comprehensive risk assessment should be required, taking also into account the precautionary principle to be compatible with proportionality. For example, the CJEU has decided<sup>58</sup> that the EU Commission cannot be considered to have applied “the precautionary principle in a manifestly erroneous manner in attaching restrictions on use to the authorisation of that substance” in the light of evidence (put forward by certain Member States during the work of the Standing Committee on the Food Chain and Animal Health, as well as the

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<sup>52</sup> *ibid* § 155.

<sup>53</sup> *ibid* § 156.

<sup>54</sup> Case C-77/09 (n 34) § 75.

<sup>55</sup> Case T-13/99 (n 2) § 143; Case T-229/04 (n 37) § 161.

<sup>56</sup> Case T-13/99 (n 2) § 144.

<sup>57</sup> Case C-236/01 (n 27) § 129-136.

<sup>58</sup> Case C-77/09 (n 34) § 78-80.

Communication<sup>59</sup> from the Commission and other studies and reports on the question), which tends to show that there was still some scientific uncertainty regarding the assessment of the effects. It can only be examined whether the applied restrictive measures are consistent with the principle of proportionality.

It is very important to note that the results of the concluded scientific evaluation could result from the variable chosen, lack of data received or existing at the concrete moment, the measurements made, the samples drawn, the models used and the causal relationship employed, limitations in scientific understanding of causal relationships, the complexity of the circumstances to be analysed, and “trans scientific” gaps in the capacities of science.<sup>60</sup> It may also depend on existing data or lack of some relevant data as well as on qualitative or quantitative elements of the analysis.<sup>61</sup> The right to choose between the named uncertainties provide a wide discretion for the involved scientists or experts to base their opinion on, as well as to influence the desired outcome, which were already discussed in the Chapter “Collection and use of expertise”.

Having defined the scope of the risk to be assessed during the decision-making process when the precautionary principle is used, the General Court had set “the two complementary components of risk assessment: ascertaining what level of risk is deemed unacceptable and conducting a scientific assessment of the risks”.<sup>62</sup> One more of the constituent parts of the precautionary principle to be defined are the level or a margin of safety acceptable to the society.

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<sup>59</sup> Commission, “Community Strategy for endocrine disruptors: A range of substances suspected of interfering with the hormone systems of humans and wildlife” (Communication) COM (1999) 706 final.

<sup>60</sup> Richard B. Stewart (n 16) 3.

<sup>61</sup> COM (2000) 1 final (n 23) 13-14.

<sup>62</sup> Case T-13/99 (n 2).

Determining what level of risk is deemed unacceptable “it is for the [Union] institutions to define, observing the applicable rules of the international and [Union] legal orders, the political objectives which they intend to pursue within the parameters of the powers conferred on them by the Treaty”.<sup>63</sup> It has to be a political decision on the level of protection both the EU Institutions and/ or national competent authorities deem to determine as appropriate to the society. There is no dispute that a “zero-risk” could exist in the particular circumstances of each individual case when a preventive measure has to be decided upon, however the EU Institutions can legitimately decide to ensure a high level of environment, human health and consumer rights protection. “It is by reference to that level of protection that they must then, while dealing with the first component of the risk assessment, determine the level of risk — i.e. the critical probability threshold for adverse effects on human health and for the seriousness of those possible effects — which in their judgment is no longer acceptable for society and above which it is necessary, in the interests of protecting human health, to take preventive measures in spite of any existing scientific uncertainty”.<sup>64</sup>

It is also acceptable, that in some cases even a decision to do nothing may be a response in its own right, and decision-makers are not always expected to adopt final instruments designed to produce legal effects, which are subject to judicial review.<sup>65</sup> Even if scientific advice is supported only by a minority fraction of the scientific community, due account should be taken of their views, provided the credibility and reputation of this fraction are recognised.<sup>66</sup> As well as the possessed specific data cannot be only constituted by new scientific data from experimental trials, but also when a consensus within a community,

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<sup>63</sup> *ibid* § 150.

<sup>64</sup> *ibid* § 151.

<sup>65</sup> COM (2000) 1 final (n 23) 15.

<sup>66</sup> *ibid* 16.

reflected in reports by specialists, calls into question the effectiveness of a specific product to be used.<sup>67</sup>

In its decision,<sup>68</sup> the CJEU has supported the Commission's position that "the precautionary principle, which guides its actions, does not have the effect of obliging it to follow every scientific opinion without any power to carry out its own assessment, be it an opinion issued by a Member State body or by minority members of a Community working party", and has ruled against application of the precautionary principle. In conclusion it could be noted that there is "no coherent relationship in the judiciary's opinions on the appropriate relationship between scientific advice and the precautionary principle".<sup>69</sup>

The General Court has also highlighted that, although a full scientific risk assessment is not possible to be achieved, it shall not repel the competent public authority from taking preventive measures even at very short notice if necessary.<sup>70</sup> The competent public authority must therefore weigh up its obligations and decide either to wait until the results of more detailed scientific research become available or to act on the basis of the scientific information available.<sup>71</sup>

Returning back to experts role in the decision-making procedure by applying the precautionary principle, it shall be denoted that "where experts carry out a scientific risk assessment, the competent public authority must be given sufficiently reliable and cogent information to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts". Based on the received available risk assessment, even embodying scientific uncertainty, the received information must "enable the competent public authority to ascertain, on the basis of the best available scientific data and

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<sup>67</sup> Case C-221/10 P *Artegodan GmbH v. European Commission*, 19 April 2012, Opinion of AG Bot, § 97.

<sup>68</sup> Case C-1/00 *Commission of the European Communities v. French Republic* ECR [2001] I-10029, § 89.

<sup>69</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 48.

<sup>70</sup> Case T-13/99 (n 2) § 160.

<sup>71</sup> *ibid* § 161.



the most recent results of international research, whether matters have gone beyond the level of risk that it deems acceptable for society”.<sup>72</sup>

The final decision on the level of protection, as well as on the measures to be appropriate and necessary to prevent the risk from materialising, is taken by a political body, implementing its rights and obligations within the parameters of the powers conferred on them by the Treaty. The Union institutions are obliged to show that the contested regulation is adopted following as thorough a scientific risk assessment as possible, and as the result of this assessment the EU Institutions have available, sufficient scientific indications to conclude, on an objective scientific basis.<sup>73</sup> Notwithstanding, the basis for a decision is formed using a scientific evaluation of the particular circumstances of a present case by a committee of experts, which has to be provided with the factual questions which need to be answered before a competent institution can adopt a decision and assessed the probative value of the provided opinion.<sup>74</sup> The more detailed analysis of this issue is provided in the Chapter “Collection and use of expertise” and Chapter “External participation through comitology”.

Summarising the study of this principle, some substantive elements should be identified. The major attention is provided to the evaluation of a possible hazard or possessed/missing scientific data, which might be elaborated into the following components.

First, there should be identification of potentially negative effects, if there is a good reason to believe that harmful effects might occur, even if the likelihood of harm is remote.<sup>75</sup> Second, the precautionary principle might be applied if scientific uncertainty exists - resulted from the variable chosen, the measurements made, the samples drawn, the models used and the causal relationship employed. Third, if a scientific evaluation of a risk which because of

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<sup>72</sup> *ibid* § 162.

<sup>73</sup> *ibid* § 165.

<sup>74</sup> *ibid* § 198.

<sup>75</sup> Interdepartmental Liaison Group on Risk Assessment (n 5) 6.

the insufficiency of the data, its inconclusive or imprecise nature, makes it impossible to determine with sufficient certainty the risk in question,<sup>76</sup> the final decision-making should be left for the political decision-makers to be taken. As it was already mentioned, the final decision in no way should be taken based on scientific opinion.

So, in other words, whenever a situation is faced with potentially “dangerous effects deriving from a phenomenon, product or process have been identified, and preliminary scientific evaluation does not allow the risk to be determined with sufficient certainty, it is up to political decision-makers to judge what is an acceptable level of risk for society”.<sup>77</sup>

The European Commission believes and implements in its Communication<sup>78</sup> that the precautionary principle is particularly relevant to the management of risk and should start with a scientific evaluation and where possible, identify at each stage the degree of scientific uncertainty to be taken into consideration.

However, there is a controversy as to the role of scientific uncertainty in risk analysis, and notably as to whether it belongs under risk assessment or risk management. The European Commission considers that measures applying the precautionary principle belong in the general framework of risk analysis, because application of the precautionary principle is part of risk management, when scientific uncertainty involves a full assessment of the risk and when decision-makers consider that the chosen level of protection in the event of a potential risk (even if the risk cannot be fully demonstrated or quantified or its effects determined because of the insufficiency or inclusive nature of the scientific data) may be in jeopardy.<sup>79</sup>

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<sup>76</sup> COM (2000) 1 final (n 23) 15.

<sup>77</sup> Use of the precautionary principle (n 10) 6.

<sup>78</sup> COM (2000) 1 final (n 23) 13.

<sup>79</sup> *ibid* 12.

There is no doubt that the precautionary principle is mainly used for risk assessment and/or management, however “risk assessment must be conducted by independent specialist scientists or must at least be open to independent examination;” and “risk management is a matter for decision-makers, and it is also up to them to decide whether there is a need for recourse to the precautionary principle and how that principle is to be applied”.<sup>80</sup> In other words, the decision-makers mainly take responsibility at the second and third levels, that is, at risk management and risk communication levels – the first level is mainly left for the different participants to decide on the matter based on the available scientific information and providing fresh results needed to ensure ongoing objective risk assessment.

#### 5.4. APPLICATION OF THE PRECAUTIONARY PRINCIPLE

One more issue should be cautioned regarding the application of the precautionary principle – it is believed<sup>81</sup> that measures based on the precautionary principle must meet a series of conditions, including the position that this principle should be applied in conjunction with other fundamental principles, e.g. *the proportionality principle* (the appropriate level of protection must be envisaged, such as appropriate treatment, reduction of exposure, tightening of controls, adoption of provisional limits, recommendations for populations at risk, etc); *non-discrimination* – measures should not be discriminatory in their application; *consistency* – measures should be consistent with the measures already adopted in similar circumstances or using similar approaches; *examination of the benefits and costs of action and lack of action* (an economic cost/benefit analysis should be concluded when it is appropriate and feasible as well as taking into account non-economic considerations, such as the protection of health,

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<sup>80</sup> Use of the precautionary principle (n 10) 9.

<sup>81</sup> COM (2000) 1 final (n 23) 17-20.

having in mind that the protection of public health must take precedence over economic considerations<sup>82</sup>); *examination of scientific developments* – the measures shall be maintained as long as the scientific data remain incomplete, imprecise or inconclusive and as long as the risk is considered too high to be imposed on the society. It should also be noted that “regardless of its form, the precautionary measure chosen must be revisable and subject to periodic re-examination in the light of new scientific data”,<sup>83</sup> suggesting that “precautionary measures should have a temporary character before more thorough scientific evidence is collected (...) [and] additional evidence [is obtained] that is needed for a more objective risk assessment”.<sup>84</sup>

Though, it seems that there is no firm position regarding application of the precautionary principle – the Advocate General, quoting the Communication on the use of the precautionary principle of the European Commission, defines that “conclusive scientific evidence of the reality of risk is not required (...) even where cause for concern is based on preliminary scientific findings”,<sup>85</sup> however the next paragraph does not uphold this position: “not every claim or scientifically unfounded presumption of potential risk to human health or the environment can justify the adoption of national protective measures. Rather, the risk must be adequately substantiated by scientific evidence”.<sup>86</sup> Further, the opinion of the Advocate General does not provide the more detailed explanation, so it stays unclear whether “preliminary scientific findings” might qualify in a decision-making process or the risk “must be adequately substantiated by scientific evidence”. Nevertheless, “judges are more than ever repeatedly placed in a position where they have to check the scientific basis of such or such

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<sup>82</sup> Case T-177/02 (n 49), §54; Case T-13/99 (n 2) §456; Case T-392/02 *Solvay Pharmaceuticals BV v. Council* [2003] ECR II-4555, § 121;

<sup>83</sup> Christine Noiville, Frederic-Yves Bois, Philippe Hubert, Reza Lahidji, and Alain Grimfeld (n 50) 292.

<sup>84</sup> Christine Noiville (n 42) 4.

<sup>85</sup> Case C-236/01, opinion of AG Alber (n 27) §137.

<sup>86</sup> *ibid* § 138;

precautionary measure that is submitted to them – [...] the Courts are more and more drawn in the heart of experts’ battles, [...] where they are asked to verify if the contested measure is scientifically justifiable, if the state of scientific knowledge justifies this measure, if all relevant scientific data have been taken into account, or if weak data have been used as a simple alibi”.<sup>87</sup>

The General Court has set significant guidance as to how the rules of evidence should be interpreted taking into account the precautionary principle.<sup>88</sup> “The competent authority, when considering an application for authorisation of a medicinal product, in principle exercises its discretion in weighing up the benefits and risks of that medicinal product — reserving the right subsequently to revise its assessment of that benefit/risk balance in the light of new scientific data”.<sup>89</sup> The undertaking, which seeks for an initial authorization to market a medicinal product, in its turn, needs “to prove, first, the efficacy of the medicinal product and, second, its safety”.<sup>90</sup> It shall be emphasized that “in cases of scientific uncertainty reasonable doubts as to the efficacy or safety of a medicinal product are capable of justifying a precautionary measure cannot be treated as equivalent to a reversal of the burden of proof”.<sup>91</sup>

It shall also be noted that the shift in the burden of proof on risk has also been on criticism, as the requirement to prove that an activity or a product is “safe” depends on how safety and its proof is defined. It is suggested that regardless of “which party bears the ultimate [burden of proof] regarding safety, the standard of proof must be defined in a reasonable and workable fashion in order for a regulatory program to function successfully”,

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<sup>87</sup> Christine Noiville (n 42) 1-2;

<sup>88</sup> Paul Craig (n 19) 650.

<sup>89</sup> Cases T-74, 76, 83, 84, 85, 132, 137 and 141/00, *Artegodan GmbH v. Commission*, [2002] ECR II-4948, §187.

<sup>90</sup> *ibid* § 188.

<sup>91</sup> *ibid* § 191.

as in some cases the regulated party is better able to generate the relevant data, and in other instances, the regulator may have superior capacity.<sup>92</sup>

The burden of proof lies with the EU Commission, though the General Court has held that the precautionary principle is relevant in discharging this obligation. The EU Commission has enshrined the principle of *prior approval* or *fair notice* before the placing on the market of certain products, - it will no longer be the user, a private individual, a consumer association, citizens or the public authorities complaining about possible damage that will have to bring forth reasonable proof of the nature of a danger and the level of risk posed by a product or a process before a regulation is made. Rather it is up to the business community (the regulated) to carry out the scientific work needed to evaluate the risk and as a minimum should provide the information needed for a decision-making, and until it is not proved to the contrary, the legislator is not legally entitled to authorize the use of substances.<sup>93</sup>

One more criteria needs to be highlighted in this scope – whether and how costs are to be considered in making regulatory decisions. The European Commission has stated in its Communication that the precautionary principle incorporates the principle of proportionality, in that “[m]easures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists”.<sup>94</sup> The CJEU has supported the Commission’s position by stating that “[i]t is never possible to prove conclusively that (...) anything created by modern technology represents a zero-risk to public health now or that it will do so in the future. To apply such a test would quickly lead to the paralysis of technological development and innovation”.<sup>95</sup> The analysis of the taken decisions, based on the precautionary principle, it is possible to sum up that “[j]udges refrain

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<sup>92</sup> Richard B. Stewart (n 16) 35-36.

<sup>93</sup> Use of the precautionary principle (n 10) 10.

<sup>94</sup> COM (2000) 1 final (n 23) 18.

<sup>95</sup> Case T-13/99 (n 2) § 130.

from defining a risk threshold below which a precautionary measure would be considered unfounded”.<sup>96</sup>

## 5.5. THE PRECAUTIONARY PRINCIPLE IS A GENERAL PRINCIPLE OF EU LAW

It is believed<sup>97</sup> that the biggest supporter of this principle is the European Union. It has formally committed to implementing environmental policy in conformity with the precautionary principle. It might be affirmed, that EU Institutions have used this principle as a specific decision rule rather than “mere policy guidance”<sup>98</sup>. The first attempts were made in the 1992 Maastricht Amendments to the Treaty, which incorporated the principle in a new Article 130r (2) (later renumbered Article 174(2)), and now implemented in Article 191 of TFEU) with the same wording, stating that “[t]he community policy on the environment... shall be based on the precautionary principle and on the principles that preventive actions should be taken”. The quoted legal provision of the TFEU refers to the precautionary principle only in the context of environmental protection (similar to the definition, proposed by the Rio Declaration). However, a single mention in relation to a specific area is a very courageous decision to base a new general principle on.<sup>99</sup>

There are quite a number of various legal studies and other regulatory decisions, trying to explain the precautionary principle, as “the EU institutions generally provide no explanation or insight as to why the precautionary principle applies in that case and what it

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<sup>96</sup> Christine Noiville (n 42) 5.

<sup>97</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 2.

<sup>98</sup> Wybe Th. Douma (1996), *The Precautionary Principle*, taken from the European Environmental Law Webpage Dossier at T.M.C. Asser Institute, The Hague, The Netherlands; article has also appeared under the same title in the Icelandic legal journal *Útljótur* (Vol. 49, nrs. 3/4, p. 417-430).

<sup>99</sup> Paul Craig (n 19) 644.

specifically requires”.<sup>100</sup> The definition of the precautionary principle offered by EU courts does not contribute to a better understanding of the meaning of the latter. Thus, there is no clear definition of this principle provided by the EU Institutions.

The General Court has looked further for legitimization and stipulated that “environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities”,<sup>101</sup> meaning, that it should be closely integrated into other EU policies by extending the frames of application of the precautionary principle. It was acknowledged in the *Artegodan* case<sup>102</sup> that “although the precautionary principle is mentioned in the Treaty only in connection with environmental policy, it is broader in scope. It is intended to be applied in order to ensure a high level of protection of health, consumer safety and the environment in all of the [Union’s] spheres of activities”, by providing reference to the Article 174(1) (renumbered to Article 191(1) of TFEU), where it is implemented that despite a wide range of environmental protection, “Union policy on the environment shall contribute to pursuit of the following objectives: [...] protecting human health, prudent and rational utilisation of natural resources [...]”.<sup>103</sup>

Following this line, Article 191(1) of the TFEU implements that one of the objectives of environmental protection is public health. In order to ensure the requisite level of protection “a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”.<sup>104</sup> The same injunction to ensure high level of consumer protection is also implemented in Article 12 “consumer protection requirements shall be taken into account in defining and implementing other Union policies

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<sup>100</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 29.

<sup>101</sup> Article 11, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

<sup>102</sup> Case *Artegodan* (n 89) § 183.

<sup>103</sup> Case C-180/96 (n 29) § 100; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, § 64; Case T-13/99 (n 2) § 114.

<sup>104</sup> Article 168 paragraph 1 TFEU (n 101).



and activities” and Article 169 of TFEU aiming to integrate such protection into the definition and implementation of other Union policies.<sup>105</sup>

After recognizing this principle as a general principle of EU law, the General Court has also framed the obligation of its use. In the *Pfizer* case<sup>106</sup> it was emphasized that “under the precautionary principle the [Union] Institutions are entitled, in the interests of human health to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions, and they enjoy *a broad discretion*<sup>107</sup> in that regard”. Later decision in the *Artegodan* case<sup>108</sup> seems to limit “the level of protection chosen by the competent authority in the exercise of its discretion” to comply with “the principle that the protection of public health, safety and the environment is to take precedence over economic interests, as well as with the principles of proportionality and non-discrimination”. The further development of case law moves to a tighter direction – “the precautionary principle constitutes a general principle of [Union] law *requiring*<sup>109</sup> the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, consumer safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests”.<sup>110</sup>

The General Court has rendered the precautionary principle into an explicit general principle of EU law, drawing on cases where the CJEU had made implicit use of the precautionary principle.<sup>111</sup> This was first noticed when the CJEU has used this principle as an

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<sup>105</sup> Paul Craig (n 19) 644.

<sup>106</sup> Case T-13/99 (n 2) § 170.

<sup>107</sup> Emphasis added by the author.

<sup>108</sup> Case *Artegodan* (n 89) § 186.

<sup>109</sup> Emphasis added by the author.

<sup>110</sup> Case T-392/02 (n 82) § 121.

<sup>111</sup> Paul Craig (n 19) 642.

interpretive tool when construing a directive.<sup>112</sup> It shall be recalled that “the validity of a [Union] act cannot depend on retrospective assessment of its efficacy”, and it is “open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question”.<sup>113</sup>

Having in mind that the EU Institutions are granted the broad discretion of the Union legislature and also being required to ensure the high level of protection of human health which is to be ensured in the definition and the implementation of all Union policies and activities,<sup>114</sup> and the right of the CJEU to construe a secondary legal act using this principle as an interpretive tool, the importance of the precautionary principle is implemented in the Union secondary legislation as a concurrent part, for example, it is stated in a legal act that “the precautionary principle has been taken into account in the drafting of this Directive and must be taken into account when implementing it”.<sup>115</sup>

However, the more significant use of the precautionary principle was identified in the *BSE* case,<sup>116</sup> when the CJEU stated that “where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become apparent”.<sup>117</sup>

If the principle is left just as a principle, incorporated in soft law, it might stay vague without any restrictions. However attempts are being made for it to be translated into

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<sup>112</sup> Case C-6/99 *Association Greenpeace France v. Ministere de l'Agriculture and de la Peche* [2002] ECR I-1651, § 44.

<sup>113</sup> Case C-504/04 *Agrarproduktion Staebelow GmbH v. Landrat des Landkreises Bad Doberan* [2006] ECR I-681, § 38; Case C-189/01 *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren, Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v. Minister van Landbouw, Natuurbeheer en Visserij* [2001] ECR I-5693, § 84.

<sup>114</sup> Case C-504/04 (n 113) § 39.

<sup>115</sup> Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106, recital 8 (preamble).

<sup>116</sup> Case C-180/96 (n 29) § 99.

<sup>117</sup> Case T-13/99 (n 2) § 139; Case C-333/08 (n 46) § 91; Case T-392/02 (n 82) § 121-122; Case T-177/02 (n 49) § 54; Case C-504/04 (n 113) § 39; Case C-343/09 (n 34) § 62.

operational and binding rules,<sup>118</sup> in order to make it to achieve its purpose. “The decisions of the EU courts leave no doubt that the precautionary principle is a binding rule of law in the EU”.<sup>119</sup> Even though the CJEU did not explicitly mention the precautionary principle itself, “it was clearly implicit in the legitimization of protective measures when there was scientific uncertainty”.<sup>120</sup> Scientific uncertainty was also the core, allowing member states to set a threshold above which exposure to the material used poses a serious risk to humans, “given the present state of research, there is no evidence [...] to justify a conclusion”.<sup>121</sup> However, this principle does not predetermine the decision.<sup>122</sup>

As E.Fisher<sup>123</sup> has noted, “the explicit recognition of the precautionary principle within EU law has led to increased judicial emphasis on scientific method as a means of ensuring non-arbitrary decision-making”.<sup>124</sup> This will also mean a parallel increase in the need of expert advice to be involved into the process of forming EU policies and drafting legislative acts.

It can be assumed that the precautionary principle, being one of the general principles of the EU law, is used for the revision the legality of Union activities.

## 5.6. MEMBER STATES COMPLIANCE WITH THE PRECAUTIONARY PRINCIPLE

The European Union needs to deal with risk assessment of specific products or substances (measuring the risk associated with specific products/substances) and risk

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<sup>118</sup> C. Joerges, K.H. Ladeur and E. Vos (eds.) (1997), *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations*, Baden-Baden: Nomos Verl.-Ges., p.40.

<sup>119</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 37; Case C-318/98 (n 26) Opinion of AG Cosmas, § 33.

<sup>120</sup> Paul Craig (n 19) 643.

<sup>121</sup> Case C-473/98, *Kemikalieinspektionen v. Toolex Alpha AB*, [2000] ECR I-5681, § 45; joined cases 266/87 and 267/87 *Association of Pharmaceutical Importers* [1989] ECR 1295, § 22.

<sup>122</sup> Christine Noiville, Frederic-Yves Bois, Philippe Hubert, Reza Lahidji, and Alain Grimfeld (n 50) 293.

<sup>123</sup> Elisabeth Fisher (2007), *Risk Regulation and Administrative Constitutionalism*, Hart Publishing, p. 232-236.

<sup>124</sup> Paul Craig (n 19) 666.

management (deciding what to do about the risks which the assessment reveals). Hence, risk regulation sees “objective” scientific values intertwined with more normative considerations.<sup>125</sup> The acceptability of risks must therefore be weighed against normative values which are often strongly rooted in national traditions and cultures. Committee structures of risk regulation must therefore address the tensions arising from the opening up of markets on the one hand and the need to respond to “legitimate” regulatory concerns on the other.<sup>126</sup>

First of all, it should be identified that the applicable EU legislation has a prerogative right over national provisions, especially if Member States adopt regulations more protective than the community actions that themselves supposedly observe the precautionary principle.<sup>127</sup> “[A] Member State cannot unilaterally invoke the precautionary principle in order to maintain derogating national provisions. In an area where Member State legislation has been harmonised, it is for the [Union] legislature to apply the precautionary principle”.<sup>128</sup> However, “[...] in the absence of [Union] provisions, Member States are free to chose the modes of proof of the various matters defined in the directives which they transpose, provided that the effectiveness of [Union] law is not thereby undermined”.<sup>129</sup>

Another noteworthy criteria should be taken into account, is the level of responsibility of a Member State. The Opinion of the Economic and Social Committee on the use of the precautionary principle<sup>130</sup> states that “under this principle, the State must act in line with

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<sup>125</sup> Ellen Vos (1999), *Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies*, Oxford.

<sup>126</sup> C. Joerges (1997), “Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalised Governance Structures” in C.Joerges, K.-H. Ladeur and E.Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making. National Traditions and European Innovations* (Baden-Baden), p. 295-323.

<sup>127</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 43.

<sup>128</sup> Case C-3/00 *Denmark v. Commission* [2003], ECR I-2732, § 103.

<sup>129</sup> Cases C-418/97 and C-419/97 (joined) *ARCO Chemie Nederland Ltd v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [2000] ECR-4512, § 41.

<sup>130</sup> Use of the precautionary principle (n 10) 8.

certain hypotheses”, as the precautionary principle is only the State’s responsibility. The French Republic has argued<sup>131</sup> with the EU Commission that in accordance with the application of the precautionary principle, “it is for the Member States to establish the risk which the use of processing aids may pose, but they are not obliged to establish precisely and scientifically the existence of the risk which they pose”. It was supported by the CJEU that a Member State may “base justification on the precautionary principle where it proves impossible to determine with certainty the existence or the scope of the alleged risk”, though the Member State is obliged to show the existence of “the potentially negative consequences” and “a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research”.<sup>132</sup>

“The precautionary principle also makes the State responsible for abstention from action. Such failure to act jeopardizes the State’s own national procedures in relation to other EU and non-EU countries, which can then take advantage of the situation. The precautionary principle is a principle of action, not inaction”.<sup>133</sup>

Additionally, it should be emphasized that both primary and secondary Union law recognize the responsibility of Member States for human health and safety,<sup>134</sup> which are the core areas for the application of the precautionary principle. So, it is “for the Member States, in the absence of harmonisation and to the extent that there is still uncertainty in the current state of scientific research, to decide on the level of protection of human health and life they wish to ensure”.<sup>135</sup> It is also for the competent national authorities to carry out a new

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<sup>131</sup> Case C-333/08 (n 46) § 68.

<sup>132</sup> *ibid* § 92, 96.

<sup>133</sup> Use of the precautionary principle (n 10) 8.

<sup>134</sup> Ellen Vos (1999) “EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation”, *EU Committees: Social Regulation, Law and Politics*, Christian Joerges and Ellen Vos (eds.), Hart Publishing: Oxford-Portland, p.36.

<sup>135</sup> Case C-95/01 *Criminal Proceedings against John Greenham and Leonard Abel* [2004] ECR I-1352, §37; Case C-333/08 (n 46) § 85.

assessment of the benefit/risk balance of the substances in question in the light of the most up-to-date scientific data available at the time of that assessment.<sup>136</sup>

And the ensured broad discretion shall be complied with the principle of proportionality, to be more precise; the revealed degree of scientific and practical uncertainty influences the extent of the discretion of the Member State and thus has an impact on the means of applying the proportionality principle.<sup>137</sup>

Another difficulty lies in the left ambiguity and tension in the precautionary principle by the political authorities and regulators, who “enjoy a broad discretion” under the precautionary principle “to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions”.<sup>138</sup>

The General Court has stated that the decision will be affected by the general principles of judicial review, if this type of case will be taken to court to challenge: “the [Union] judicature is not entitled to substitute its assessment of the facts for that of the [Union] institutions, on which the Treaty confers sole responsibility for that duty”.<sup>139</sup> It has to limit itself to “ascertaining whether the exercise by the institutions of their discretion in that regard is vitiated by a manifest error or a misuse of powers or whether the institutions clearly exceeded the bounds of their discretion”.<sup>140</sup> And any determination of such errors must be made having in mind “that the assessment made by the [Union] institutions can be challenged only if it appears incorrect in the light of the elements of fact and law which were available to them at the time when the contested regulation was adopted”.<sup>141</sup> The Union judicature is not

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<sup>136</sup> Case T-147/00 *Les Laboratoires Servier v. Commission of the European Communities* [2003] ECR II-88, §52;

<sup>137</sup> Case C-333/08 (n 46) § 91.

<sup>138</sup> Case T-13/99 (n 2) § 170.

<sup>139</sup> *ibid* § 169.

<sup>140</sup> Case T-13/99 (n 2) §169; Case *Artegodan* (n 89) §201; Case C-221/10 P (n 67), Opinion of AG Bot, § 96.

<sup>141</sup> Case T-13/99 (n 2) § 324.

able to review “a large number of arguments of a scientific and technical nature, based on a large number of studies and scientific opinions from eminent scientists”.<sup>142</sup>

And the CJEU is also only granted a discretion to review “whether the Council, by adopting the Regulation, committed a manifest error of appraisal regarding the conditions for the application of Article 130r of the Treaty”<sup>143</sup> (now Article 191 of the TFEU) in order to keep a balance between certain objectives and principles – to be more precise, to keep the balance between the precautionary principle and the criteria identified in the same section, including “polluter pays” principle and the requirements to “take account” of “available scientific and technical data”, “the potential benefits and costs of action or lack of action”, and the “economic and social development of the [Union]”.<sup>144</sup>

Moreover, pursuant to the legal provision of Article 267 of the TFEU, “it will normally be for the national court to decide whether the conditions mentioned in the [CJEU’s] judgment were met. Thus it will be for the referring court to determine whether scientific data was taken into account when the national legislation was adopted, whether that data showed a real risk, and whether in the event of scientific uncertainty the precautionary principle justified the state action”.<sup>145</sup> The CJEU may only give guidance or preliminary ruling to some of these matters. And for the matters based on Article 258 of the TFEU – only the CJEU can make these assessments.

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<sup>142</sup> Case T-13/99 (n 2) § 323.

<sup>143</sup> Case C-341/95 *Bettati v. Safety Hi-Tech Srl*. [1998] ECR I-4359, § 35.

<sup>144</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 45.

<sup>145</sup> Paul Craig (n 19) 656.

## 5.7. CONTROVERSY ON THE USE OF THE PRECAUTIONARY PRINCIPLE

Even though the EU Commission “represents the most detailed description of the precautionary principle by any official government body anywhere in the world to date”,<sup>146</sup> there are still some serious limitations to be mentioned, such as serious lack of a more specific interpretation of the precautionary principle, as well as no “clear, usable factors or criteria to determine when the precautionary principle applies or when it does not”.<sup>147</sup> It is believed that “the Commission Communication provides only limited guidance”.<sup>148</sup> This position is mainly supported by G.Majone,<sup>149</sup> arguing that the “precautionary principle is deeply ambiguous”, which is “abetted by a lack of clear definitions and sound logical foundations”, embodying a defective decision-making logic in the official institutional documents.

However, the precautionary principle has been criticized on a number of grounds including its potential for overregulation of insignificant or even nonexistent risks, its disregard for scientific evidence, and its failure to adequately consider the economic costs and risk-risk trade-offs inherent in risk regulation”.<sup>150</sup> G.Majone maintained that the EU Commission has failed in its Communication to consider the costs of precautionary measures, such that “the attempt to control poorly understood, low-level risks necessarily uses up resources that in many cases could be directed more effectively towards the reduction of well-known, large-scale risks”.<sup>151</sup> However, the EU Commission does not assess “the substantial uncertainties regarding the costs of prohibiting or otherwise regulating the activity in

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<sup>146</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 25.

<sup>147</sup> *ibid* 26.

<sup>148</sup> Paul Craig (n 19) 662.

<sup>149</sup> Giandomenico Majone (2002), *What Price Safety? The Precautionary Principle and its Policy Implications*, *Journal of Common Market Studies* 40 (1), p. 90;

<sup>150</sup> Gary E. Marchant and Kenneth L. Mossman (n 6) 1.

<sup>151</sup> Giandomenico Majone (n 149) 101.



question”.<sup>152</sup> It is believed that the attention of regulators is mainly focused on only particular events and losses concerned, rather than the entire picture.<sup>153</sup> This may also be a “side-effect” of the provided expert advice, which is focused only to one specific risk in the field of the expert’s competence, which makes difficult to see a wider picture, covering various fields of science.

E.Fisher<sup>154</sup> notes, “those who promote the precautionary principle tend to argue that regulatory regimes that place too much faith in scientific method and crude understandings of acceptable risk are inadequate to deal with the challenges created by scientific uncertainty.” “Even if regulators do have some ability to discriminate among uncertain risks of varying magnitude, they will fail to impose adequate regulatory requirements on activities that pose significant risks of harm as a result of institutional capacities and incentives, as well as political pressures”.<sup>155</sup>

Opponents of the precautionary principle argue that “in practice the precautionary principle will block economic initiative and all scientific and technological innovation; at the end of the day, it would cost the society dearly”.<sup>156</sup> This is supported by the fear that “considerable resources will be spent to protect against risks that may turn out to be negligible, while other risks, better known and much more serious, may not receive adequate attention”.<sup>157</sup> However, a study, made by the European Environment Agency, was not able to find any examples in which significant additional costs resulted from a negligent application of the precautionary principle.<sup>158</sup>

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<sup>152</sup> Richard B. Stewart (n 16) 3.

<sup>153</sup> Giandomenico Majone (n 149) 103.

<sup>154</sup> Elisabeth Fisher (n 123) 44.

<sup>155</sup> Richard B. Stewart (n 16) 32.

<sup>156</sup> Christine Noiville, Frederic-Yves Bois, Philippe Hubert, Reza Lahidji, and Alain Grimfeld (n 50) 289.

<sup>157</sup> *ibid* 290.

<sup>158</sup> European Environment Agency (2001), *Late Lessons from Early Warnings: the Precautionary Principle 1896 – 2000*, Luxembourg: Office for Official Publication of the European Communities.

The main criticism on the use of the precautionary principle is the notion that there is an inadequate establishment of the probability and extent of the risk to be regulated and that the indefinite “possible risk” requires “a certain threshold of scientific plausibility”.<sup>159</sup> The need for establishment of safety limits was also favoured and supported by the CJEU, which has ruled that without setting the upper safe limits, a regulated measure may only be justified in accordance with the precautionary principle, if a scientific risk assessment reveals that scientific uncertainty persists as regards the existence or extent of real risks to human health.<sup>160</sup>

However, it is quite popular with the mere fact of uncertainty in the risks of activity to justify the automatic introduction of an additional and extreme degree of risk aversion in a decision-making process.<sup>161</sup> Due to that, the application of the precautionary principle is socially undesirable regulatory result, as it leads to unnecessarily stringent and costly regulation in most of the cases as well as to a disproportionate allocation of limited regulatory resources to those activities which may never eventuate in significant harm. The precautionary principle is also “incapable of dealing with risk-risk tradeoffs and setting intelligent regulatory priorities”.<sup>162</sup>

There is not much discussion regarding the potential causes of the uncertainty, which might be raised due to “lack of data, limitations of scientific understanding of causal relationships, medical and eco-system complexity, and “trans scientific” gaps in the capacities of science”.<sup>163</sup> R.B.Stewart does not even believe in the predictive capacity of the science at

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<sup>159</sup> Cass R. Sunstein (2003), *Beyond the Precautionary Principle*, University of Pennsylvania Law Review, Vol. 151, p. 1018.

<sup>160</sup> Case C-446/08 *Solgar Vitamin’s France and Others v. Ministre de l’Economie, des Finances et de l’Emploi and Others*, 29 April 2010, § 73.

<sup>161</sup> Richard B. Stewart (n 16) 28.

<sup>162</sup> *ibid* 29.

<sup>163</sup> Tim O’Riordan, James Cameron and Andrew Jordan (n 15) 23-24.

all, as science has often been unable to predict the occurrence of serious environmental harms (e.g. asbestosis or stratospheric ozone depletion).<sup>164</sup>

There is no much consideration regarding “cases in which the views of experts are sharply divided, for example on issues such as the ecological effects of widespread application of GMO crop plants”.<sup>165</sup>

It shall be noted that critics of the precautionary principle do not want to diminish or waive the precautionary principle. There are a number of suggestions, how it could be used in order to avoid the disadvantages it has. If a scientific uncertainty exists, a regulator “may justify an initial decision to prohibit an activity or to allow it to proceed only under certain limitations in order to gather information that will enable regulators to revisit the decision in the future with the benefit of the additional information”, “provided that affirmative steps are taken to develop the new information so as to permit timely reconsideration of the regulatory decision with the benefit of such information”.<sup>166</sup> Although the later amendments get authorized and a regulatory program is undertaken, “it becomes very difficult alter to eliminate or relax the program even though it is no longer justified”.<sup>167</sup>

There is also an opinion<sup>168</sup> that uncertainty and the related risks shall be regulated under the same decisional framework as well-defined risks. In case of uncertainty, decision-makers usually collect available evidence, scientific theory, expert judgements, and guidance from analogous regulatory problems and experience with them, so using this data they may resolve the existing uncertainty as best as it is possible in this situation, and treat the received results equivalent to risks where the probability distribution is well known.

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<sup>164</sup> Richard B. Stewart (n 16) 12.

<sup>165</sup> *ibid* 21.

<sup>166</sup> *ibid* 15.

<sup>167</sup> *ibid* 39.

<sup>168</sup> *ibid* 14.

Another very important consideration which shall be taken into account is the limitations imposed by the political process on their budgets and authority and on other regulatory resources, which has a direct link to the number of risks that can be taken into account and the intensity of such regulations.<sup>169</sup>

## 5.8. CONCLUSIONS

The aim of this Chapter was to identify the place of the precautionary principle in the EU policies, activities and legislation. It also aimed to analyse how the use of this principle may influence the collection and use of expertise. The idea of the principle was taken from the German national law as well as from international environmental agreements and treaties. The principle targeted activities raising threats of harm to human health or the environment without an affirmative duty to act at the very beginning; later getting imposed a positive obligation to act. It is believed that the biggest supporter of this principle is the European Union, as it has developed it into the general principle of EU law, leaving to define the constituent parts to the Union Institutions. The analysis of the EU policy documents and the case law has rectified the following constituent parts of the precautionary principle:

- the decision, based on the precautionary principle, has to be in the interest and protection of environment, human health and consumer safety;
- there shall be reasonable grounds for potentially dangerous effects;
- the decision needs to be taken on the basis of as yet inconclusive, insufficient or uncertain scientific data though a preventive measure cannot be based on a purely

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<sup>169</sup> *ibid* 18.

hypothetical approach – it needs to be backed-up by the most reliable scientific data available or most recent results of international research;

- the final decision ought to be taken by a political body rather than by a scientific one;
- the EU Institutions enjoy a broad discretion regarding the application of the precautionary principle though they are required to prevent specific potential risks to public health, consumer safety and environment by giving precedence over economic interests;
- the level of protection deemed to be appropriate to the society – “margin of safety”, though it cannot be expected that a “zero-risk” may exist in the decision-making process.

The precautionary principle is considered in a structured manner, and the Courts of the EU have established that the decision-making shall be based on the most reliable scientific data available. It has to be done at the “risk assessment” stage where external and independent scientific expertise is mainly involved. Political bodies shall entrust a scientific risk assessment to experts who shall provide sufficiently reliable and cogent information to base a political or regulatory decision upon. Though, the final decision shall be taken only by a political body.

It can be assumed that scientific expertise and advice is obligatory to be obtained whenever there are reasonable grounds for concern, though EU Institutions are not obliged to follow every scientific opinion without any power to carry out its own assessment. It means that there is no coherent relationship between scientific advice and the precautionary principle – EU Institutions have a broad discretion to refuse to accept and implement the provided scientific advice without even being challenged at the Courts of the EU. There is also another

risk regarding involvement of scientific expertise is the setting of a certain threshold of scientific plausibility.

It was also considered in this Chapter that the results of the concluded scientific evaluation may be influenced by the chosen methods to be used for collection of expertise and scientific advice. There might be cases where the provided scientific advice may be opposed by a completely opposite expert view - there are not many considerations regarding such situations. The EU policy documents and guidelines which were discussed in this Chapter identify it as a risk, though there is no solution how to deal with the situation where the provided scientific advice has a completely opposite expert view. It seems that EU Institutions do not deal with such situations, so in some cases it may raise suspicion that the Commission and other EU Institutions as well tend to avoid conflict of expert views collecting and using expertise.

The defined main constituent parts of the precautionary principle seem to ease the application process, though there is a lot of criticism towards the principle itself and the set guidelines by the EU Commission. First of all, there are no explicit criteria on application of the precautionary principle. The criteria are still left to be decided by the Community judicature or the EU Institutions, so the decision-making process in the future may still be vague and each time leaving a place for a challenge.

Another issue to be criticised is the failure to adequately consider the economic costs and ability to deal with the risk-risk trade-offs. The EU Commission has been continuously attacked for its attempt to control risks of using up the allocated limited resources without clearly defining the level of risk which is appropriate for the society. By taking such a position, it may get depleted in face of well-known large-scale risks.

The EU Commission is not ready either to deal with scientific uncertainty. Both the Communication<sup>170</sup> on the precautionary principle and the Communication<sup>171</sup> on the collection and use of expertise have not considered circumstances whether they are adequate to deal with the challenges created by scientific uncertainty. There is no discussion regarding the costs of prohibition or a possibility to take an alternative decision regarding an activity to be considered.

The main issues, which were raised in the previous Chapter “Collection and use of expertise” and this one, will be used in analysing the involvement of external expertise in the drafting phase of delegated and implementing acts conferred on the Commission and especially emphasizing the comitology framework.

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<sup>170</sup> COM (2000) 1 final (n 23).

<sup>171</sup> COM (2002) 713 final (n 1).

## **VI CHAPTER**

### **EXTERNAL PARTICIPATION IN THE EU DECISION-MAKING PROCESS THROUGH MULTI-LEVEL GOVERNANCE**

#### **6.1. INTRODUCTION.**

The new developments at EU level, initiated and supported or sometimes, even required, by Member States make a new turn in EU policies. The first attempts to formalize and regulate the structure of EU governance and its legal regulation dates from the Maastricht Treaty in 1992. The attempt was not completely successful. However, multi-level partnership or multi-level governance has not disappeared from academic discussions and publications; these will be analysed further in this Chapter. However, the rapid changes in public life lead to the appearance of new forms of governance as does the dispersion of decision making away from the centralised decision-making bodies into multiple centres of authority. Centralising national authorities in a



European super-state is not on agenda, but still pro-Europeans support a more coherent system of governance.

This approach could help to increase the degree of regulatory harmonisation and reduce the possibility of Member States restrictions. On the other hand, multiple enforcements are likely to lead to more innovation in the interpretation and application of the law. This may have been the impulse for the reforms of the Treaty of Lisbon<sup>1</sup> - to be more precise, the new task of the national parliaments' to "contribute actively to the good functioning of the Union."<sup>2</sup> This is done by getting national Parliaments to perform a subsidiarity check.

Based on this, the Chapter will focus mainly on defining multi-level governance as a new form of governance in the EU and on determining ways to promote external participation in various phases of the decision making process. On the other hand, the research will aim to establish whether the instruments established by the EU institutions have any legal power in the decision-making process; or are they just a political instrument for declaring the existence of a vague participation and representation of external participants.

The analysis will start by defining multi-level governance and identifying its constituent parts. This will play a key role in forming the paths for more effective participation in the decision-making process. Having identified key actors and techniques, the analysis will attempt a typology of participation through the newly formed governance. The types of governance are based on the identification of new possible forms of participation and their legal enforcement. The analysis will also focus on the different nature of multi-level participation in comparison with participation at the EU level.

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<sup>1</sup> Consolidated Versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union [2012] OJ C 326.

<sup>2</sup> Article 2 TEU.

## 6.2. DEFINITION OF MULTI-LEVEL GOVERNANCE.

The complexity of problems, the need for new knowledge and the diverse settings of all twenty-eight Member States, has led to the creation of new forms of policy making such as power sharing, participation, management by objectives and experimentation.<sup>3</sup> It is also influenced by traditional conception of law, which posits hierarchies, and places courts at the centre of systems of accountability as well as makes a clear distinction between rule making and rule implementation. While the new approach posits heterarchy, looks outside of the courts to secure real accountability and accepts new challenges for the resolution of unexpected problems.

To begin with, it should be mentioned that “governance” is not a legal term.<sup>4</sup> The United Nations Commission on Global Governance suggests a vague definition of “governance”, stating that “governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest”.<sup>5</sup> Another possible identification is suggested by C.F. Sabel and J. Zeitlin,<sup>6</sup> stating that “governance is not a political rule through responsible institutions, such as parliament and democracy – which amounts to

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<sup>3</sup> R.A.W. Rhodes (1997), *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Open University Press.

<sup>4</sup> Rainer Nickel (2006), “Participatory Governance and European Administrative Law: New Legal Benchmarks for the New European Public Order”, European University Institute, Working Paper LAW No. 2006/26, p. 2.

<sup>5</sup> Commission on Global Governance, published 22 December 2001, <http://web.archive.org/web/20011222021819/www.cgg.ch/chap1.html>, accessed 3 May 2009.

<sup>6</sup> Charles F. Sabel and Jonathan Zeitlin (2008), “Learning from Difference: The New Architecture of Experimentalist Governance in the EU”, in *European Union Journal*, Vol. 14, No. 3, May 2008, p. 274.

government – but innovative practices of networks, or horizontal forms of interaction”. This “horizontal form of interaction” is developed into the regional participation and governance, which will be discussed later in the Chapter. The new form of governance might be also defined as a response to major political, economic and social changes, including globalization, Europeanization, urbanization, and could be described as a “system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional and local”,<sup>7</sup> changes to the composition, orientation and sophistication of citizens.<sup>8</sup>

An understanding of the system of governance itself is necessary to clarify both the organisational and structural choices. In fact, it is not clear which legal mechanisms and/or standards should be applied to the EU governance techniques, structures and decisions, as they are neither rooted in a single legal source or structure, nor are they formed or implemented by a single administrative entity, be it the Commission, or the national administrations,<sup>9</sup> especially as national governments and administrations are made accountable through the work of the courts and the application of the Rule of Law. It should also be noted that the legitimacy of the European governance seems “more dependant on its transparency, the integration and participation of affected interests, rather than on the judicial control by courts”.<sup>10</sup> Whatever the legal form that the present the EU governance possesses, “an integrated administration does not threaten the very existence of the EU Member States, [as they are] of an evolutionary nature and

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<sup>7</sup> Gary Marks (1993), “Structural Policy and Multilevel Governance in the EC”, in *The State of the European Community*, eds. Alan Cafruny and Glenda Rosenthal; Boulder: Lynne Rienner, pp. 391-411; and Liesbet Hooghe (ed.) (1996), *Cohesion Policy and European Integration: Building Multi-Level Governance*, Oxford: Oxford University Press.

<sup>8</sup> B. Denters and L.E. Rose (2005); “Local Governance in the Third Millennium: a Brave New World?”, in B. Denters and L.E. Rose (eds.) *Comparing Local Governance*; Basingstoke: Palgrave, pp. 1-11.

<sup>9</sup> Rainer Nickel (n 4) 6.

<sup>10</sup> Herwig C.H. Hofmann and Alexander Turk (2006), “Constitutionalising Governance? The Case of Europe’s Integrated Administration”, in *An Introduction to EU Administrative Governance*, Cheltenham: Edward Elgar, p. 8.

represent a patchwork, rather than a coherent structure, and this holds especially true with regard to institutional structure, with its sometimes confusing variety of European Agencies and Comitology committees.”<sup>11</sup>

So, the aim of this part of the Chapter is to identify the place and the structure of the new kind of the governance and its constituent parts; this in turn will help to identify the place of external participants at the local and regional level.

### 6.3. EU GOVERNANCE V. NATIONAL GOVERNANCE STRUCTURES.

First of all, it would be convenient to distinguish all the possible modes of governance in EU from the perspective of power, and to define how different institutional and external actors share the decision-making power in the process. J. Weiler<sup>12</sup> suggests three modes of governance:

- 1) intergovernmental or international, where the key players are the States, and governments are the principal actors with the privileged power, focusing on negotiation, intergovernmental bargaining and paying less attention to institutionalisation;
- 2) supranational, originating from public law and comparative constitutionalism and forming the most structural, formal and rule-bound mode of governance, where the key powers are provided for State governments, including legislative and judicial branches; and Union institutions, which are critical actors and fora of decision-making;

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<sup>11</sup> Rainer Nickel (n 4) 10.

<sup>12</sup> J.H.H. Weiler (1999), “The Constitution of Europe. “Do the new clothes have an emperor?” and other essays on European integration”; article title: *European democracy and its critics: polity and system*, Cambridge University Press, p.271.

- 3) and infranational mode of governance comes from domestic policies and regulatory states, where different level of actors both at the European Union and a Member State level – administrations, departments, private and public associations, corporate and interest groups are involved.

The supranational and infranational modes of governance are closely interlinked with the regional and local representation as well as to external participation, which are the core of this Chapter.

The Commission has been aiming to enhance its credibility, which shall be judged by “its ability to add value to national policies and address people’s concerns more effectively at European and global level”.<sup>13</sup> In order to form an “adequate interaction in a multi-level partnership; a partnership in which national governments involve their regions and cities fully in European policy-making”,<sup>14</sup> the Commission needs to ensure that “regional and local knowledge and conditions are taken into account when developing policy proposals”.<sup>15</sup> The EU Commission is often criticised that it does not fully exploit the role of regions and cities as an elected and representative channel interacting with the public on EU policy.<sup>16</sup> Though, “[t]he principal responsibility for involving the regional and local level in EU policy remains and should remain with national administrations”.<sup>17</sup>

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<sup>13</sup> White Paper: European Governance, COM (2001) 428 final, p. 9.

<sup>14</sup> *ibid* 12.

<sup>15</sup> *ibid* 13.

<sup>16</sup> *ibid* 12.

<sup>17</sup> *ibid*.

It may also be linked to the decision taken by the CJEU in the case *Regione Toscana*,<sup>18</sup> where it was concluded from the general scheme of the Treaties that the term “Member State” for the purpose of the institutional provisions refers only to government authorities of Member States and does not include the governments of the regions or autonomous communities: “(...) it would undermine the institutional balance provided for by the Treaties, which determine the conditions under which the Member States, that is to say the States party to the Treaties establishing the [Union] and the Accession Treaties, participate in the functioning of the [Union]”.<sup>19</sup> It means that the Commission is not empowered to oblige Member States to involve regional and local authorities in the EU decision-making process. It neither has the power to impose on Member States uniform rules of territorial development governance. The Commission shall provide enough space for regional and local authorities to create rules and adjust them to regional peculiarities.<sup>20</sup> If a “higher” government tries to impose any rules downwards, it can face a resistance from domestic actors seeking to redefine the imposed requirements.<sup>21</sup> As Member States enjoy broad policy discretion in the implementation of directives, they are also constrained in terms of the manner in which they exercise their implementation choices through consultation requirements, reporting obligations and transparency concerns.<sup>22</sup>

Furthermore, the need for participation of Member States stems from the specific character of the EU. The European Union is not a state.<sup>23</sup> Instead, it can be identified as a system

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<sup>18</sup> Case C-180/97 *Regione Toscana v Commission of the European Communities* [1997] ECR I-5247.

<sup>19</sup> *ibid* § 6.

<sup>20</sup> Laszlo Bruszt (2007), “Multi-level governance – the Eastern versions emerging patterns of regional developmental governance in the new member states”, Department of Political and Social Sciences of the EUI working papers, SPS 2007/13; p. 6.

<sup>21</sup> Case C-23/75 *Rey Soda v. Cassa Conguaglio Zuccheri* [1975] ECR I-1279, § 9.

<sup>22</sup> Joanne Scott and David M. Trubek (2002), “Mind the Gap: Law and New Approaches to Governance in the European Union” in *European Law Journal*, Vol. 8, No. 1, March 2002, p. 2.

<sup>23</sup> G.F. Mancini (1998), “Europe: The Case for Statehood”, in *European Law Journal*, Vol. 4, 29-42.

of multi-level or transnational governance. In such a system, governance with a non-hierarchical structure can only be accomplished through co-operation among power holders, which are both Member States and the EU institutions.<sup>24</sup> The multi-level approach perceives decision-making at different levels of government and with shifting fields of competence.<sup>25</sup> It appears to be compatible with the conservation of national administrative powers and the assumption of national powers by the EU.

If the elected representatives are obliged to use the instruments that are monitored by national administrations, the involvement of non-elected external participants is reserved to the EU institutions at EU level. This process was developed as a response to the changes of participation, representation and sophistication of EU citizens. It encourages participation of civil society in policy making, sometimes even offering a greater degree of power sharing as it is believed that policy making is a process of mutual problem-solving among stakeholders from government and the private sector, and from different levels of government, rather than autonomous regulation. This core feature is more effective in cases, where individuals who share some geographical or functional space and who have a common need for collective decision-making can be a member of several such groups.

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<sup>24</sup> C. Joerges and J. Neyer (1997), "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology", in *European Law Journal*, Vol. 3, 273-299.

<sup>25</sup> J.G. Marks, L. Hooghe, K. Blank (1996), "European Integration from the 1980s: State Centric vs. Multi-level Governance", in 34 *JCMS*, 341 – 378; and D.Curtin, "Civil Society and the European Union: Opening Spaces for Deliberative Democracy" in *Collected Courses of the Academy of European Law*, vol. 7, book 1 (Florence 1999), 185 – 280.

### 6.3.1. Supranational governance.

The Treaty of Lisbon introduced a major innovation in the EU decision-making process by equipping national parliaments with a *de facto* power to veto the Commission's legislative proposals before they are subject to adoption by both legislative bodies, - the Parliament and the Council.<sup>26</sup> Article 12 TEU specifies that the main engagement of national parliaments' in the EU is to "contribute actively to the good functioning of the Union". It may take the following forms: national parliaments are informed by the EU institutions, have access to all draft legislative acts of the Union,<sup>27</sup> and enjoy the right to influence the EU decision-making process at an early stage.

National parliaments may also establish subsidiarity checks on the basis of their own laws and procedures and communicate this information to the EU institutions within eight weeks. However, Protocol No. 2<sup>28</sup> does not provide a precise definition of subsidiarity, it can be worked out either by the national parliaments themselves or agreed with the Commission. Additionally, "there is a lack of clarity regarding the potential procedures for monitoring subsidiarity in the later stages of negotiations when the draft law enters the decision-making process in the Parliament and the Council".<sup>29</sup> Of course, the right to challenge EU laws before the CJEU on the basis of a breach of subsidiarity principle is available.<sup>30</sup>

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<sup>26</sup> Joint Study *The Treaty of Lisbon: A Second Look at the Institutional Innovations* (prepared by CEPS, EGMONT and European Policy Center, September 2010), <[www.epc.eu/documents/uploads/pub\\_1150\\_epc\\_egmont\\_ceps\\_-\\_treaty\\_of\\_lisbon.pdf](http://www.epc.eu/documents/uploads/pub_1150_epc_egmont_ceps_-_treaty_of_lisbon.pdf)> accessed 16 April 2012, p.109.

<sup>27</sup> Article 12 paragraph (a) TEU and Treaty of Lisbon (n 1) Protocol No. 1.

<sup>28</sup> Treaty of Lisbon (n 1) Protocol No. 2.

<sup>29</sup> Joint Study *The Treaty of Lisbon* (n 26) 113.

<sup>30</sup> Treaty of Lisbon (n 1) Article 8 of the Protocol No. 2.



It is expected that the more active involvement of national parliaments in the EU decision-making process from the drafting phase should enhance the legitimacy of the EU laws.<sup>31</sup> Moreover, the new mechanism creates additional possibilities for both regional and local representatives and external participants to get involved at the early stage of the EU decision-making process through the national bodies – either actively lobbying a national parliament or getting involved in activities of scrutiny of a draft legislation run by a national government.

Supranational governance could also cover the possibility for each Member State to choose the jurisdiction to which it would belong,<sup>32</sup> as the “European governance extends to the field of legislation to a much higher degree than governments do within the framework of the nation-state, especially in the form of the Comitology structure and the emerging concepts of regulation following the Lamfalussy procedure.”<sup>33</sup> The latter procedure is composed of four levels, each focusing on a specific stage of the implementation of legislation and is more linked to implementation of technocratic details and standards. The choice of jurisdiction is usually analysed on the grounds of the terms of supply and demand for jurisdictions, which might be conceived as “voluntary coalitions for financing, choosing, and enjoying excludable public goods”,<sup>34</sup> which leads to a basic postulate that “dispersion of governance across multiple jurisdictions is more flexible than concentration of governance in one jurisdiction”.<sup>35</sup>

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<sup>31</sup> Joint Study *The Treaty of Lisbon* (n 26) 118.

<sup>32</sup> Liesbet Hooghe and Gary Marks (2003), “Unravelling the Central State, But How? Types of Multi-Level Governance”, in the *Political Science Series*, Department of Political Science at Institute for Advanced Studies, Vienna; p.1.

<sup>33</sup> Rainer Nickel (n 4) 7.

<sup>34</sup> Alessandra Casella and Barry R. Weingast (1995), „Elements of a Theory of Jurisdictional Change“, in *Politics and Institutions in an Integrated Europe*, ed. Barry Eichengreen, Jeffrey Frieden and Jurgen von Hagen; New York/Heidelberg: Springer Verlag, p. 15.

<sup>35</sup> Liesbet Hooghe and Gary Marks (n 32) 5.

Governments, which focus on *function – specific policy regimes* by providing a particular local service (managing a local pool resource, setting a technical standard, managing an urban service, or shipping hazardous waste), could be identified as another form of the new governance. The number of created jurisdictions in such a governance system is potentially vast, varying highly on demand for governance change. Jurisdictions in this alternative multi-level form are the opposite – they operate at numerous territorial scales, in which they are task-specific and flexible. This is kind of governance system where “each citizen is served not by “the government, but by a variety of different public service industries (...). We can then think of the public sector as being composed of many public service industries including the police industry, the fire protection industry, the welfare industry, the health services industry, the transportation industry, and so on”.<sup>36</sup>

This type of governance allows to put the burden of mobility and change on jurisdictions rather than on citizens: “functional, overlapping, and competing jurisdictions are flexible units which are established when needed [...and they] discontinued when their services are no longer demanded as more citizens and communities exit and the tax base shrinks”,<sup>37</sup> and it can be described as a polycentric system, where various centres of decision-making exist that are formally independent of each other and the hierarchical centre of the system is replaced by functional networks.<sup>38</sup>

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<sup>36</sup> Vincent Ostrom and Elinor Ostrom (1999), “Public Goods and Public Choices”, in *Polycentricity and Local Public Economies. Readings from the Workshop in Political Theory and Policy Analysis*, ed. Michael McGinnis; Ann Arbor: University of Michigan Press; p. 88-89.

<sup>37</sup> Bruno Frey and Reiner Eichenberger (1999), *The New Democratic Federalism for Europe. Functional, Overlapping, and Competing Jurisdictions*; Cheltenham: Edward Elgar; p. 18 and 41.

<sup>38</sup> M. Knodt (2004), “International embeddedness of European multi-level governance”, in *Journal of European Public Policy* 11:4 August; p. 704, **quoting** Beate Kohler-Koch (1999), “The evolution and transformation of European governance”, in Beate Kohler-Koch and R. Eising (eds.), *The Transformation of Governance in the European Union*, London: Routledge, p.p. 14-35.

#### 6.3.1.1. National governance.

There is currently a lack of clarity regarding the ways an external participant or an elected representative can get involved in the EU decision-making process, especially as an obligation to involve external participants and representatives is reserved to the Commission and other EU institutions. In fact, it may be complicated for external participants to understand the structure of EU governance.

The exceptional features of the EU governance can be compared with the existing national governance structures in this way: the same decision-making procedures; the same laws; making national governments to be responsible for policies at lower territorial levels; the diffusion of decision making to informal and overlapping policy networks.<sup>39</sup> However policy networks are non-hierarchical, fluid, mostly non-governmental and often non-territorial.<sup>40</sup> Additionally, they “do not respect the traditional “rules of the game” but instead occur as “negotiated, non-hierarchical exchanges between institutions at the transnational, national, regional and local levels”.<sup>41</sup> This governance uses the “classical nation-state model, with its features of democratic representation, constitutional rights, accountable administration and

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<sup>39</sup> Christopher Ansell (2000), „The Networked Polity: Regional Development in Western Europe“, in *Governance* 12: p.303-333; Beate Kohler-Koch and Reiner Eising (n 38), John Peterson (2001), „The Choice for EU Theorists: Establishing a Common Framework for Analysis“, in *European Journal of Political Research* 39: 289-318.

<sup>40</sup> James N. Rosenau (1997), *Along the Domestic-Foreign Frontier. Exploring Governance in a Turbulent World*; Cambridge: Cambridge University Press.

<sup>41</sup> G.B. Peters and J. Pierre (2001), “Developments in Intergovernmental Relations: Towards Multi-level Governance”, in *Policy and Politics*, 29, 2, 131-136.

independent courts, all embedded in a constitutional framework, as a blueprint and a normative reference point.”<sup>42</sup>

The initial attempt to identify the characteristic features of the European governance, leads to another possible characteristic of the system. “Multi-level” decision-making is believed to blur the distinction between centralised and decentralised decision making by connecting national administrations, supporting their local fragmentation, with each other and EU without establishing a hierarchy between them.<sup>43</sup> It also blurs national borders, as significant territorial boundaries between national and international politics;<sup>44</sup> by “enlarging the scope of the relevant unit of policy-making”,<sup>45</sup> and encouraging greater multi-level territorial interaction.<sup>46</sup>

The multi-level governance defines the necessity to coordinate actions and actors at many levels of governance, as well as between government and private actors (localities, subnational regions, national, European), in order to bring actors together in ways that facilitate dialogue and coordination via multiple, overlapping arenas characterized by loose coupling<sup>47</sup> and including different actors, whose interests diverge.

The blurred boundaries of the centralised and decentralised national administration decision-making has evolved into regional decision-making, where the involvement of subnational actors in the complex system of the European decision-making process drew attention to policy-making across the levels by enlarging the territorial scope for political action

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<sup>42</sup> R. Nickel (2005), “Participatory transnational governance”, *EUI Working Paper LAW No. 2005/20*; p. 8.

<sup>43</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 273.

<sup>44</sup> M. Knodt (n 38) 702.

<sup>45</sup> Beate Kohler-Koch (n 38) 14-35.

<sup>46</sup> A. Marshall (2005), “Europeanization at the urban level: local actors, institutions and the dynamics of multi-level interaction”, in *Journal of European Public Policy*, p. 673.

<sup>47</sup> M. Knodt (n 38) 704, **quoting** A. Benz (2000) “Entfechtung als Folge von Verflechtung: Theoretische Überlegungen zur Entwicklung des europäischen Mehrebenensystems”, in E. Grande and M. Jachtenfuchs (eds.), *Wie problemlosungsfähig ist die EU? Regieren im europäischen Mehrebenensystem*, Baden-Baden: Nomos, pp. 141-64; and L. Hooghe and G. Marks (n 32).

“beyond the nation-state”. It incorporates Member States into a complex transnational, multi-level system of decision-making.<sup>48</sup> It accepts the possibility of coordinated diversity and the advantages of leaving final policy making to the lowest possible level in order to support and coordinate Member States policies than to create uniformity across the Union. The characteristic feature of regionalism and the leverage of the final policy making should also be counted into the EU governance constituent parts as one of the core items.

The definition of “multi-level”-ism will be used through the whole analysis as the core key word, describing the relation between regional and local level, national governments and administrations, and the EU governance structure. Multi-level partnership is usually related to accountability, which will be discussed later in the Chapter.

#### *6.3.1.2. Participation in EU governance through constitutional power and administrative enforcement.*

To start with, “formalised procedures, - i.e. the way in which administrative decision-making is carried out according to constitutional principles, statutes or judge-made law – are determined by three main rationales, rationality and efficiency on the one hand and individual protection on the other”.<sup>49</sup> The constitutional power is usually protected as an individual fundamental right by a State when substantive policy decisions are taken. “From this perspective, the formality of the administrative decision-making process combined with the opportunity for the participation of individual parties – who adduce important information either by making use

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<sup>48</sup> M. Knodt (n 38) 703.

<sup>49</sup> Hanns Peter Nehl (1999), *Principles of Administrative Procedure in EC Law*; Oxford: Hart Publishing, p. 20.

of their procedural rights or by fulfilling their duty to co-operate – are considered necessary preconditions for administrative efficiency as well as the rationality and [...] the legitimacy and acceptance of the final outcome”.<sup>50</sup>

Although both rationales – administrative performance and individual protection, - are closely intertwined, they have different legal roots. The first one derives from the basic requirements of procedural fairness, while the latter has its origin in the democratic principle.<sup>51</sup> While it is true that participatory rights, understood as a potential counterweight to the democratic deficit of the EU, are accorded a democratic dimension, the intense participation in the decision-making process requires the administration to give a detailed account of the relevant issues of fact and law.<sup>52</sup>

Administrative law is increasingly concerned with the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision-making.<sup>53</sup> Such additional measures include greater democratic and judicial control, increased transparency, greater expertise and stronger participation of citizens in the decision-making process, by means of representative interest groups, open hearings and public debate. Not a state, but a system of multi-level governance, the EU is beset by additional difficulties inherent in the need to respect the regulatory concerns of Member States and the differing linguistic and cultural systems and the “representativity” of socio-economic interests. Therefore, contrary to the non-majoritarian approach to market integration which holds that the market can be managed in isolation from political concerns by non-majoritarian technical experts,

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<sup>50</sup> *ibid* 21.

<sup>51</sup> *ibid* 59-60.

<sup>52</sup> *ibid* 123.

<sup>53</sup> R. Stewart (1975), “The Reformation of American Administrative Law” in 88 *Harvard Law Review*, p. 1670; and M.Everson “Administering Europe” (1998) in 36 *JCMS*, 195-216.

in particular independent agencies<sup>54</sup> for risk regulation to be legitimate, it cannot be left to technocrats/experts alone but needs to be decided by political (national representatives) and socio-economic actors. Although this contribution does not go so far to attempt to resolve the “pressing problem” of what weight to attach to the various interests (national, Union, public and private interests), it does aim to emphasize the need for the participation of and deliberation with such interests.<sup>55</sup>

Based on the various rationales, it should be decided whether a commitment to devolution is embedded in the formal constitution of the governing institutions or it should take place in response to local needs, as this development should be described in and measured on constitutional terms and norms (with regard to doctrines of separation of powers, of popular sovereignty, or of constitutional rights), or whether it should be described in terms of administrative law and administrative accountability, with its own distinctive set of normative expectations (following the doctrines of rule of law).<sup>56</sup> Formalising a constitution, a number of dimensions are suggested to be distinguished. First of all, a constitution contains basic rules of design of society, constituting the “power map”, including the framework of government and a

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<sup>54</sup> G. Majone (1996), *Regulating Europe*, Routledge: London/New York: “Agencies can be distinguished from committees in that they possess legal personality and, supported by their own administrative structures, have a degree of administrative independence. The agency model, foremost advocated by G. Majone, is based upon non-majoritarian thinking, preferring administrative market integration to be carried out by fully independent agencies; and bringing together technical and economic expertise. However, the agencies currently operating within the Community structure are not (yet) independent regulatory agencies in the American sense. The agency model adopted in the Community does, by no means, exclude resorting to committees. On the contrary, most agencies are actually based on committees or require resort to committees. Just as scientific committees, they produce information, which potentially leads to more informed decision-making, although they are more visible than committees, which possibly facilitates the political oversight and transparency of their activities. In general, decision-making is (formally) left to the Commission together with policy-making/implementation committees”.

<sup>55</sup> E.Vos (1999), “EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation”, *EU Committees: Social Regulation, Law and Politics*, Christian Joerges and Ellen Vos (eds.), Hart Publishing: Oxford-Portland, p. 32.

<sup>56</sup> Rainer Nickel (n 4) 7.

body of rights operating according to the rule of law, which is called institutional dimension.<sup>57</sup> It concerns the “handling and managing power in a world where states are highly interdependent and are not only *loci* and *foci* of political activity and processes” (emphasis in the original).<sup>58</sup> Another dimension to be mentioned is the geographical one, which “relates to the nature and structure of communities and the reflection that, in respect to questions of attribution, identity and affinity, issues of political community should more accurately be described in plural rather than singular terms, with the increasing emergence or re-emergence of local, linguistic or cultural, regional, national and even supra-state identities, in each case outside the formal framework of the state”.<sup>59</sup>

“Procedural approach alone gives no simple solutions to enduring problems such as ensuring “inclusiveness” and belonging in divided societies. [...] [It might imply that the legal rules can] confer legal rights to be heard or rights to information which go beyond the veneer of transparency which currently characterizes the EU’s approach to this question and gives rise to relationship of clientelism which so often links the EU institutions with many associations and NGOs.”<sup>60</sup>

Identifying accountable administration as well as accountable implementation and judicial accountability, it should be replied “who is accountable to whom (the regulators to the citizens; the private participants of regulatory processes to the market forces; Member States officials in

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<sup>57</sup> Jo Shaw (1999), “Postnational Constitutionalism in the European Union”, in *Journal of European Public Policy*, 6:4 Special issue; p. 583.

<sup>58</sup> *ibid* 587.

<sup>59</sup> *ibid* 588.

<sup>60</sup> *ibid* 596.



Comitology committees to the European polity), to what extent, and what are the legal and factual consequences of a violation of accountability benchmarks and rules?”<sup>61</sup>

### 6.3.2. *Participatory democracy and governance.*

Participation should be understood as an inclusive, not exclusive process, possible “throughout the policy chain from agenda-setting to implementation and monitoring – and in all fora: committees subordinate to the Council formations, indicators’ working groups, and peer review process”.<sup>62</sup> It suggests that there is a connection between the degree of participation and the degree of politicization,<sup>63</sup> having it as a key vision of democratic deliberation,<sup>64</sup> which might as well embody technocratic deliberation.<sup>65</sup> “Under what is often termed a “deliberative democracy” model, the role of government is to provide a space which allows people (or citizens or civil society) to be involved in decision making. [...] The participants, each seeking not to further their own selfish interest, but to foster the public interest or the common good, indulge in reasoned argumentation”.<sup>66</sup> This idea seems to be fostered by the EU institutions, and this approach has been increasingly influential in the decision-making process of the CJEU,

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<sup>61</sup> Rainer Nickel (n 4) 12-13.

<sup>62</sup> Paul Craig (2006), *EU Administrative Law*; Academy of European Law, European University Institute; Oxford University Press; p. 221.

<sup>63</sup> C. de la Porte and P. Pochet (2003), „*The Participative Dimension of the OMC*“, paper delivered at the Conference „Opening the Open Method of Coordination“, EUI Florence, 4 July 2003.

<sup>64</sup> Paul Craig (n 62) 223.

<sup>65</sup> Claudio M. Radaelli (2003), „The Open Method of Coordination: A New Governance Architecture for the European Union“, 1 *Swedish Institute for European Policy Studies: SIEPS*, p. 49-50.

<sup>66</sup> N. Bernard (2000), „Legitimising EU Law: Is the Social Dialogue the Way Forward? Some Reflections on the UEAPME Case“, in J.Shaw (ed.), *Social Law and Policy in an Evolving European Union*; Hart Publishing; p. 299; and Phil Syrpis (2002), *Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination*, European University Institute Working Paper LAW No. 2002/10; p. 10.

comitology and agencies.<sup>67</sup> However, there is also a negative dimension of this approach – “although it “maximises the access of “outside” interest groups to the government decision-making process”, it may also undermine democracy, quite simply because when “public policy decision-making is diffused among various government and nongovernment actors in an amorphous, non-rule-defined manner, democratic accountability is destroyed”.<sup>68</sup>

**Participatory democracy** is a “continuing risk of fundamental inequality between the two sides of the bargaining process”,<sup>69</sup> that “the use of bargaining to achieve legislation could well entrench these inequalities which would be more likely to be evened-out through the normal legislative process.”<sup>70</sup> It is still premised on input from interested parties, with the final decision still residing with traditional legislative bodies, or administrative institutions such as agencies.<sup>71</sup>

**Participatory governance** is not meant to replace democratic representation, as situated between co-decision powers and mere consultations, the principle of participatory governance can be filled with context-sensitive contents, reaching from notice and comment provisions and transparency regulations, through rights to a hearing by regulatory institutions and networks, up to procedural involvement that stops short of a veto position.<sup>72</sup>

It is believed that recent years have seen an expansion of civil society’s role in the decision-making processes starting from *ad hoc* to highly institutionalised civil society’s dialogue, however “these possible reforms seem to break with classic methods used by the Commission, or with the philosophy which underpins it – i.e. that participation is initiated only

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<sup>67</sup> Phil Syrpis (n 66) 10.

<sup>68</sup> M. Shapiro (2001), “Administrative Law Unbounded: Reflections on Government and Governance”; in 8 *Indiana Journal of Global Legal Studies*; p. 369.

<sup>69</sup> S. Fredman (1998), “Social Law in the European Union: The Impact of the Lawmaking Process”, in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union*; Kluwer Law International; p. 410.

<sup>70</sup> Paul Craig (n 62) 251.

<sup>71</sup> *ibid* 256.

<sup>72</sup> R. Nickel (n 42) 30.

by the institutions, is limited to non-decision [namely consultation rather than shared responsibility for decision-making], and is directed mainly towards sectoral actors”.<sup>73</sup> With appropriate support (e.g. civic education, capacity building), it can be achieved by mobilizing and engaging citizens in the governance process. Through participation, citizens gain an appreciation of the wider public interest and of the needs and contributions of all sections of the community.<sup>74</sup>

Following this approach, it is assumed that individuals and/or smaller political entities are more likely to be better represented, to have greater opportunities for participation, to be better able to hold policy makers to account as well as to possess regime legitimacy than larger political entities and/or communities (such as the EU).<sup>75</sup> It is believed,<sup>76</sup> that national polities are no longer able to control participation and representation of all those who are affected by their decisions. And “in relation to policies of transnational scope, European level decision-making seems to be better able than national to ensure the participation and representation of those affected, and may also offer performance legitimacy advantages as regards the making and implementation of policy”.<sup>77</sup>

However, the General Court insists that it is incumbent upon the EU institutions concerned to ensure the collective representativity of the parties to the social dialogue, conceived in both procedural and substantive terms.<sup>78</sup> “As regards the former, it entails an obligation to take

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<sup>73</sup> Paul Magnette (2001), “European Governance and Civic Participation: can the European Union be Politicised?”, in the Jean Monnet Working Paper No.6/01, Symposium: *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, at: <http://www.jeanmonnetprogram.org/archive/papers/01/010901.html>; p. 3-4.

<sup>74</sup> Lowndes, V. and Helen Sullivan (2008), “How low can you go? Rationales and challenges for neighbourhood governance”, in *Public Administration*, Vol. 86, No. 1, p. 65.

<sup>75</sup> Phil Syrpis (n 66) 17.

<sup>76</sup> Maduro, M.P. (2000), “Europe and the Constitution: What if this is As Good as It Gets”, at ConWeb (Webpapers on Constitutionalism and Governance beyond the State), Con WEB No. 5/2000; p. 9.

<sup>77</sup> Phil Syrpis (n 66) 21.

<sup>78</sup> Joanne Scott and David M. Trubek (n 22) 13.

steps to verify representativity; compliance on this occasion being evidenced by the terms of the preamble to the contested directive, and by information and evidence presented by the Commission and Council to the General Court, including extracts from documents relating to the relevant Council meetings, and a Commission study.”<sup>79</sup>

***Formalization or empowerment.*** The embedded new form of institutional changes within the EU has to establish processes of institutionalisation in daily routines of policy formulation and implementation or in acceptance of dominant belief systems.<sup>80</sup> It might be done in a way, when “representatives of the Member States in consultation with the Commission set broad “non-binding” goals and metrics, to be implemented through national action plans or strategies, and periodically revised following peer review of implementation experience”.<sup>81</sup>

Another option could be implemented - relying less on formal rules and “hard law” than on open-ended standards, flexible and revisable guidelines and other forms of “soft law” making it easier to revise strategies and standards in light of evolving knowledge. This approach might be used in cases where the legal authority of the EU is limited or non-existent; it may be the only way the Union can play a role in a particular domain.<sup>82</sup>

The identified elements of the described process can be imposed by treaty revision and formal intergovernmental agreement affecting the formal organization of the political system. It

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<sup>79</sup> Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335.

<sup>80</sup> M. Knodt (n 38) 704, **quoting** J.G. March and J.P. Olsen (1998), “The institutional dynamics of international political orders”, *International Organization* 52(4), p. 943-969, and J.P. Olsen (2000), “Organising European institutions of governance. Fragments of an institutional account of political integration”, Arena Working Paper, manuscript.

<sup>81</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 280.

<sup>82</sup> Joanne Scott and David M. Trubek (n 22) 5.

may be done by involving the provided channels of access and participation as well as incorporated principles in programmes affecting the patterns of interaction.<sup>83</sup>

If the empowerment procedure is not followed, the described differences might end up with non-compliance of the obligatory legislative provisions, which might impose additional administration costs on the EU institutions as well as burden on the CJEU. Encouraging the change of information and experience and organising mutual cooperation and assistance among national regulation authorities in order to develop common principles, objectives, and evaluation methods, based on preventative and multi-disciplinary approach.<sup>84</sup>

***Representative democracy*** ensures “a system of judicial review being in place, along with formal acknowledgements of the rule of law, the importance of justice, the separation of powers amongst institutions, and respect for human rights and democracy”.<sup>85</sup> The more detailed analysis of representation is discussed in the Chapter “EU Law and policy on participation in EU governance”.

### *6.3.3. Types of governance.*

#### *Europeanization*

“Europeanization” defines “a process whereby European ideas and practices transfer the core of local decision-making to the supranational level. The European function is a means

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<sup>83</sup> M. Knodt (n 38) 704; **quoting** B. Kohler – Koch and M. Knodt (1997), “Multi-level governance: the joy of theorising and the anguish of empirical research”; paper presented at the ECPR Workshop on “Regional Integration and Multi-level Governance” of the Joint Sessions of Workshops, Bern, Switzerland, 27 February – 4 March.

<sup>84</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 287.

<sup>85</sup> Jo Shaw (n 57) 594.

whereby public authorities can innovate and initiate policies and programmes in the context of transnational co-operation and European policy-making”.<sup>86</sup>

#### External “trans” networks

Focusing on another kind of participants in the Europeanization process, the “transnational networks of experts” have occupied a position in the political arena, and they are increasingly sought after by governments and international organizations for the delivery of public goods.<sup>87</sup> It is even believed that “supernational and international entities or arrangements play an increasing role in the shaping of national law”.<sup>88</sup> Despite pessimistic evaluations of the earlier times, as the power of transnational participants has been constantly increasing, the Commission has also been advised to make use of co-operative networks and partnerships, where national and European regulators could co-operate in regulatory policies implementation, which is more often “served by governments and private-party networks and not by parliaments”.<sup>89</sup>

This view is not new in analysis of EU policy and law, especially speaking about law, which is “not necessarily the product of procedures within parliaments and of governments enforcing it and courts applying it, but can also be produced within networks of governments and/or private parties, outside the nation state and in many variations.”<sup>90</sup> The dissolution of territorially delineated democracy and the production of binding rules outside the institutional design of national parliaments is no longer an exception but is actually becoming the norm.<sup>91</sup> The

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<sup>86</sup> P. John (2001), *Local Governance in Western Europe*, London: Sage; p. 73.

<sup>87</sup> Sonja Bugdahn (2008), “Travelling to Brussels via Aarhus: can transnational NGO networks impact on EU policy”, *Journal of European Public Policy*, issue No. 15; p. 588.

<sup>88</sup> R. Nickel (n 42) 1.

<sup>89</sup> *ibid* 2.

<sup>90</sup> *ibid*.

<sup>91</sup> A.-M. Slaughter (2004), *A New World Order*, Princeton, N.J./Oxford: Princeton University Press.

starting point here is that governments and non-state actors play a significant role in pre-formation of legal rules by representing highly aggregated entities with an enormous potential of resources, manpower, knowledge assessment, and experience as well as being the primary source and filter for legislative proposals.<sup>92</sup> In order to legitimize an embedded norm as a “law”, the functional equivalent should be set: “participatory arrangements ensuring the involvement of civil society actors, stakeholders, and the public, in the arguing, bargaining, and reasoning processes of transnational regulation, procedural rights safeguarding these procedural positions, and courts or court-like institutions that flank these arrangements.”<sup>93</sup> Such position “would call for some form of juridification of participatory governance, not necessarily as another form of an overarching “constitution” in a single text, but as a juridification of deliberative structures within the regulatory islands of international law and international regulation”.<sup>94</sup> The procedural right of affected interest groups and civic associations to participate comprehensively in regulatory processes is already formed as an integral part in most domestic administrative laws.

The second issue is that parliaments do not act in a social vacuum, but within a societal sphere influenced by aggregated interests and conflicting positions, which is constituted by a patchwork of unions, employer associations, political parties, NGOs, religious groups, participating in public debates about, amongst others, market regulation and social regulation.<sup>95</sup> Private standard-setting bodies, agreements on technical norms, and other forms of regulative activities suggest a shift from state regulation and international law regulations to private international regulations, where national governments try to regain control over the issues that

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<sup>92</sup> R. Nickel (n 42) 3.

<sup>93</sup> R. Nickel (n 42) 4.

<sup>94</sup> *ibid* 25.

<sup>95</sup> *ibid* 4.

cannot be dealt with at national level by increasing their efforts at international level.<sup>96</sup> It is quite hard to achieve, as procedural rules of participation are transformed into much higher level “than within the national constitutional framework, where decision-making procedures in governmental regulatory regimes or private societal spheres are still controlled by both parliaments and by a genuine democratic process, and are embedded in a constitutional setting of administrative rules and judicial control.”<sup>97</sup>

In private standardisation issues, “private transnational governance is linked to the law via national courts: law “constitutes” private governance through an *ex-post* process of measuring the regulatory processes on standards borrowed from concepts of due process of law”.<sup>98</sup> If we are facing a comprehensive global regulatory machine under the control of (semi-) autonomous private regimes, we have to seek for more than just a vague form of mutual observation of global law regimes and *ex-post* litigation. Procedural safeguards which bring civil society back in – not only as outside protesters, but as legitimate voices – may not be last word, but may be an essential beginning.<sup>99</sup> However, there is another position, regarding the strengthening of the role of the civil society. It is believed that as “the civil society idea actually suggests a “corporativist” approach to international decision-making, it is dramatically troubling for democratic theory because it posits “interests” (whether NGOs or business) as legitimate actors along with popularly elected governments”.<sup>100</sup> This position was criticized straight away. “It firstly envisions a concept of civil society that reflects a market-place model of competing organised interests, thus rejecting the notion of deliberative decision-making within public spheres; it secondly

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<sup>96</sup> *ibid* 6.

<sup>97</sup> *ibid* 25.

<sup>98</sup> H. Schepel (2005), *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets*, Oxford: Hart Publishing.

<sup>99</sup> R. Nickel (n 42) 14.

<sup>100</sup> J. Bolton (2000), “Should we take Global Governance seriously?”, 1 *Chicago Journal of International Law*, 205.



presupposes that “international decision-making” is exclusively managed by governments alone and not by a joint co-operation with certain business interests, and thirdly, it tries to shield a process of vastly executive decision-making that is only remotely connected to democratic self-government”.<sup>101</sup>

Such formations are understood “as arrangements (other than EU committees) consisting of actors based in various Member States that receive logistical and/or financial support from the EU to pursue common goals linked to influencing the creation, the review and/or the implementation of an EU regulatory policy.”<sup>102</sup>

They might be divided into two types of networks: EU-centred transgovernmental, which link up authorities operating at the national or sub-national level of Member States, and EU-centred transnational networks, linking up private actors, with a specific focus placed on non-governmental “civil society” actors.<sup>103</sup> Further on, transgovernmental networks might be distinguished into three sub-types: first, there are networks of national authorities supporting several of the EU-level agencies with information tasks; second, there are networks of national regulatory authorities; and third, there are networks of national bodies with an ombudsman function in dealing with complaints from citizens.<sup>104</sup>

Reading the distinguished types of network tasks<sup>105</sup> by S. Bugdahn,<sup>106</sup> a conclusion could be made, that the networks are established to monitor the work of civil servants, as well as the

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<sup>101</sup> R. Nickel (n 42) 28.

<sup>102</sup> Sonja Bugdahn (n 87) 589.

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid* 592: “[first,] make citizens, administration, economic actors and NGOs in (sub-) national arenas more aware of new rights and obligations based on EU policies; [second,] agree on common standards regarding transposition and application of EU directives across and within countries (coherence between (sub-) national arenas); [third,] report cases of doubtful compliance to the Commission, which forms a basis for opening of infringement procedures and the amendment of transposition and application (coherence between (sub-) national arenas and the EU

established comitology committees. The activities which are prescribed for the Commission are duplicated for networks, which seem to replace comitology committees after they have agreed on decision concerning a specific regulation. On the other hand, the networks might be required to police and report infringements.

In the event that national authorities object to the implementation of an EU policy, the Commission usually lacks the power to replace the transgovernmental networks with alternative national institutions that might not be available in any case. It may be slightly different in the case of transnational networks, which are typically built around a set of shared values, and the Commission funds only those “advocacy” networks that supports the objectives of EU policies,<sup>107</sup> but such networks are limited in their achievements, since they cannot issue guidance for sub-national authorities or ombudsmen, and they cannot easily have a strong impact on the development and review of EU policies. Also, transnational networks might be used preferably in cases when an EU policy creates new rights for citizens and/or groups so as to mobilise these citizens and/or groups (especially as national authorities might fear costs for governmental and economic actors).

In addition, transnational networks have fewer inhibitions if they need to implement watchdogs and inform the Commission of non-compliance by Member States – provided that they can obtain enough information.<sup>108</sup> On the other hand, infringement procedures are usually

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implementation arena); [fourth,] carry out peer reviews in member states to acquire information on national solutions and to critically evaluate them (coherence between (sub-) national arenas and the EU implementation arena and/or review arena); [fifth,] provide input based on (sub-) national experience into the policy review process at the EU level (coherence between (sub-) national arenas and the EU review arena)”.  
<sup>106</sup> *ibid.*  
<sup>107</sup> *ibid* 593.  
<sup>108</sup> *ibid* 594.

“slow, secretive, inflexible, complex and dominated by states and the Commission.”<sup>109</sup> Also the watchdogs are normally excluded from the subsequent negotiations between member states and the Commission,<sup>110</sup> and interest groups cannot normally influence the “complex process of bargaining and the complicated trade-offs behind the closed door of a Council meeting”.<sup>111</sup>

The promises on “working with key networks, to enable them to contribute to decision shaping and policy execution”, defined in the White Paper on European Governance, are yet to be fulfilled. So far, the funding and strong network loyalty does not provide any tangible results, as maybe only the “informalization” function. However, semi-formalised networks might be useful to the EU institutions, as they are readily identifiable and more transparent than totally informal public-private policy networks; the latter might be enhanced by publicising details on the membership of the network and minutes of meetings or by assigning formal functions.<sup>112</sup> However, “issues and perspectives voiced by civil society are hardly represented within global regulatory networks – a single government representative per country in such a regulatory network simply cannot be understood as an agent of a whole constituency and its internal diversity”.<sup>113</sup>

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<sup>109</sup> A. Jordan (1999), “The implementation of EU environmental policy: a policy problem without a political solution?”, *Environment and Planning C: Government and Policy* 17(1); p. 79.

<sup>110</sup> R. Williams (2002), “Enforcing European environmental law: can the European Commission be held to account?”, in H. Somsen (ed.), *Yearbook of European Environmental Law*, Vol. 2, Oxford: Oxford University Press; p. 270-294.

<sup>111</sup> E. Grande (1996), “The state and interest groups in a framework of multi-level decision-making: the case of the European Union”, *Journal of European Public Policy* 3 (3); p. 331.

<sup>112</sup> Sonja Bugdahn (n 87) 601.

<sup>113</sup> R. Nickel (n 42) 29.

### Open method of coordination<sup>114</sup>

It implies mechanisms for monitoring and supplementing existing EU legislative instruments and authority based on common European objectives, where the EU has few if any legal powers. This method was envisaged as a “third way” for the EU governance between regulatory harmonisation and fragmentation, as in the years to follow it appeared “to have become the governance instrument of choice for EU policymaking in complex, domestically sensitive areas, where diversity among the Member States precludes harmonization but inaction its politically unacceptable [...] when faced with the perceived need for joint action in politically sensitive, institutionally diverse policy fields, from improving regulation and reducing administrative burdens to promoting local and regional clusters”.<sup>115</sup>

### Neighbourhood governance

The “neighbourhood governance” is linked very closely to the characteristic feature of regionalism, where the leading actors are national and beyond-national governments and/or administrations. Neighbourhood governance is more focused on internal participation and decision-making, which refers to arrangements for collective decision making and/or public service delivery at the sub-local level [...] through the devolution of political and/or managerial

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<sup>114</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 289-291: establishing the main elements: 1. fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long term; 2. establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice; 3. translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; 4. periodic monitoring, evaluation and peer review organised as mutual learning processes (taken from Lisbon European Council Presidency Conclusions, 23-24 March 2000, §37).

<sup>115</sup> *ibid* 292; and Commission, “Working Together for Growth and Jobs: A New Start for the Lisbon Strategy” (Communication) COM (2005) 24; Commission, “Working Together, Working Better: A New Framework for the Open Coordination of Social Protection and Inclusion Policies in the European Union” (Communication) COM (2005) 706 final.

authority from “higher” to “lower” level actors”.<sup>116</sup> It is a response to particular local circumstances, i.e. an active neighbourhood movement into the city.<sup>117</sup> It may also be a new orientation of political elites keen on direct participation of citizens and other stakeholders in local decision making. It shall be combined with a neighbourhood approach.<sup>118</sup>

Neighbourhood governance defines four rationales: civic, social, politic and economical. Each of them favours political devolution.

Neighbourhood partnership takes a client or community-centred approach to developing integrated services through public service boards or strategic forums by bringing together the key service providers and decision makers in the community.<sup>119</sup>

“Community representatives, appointed or elected by a variety of means, face the dual challenge of establishing their legitimacy with citizens and also with the more powerful and experienced stakeholders with whom they sit”.<sup>120</sup> The aim is to pool resources, risks and rewards with the aim of achieving “collaborative advantage”<sup>121</sup> – that is, the improved delivery of each stakeholder’s objectives and the creation of new opportunities – which can be both a source of strength and conflict. It is a system that binds the representatives of different interest groups into a process of collective decision making.

It is also a place, where local government (and other agencies) are able to establish new routes for citizen engagement and to improve accountability. It shall be done in an entirely

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<sup>116</sup> V. Lowndes and Helen Sullivan (n 74) 62.

<sup>117</sup> G. Blakeley (2002), “Decentralisation and citizen participation in Barcelona”, in P. McLaverty (ed.), *Public Participation and Innovation in Community Governance*, Aldershot: Ashgate, p. 77-98.

<sup>118</sup> B. Denters and P. Klok (2005), “The Netherlands: in Search of Responsiveness”, in B. Denters and L. Rose (eds.) (n 8) 1-11.

<sup>119</sup> V. Lowndes and Helen Sullivan (n 74) 65.

<sup>120</sup> *ibid* 65; and H. Sullivan (2003), “New Forms of Local Accountability – Coming to Terms with “Many Hands”?”, *Policy and Politics*, 31, 3, p. 353-369.

<sup>121</sup> C. Huxham (ed.) (1996), *Creating Collaborative Advantage*, London: Sage.

reorganized system of local government that combines strategic capacity with local decision-making.<sup>122</sup> In other words, government statements link to “double devolution” – the shifting of power from central to local government and beyond to neighbourhood.<sup>123</sup> It embodies in an institutional form the civic rationale by stressing opportunities for direct citizen participation in the context of declining public involvement in conventional local politics and increasing citizen “voice” by developing forms of participatory democracy at the neighbourhood level.<sup>124</sup>

First of all, neighbourhood units of governance provide more opportunity for citizens to participate effectively in decisions: it is easier to distribute information about opportunities for participation and to communicate with citizens about options and outcomes as well as to address “collective action problems” in the presence of small numbers and with the absence of significant social or economic cleavages.<sup>125</sup> “Increasing citizen interest and competence requires the development of a mix of opportunities for participation at the neighbourhood level: these may or may not involve election and they may be based upon a single service or issue, or broader strategic concerns.”<sup>126</sup>

The neighbourhood governance primarily emphasizes representative democracy and can be seen as having the potential to revitalize it: the citizen’s role is to elect local councillors and hold them to account – their key resource is their vote, - by providing a platform from which to rebuild trust and confidence in elected politicians and representative institutions. The representative role of councillors can also be enhanced via the ongoing dialogue with their

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<sup>122</sup> V. Lowndes and Helen Sullivan (n 74) 53.

<sup>123</sup> Hon David Miliband (MP) (2006), “Empowerment and the Deal for Devolution”, Speech by the RT, Minister of Communities and Local Government, February 2006, London: ODPM.

<sup>124</sup> A. Hirschman (1970), *Exit, Voice and Loyalty*, Cambridge, MA: Harvard University Press.

<sup>125</sup> V. Lowndes and Helen Sullivan (n 74) 57.

<sup>126</sup> *ibid* 68.

constituents, speaking for their community, and scrutinizing the work of the local authority and other service providers on their behalf.<sup>127</sup>

Second, the social dimension is also important when innovating on the design of public services and when collaborating on decision making (through multi-agency and community-led partnerships).<sup>128</sup> At the same time, neighbourhood action can provide a potential basis for building associative or stakeholder democracy,<sup>129</sup> which may operate outside state initiated governance networks, in new politico-social communities that are in contact with, but not conditioned by, the state.<sup>130</sup> Urban relationship depends mainly on the presence of certain conditions – where people are of similar status, have common interests, and are supported by institutions that encourage engagement and understanding,<sup>131</sup> which might limit the diversity in neighbourhood governance.

From a political perspective, citizens can access neighbourhood governance more easily and are more knowledgeable about the issues at stake. Their leaders are usually expected to have direct experience and knowledge of the matters at hand, enabling them to make informed inputs into policy making and to hold representatives and service deliverers to account. They are also more likely to be known to the citizens and they have more opportunities to communicate with them on an ongoing basis and to monitor governance outcomes in the locality.<sup>132</sup> However, the “recruitment of representatives may be harder at the neighbourhood level because party systems

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<sup>127</sup> *ibid* 66.

<sup>128</sup> *ibid* 58.

<sup>129</sup> P. Hirst (1994), *Associative Democracy. New Forms of Economic and Social Governance*, Cambridge: Polity Press.

<sup>130</sup> H.P. Bang and E. Sorenson (1999), “The EM: A New Challenge to Democratic Governance”, *Administrative Theory and Praxis*, 21, 3, p. 325-342.

<sup>131</sup> T. Blokland (2003), *Urban Bounds*, Cambridge: Polity Press, p. 169-170.

<sup>132</sup> V. Lowndes and Helen Sullivan (n 74) 58; and R. Dahl and E. Tufte (1973), *Size and Democracy*, Stanford, CA: Stanford University Press, p.15.

are less well developed, there are fewer and less diverse community organizations, and there is little media coverage of local politics”.<sup>133</sup> It is also noticed that “larger units have a more “representative” councillor body (to the extent that it reflects the make-up of the population), with councillors also more likely to have been born and still live in the locality”.<sup>134</sup>

The political devolution might be “download” – changes in policies, practices, preferences or participants within local systems of governance, arising from the negotiation and implementation of EU programmes; or “upload” – the transfer of innovative urban practices to the supranational arena, resulting in the incorporation of local initiatives in pan-European policies or programmes.<sup>135</sup>

One more of the core elements in defining a neighbourhood’s concept is a *geographic dimension* (in other words – it would be appropriate to define it as a part of definition of regionalism), which circumscribes the built environment that people use practically and symbolically – constructing the social meaning.<sup>136</sup> Other elements could be noted such as support and/or shape of the development of individual and collective identities, facilitated connections and interactions with others, only if these features provide positive comfort and support.<sup>137</sup> However, the smaller and more homogenous the unit of governance, the easier it is for elites to dominate, and the harder it is for diverging views to be expressed and accommodated.<sup>138</sup>

And the final identified rationale – the *economic* one, - is based upon the proposition that neighbourhood governance can make more efficient and effective use of available resources, as

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<sup>133</sup> K. Newton (1982), “Is Small Really So Beautiful? Is Big Really So Ugly? Size, Effectiveness, and Democracy in Local Government”, *Political Studies*, No. 30, 2; p. 203.

<sup>134</sup> *ibid* 199.

<sup>135</sup> A. Marshall (n 46) 672.

<sup>136</sup> T. Blokland (n 131).

<sup>137</sup> V. Lowndes and Helen Sullivan (n 74) 56.

<sup>138</sup> *ibid* 69.



in a more closed environment it is possible better to identify and limit waste in organizational processes as well as propose the more targeted services. The small-scale communities are also more flexible regarding exit options (transfer to another jurisdiction) if they raise their own taxes<sup>139</sup> and they are more conducive to forms of “bottom-up accountability”. It enables to respond better to citizens’ needs and so improve allocative efficiency by accumulating separate services, developing new services and even abolishing outmoded modes of delivery.<sup>140</sup> It also evolves a concept of changing a citizen’s behaviour, with the aim of enhancing a well-being and reducing pressure on services.

#### Networked governance<sup>141</sup>

This type of governance is a win-win arrangement improving the positions of both the regions and national governments by strengthening government capacities in directing territorial development and making it more inclusive by way of extending its political accountability upwards to the Commission, downwards to the regions and sideways to non-state actors.<sup>142</sup> The networked governance is most often related to the „networked agencies” – the judicial bodies, which actually do all the relevant tasks and networking itself.

The EU governance through networks is committed to openness, accessibility to information, and publicity of decision-making. In this it has developed some identifiable rules, such as the right to good administration, the right to remedies against bureaucratic inertia; the

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<sup>139</sup> B. Smith (1985), *Decentralisation: The Territorial Dimension of the State*, London: George Allen and Unwin, p.4.

<sup>140</sup> V. Lowndes and Helen Sullivan (n 74) 66.

<sup>141</sup> Chris Ansell (2000), “The networked polity: regional development in Western Europe”, in *Governance*, Volume No. 13, Issue No. 2; p. 279-293.

<sup>142</sup> Laszlo Bruszt (n 20) 1.

duty to notify interested parties that administrative proceedings have begun, to exercise diligence and to conclude the proceedings within a reasonable time.<sup>143</sup>

These rules are applied not only to the EU institutions themselves, but also to any agencies established by them. However, it should be noted that the European Charter of Fundamental Rights reflects this choice for a qualitative approach to governance; the citizens are granted a “right to a good administration”,<sup>144</sup> albeit limited to “his or her affairs” and focused on individual measures instead of on all administrative actions”.<sup>145</sup>

The qualitative approach to governance could be seen as a way of organizing heterogeneity, integrating in developmental programs interests, values and considerations represented by state and non-state actors participating in the making and implementing of developmental programs. The responsibility of setting formal legal regulation of the relationships among the different constitutive units of regional governance should remain strictly at national level. Another possible step in this type of governance is the “creation of independent national regulatory authorities, or reinforcement of the autonomy of existing ones, on condition that these authorities consult more widely with each other and the European Commission”.<sup>146</sup>

On the other hand, “this networked deliberative decision making is widely seen as a departure from the norms of representative democracy by which laws are legitimate only if they

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<sup>143</sup> S. Cassese (2004), “European Administrative Proceedings”, 68 *Law and Contemporary Problems* 21, p. 25.

<sup>144</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83, Article 41 “Right to good administration. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union”.

<sup>145</sup> Rainer Nickel (n 4) 3.

<sup>146</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 279, taken from T. Christiansen and E. Kirchner (eds.) (2000), *Committee Governance in the European Union*, Manchester University Press.

can exhibit a pedigree extending from a sovereign people assembled in the electorate through a legislative act as eventually adjusted by administrative elaboration”.<sup>147</sup>

The development of territorial governance is usually about the power to decide in planning development and their diverse dimensions - the properties of the rules of making binding decisions about the goals and means of sub-national development, and the distribution of opportunities for autonomous action for lower levels of the state, - of the distribution of power.<sup>148</sup> The first defined dimension might be hierarchical in retaining the right to take binding decisions on issues of regional development to a single unit (i.e. a central state agency), or they might be based on distributed authority, as the second dimension might be a case where only the central state has room to undertake autonomous room for identifying and solving problems of territorial development, but nevertheless, only a government can take binding decisions in issues of territorial development.

### Networked agencies

The already mentioned “networked agencies”,<sup>149</sup> which usually involves tripartite participants, on one side representing public organisations and/or associations or other relevant scientific organizations and/or institutes, private consultants as one part; official representatives from the Commission and the Parliament as the second part, and representatives from Member States (might be representatives from social partners, NGOs, charities and etc.) as well as observers from EEA states as the third part. The constituency part of the “networked agencies” strongly reflects the constituency of comitology committees.

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<sup>147</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 273.

<sup>148</sup> Laszlo Bruszt (n 20) 3.

<sup>149</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 283.

The “networked agencies” type of governance is closely related to the “principal – agent” model, where the principal is the EU and its agents are the national administrative authorities.<sup>150</sup> The principal – agent model works in two ways – the first is, that “agents being what they are, each of these will interpret the principal’s instructions (i.e. directives, decisions and similar) in a self-serving way; and the principal will of course be determined to minimise this agency “drift”. The second, [...] it is presumed to have only a vague or provisional idea of its own goals, [where] national administrative agencies will reveal possibilities that the principal has overlooked, and prefers more than any of the options entertained ex ante”.<sup>151</sup> In such a relationship, the principal wanting expertise in a sector of policy-making delegates a task to private actors outside the political legislative stream of decision-making. And this partnership might be expressed in three forms: an exclusive form of self-regulation; partial regulation, which takes form of co-regulation, i.e. joint decision-making with public actors; and the third form – no regulation or action at all, where the first form is most favourable of governmental institutions and the last form is preferred by the private sector.<sup>152</sup>

The braver conception could be granting the non-elected public officials the right to decide upon the major part of material risk regulation. It shall lead to a virtue of the rule-making system, which could preserve democratic legitimacy.<sup>153</sup> In other words, it might be said that domestic groups pursue “their interests by pressuring the government to adopt favourable policies, and politicians are seeking power by constructing coalitions among those groups” in order for “domestic actors to put pressure on governments at the national level to gain leverage,

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<sup>150</sup> *ibid* 304.

<sup>151</sup> *ibid*.

<sup>152</sup> A. Heritier and Sandra Eckert (2007), *New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe*, European University Institute Working Paper RSCAS, 2007/20, p. 2.

<sup>153</sup> Rainer Nickel (n 4) 16.

and that on the international level governments use negotiations to meet or escape domestic actors' interests.<sup>154</sup>

A. Heritier and S. Eckert<sup>155</sup> have demonstrated that the partnership is effective, if government takes the first steps to regulate an issue or tighten the existing one – in such a case the private sector reacts by self-regulation and its ambitiousness is directly linked to the level of the legislative threat and NGO campaigns, and on the other hand such a reaction raises more rigorous instruments of control over the agent's performance. Their study has shown that NGO campaigns are not always a necessary condition for self-regulation to emerge, and their influence is hard to control, as usually after their campaigning has reached any kind of legal regulation or agreement, they lose interest once it comes to watching over implementation and monitoring. However, it is believed that the described partnership is effective if the legislative threat is sustained or if it is prompted by external monitoring and sanctioning.

The “networked agencies” have the same tasks as the comitology committees – these should be undertaken in conditions that respect the virtues of “independence”, “scientific and technical quality”, “transparency” and “diligence”,<sup>156</sup> ensuring “effective coherence between risk assessment, risk management and risk communication”.<sup>157</sup> It should only be separated that some of the networked bodies that deal with risk analysis but not with risk management, when it is exceptionally left to the Commission. The decisions are usually conducted through a network that might cover up to a thousand of experts or nominating authorities or more.

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<sup>154</sup> M. Knodt (n 38) 702, **quoting** R.D. Putnam (1988), “Diplomacy and domestic politics: the logic of two-level games”, *International Organization* 42; p. 427-60.

<sup>155</sup> A. Heritier and Sandra Eckert (n 152) 20.

<sup>156</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 293.

<sup>157</sup> K. Vincent (2004), “Mad Cows” and Eurocrats: Community Responses to the BSE Crisis”; 10 *European Law Journal* 499; p. 517.

The main problem for the agencies is to ensure that the members act in the public interest and in an independent manner. The transparency (from a “networked agency” to public in general) is even poorer – a very small part of regulatory information is publicly available, which usually covers “accompanying documents and data of applications, the assessment and evaluation discussions of the concerned regulatory bodies, [...] the details of the resulting decisions and their justification, including minority positions”.<sup>158</sup> Furthermore, the increased transparency and accessibility might come at the expense of complexity and possible domination by large states and/or related party interests.<sup>159</sup>

It might be due to some significant limitations to the effectiveness of networked governance, such as weak influence of the latter due to a possible conflict between the compiled information supplied by the national authorities, which, it is believed, does not reach a wide audience of practitioners within industry, and the Commission’s priorities. Another reason might be identified as the burdened participation by Member States themselves. “Many Member States do not consider the work of the Agency as a priority, or worse, see it as a possible “intrusion” into their administration”.<sup>160</sup> The other problem to be mentioned – the dominant position of national administrations within the networks, who appear as “both interested party and judge“. This kind of dual position might be affected by the fear to provide information on bad implementation to the responsible agency, as this information might be used against them. On the other hand, Member States are not interested to provide this information as the collector has not contributed to improved implementation of EU legislation and it does not ensure the system of

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<sup>158</sup> J. Feick (2004), “Regulatory Rationalisation and Legitimation in the Face of Interests, Influence and Institutional De-politicisation: Market Entry Regulation for Pharmaceuticals in the EU”, unpublished paper for conference on “*Good Governance*” in *Supranational Market Regulation: How Do Regulatory Institutions Matter?*” (University of Bamberg, 16-17 January 2004).

<sup>159</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 297.

<sup>160</sup> *ibid* 288.

monitoring, so due to limited activities on analysis, implementation and monitoring, the activities of mediators and external participants is not so effective.<sup>161</sup> The possible solution found to this problem is “a system of legally binding duties that are controlled and could be enforced with sanctions, this strong-soft monitoring system is likely to have a better outcome than the current “voluntarily” soft-soft approach of the Agency’s “governance by information”.<sup>162</sup>

When an agent is required to explain and justify his/her action to those who have the necessary knowledge to understand and evaluate those actions. Such conferred decision-making discretion creates accountability for these established legal bodies.<sup>163</sup> In some cases, the legal bodies, possessing the same knowledge, might be ineffective, as their “deliberations might seem to yield only recommendations that can be ignored without penalty by those to whom they are addressed; [and] unworkable because in the absence of any sanction or discipline the actors could well choose to limit themselves to pro forma participation or worse yet manipulate the information they provide so as to show themselves, deceptively, to best advantage.”<sup>164</sup> Especially it is true when the provided information between agencies is asymmetric.

Having in mind the present financial situation in most of the Member States, a new form of networking called “shadow of hierarchy” is initiated where the state or public hierarchy is limited in its ability to secure the outcomes that it prefers; due to this reason non-state actors are endowed with a right of “bargaining in the shadow of the state” and act in some sense as its authorised agents or deputies in reaching solutions not directly available to the authorities

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<sup>161</sup> *ibid* 289.

<sup>162</sup> S. Smismans (2003), “Towards a New Community Strategy on Health and Safety at Work? Caught in the Institutional Web of Soft Procedures”, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 19, 55, p. 70.

<sup>163</sup> P. Nicolaides, A. Geveke and A.-M. den Teuling (2003), *Improving Policy Implementation in an Enlarged European Union: The Case of National Regulatory Authorities* (European Institute of Public Administration), p. 55-58.

<sup>164</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 305.

themselves; while all the time being assured that their agreements will be backed by the authority of the state.<sup>165</sup>

The Commission is now also considering the creation of a network of independent authorities in Member States, which would share responsibility for enforcement of the EU rules in terms on the issue, while also facilitating the horizontal flow of information and exchange of best practice.<sup>166</sup>

### Urbanization

Today the European city is a local actor and a “player” no longer overwhelmed by the state.<sup>167</sup> EU element influences the development of a regional identity. This policy usually covers four categories, affected by interaction with the EU – policies, practices, preferences and participants. The fourth category could be identified as the most important one, as EU-financed programmes “force the expansion of the number of players at the local decision-making table, bringing non-governmental organizations, representatives from the community and voluntary sectors, business leaders, and other social partners into the increasingly complex world of urban governance,”<sup>168</sup> by encouraging the development of more urban partnerships, widening the number of participants involved in the decision-making process.

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<sup>165</sup> F.W. Scharpf (1997), *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*, Westview Press, p. 197-205.

<sup>166</sup> Commission, “State Aid Action Plan. Less and Better Targeted State Aid: A Roadmap for State Aid Reform. 2005 - 2009”, (Consultation document – not published in the Official Journal), COM (2005) 107 final.

<sup>167</sup> P. Le Gales and A. Harding (1998), “Cities and States in Europe”, *West European Politics* 21(3), p. 120-145.

<sup>168</sup> A. Marshall (n 46) 478-485; and I. Bache (2000), “Government within governance: network steering in Yorkshire and the Humber”, *Public Administration* 78(3), p. 575-592; and A. Smith (1998), “The sub-regional level: key battleground for the Structural Funds?”, in P. Le Gales and C. Lequesne (eds.) (1998), *Regions in Europe*, London: Routledge.



Additionally, it should be noted that different Member States do have different institutional context, i.e. British local authorities lack constitutional standing, as the result of which it possess relatively few competencies, and are subject to a restrictive *ultra vires* rule which prevents them from taking action outside those responsibilities expressly granted to them by the UK Parliament as well as a decrease in their influence due to the fact that private companies have taken over many aspects of policy implementation and service delivery over the past twenty years.<sup>169</sup> While not engaging in European high politics, “more important for UK local government is the part they have played in shaping regional plans, such that they have become recognised as true if not equal partners in the policy implementation and management processes at the regional level.”<sup>170</sup>

However, not all regional institutions and actors are able to dominate sub-national development, as weak civil societies in some countries are not able to transform territorially sensitive issues into effective local demands. However, central states have weak incentives, lack resources and skills which may increase the efficiency of sub-national policy making.

The Commission was confronted by those weaknesses and it decided to change its priorities in order to push especially new Member States towards a hierarchical mode of governance<sup>171</sup> by creating problem-solving capacities with a focus on increasing the capacity of regional state and non-state actors to participate in integrated developmental policies. However, the central state still keeps its role in co-ordinating, helping and monitoring the making and implementing of regional developmental policies, that is why the Commission pushed the new

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<sup>169</sup> A. Marshall (n 46) 674.

<sup>170</sup> R. Smith (1999), “European Union policies and funds – the role of urban government in England”, in Bernhard Blanke and Randall Smith (eds.) (1999), *Cities in Transition: New Challenges, New Responsibilities*, London: Macmillan; p. 166.

<sup>171</sup> James Hughes, Gwendolyn Sasse and Claire Gordon (2004), *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe: The Myth of Conditionality*, Basingstoke: Palgrave Macmillan.

Member States towards centralised management. The reasons might be the following: either national governments do not provide enough power for regional actors, or sub-national stakeholders are not organised enough and lack cohesive regional development partnership or finally, the organised non-state actors do not have the skills, motivations and the know-how to participate actively and effectively in making and implementing regional development programs. On the other hand, despite the fact that Member States were pushed to focus on regional state and non-state actors participation in integrated developmental policies, the Commission itself can only “create networks and encourage others, involve a wide range of actors, and participate itself, but it can do little to shift the long-standing power dependencies between central and local government”.<sup>172</sup>

In nearly all new Member States one can find some challenge of the rules of governance and/or temporary compromises between central state and regional actors that might lead to what historical institutionalism would call “an emergence of a change at the margins implying local rule transformation within a basically unchanged institution that does not challenge dominant characteristics of the mode of governance” and a “change in continuity”.<sup>173</sup>

### Experimentalist governance

“Experimentalist governance” focuses on functionalism, such as monitoring and review of implementation experience, and setting the possibility conditions, containing strategic uncertainty, meaning that policy makers cannot rely on their strategic dispositions to guide action

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<sup>172</sup> I. Bache et al. (1996), “The European Union, cohesion policy and sub-national authorities in the United Kingdom”, in L. Hooghe (ed.) (1996), *Cohesion Policy and European Integration: Building Multi-Level Governance*, Oxford: Oxford University Press; p. 317.

<sup>173</sup> Laszlo Bruszt (n 20) 13.

in particular domain; and a multipolar or polyarchic distribution of power, in which no single actor has the capacity to impose her own preferred solution without taking into account the views of the others.<sup>174</sup> It is a method for dealing with political controversies in which actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with each other.”<sup>175</sup>

#### **6.4. CONCLUSIONS.**

The aim of this Chapter was to overview the possibility for external participants to get involved in the EU decision-making process at local and regional level. Though, the responsibility of involvement of regional and local representatives remains exceptionally with national administrations. It means that the Commission does not have any legal power to impose any obligations on Member States regarding territorial development governance.

As for external participants who are non-civil servant, it is left to the national government to create rules and procedures to be involved in the decision-making process. The involvement of non-elected external participants is also reserved to the EU institutions at EU level. The main instruments have already been discussed in the preceding Chapters.

The involvement of external participants is rather a complex process which may be related to the multi-level decision-making process, as it covers actions and actors at many levels of governance. Moreover it is stated that participation at multi-level decision-making process

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<sup>174</sup> Charles F. Sabel and Jonathan Zeitlin (n 6) 274.

<sup>175</sup> E.O. Eriksen and J.E. Fossum (2004), “Europe at crossroads: Government or Transnational Governance?”, in Ch. Joerges, I.-J. Sand, G. Teubner (eds.) (2004), *Transnational Governance and Constitutionalism*, Oxford and Portland/ Oregon: Hart Publishing; p. 120.

cannot be separated from politicization, and the final decision almost always reside with traditional legislative bodies or administrative institutions.

## **VII CHAPTER**

### **PARTICIPATION IN ENVIRONMENTAL ISSUES – PRIMORDIAL RIGHTS OF EXTERNAL PARTICIPANTS**

#### **7.1. INTRODUCTION**

Environmental issues usually cover the five elements – soil, water, air, climate and the landscape. Most of the legislation, drafted and implemented by DG Environment is also focused on those five elements. Strange to say that human beings are left out of the focus, as they should be the centre of all the further legal, technical or scientific developments. Water, soil, air, and nature have no voice of their own either, and citizens are usually dependent on the Commission to take up their complaints since citizens have practically no access to the Courts of the EU in environmental matters.<sup>1</sup>

The first steps to implement appropriate legal instruments and procedural rights were made by the UNECE Convention, which is considered to be a milestone in environmental

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<sup>1</sup> M. Taylor (2005), "Public involvement in environmental decision-making", in *EU Environmental Policy Handbook*, EEB, p.160.

democracy, granting procedural rights to individuals with respect to access to environmental information held by public authorities and public participation in decision-making. It does not set standards for environmental quality in itself, but sets out rules for the public's right of access to environmental information held by public authorities and a right of public participation in permitting procedures. It is a great tool for campaigners to greatly improve government accountability, environmental decision-making, and the involvement of stakeholders.<sup>2</sup>

This Chapter aims to identify the place of a human being in environmental decision-making process and its practical obstacles while ensuring participation in environmental issues. The right to participate in a decision-making process should be considered as a primordial right, of any natural or judicial person. In the last decades, citizens have been more willing to participate in an environmental decision-making process. For that role to be effective, it follows that citizens must be able to access relevant information and must have opportunities to express themselves. The right to participate in the environmental decision-making process enhances the quality and the implementation of decisions, contributes to public awareness of environmental issues, and gives the public the opportunity to express its concerns and enables public authorities to take due account of such concerns, by recognizing that every person has the right to live in an environment adequate his or her health and well-being.<sup>3</sup>

Whether this right is correctly ensured, the reply would be provided after the analysis of the main omissions faced by participants challenging contravening provisions of legal acts by the EU institutions as well as by national authorities would be accomplished. The environmental policy and its legislation have been chosen to be provided as an example,

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<sup>2</sup> *ibid* 161.

<sup>3</sup> Convention on access to information, public participation in decision-making and access to justice in environmental matters (done at Århus, Denmark, on 25 June 1998), preamble.

where a number of legal acts have been implemented. Based on this practice, it would be possible to evaluate whether such an instrument could be implemented in other policy areas as an example.

The participation and consultation of external participants has become a good practice, but it is still not obligatory. The first step to regulate this issue was tried by implementing an Århus Convention.<sup>4</sup> The document addresses the relationship between individuals and their associations on the one hand, and the public authorities on the other hand.<sup>5</sup> This Convention could be treated as the most unconventional Convention, due to the fact that it seeks to guarantee the procedural rights of the public. Addressing the environment/human rights interface there is great attention to the relations between governments and civil society and there is an unprecedented involvement of NGOs, both in the negotiation and implementation of the Convention.<sup>6</sup> It is not ‘only’ an environmental agreement, but it is also about governmental accountability, transparency, and responsiveness. The Århus Convention is also an instrument that stresses the need for information and provides a means for participation in the decision making process.<sup>7</sup>

This document was also ratified by the European Union in 2005.<sup>8</sup> By ratifying the Århus Convention, the EU “took upon itself the obligation to ensure that members of the public have

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<sup>4</sup> *ibid* – entered into force 30 October 2001.

<sup>5</sup> Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to justice in Environmental Matters to [EU] institutions and bodies, COM (2003) 622 final, p. 8.

<sup>6</sup> J. Wates (2004), Secretary to the Århus Convention, Environment and Human Settlements Division, UN Economic Commission for Europe; speech given during the conference “The Århus Convention and the Citizen“, on 5-6 July 2004.

<sup>7</sup> Margot Wallstrom (Environment Commissioner of the EU Commission) opening speech during the conference “The Århus Convention and the Citizen“, 5-6 July 2004.

<sup>8</sup> Council Decision No. 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124.

access to administrative or judicial procedures to challenge acts and omissions by EU institutions which contravene provisions of EU law relating to the environment”.<sup>9</sup>

## **7.2. THE TWO PILLARS OF PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING PROCESS**

The Convention has implemented some general features, which should be discussed in order to have a more thorough understanding of some of the evolved terms to be used in this context.

Even though the Convention implements three pillars on participation in the environmental decision-making process, namely access to information (first pillar), public participation (second pillar) and access to justice (third pillar), the first and the third ones are chosen to be analysed further in this Chapter. The second pillar will be excluded from the analysis, as it only covers public participation in specific projects or activities related to the environment.

### *7.2.1. The definition of the “Public”.*

This concept is offered a broad definition and covers any natural or legal person, as well as informal groups. The most relevant secondary legislation<sup>10</sup> has also identified this concept

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<sup>9</sup> M. Pallemerts (2009), “Compliance by the European Community with its obligations on access to justice as a party to the Århus Convention“, prepared by Institute for European Environmental Policy, 2009, p. 6.

<sup>10</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264, Article 2; and Council Directive No. 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175, Article 1.



in its legal text – both legal acts have implemented the same definition.<sup>11</sup> “Accordingly, the concept of “*members of the public*” can only be interpreted as encompassing any natural or legal person, as well as informal groups without legal personality, but the latter only to the extent that such groups are recognised as entities in their own right in accordance with the internal law or domestic practice of the Parties”.<sup>12</sup>

The definition of “*public authorities*”, which covers all sectors of the government, excluding bodies acting in a legislative or judicial capacity, requests an additional explanation. The Convention actually covers the “institutions” of the contracting parties to the Convention. EU legislation covers a specific legal meaning of the notion “institutions”. Pursuant to Article 13 of the TEU, the EU institutions are the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. The EU, – signing and approving the Århus Convention, - has explicitly referred to „[Union] institutions“, the list of which is finite.<sup>13</sup> Regulation 1367/2006/EC applies to „[Union] institution or body“, which means „any public institution, body, office or agency established by, or on the basis of, the Treaty“. <sup>14</sup> The question is, whether the CJEU deciding on this issue, would formally be bound by the secondary law definition contained in the Regulation. On the other hand, whether the legal decisions, taken by functional agencies, established by the EU legislator, entrusted with specific tasks of a scientific, technical or even regulatory nature, governed by European public law, with their own legal personality, distinct from the institutions established by the Treaty of Lisbon itself, <sup>15</sup> fall within the scope of the Århus Convention.

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<sup>11</sup> “The public” means one or more natural or legal persons, and associations, organisations or groups of such persons”.

<sup>12</sup> M. Pallemarts (n 9) 14.

<sup>13</sup> *ibid* 11.

<sup>14</sup> Regulation 1367/2006 (n 10) Article 2 paragraph c.

<sup>15</sup> M. Pallemarts (n 9) 16.

A recent study, conducted for the Commission by the consultants “Milieu Ltd.”,<sup>16</sup> showed the level of compliance of EU-25 Member States. However, the Commission did not get engaged in assessing compliance by the EU itself with its obligations on access to justice. The problem of the issue of the EU non-compliance is discussed in this Chapter.

It should be pointed out that the Århus Convention does not require the Parties to provide access to justice to any and all members of the public without distinction.<sup>17</sup> First, it has to meet the set criteria, if any, laid down in national legislation.<sup>18</sup> Further on, it would be expedient to define “*sufficient interest*” and “*showing the affected rights*”. The wider definition is suggested by Article 1 paragraph 2 of Directive 85/337/EEC,<sup>19</sup> where it is stated that for the purposes of this Directive, “*the public concerned*” means “the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2.2.; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”. So, the definition clearly states what can be an interest in order to be considered “the public concerned”, or having interest in the matter. The definition of “the public concerned” is extended in Article 10a of the same Directive, stating that “Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or

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<sup>16</sup> “Inventory of EU Member States’ measures on access to justice in environmental matters”, a study conducted by Millieu Ltd. in 2007. The full text can be found at <[http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm)> accessed 15 July 2010.

<sup>17</sup> M. Pallemerts (n 9) 14.

<sup>18</sup> Regulation 1367/2006 (n 10) Article 9 paragraph 3.

<sup>19</sup> Council Directive of 27 June 1985 No. 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175, amended by Directives 97/11/EC, 2003/35/EC and 2009/31/EC.

procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive”.

A slightly different definition is also offered by Directive 96/61/EC,<sup>20</sup> Article 2 paragraph 13 and Article 14, where it is stated “the public concerned” shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”.

“While referring to “the criteria, if any, laid down in national law”, the Århus Convention neither defines these criteria nor sets out the criteria to be avoided”.<sup>21</sup> The Parties of the Convention are not obliged to establish a system of their national laws with the effect that anyone can challenge any decisions, acts or omission relating to the environment, thus they cannot introduce or maintain any strict criteria which may bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment.<sup>22</sup>

#### *7.2.2. Freedom of Access to Information.*

Access to environmental information (either active or passive, as it is defined in Articles 4 and 5 of the Convention) held by public authorities is a prerequisite for improving the application and monitoring of the EU environmental law. Disparities between the laws in force in Member States concerning access to environmental information held by public

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<sup>20</sup> Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ L 257.

<sup>21</sup> M. Pallemarts (n 9) 15.

<sup>22</sup> *ibid.*

authorities can create inequality within the EU regarding access to information and/or conditions of competition.

Council Directive 90/313/EC,<sup>23</sup> which was implemented long before the Community signed the Århus Convention, ensures the freedom of access to and dissemination of information on the environment. It was repealed by Directive 2003/4/EC,<sup>24</sup> because of the shortcomings of Directive 90/313/EEC (identified by the stipulated reports on experience gained)<sup>25</sup> and the obligations arising from the Århus Convention. The new directive imposes a number of stricter obligations upon Member States, notably as regards the active dissemination of environmental information by public authorities and the extension of rights of access to information from citizens of EU to any person, regardless of his or her residence. It implements the availability of information to any natural or legal person without having to prove an interest. The Directive also obliges Member States to provide for an administrative “appeal”, (optional in the Århus Convention) which is a procedure that has the advantage of being rapid and free of charge.<sup>26</sup>

Progress includes the definition of environmental information, which is very broad and includes cost-benefit analysis and other economic analyses and measures, such as policies likely to affect the environment. It is also much clearer that health and safety information is within its scope. Under Article 6 paragraph 3 of Directive 85/337/EEC, each Member State has the power to determine the detailed arrangements for the consultation. That provision lists

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<sup>23</sup> Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment [1990] OJ L 158.

<sup>24</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [2003] OJ L 41, p. 26.

<sup>25</sup> Council Directive 90/313/EEC (n 23) Article 8.

<sup>26</sup> See the website of the United Nations Economic Commission for Europe (UNECE), Public Participation, Århus Convention at <http://www.unece.org/env/pp/prtr.ng.htm> - accessed 11 July 2005.

a number of possibilities open to Member States in this regard, but the list is not exhaustive, as evidenced by the words “in particular”.<sup>27</sup>

#### *7.2.2.1. Availability of Environmental Information.*

Information must be made available to the applicant no later than one month after receipt of the request. If the volume and complexity of the information is such that this period cannot be complied with, a period of two months from the date of receipt of the request is allowed.<sup>28</sup> But, one should note that environmental information should not be interpreted as simply about the state of the environment or just about information held by environmental ministries. Where public functions have been devolved or delegated or even privatised, it is clear that these secondary bodies cannot escape obligations to provide access to information.<sup>29</sup>

Member States shall ensure that public authorities inform the public adequately of the rights they enjoy and, to an appropriate extent, provide information, guidance and advice to this end. Availability of environmental information in a specific form or format is regulated in the same way as in the Århus Convention – the only additions to the Convention are:

- officials support the public seeking information;
- lists of public authorities are publicly accessible;
- the right of access to environmental information can be effectively exercised.

The foreseen exceptions also correspond to the Convention. In addition, it is regulated so that where a Member State provides for exceptions; it should draw up a publicly accessible list of criteria on the basis of which the authority concerned may decide how to handle

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<sup>27</sup> Case C-216/05 *Commission of the European Communities v. Ireland* [2006] ECR I-10802, § 31.

<sup>28</sup> Directive 2003/4/EC (n 24) Article 3 §1-2.

<sup>29</sup> M. Taylor (n 1) 163.

requests.<sup>30</sup> Member States may also exclude bodies or institutions that act in judicial or legislative capacities. This includes bodies such as parliaments, courts and tribunals, and can also apply to authorities which may have both legislative and administrative functions – the authority does not have a blanket exemption – only those areas which are legislative in nature should be exempted.<sup>31</sup>

#### 7.2.2.1.1. *Charges for Environmental Information.*

Access to any public registers or lists established, maintained and examined *in situ* of the information requested are free of charge. However, authorities may make a reasonable charge for supplying any environmental information.<sup>32</sup> However, it is also a case that the Courts of the EU have noted that high charges would be perverse if they restricted access to information.<sup>33</sup> If the cost of information is prohibitively high, then a serious inequality is created between, for example, corporations with access to large budgets and much poorer ECOs.<sup>34</sup> The same decision was also taken in the case *Commission v. Ireland*<sup>35</sup> stating that Ireland has, actually or potentially, created an obstacle to the exercise of the right, particularly for person of low income and it fails to ensure that opinions expressed by members of the public who are not able to pay participation fees are taken into account in development consent procedures pertaining to projects likely to have significant effects on the environment.

On the other hand, by making the participation of the public in certain environmental impact assessments subject to prior payment of participation fees, it should be treated as

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<sup>30</sup> Directive 2003/4/EC (n 24) Article 4 § 3.

<sup>31</sup> Article 8 of the Århus Convention (n 3) promotes public participation in the preparation of drafts of legislation, this being regarded as an executive function.

<sup>32</sup> Directive 2003/4/EC (n 24) Article 5.

<sup>33</sup> Case C-217/97 *Commission of the European Communities v Federal Republic of Germany* [1999] ECR I-5105.

<sup>34</sup> M. Taylor (n 1) 163.

<sup>35</sup> Case C-216/05 (n 27) §16-17.

infringement of the existing legislation, as it is not expressly authorised in the Directive.<sup>36</sup> Only access to information is authorised of levying of a fee. The fact that under another Directive the levying of fees is expressly permitted cannot found a general presumption that the Community legislature has wished to allow fees only when the legislation expressly so provides.<sup>37</sup> The levying of a fee, seeking to supplement environmental impact assessments with appropriate information may have the effect of dissuading members of the public, one of the principal sources of information, from participating in the decision-making process or of making their participation more difficult.<sup>38</sup> The only exception allowed by the case-law,<sup>39</sup> is the levying of an administrative fee, if the amount of the fee is not liable to constitute an obstacle. “Article 5 of each of these directives<sup>40</sup> provides that Member States may levy a charge for supplying information but that such charge is not to exceed a reasonable amount. Those rules show that, for [Union] legislature, the charging of a fee of a reasonable amount is not incompatible with the guarantee of access to information.”<sup>41</sup>

#### 7.2.2.1.2. *Format of Environmental Information.*

Should information<sup>42</sup> be requested in a specific format, the public authority must supply it in that format, unless it is already publicly available in another format, or unless it is

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<sup>36</sup> *ibid* § 11.

<sup>37</sup> *ibid* § 27.

<sup>38</sup> *ibid* § 14.

<sup>39</sup> *ibid* § 45.

<sup>40</sup> Directive 90/313/EEC (n 23) and Directive 2003/4/EC (n 24).

<sup>41</sup> Case C-216/05 (n 27) §41.

<sup>42</sup> Directive 2003/4/EC (n 24) Article 7 “Dissemination of environmental information”: “The information to be made available and disseminated shall be updated as appropriate and shall include at least: a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it; b) policies, plans and programmes relating to the environment; c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities; d) the reports on the state of the environment; e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be

reasonable for the public authority to make it available in another format. In this case, the reasons for refusal to make it available in the requested format must be provided to the applicant within one month. Public authorities must endeavour to keep information in formats that are readily reproducible and accessible by electronic means, and ensure it is up-to-date, accurate and comparable (it excludes information which was available before the entry into force of this Directive).

#### *7.2.2.1.3. Exemptions for Disclosure of Environmental Information.*

Requests for information might be refused if it complies with the listed reasons: the public authority does not hold the requested information; the request is unreasonable or too general; the requested information is in the course of completion, or concerns internal communication and disclosure would adversely affect the confidentiality.

The grounds for refusal have also been challenged in the *Office of Communications* case.<sup>43</sup> The reference for preliminary ruling was submitted by the Supreme Court of the United Kingdom following proceedings between the Office of Communications and the Information Commissioner concerning the interpretation of Article 4 of Directive 2003/4 on public access to environmental information. The issue arose as an epidemiologist requested access to the precise location of mobile phone base stations, which was denied. The CJEU was asked to explain how the exemptions for disclosure had to be weighed against reasons for disclosure. The CJEU points out reasons – “a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-

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requested or found; g) environmental impact studies and risk assessments concerning the environmental elements or a reference to the place where the information can be requested or found.”

<sup>43</sup> Case C-71/10 *Office of Communications v Information Commissioner* of 28 July 2011.



making and, eventually, to a better environment”,<sup>44</sup> which may cumulatively militate to disclosure.<sup>45</sup> The concept of “public interest served by disclosure” shall be regarded as an overarching concept covering more than one ground for the disclosure of environmental information.<sup>46</sup> The CJEU held that the concept of “interest served by refusal” is an overarching concept as well. It thus found that the competent public authority might, when undertaking that exercise, evaluate cumulatively the grounds for refusal to disclose.

The CJEU has ruled that provisions for disclosure of environmental information under Article 4 of Directive 2003/4/EC can override commercial confidentiality.<sup>47</sup> It must be interpreted that the confidentiality, which is expressly provided in Article 14 of Directive 91/414/EEC,<sup>48</sup> is stated to be without prejudice to Directive 2003/4/EC on public access. Though, Member States must grant access if (i) public interest outweighs exception grounds, or (ii) relates to “emissions into the environment”. “[T]he balancing exercise prescribed by article 4 of Directive 2003/4 between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the interests involved”.<sup>49</sup>

The same legal obligations are also applied to the EU institutions as well as it is stated in the most recent *ClientEarth* case.<sup>50</sup> The General Court had to decide whether studies which were made by private contractors at request of the Commission, and which examined whether

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<sup>44</sup> Directive 2003/4/EC (n 24) Recital 1 to the Preamble.

<sup>45</sup> Case C-71/10 (n 43) § 25.

<sup>46</sup> *ibid* § 27.

<sup>47</sup> Case C-266/09 *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden* of 16 December 2010.

<sup>48</sup> Council Directive No. 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market [1991] OJ L 230.

<sup>49</sup> Case C-266/09 (n 47) § 59.

<sup>50</sup> Case T-111/11 *ClientEarth v European Commission* of 13 September 2013.

the national law on hazardous waste and water quality complied with the requirements of EU law, could be made available to the public. The General Court has decided that „the Commission is entitled to maintain the confidentiality of documents assembled in the course of an investigation relating to infringement proceedings where their disclosure might undermine the climate of trust which must exist, between the Commission and the Member State concerned, in order to achieve a mutually acceptable solution to any contraventions of European Union law that may be identified“.<sup>51</sup> It is still too early to state whether the Commission tends to treat violation of EU law by Member States as confidential information without disclosing information to public on governments’ compliance with EU environmental law.

#### *7.2.2.1.4. Notification Procedure.*

The recent case-law based on implemented secondary legislation has extended the “notification procedure”. Article 25 of Directive 2001/18/EC<sup>52</sup> provides that “the Commission and the competent authorities shall not divulge to third parties any confidential information notified or exchanged under this directive and shall protect intellectual property rights relating to the data received”, unless the provided information is related to “general description of the GMO or GMOs, name and address of the notifier, purpose of the release, location of release and intended uses” as well as to environmental risk assessment. In such cases the provided information cannot be considered confidential.<sup>53</sup> “Indeed, such an assessment is possible only with full knowledge of the proposed release, because, without

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<sup>51</sup> *ibid* § 60.

<sup>52</sup> Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106.

<sup>53</sup> Case C-552/07 *Commune de Sausheim v. Pierre Azelvandre* as of 17 February 2009, §10.

such information, it would not be possible to validly assess the potential effects of a deliberate release of GMOs on human health and the environment.<sup>54</sup> The above mentioned Article creates a system which precisely defines the confidentiality which can apply to the various information that is disclosed in the context of notification procedures and exchange of information provided for by that Directive.

What would be the difference between the notification procedure and the access to information in this situation? The established connection suggests that the relevant public may request the disclosure of all information submitted by the notifier in the context of the authorisation procedure relating to that release.<sup>55</sup>

An important loophole in the Convention was the exemption of public participation obligations for GMO-related decisions. With an amendment to the Convention, agreed by the Meeting of Parties,<sup>56</sup> this loophole was partially addressed. The main weakness of this amendment is that it does not guarantee access to justice in cases where public participation requirements are violated or when contributions from the public are ignored without clarification. The amendment will only enter into force when some thirty countries have ratified it.

Parties must also make public the reasons and considerations on which the decision is based, so decision-makers should respond to each specific point raised by the consultation responses.<sup>57</sup> The same is also implemented in Article 8 of Directive 85/337/EEC that “the results of consultations and the information gathered must be taken into consideration in the development consent procedure”. It has to be made clear why environmental impact

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<sup>54</sup> *ibid* § 51.

<sup>55</sup> *ibid* § 32.

<sup>56</sup> Second meeting of the parties to the Århus Convention 25-27 May 2005, <<http://www.unece.org/press/execsec/2005/bs050525a.html>> accessed January 2012.

<sup>57</sup> M. Taylor (n 1) 164.

assessment on a specific project, which is believed to have a significant effect on the environment, has to be determined, as the public cannot assess the lawfulness of such a determination independently if the reasons for that determination are not given.<sup>58</sup>

### *7.2.3. Access to Justice in Environmental Matters.*

It is the right to challenge, in a court of law, public decisions that have been made without respecting the two aforementioned rights – access to environmental information and public participation in environmental decision-making – or environmental law in general.<sup>59</sup> “The purpose of judicial review is to provide a form of review of decisions made and actions taken by courts and administrative bodies, to ensure that the functions conferred on such authorities have been carried out correctly and legally”.<sup>60</sup>

Within the framework of its national legislation, an access to review procedure before a court of law or another independent and impartial body established by law, free of charge or inexpensive, where the final decision shall be binding, the public authority holding the information, should be ensured to:<sup>61</sup>

- any person, who considers that his or her request for information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance (procedures to challenge the handling of information requests);
- any concerned public (restricted) who considers that the procedures are challenged of legality of project-level decisions, requiring public participation;

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<sup>58</sup> Case C-75/08 *Christopher Mellor v. Secretary of State for Communities and Local Government* of 30 April 2009, §43; Case C-216/05 (n 27) §2; Directive 85/337/EEC (n 10) preamble, recital No. 6.

<sup>59</sup> Århus Convention (n 3) Article 9.

<sup>60</sup> Case C-427/07 *Commission of the European Communities v. Ireland*, as of 16 July 2009, §75.

<sup>61</sup> Århus Convention (n 3) Article 9.

- any Party who considers that the procedures challenge general violations of national law relating to the environment (standing may be established by Parties).

Access to justice also guarantees procedures to be fair, timely, and not prohibitively expensive. Also, in order to make it more transparent, the decisions should be in writing and publicly accessible.

#### *7.2.3.1. Access to Justice in EU Law and Policies.*

Legal instruments related to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the EU<sup>62</sup> are still not well developed. The Convention itself provides the minimum standards and any country can go further than the Convention.<sup>63</sup>

The Commission has drafted a proposal for a Directive<sup>64</sup> to fully address the requirements of that Convention on access to justice in environmental matters also aiming at improving the enforcement of environmental law. “The [Union] will only be able to fulfil these obligations if it is able to ensure that citizens and non-governmental organisations have the required access to justice as far as the [Union] law is concerned.”<sup>65</sup> It shall also be an efficient tool for representative associations seeking to protect the environment to have access to administrative or judicial procedures in environmental matters. The same point is also recognised in the 6<sup>th</sup> EU Environment Action Programme<sup>66</sup> that better access to courts of non-governmental organisations and individuals would have a beneficial effect on the

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<sup>62</sup> M. Pallemarts (n 9) 8.

<sup>63</sup> M. Taylor (n 1) 162.

<sup>64</sup> Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM (2003) 624 final, [2003] COD 2003/0246.

<sup>65</sup> *ibid* 4.

<sup>66</sup> Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme [2002] OJ L 242, p.1

implementation of the EU law.<sup>67</sup> The common minimum framework also needs to be established throughout the European Union in order to ensure a harmonised approach in all Member States on the same right.

Since signing the Convention in 1998, the EU has taken important steps to update existing legal provisions in order to meet the requirements of the Århus Convention by means of legislation directed to both Member States and its own institutions. In particular, two directives concerning access to environmental information and public participation in environmental decision-making (the “first” and “second pillar” of the Århus Convention) were adopted by the Parliament and the Council in 2003:<sup>68</sup> Directive 2003/4/EC<sup>69</sup> on public access to environmental information and Directive 2003/35/EC<sup>70</sup> on public participation in respect of the drawing up of certain plans and programmes relating to the environment and public participation and access to justice.

Regulation 1367/2006 grants citizens the right to initiate administrative or judicial procedures against acts or omissions that do not comply with environmental law in order to improve it. Member States would ensure that members of the public have access to administrative or judicial proceedings against administrative acts or omissions that infringe environmental law, if they have a sufficient interest, or if they show that their rights have been affected.

Access to the courts in pursuit of environmental protection of exercise of rights is still not well developed. One of the most contentious issues is that of legal standing for ECOs, i.e.

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<sup>67</sup> See the website of the United Nations Economic Commission for Europe (UNECE), Public Participation, Århus Convention at <http://www.unece.org/env/pp/prtr.ng.htm> - accessed 11 July 2005.

<sup>68</sup> *ibid.*

<sup>69</sup> Directive 2003/4/EC (n 24).

<sup>70</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156.

the recognition of sufficient status to bring legal proceedings. A totally open system providing for “action popularis” was opposed by the Commission on the grounds that this goes further than the Convention. Others have objected that enhanced access to the courts would create a number of actions, flooding the system.<sup>71</sup> However, an analysis of environmental cases brought by ECOs in a number of countries where ECOs have broader standing indicates that his view is not well-founded. Such actions formed a minuscule proportion of the overall case load (0.0148% in one study) and indeed were far more successful on average than other cases, emphasising the highly focused and targeted nature of the legal cases fought by ECOs.<sup>72</sup>

Members of the public and qualified entities who have access to justice against an act or an omission must be able to submit a request for an internal review. This request is a preliminary procedure under which the person or entity concerned can contact the public authority designated by the Member State before initiating the legal or administrative proceedings. It must be submitted within four weeks of the date of the administrative act or omission. The public authority then has 12 weeks to take a written and reasoned decision and notify it to the party that submitted the request. In the decision, the authority should describe the measures necessary to comply with environmental law, or, where appropriate, reject the request.

#### *7.2.3.2. Sufficient Interest and Impairment of Right.*

What could be constituted as a sufficient interest and impairment of a right might only be determined by a national legislation, consistently with the objective of giving the public

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<sup>71</sup> M. Taylor (n 1) 164.

<sup>72</sup> SRU: German Advisory Council on the Environment (2005), *Access to Justice in Environmental Matters: the crucial role of legal standing for non-governmental organisations*. SRU, Germany.

concerned wide access to justice.<sup>73</sup> According to the settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application in a sufficiently clear and precise manner.<sup>74</sup> However, those “national rules must not be liable to nullify [Union] provisions which provide the parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts”.<sup>75</sup>

On the other hand, it cannot be concluded that a Member State, which has failed to reproduce a precise definition of “the public concerned” in its legislation, has not fulfilled its obligation to transpose the provision in question,<sup>76</sup> especially when a Member State ensures that the relevant rights are already granted to the general public and that a specific definition of the public concerned is not therefore needed.<sup>77</sup> The definition would stay vague as it is, until the Commission establishes to what extent „the public concerned“, understood as the public affected or likely to be affected by, or having an interest in, environmental decision-making procedures, should be the rights deemed to be enjoyed under the implemented legal acts.<sup>78</sup>

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<sup>73</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* of 15 October 2009; for example, Swedish national legislation – the Environment Act, paragraph 13, - implements that a non-profit making association has to fulfill three conditions – the statute of the association must state that its purpose is the protection of nature and the environment, the association must have been active in Sweden for at least three years and it must have at least 2000 members. Only meeting those requirements, a non-profit organization may appeal against judgements and decisions on development consent, approval and exemption under Environmental Act.

<sup>74</sup> Case C-427/07 (n 60) §54; Case C-214/98 *Commission v. Greece* [2000] ECR I-9601, §49; Case C-38/99 *Commission v. France* [2000] ECR I-10941, §53; Case -32/05 *Commission v. Luxembourg* [2006] ECR I-11323, §34.

<sup>75</sup> Case C-263/08 (n 73) § 45.

<sup>76</sup> Case C-427/07 (n 60) § 56.

<sup>77</sup> Case C-427/07 *Commission of the European Communities v. Ireland* of 16 July 2009, Opinion of AG Kokott, § 36-37.

<sup>78</sup> Case C-427/07 (n 60) § 58.



#### 7.2.3.2.1. *The Public Concerned.*

It means, that qualified entities (associations, groups or organisations recognised by a Member State whose objective is protecting the environment) signal a concept which is not found in the Århus Convention and which is opposed by environmental citizens' organisations. Qualified entities may exercise the right to take legal action if they consider that an administrative act or an omission by an EU Institution or body is in breach of environmental law. This is implemented in Article 10a of Directive 85/337/EEC, which provides that members of the public concerned who fulfil certain conditions<sup>79</sup> have access to a review procedure before the court of law or another independent body in order to challenge the substantive or procedural legality of decisions, acts or omissions which fall within its scope.<sup>80</sup> Directive 85/337/EEC "in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure".<sup>81</sup> The CJEU has precluded in the case *Djurgården*<sup>82</sup> that a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of the Directive solely to environmental protection associations with the defined number of members. This judgement has raised some concerns among the academics that it seems to be up to the CJEU to decide "whether national conditions regulating access to justice are compatible with both the Århus

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<sup>79</sup> Members of the public concerned either have sufficient interest or maintain that one of the projects covered by Directive 85/337/EEC impairs their rights, as well as any non-governmental organizations which promote environmental protection and meet the conditions which may be required by national law satisfy the criteria.

<sup>80</sup> Case C-263/08 (n 73) § 33-35.

<sup>81</sup> *ibid* § 48.

<sup>82</sup> *ibid* § 52.

Convention and EU law, at least as far as it concerns the implementation of Article 9(2) of the Århus Convention”.<sup>83</sup>

The application of Article 10a of Directive 85/337/EEC was extended by the CJEU decision in the *Trianel* case.<sup>84</sup> The reference for a preliminary ruling was made between the “Friends of the Earth” of the Nordrhein-Westfalen branch in Germany and the Bezirksregierung Arnsberg, concerning the authorisation granted by the latter to Trianel for the construction and operation of a coal-fired power station in Lünen. The issue of this case was whether Article 10a of Directive 85/337 precluded legislation which did not permit NGOs promoting environmental protection to rely before the courts, in an action contesting a decision authorizing projects likely to have “significant effects on the environment”, on the infringement of a rule which protected only the interests of the general public and not the interests of individuals. The CJEU has stated that „[i]f those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest“.<sup>85</sup> The CJEU has decided that by providing that the interest of any non-governmental organisation meeting the requirements referred to in Article 1 paragraph 2 of Directive 85/337/EEC are to be deemed sufficient and that such organisations are also to be deemed to have rights capable of being impaired,<sup>86</sup> they shall be granted the right to defend the right to rely before the courts, in an action contesting a decision authorising projects “likely to have significant effects on the environment“, even

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<sup>83</sup> Jan H. Jans (2011), “Who is the referee? Access to Justice in a Globalised Legal Order”, in *Review of European Administrative Law*, Volume 4, No. 1, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1834102](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1834102)> accessed 28 August 2013, p. 87.

<sup>84</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* (intervening party - *Trianel Kohlekraftwerk Lünen GmbH & Co. KG*) of 12 May 2011.

<sup>85</sup> *ibid* § 46.

<sup>86</sup> *ibid* § 57.

where, on the ground that the rules relied on protected only the interests of the general public and not the interests of individuals, national procedural law did not permit this.

It should be noted that the proposal of a Directive excludes the Århus provision for the challenge of acts and omissions by private persons, which contravene national law relating to the environment (but covers those public authorities).<sup>87</sup> It is left for Member States to set up appropriate criteria for related access to justice under their national law if there is any action against a private person, covered by Article 9 paragraph 3 of the Århus Convention.<sup>88</sup> It was decided by the consulted experts from Member States<sup>89</sup> that “groups without legal personality have no legal structure, their objectives are not established in a public, transparent document and they have no financial ways of answering for their acts”. Based on these arguments, those groups should not be allowed to act in courts and administrative bodies of review. The same was decided for “certain groups, previously recognised as such by means of a special procedure, [which] could have access to review proceedings without having to claim the impairment of a right or having a sufficient interest”.<sup>90</sup> Based on this comment, the privileged legal standing for local and regional authorities has been removed from the text of the proposal for a Directive.

Though, the question “who has the right to have access to justice” is still unclear. The case *Lesoochránárske zoskupenie*<sup>91</sup> has been under the controversial discussion. *Lesoochránárske zoskupenie* (VLK) is a Slovak association whose objective is the protection

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<sup>87</sup> M. Taylor (n 1) 165.

<sup>88</sup> COM (2003) 624 final (n 64) 5.

<sup>89</sup> *ibid* 8.

<sup>90</sup> *ibid* 8-9.

<sup>91</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* of 8 March 2011.

of the environment. It requested the Slovak ministry for the environment to inform on any administrative decision-making procedures which might potentially affect the protection of nature and the environment. “The dispute concerned the request of the association to be a “party” to the administrative proceeding relating to the grant of derogations to the system of protection for certain species, such as the brown bear; access to protected countryside areas; and the use of chemical substances in such areas”.<sup>92</sup> It relied on Article 9 paragraph 3 of the Århus Convention. The Ministry refused to do that as it held a status of “interested parties” rather than “parties to the proceedings”, which was granted to associations whose objective was the protection of the environment. On the other hand, Article 9 paragraph 2 and 3 of the Århus Convention do not contain any unequivocally drafted fundamental rights or freedoms which would be directly applicable to public authorities. The issue of the case was “whether Art. 9(3) of the Århus Convention are directly effective within the meaning of settled case law of the [CJEU]”.<sup>93</sup>

As the EU acceded to the Århus Convention by Council Decision No. 2005/370/EC,<sup>94</sup> the CJEU concluded that the provisions of that convention now form an integral part of the legal order of the European Union.<sup>95</sup> Based on the fact that the dispute directly relates to the area of environment, Article 192 TFEU implements that EU has explicit external competence<sup>96</sup> and, furthermore, and it concerns a field in large measure covered by Union law (it is feared<sup>97</sup> that after such conclusion Article 9 paragraph 3 of the Århus Convention would almost always fall within the scope of EU law on environmental protection). The CJEU has admitted that the EU has not taken any legislative action with regards to Member States to

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<sup>92</sup> Legal analysis “The VLK Case: Slovakia. Application of Art. 9 Para. 3 of the Aarhus Convention According to the Decision of the Court of Justice of the European Union”, in *Justice and Environment 2011*, <[www.justiceandenvironment.org](http://www.justiceandenvironment.org)> accessed 21 September 2013, p. 2.

<sup>93</sup> Jan H. Jans (n 83) 89.

<sup>94</sup> Council Decision No. 2005/370/EC (n 8).

<sup>95</sup> Case C-240/09 (n 91) § 30.

<sup>96</sup> *ibid* § 35.

<sup>97</sup> Jan H. Jans (n 83) 94.

implement Article 9 paragraph 3. Though it has ruled that the national courts must interpret their national law in accordance with the objectives of this provision “in order to enable an environmental protection organisation, such as *zoskupenie* [VLK], to challenge a decision before a court following administrative proceedings liable to be contrary to EU environmental law”.<sup>98</sup> By making such a conclusion, the CJEU enhanced the legal position of environmental organisations at the level of the Courts of the EU.<sup>99</sup>

It shall be concluded that even Article 9 of the Århus Convention does not have direct effect; national authorities as well as courts shall ensure an effective right to challenge before a court a decision taken following administrative proceedings liable to be contrary to environmental law.

If the qualified entity which made the request considers that the decision of the EU institution or body does not guarantee conformity with environmental law or if it fails to communicate its decision within the specified period, the qualified entity may institute proceedings before the CJEU.

In order to be recognised (either between preliminary procedure (advance recognition) and a case-by-case *ad hoc* procedure), a qualified entity must meet the following criteria:

- be independent, operate on a non-profit basis and pursue the objective of protecting the environment;
- be active at Community level (in at least 3 Member States);
- have an organisational structure enabling it to achieve its objectives;
- be legally constituted for more than two years and have experience in environment protection;

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<sup>98</sup> Case C-240/09 (n 91) § 51.

<sup>99</sup> Jan H. Jans (n 83) 98.

- have its annual accounts (for the two receding years) certified by a registered auditor.

Regular checks are made to ensure that entities continue to satisfy these conditions; otherwise it may lead to the cancellation of recognition.

### **7.3. CONCLUSIONS.**

The overview of the Århus Convention is the last point in the analysis of external participation in EU decision-making process. This international Convention is the only one in the whole analysis and was chosen purposefully. It ensures participation in the environmental decision-making process and settles procedures to have access to relevant information and be able to express oneself.

The appropriate legal instruments that will apply the rules of the Convention to the EU institutions as well as to Member States to have access to information and justice still need to be developed and the omissions need to be corrected. It concerns, in particular, the EU institutions, which have not complied yet with their obligations on access to justice.

It is important to identify who can participate in the environmental decision-making process. First of all, the party needs to define “sufficient interest” and “show the affected rights”. The case studies show that a standing is usually governed by legislation that required the litigant to have an “interest” of some kind, in order to be allowed to bring a court case. Only meeting those requirements, external participants may be allowed to have access to information and justice. It allows challenging of a broad range of environmental laws, acts and omissions by the qualified entities or *locus standi*. The standing of private persons is excluded in the EU and in most of Member States national legislation.

It shall also be noted that the present legislation both at the international and EU level grant information seekers a right to access to information without a corresponding responsibility. There is no obligation on the information seekers to account where and for what purposes this information will be used, though the information holders are expected to achieve their core functions before issuing the requested information or limiting its disclosure.

There is no consensus of what kind of information shall be disclosed and which may be considered as confidential. In order to preclude such ambiguous treatment, information holders ought to make sure that the future legislation gets precise and comprehensive vertical disclosure and dissemination regimes in the legislative acts or at least “without prejudice” clauses in horizontal legislation. It is also advisable to anticipate vertical information management regimes if less predictable horizontal rules get implemented.

However, if there is a narrow exception implemented in the legislative acts, it needs to be ensured that it is properly applied whenever the disclosure of the required information is not appropriate.

The legal provisions, which were implemented under the Århus Convention, are mainly in the form of hard law. It means that external access to information and justice is regulated under binding legislative acts contrary to other instruments which are established for external participation. However, external participation in the environmental decision-making process confronts a number of rules and restrictions, which limits the frame of participation. Thus far, the criteria for defining qualified entities for legal standing are still under development in order to create an effective system of *judicial safeguards* when law is challenged or must be applied.

## **VIII CHAPTER**

### **EMPIRICAL RESEARCH OF ENVIRONMENTAL COMITOLGY COMMITTEES: RESULTS AND COMPARATIVE ANALYSIS**

#### **8.1. INTRODUCTION**

This Chapter describes the empirical research that was undertaken and its results. The first part of the Chapter overviews the chosen methodology and its compound parts. It explains how the two empirical researches were performed and the final results obtained. The second part aims at ascertaining the main reasons for establishing comitology committees and their ability to achieve the tasks for which they were created, which were noticed during the period of empirical research. This Chapter also lists the scope of mostly common delegated tasks. The set task of this research is to prove that comitology committees are established for a definite goal, mainly related to the involvement of external participants with technical and scientific experience. The results of the first empirical research were verified and supported or rebutted in the second empirical research.



### 8.2.1. METHODOLOGY OF EMPIRICAL RESEARCH.

The aim of this study is to show how external participants can legally participate in the EU decision-making process and represent their interests or provide their opinion on the relevant subjects. The methodology used to carry out the two empirical studies consisted of the application of a number of steps. It was decided to use a qualitative<sup>1</sup> research method due to a number of reasons, applicable to the chosen target group for this research:<sup>2</sup>

- 1) it is appropriate for gaining “a “holistic” overview of the context – its logic and its arrangements, as well as its explicit and implicit rules”;
- 2) the best way to gain the most qualitative data is “on the perceptions of local actors through a process of suspending or “bracketing” preconceptions about the topics under discussion”;
- 3) without having much primary information, the “researcher is essentially the main “measurement device” in the study”;
- 4) the whole research is done through discussions, interviews and other kinds of verbal communication.

One of the reasons to treat the second empirical research as a qualitative one was mainly due to the fact that only 21 replies were received out of 950 invitations to participate in the study on external participation in the EU decision-making process<sup>3</sup> sent out to

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<sup>1</sup> Keith Fu. Punch (1998), “Introduction to Social Research: Quantitative and Qualitative Approaches”, Sage Publications Ltd., London, p. 4: “Qualitative research is empirical research where the data are not in the form of numbers.”

<sup>2</sup> M. B. Miles and A. M. Hubermann (1994), *Qualitative Data Analysis*, 2<sup>nd</sup> edition, Thousand Oaks, CA: Sage Publications, p. 6-7; in Keith Fu. Punch (n 1).

<sup>3</sup> The study was conducted in April – September 2012.

Ministries of Environment of twenty-seven Member States as well as to various NGOs, expert groups, universities and other stakeholders. The received number of replies is not sufficient to treat the research as a quantitative one and treat descriptive statistics (frequencies) as representing the whole target group. Opinions and replies provided by respondents will only be used to support and exemplify some of the statements throughout the whole analysis on external participation.

The entire design of the research utilized the following main principles:

- *the strategy*: the aim of the researches was to gain an answer to the already defined object: how external participants are involved in the EU decision-making process in order to represent their interests and achieve their goals. It is also used as a tool to prove or deny the conclusions reached based on the analysis of the secondary literature. The results of the research will provide the missing information in order to get a “holistic” overview of the context, as well as replies to the previous analysis.
- *conceptual framework*: the secondary source research (research of the literature) was done before the structuring of the questionnaires – the first one is intended for civil servants of DG Environment of the Commission (Annex I) and the second questionnaire was drafted for civil servants of national ministries of environment and external participants being active in the area of environment (Annex II). It was assumed that the questionnaire contained only a small set of questions, which would be corrected and/or supplemented after each interview. Also, further questions were devised and forwarded to respondents already questioned. The aim of this action is to include all the missing information, which was not defined while reading the literature, as well as to allow for the addition of all recent developments and updates.

The results of the literature research would also be used to explain the meaning of some questions and the provided answers.

- *the target group* (targeted respondents): includes all the civil servant of DG Environment, working with, in or on behalf of comitology committees in the first empirical research. In order to get contacts and general information on comitology committees, a civil servant in charge of administrative issues was interviewed or any other member of a comitology committee who represents the Commission. The information on existing and active comitology committees in DG Environment was provided by a civil servant. This information was also checked at the Comitology Register.

The second empirical research aimed to cover all civil servants of ministries of environment in all 27 Member States as national representatives and external participants representing environmental NGOs, consultancies, stakeholders, universities and similar on the other side. The search for contacts was carried out through various random databases and other sources (lists of members of various working groups, conferences, projects, programs and similar).

- *the used tools*: the target respondents were contacted by e-mail to explain the aim of the research and to set a convenient meeting time. The designed questionnaire (Annex I) was used as a leading tool to give directions for the answers for the respondents. Each respondent was giving different information and primary data on the provided questions. The second research was implemented using two tools – the drafted questionnaire (Annex II) was sent by e-mails stating that the replies can be submitted

in two ways – either returning the replies by e-mail or filling in a questionnaire on the database.<sup>4</sup>

### **8.2.2. COLLECTING DATA**

In this research, multiple methods of data collection and multiple sources of data were used.

#### *The interview*

The interview is one of the main data collection tools in qualitative research.<sup>5</sup> In this research, an open-ended research methodology was used.

The interview questions were marginally pre-planned and standardized. General questions helped initiate the interview. Specific questions were provided only when the interview unfolded, depending upon the direction the interview took. The possible responses to pre-established categories were prepared, but these were not provided to the respondents. The possible responses were primarily used as examples, in case the respondent did not understand the question or did not know how to formulate the answer. The respondent was provided a lot of space for flexibility and variation while answering the questions.

In the beginning, general questions were asked and the object was not strictly defined, due to the lack of practical information. During the first interviews, respondents were asked to tell all they knew about the subject. The interviews were recorded and more focused classifications and categories were developed in the field notes. So, developing the research further, the nature of observation sharpened in focus, leading to clearer and more

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<sup>4</sup> The questionnaire was also provided in an on-line version on [www.manoapklausas.lt/apklausa/355398536/](http://www.manoapklausas.lt/apklausa/355398536/).

<sup>5</sup> S. Jones (1985), "Depth interviewing", in R. Walker (ed.) (1985), *Applied Qualitative Research*, Aldershot: Gower, p. 45-55.

comprehensible questions, which required more selective observations. In the second half of the research, the respondents were asked a larger number of questions, which were corrected and added after the previous interviews. The questions, which were added during the process, were asked to the first respondents additionally, to complete the relevant questionnaires.<sup>6</sup>

Before starting an interview, several main issues were considered:

- *Who will be interviewed and why?* At the beginning, a civil servant responsible for comitology procedures and data submission, in the administration Unit was interviewed. Based on the list, a responsible person of the chosen comitology committee was contacted. Only those respondents, working on the subject area of the committee, could explain the Unit's<sup>7</sup> policies and the committee's working procedures as well as covered policy areas. Thus, participants are usually representatives of the same experience or knowledge. In other words, they are not selected because of their demographic reflection of the general population, but according to some predetermined criteria relevant to a particular research objective.<sup>8</sup>
- *How many will be interviewed, and how many times will each person be interviewed?* There were 36 registered comitology committees in DG Environment. The initial plan was to contact and interview every single responsible person of the registered committees. But, the interviewing process depended upon the willingness and availability of the respondents. In total, 20 interviews were held.

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<sup>6</sup> D. Silverman (1993), *Interpreting Qualitative Data: Methods for Analyzing Talk, Text and Interaction*. London: Sage.

<sup>7</sup> According to the information, received from the administration Unit (A.4), each Unit works with one up to 3-4 committees constantly. The number of committees changes constantly - some of them disappear as the basis of their establishment expires, as the others get created due to the implemented new policy.

<sup>8</sup> A. M. Huberman and M. B. Miles (1994), "Data Management and Analysis Methods", in Norman K. Denzin and Yvonna S. Lincoln (eds.) (1994), *Handbook of qualitative research*, Thousand Oaks (CA) etc: Sage Publications: "This is called purposive sampling, a commonly used form of nonprobabilistic sampling techniques".

- *When and for how long will each respondent be interviewed?* All the interviews were held from May to July of 2005. The time for the discussions was suggested to be up to 1 hour, but, depending on the available information, interviews lasted up to 2 hours. Hand-written notes were taken during all of the interviews and the analysis-summary of the interview was sent to each respondent; they checked the accuracy of the recorded information.
- *Where will each respondent be interviewed?* All of the respondents were interviewed during the working hours in their offices. The language of the interview was English.
- *How will access to the interview situation be organized?* After contacting each respondent, they suggested the meeting time and place. Most of the interviews were held in respondents' offices, as it was more convenient for them to show the relevant websites, information material and other examples, mentioned during the interview, and also to save time on moving to different locations.

There is also a specific linguistic issue for the interviews: all of them were held in English, as most of the respondents come from non-English backgrounds and it was the most appropriate language to be understood by both sides. Most of the provided material was in English, but there were cases when material was given in French.

### Observation

During direct observation, where observers watch participants closely, they neither manipulate nor stimulate the behaviour of those whom they are observing, in contrast to some other data gathering techniques. The situation being observed is not contrived for research purposes.<sup>9</sup>

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<sup>9</sup> Keith Fu. Punch (n 1) 185.

The observation itself evolved during the meetings of comitology committees. Two comitology committee meetings were attended – a *Climate Change Committee* meeting and a *Nitrate Committee* meeting. I was allowed to stay and observe all the procedures – discussions and voting. The attended meetings also hosted external participants, who were invited due to their scientific and technical input.

This method was not applied for writing responses in the questionnaire of the second empirical research.

### Documentary Data

During the interviews, respondents offered some documentary data to be included into the research. Some of the documents were of strict use and not for quotation, while others were of public use and could be quoted directly in the research. Most of the documents, received during the interview, were original, but the information was often vague and hidden in the text – only a few passages could be taken out to be included into the research. The representativeness of the provided documents was only for the specific comitology committee, and most of them could not be applied to other comitology committees.

The acquired documents were used to update the research of the literature and the previously collected information.

### Written responses to the questionnaire

The second empirical research was conducted by using the drafted questionnaire. It was prepared using open-ended, semi-closed and closed types of questions. There were 55 questions in the questionnaire. It was prepared only in English. The questionnaire was sent out to respondents selected randomly. They were asked to fill it in and return back either by e-

mail or via the database. The respondents were not provided with additional information or explanations. The received replies were coded and processed using the SPSS program.

### **8.2.3. THE ANALYSIS OF QUALITATIVE DATA.**

All the interviews were summarised separately, including the research of the secondary literature, and coded<sup>10</sup> according to the name of a committee. The recording was done keeping the same structure, which was defined in the questionnaire. The structuring of data was based on a systematic reading of records in order to develop, examine and compare the recurring subjects: the history of the creation and development of the committee, the legal background, the procedures of the comitology committee, the main functions and the differences between committees. Each subject comprised various codes and labels that explained the components of each subject.

After the interviews, all the data was looked through once again and collated with the information provided in the primary sources.<sup>11</sup> All the *ad hoc* groups, working groups and etc., mentioned during the interview, were checked, in order to get more information and more detailed descriptions, as the facts were provided as a matter-of-fact. Respondents mentioned and suggested reading various documents, websites, books, cases, etc., which were

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<sup>10</sup> ibid 205-206: “[c]oding is the starting activity and the foundation of what comes later, i.e. it is both the first part of the analysis, and part of getting the data ready for subsequent analysis. Codes are tags, names and labels, and coding is therefore the process of putting tags, names or labels against pieces of the data. The point of assigning labels is to attach meaning to the pieces of data, and these labels serve a number of functions. They index the data, providing a basis for storage and retrieval. There are two main types of codes: descriptive codes, and inferential (or pattern codes). Early labels may be descriptive codes, requiring little or no inference beyond the piece of data itself. Second-level coding tends to focus on pattern codes, which pull together material into smaller and more meaningful units – more descriptive codes.”

<sup>11</sup> ibid 207: “[i]t is the second basic operation – it begins at the start of the analysis, along with coding. Memos can be substantive, theoretical, methodological or even personal. Some of the memos can produce deeper concepts, others propositions and conceptual outputs it is the way of balancing discipline with creativity.”



not identified during the research of the literature phase. The more detailed research helped to understand the origin and the development of each comitology committee.

As for the second empirical research there were approximately 950 invitations sent out to participate in the survey. 21 filled in questionnaires were returned; these were used for the data analysis.

#### **8.2.4. VALIDITY AND RELIABILITY**

Validity is a problematic concept with regard to both quantitative and qualitative studies.<sup>12</sup> Since the measure in the social sciences is often indirect, the question is whether researchers are measuring what they have intended to. Hence, validity depends on the audience, researchers, or academics, as well as the participants of the study themselves.

In this study due to the long interval between the initial interviews and the final research report and due to the rapid turnover of the Commission's personnel, it was not possible to ask all the original informants for their opinions of the plausibility of the results of the final interpretation. Lack of the informants' reviews and comments highlights one limitation of the methodology used in this study. Nevertheless, the opinions of various experts have been sought to ascertain the plausibility of the results and interpretations, also the interviewers' accounts and reports have been studied in order to compare the interpretation of

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<sup>12</sup> D. L. Altheide and J. M. Johnson (1994), *Criteria for Assessing Interpretive validity in Qualitative Research*, in Norman K. Denzin and Yvonna S. Lincoln (eds.) (1994), *Handbook of qualitative research*, Thousand Oaks (CA) etc: Sage Publications, p. 485-499.

the data. Although as Morse<sup>13</sup> claims, expecting the audience or another expert to have the same insight as the initial researcher is rather unrealistic.<sup>14</sup>

### Potential biases

There are several factors that might have biased the data. One problem is related to the approach of the Commission towards comitology committees. Some of civil servants, who were interviewed, took his/her comitology tasks as an additional burden to the regular workload. They could explain what they were doing and what the last meeting was about, but they were not very interested in the particularities of comitology committees. They could not provide more information, despite what they needed to know in order to follow the basic procedures. Consequently, some of the information might have been missed or misinterpreted, due to the lack of interest of some of the representatives of the Commission in comitology committees.

### Ethical considerations

Traditionally, the ethics of sociological research are concerned with informed consent, the protection of the integrity and the privacy of the research participants.<sup>15</sup> Informed consent means agreement received from the individual to participate in the study after she/he has been carefully and truthfully informed about the research and the use of the results. Nevertheless, the comitology committees were clearly defined in the research as the information on each committee was publicly available and, without disclosing the committees' identities, the analysis would not have been comprehensive.

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<sup>13</sup> J. M. Morse (1994), "Designing Funded Qualitative Research", in Norman K. Denzin and Yvonna S. Lincoln (eds.) (1994), *Handbook of qualitative research*, Thousand Oaks (CA) etc: Sage Publications, p.229.

<sup>14</sup> *ibid* 231: "no one takes a second reader to the library to check that indeed he or she is interpreting the original sources correctly, so why does anyone need a reliability checker for his or her data?"

<sup>15</sup> D. de Vaus (2002), *Surveys in Social Research*, London: Routledge.

In this study, attempts were made to secure the voluntary and informed participation of the respondents by informing of them the procedure and the goals of the interviews and the study.<sup>16</sup> All the respondents' participation was voluntarily; they could refuse to participate in an interview and decline to provide the information that was asked. Indeed, some of the representatives of comitology committees refused to meet the interviewer and to provide information. The request was sent out to all DG Environment comitology committees, but eight representatives of comitology committees did not reply. Those committees were included in the research analysis, based on publicly available information.

The written survey that was achieved by sending out questionnaires followed the same rules. Respondents were free to contribute or not. Both the goals of the survey and the researcher leading it were presented in the introductory part of the questionnaire.

### **8.3. THE NEED FOR COMITOLOGY COMMITTEES.**

The data is used to verify the issues raised and statements made in the preceding chapters. As the establishment of committees is believed to be due to “the complexity of the text and the diversity of possible solutions to scientific, technical and practical questions”,<sup>17</sup> the data shall either confirm or deny this. As the demand for technical and scientific expertise increased with the growing complexity of the regulation of contemporary society, it was decided to develop a formal consultative body, which could be used when needed without burdening civil servants of the EU institutions. On the other hand, the EU institutions need the latest scientific and technical expertise in order to establish appropriate and acceptable

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<sup>16</sup> Formally, the investigator should ask the informant to sign a special form of informed consent. At the time the study was carried out, such procedure was not very common and hence it was not included into ethical considerations.

<sup>17</sup> Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Strategic Document as agreed by the Water Directors under Swedish Presidency 2 May 2001; p.1.

implementation measures, which, in the end, are exclusively for national governments to decide. If the scientific and/or technical data, on which the legislation is drafted, is outdated, it means that the decisions will need to be amended very soon, which might weaken the trust in and legitimacy in the EU and in its decisions.

In this part of the chapter, the interview data, survey results and academic research are compared, in order to rebut the opinion that the need for comitology committees is not always so great and that, in some cases, they are being set just due to the fact that such an obligation is implemented in secondary legislation.

*Politically sensitive decisions receive more power.* It was noticed, that if decisions are politically sensitive, a comitology committee receives more power in the decision-making process. As an example the *GMO Contain Use and Release Committee* could be mentioned. The meetings of the committee, as well as the drafted material is treated strictly confidential before the adoption, as the issue is very sensitive for business, industry, environment, consumers, agriculture etc. The Commission is not willing to take the final decision itself, as it might engender dissatisfaction in different Member States, especially those, where the population is strictly against GMO products. In such case, the adoption of the decision is left to the comitology committee. External experts as well as various interest groups are not allowed to participate in comitology committee meetings until the final adoption of the drafted legal act for the sake of security of information.

*Transience of some of the comitology committees based on delegated policies.* Comitology committees are established under secondary legislation, where specific tasks are determined. And, in some cases, as soon as the provided task is implemented, a comitology committee becomes inactive. For example the *Non-road Mobile Machinery Committee*, which

is not active at the moment as all the implementation measures were adopted. The only possibility to make the committee active again is to revise the secondary legislation and define other tasks or update the previous ones. But, if a comitology committee is not needed to revise a directive or another legal act, in most cases, this type of committee will be taken off the register after a few years. When discussing the withdrawal of a committee from the official database, one should mention a *VOC by Petrol Stations Committee*, which at the time of the interview had not held any meetings for four years.<sup>18</sup> The person in charge of this committee mentioned that the unit was planning to eliminate this committee from the register.

Two distinct cases are given which leads us to assume that the importance of a comitology committee is mainly based on a political issue assigned to the committee. The more sensitive it is, the more decision-making power committee members possess. If a committee is established just because it is foreseen in the secondary legislation without being in demand, as soon as it fulfils its tasks, it ceases its activities.

*The need for scientific and technical experience.* Other important criteria for establishing a comitology committee is its standing as a representative as well as the obtained knowledge and expertise. As it was already mentioned in the chapter “External participation through comitology”, comitology committees consist of a number of representatives of social groups, parties, sectors, local and regional authorities or similar.<sup>19</sup> They either hold academic or professional experience, in order to provide expertise and technical knowledge. This is a very general statement regarding the composition of comitology committees.

The previous paragraph highlights two necessary components to make a comitology committee efficient. First, members of different committees have to sustain the interests of

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<sup>18</sup> The interview took place in June 2005.

<sup>19</sup> H. Pitkin (1972), *The Concept of Representation*, University of California Press, Berkeley.

key players in an environment. Second, the members have to have appropriate knowledge and expertise on the debated issue. This is due to the enlarging scope of the taken decisions, which could not be taken by civil servants, as they require sometimes very precise technical and up-to-date scientific knowledge. National bodies refused to take this responsibility, so it was decided to invite external expertise into different committees in order to consult them.

The interviews have proved that most of the committees involve members of comitology committees in technical drafting procedures due to their knowledge or ability to obtain such expertise. Most of the members work themselves or sub-contract commercial experts, in order to provide an up-to-date technical knowledge, such as the setting of implementation criteria, drafting and amending monitoring and implementation plans, carrying out different feasibility studies, and drafting guidelines for monitoring or other implementation measures. The sub-contracting of experts is done pursuant to the public procurement legislation. The Commission publishes a proposal and invites public and/or private bodies to tender.

Five years before the observed meeting of the *Nitrate Committee* meeting,<sup>20</sup> the Netherlands requested derogation under the Nitrate Directive 91/676/EEC. The request under paragraph 2b of annex III was prepared by the sub-contracted experts' consultants who evaluated the possible consequences for the neighbouring countries, the possible damage to underground waters and costs for the implementation of the derogation. The presentation of the finished study was made in the committee and questions from Member States were answered by a civil servant from the Netherlands. Experts were present during the meeting just in case any technical questions arose or any empirical or specific data were needed. Such experts or consultants might be tendered by the Commission or by any Member State. As the

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<sup>20</sup> Held on 27 June 2005.

Dutch request for derogation was almost agreed prior to the meeting, Austria presented its own request for derogation under the same provisions of the Nitrate Directive. This example shows that the activities of the *Nitrate Committee* entail implementation of the Directive, its adaptation to scientific and technical progress, the adoption of monitoring guidelines as well as annexes to secondary legislation where scientific and technical progress is taken into account.

*Consultative bodies involved in decision-making process as experts.* Most of the DG Environment committees, as all the rest of comitology committees established by different DGs in the Commission, deal with implementation measures of adopted legislations. The Commission has established a number of consultative bodies, as confirmed by the research. Most of the interviewed committees have formed consultative bodies on an *ad-hoc* basis, in order to ensure a valuable and up-to-date technical solution. Among the most technical committees are *Eco-label Committee*, *Nitrates Committee*, and *Water Framework Directive (WFD) Committee*. Those committees deal with the implementation of legislative acts. They review it every two years in order to update the progress and work programme as well as to support Member States in establishing monitoring networks, management plans, etc. Members of the committees provide, or make accessible, technical and scientific knowledge. They are not dealing with specific questions concerning national and/or regional situations, or institutional and administrative arrangements. These are left to individual Member States.

Members of the committees have a duty to check that the selected combination of measures is cost effective. The work under the WFD committee is so extensive in technical terms that they need to invite more experts to establish quality standards, prioritise hazardous substances, or analyse them. This work is assigned to sub-committees.

The *Eco-label Committee* deals with more or less similar issues. According to the Community Eco-label Award Scheme, the European Union Eco-label Board develops and sets or reviews ecological criteria (to be implemented in Member States for various products), and verifies both assessment and compliance. It is worth noting that the *Eco-label Committee* is the only committee where it is possible to identify most of the theoretical components of comitology committees. As for *ad-hoc* working groups, the *Eco-label Committee* has established legal rules that “for the development of eco-label criteria for each product group as well as the assessment and verification requirements related to those criteria, a specific group, involving both the interested parties, identifying and selecting key environmental aspects, and competent bodies, is established”.<sup>21</sup>

The reasons for establishing *ad-hoc groups* might not be strictly necessary for scientific knowledge and expertise accumulation purposes. It may be due to political agreements among the highest political leaders and/or top-experts. Such practice is applied in the *Packaging and Packaging Waste Committee*, where informal groups are formed. One of them is for the purpose of achieving political decisions regarding the waste management framework, another works on high technical issues, regarding waste shipping regulation. The meetings of both working groups are strictly confidential and the decisions taken are not minuted. Members of those groups meet just to agree on political orientations and then the decision is drafted by the experts under the supervision of the members of the comitology committee.

So, the main task and function for the committees is to draft technical measures, which need to be adopted by the EU institutions – the Council and the Parliament. The adopted legal

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<sup>21</sup> Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community Eco-label Award Scheme [2000] OJ L 237, Annex IV “Interested parties involvement”.



act needs to be implemented by national legislation. Still, committees have not been recognised as EU institutions, their decisions are not binding and finally committees do not have any formal investigative power. However, this position is changing with every new political decision being implemented. As most of the committees are staffed by constantly changing experts and representatives and rely on established ad-hoc working or expert groups, there is a risk that new representatives, new scientific expertise and interests would aggravate the implementation of long-term policy goals.

Additionally, whatever decisions are taken in the committees system, the final implementation is done by national governments, which have the responsibility of ensuring uniform implementation and compliance. The only reason for reaching a common agreement between Member States is the common aim to harmonise most of legal requirements are the same in their scope all over the EU.

It can be concluded that EU is in high demand of scientific knowledge and expertise, in order to be able to take effective and up-to-date political, as well as, legislative decisions. The research has shown that the gained experience and knowledge is successfully used in comitology committees. Members of committees possess different types of experience and scientific data, hence experts and consultants are more often involved in the decision-making process. The only problem, which is still not solved, is the legal regulation of the involvement of expertise in the decision- making process. There are already some initial steps, but it is not enough.

#### 8.4. TYPOLOGY OF COMITOLOGY COMMITTEES.

The committees under the EU auspices are so diverse in their nature that it is difficult to develop a concept of ‘committee decision-making’ which is meaningful.<sup>22</sup> Despite the miscellaneous nature of committees, they all share one feature in common: a committee is always embedded in, and therefore functionally dependent on, the overall decision-making process. Decision-making processes involving committees are sequenced in one way or another, so that the significance of a committee depends on its specific contribution to a larger decision-making process.<sup>23</sup> Another important issue is the ability to influence EU decision-making and to modify the outcome of the Council negotiations with Member States. A committee that does not have an impact either way will be largely irrelevant for the EU system.<sup>24</sup>

It is difficult to make a distinction between comitology committees based on their type. Whatever typology is provided, each of the comitology committees holds at least some of the criteria from each type. Due to this, the dominant types and their key features are discussed later.

The clearest distinction between comitology committees was made by the Council in the Comitology Decision:<sup>25</sup> *advisory* committees, *management* committees and *regulatory* committees (safeguard committees were not formed in the DG Environment). Based on the

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<sup>22</sup> P. van der Knaap (1996), “Government by Committee: Legal Typology, Quantitative Assessment and Institutional Repercussions of Committees in the European Union”, in R.H. Pedler and G.F. Schaefer (eds.), *Shaping European Law and Policy. The Role of Committees and Comitology in the Political Process*, Maastricht, p. 83-116.

<sup>23</sup> Thomas Gehring (1999), “Bargaining, Arguing and Functional Differentiation of Decision-making: the Role of Committees in European Environmental Process Regulation”, in Christian Joerges and Ellen Vos (eds.) (1999), *EU Committees: Social Regulation, Law and Politics*, Hart Publishing: Oxford-Portland, p.196.

<sup>24</sup> *ibid* 197.

<sup>25</sup> Council Decision No. 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L 184.

information received during the research, it is possible to make other distinctions: level of technical operation, level of influence and level of participation.

The defined typology in the *Second Comitology Decision* also covers other types. The level of technical operation mainly depends on the experts and external participants involved in the decision-making process in any of the regulated committees. The degree of influence depends on the type of committee; for instance, an advisory committee has less decision-making power than a regulatory one. Decision-making power depends on the following issue – how politically sensitive the question is. In addition, the level of the comitology committee decision-making power depends on the participants’ level; for example, if members of a committee are just civil servants, then the influence is lower. And vice versa, if members are the heads of departments, their decisions have more binding power on the Commission. It may be assumed that the type of a comitology committee mainly depends on two elements: the powers of the participants and the type of drafted decisions.

*Advisory – expert committees.* The academic literature states that decisions taken by an advisory committee should be seriously considered by the Commission; however, the decisions, in most cases, are not meaningful and they are not legally binding. In order to give them more weight, the decisions should be integrated in the decision-making process and should be more formalised.

It is stated that “the advisory procedure should be followed in any case in which it is considered to be the most appropriate”.<sup>26</sup> When this procedure is chosen, there are general rules on how an advisory committee is managed; namely, it has to be composed of

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<sup>26</sup> *ibid*, preamble, recital 8; the same statement is retained in the Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2011] OJ L 55, preamble, recital 15.

representatives of Member States, who have to deliver opinion on the submitted draft. The whole procedure of the advisory comitology committee is similar to the procedures and obligations set for expert groups. Advisory committees, which may involve scientific committees and expert groups, mainly work in the drafting phase. Its position of being able to involve experts into the drafting phase provides a committee with more decision-making power in comparison with external participants. These committees and groups can also be influential, even though their consultation is not compulsory.

First, most of them are established by a particular decision to achieve a definite task. Thus, most of these committees and expert groups are officially established to provide a definite opinion in the drafting phase. These opinions should be binding, otherwise other scientific groups will be needed later to verify the appropriateness of the decisions. It would mean double expenses, double workload, and the Commission would need to face the fact that it may be hard to find additional experts for a second scientific committee on the same issues for many areas of expertise.

Second, advisory committees and expert groups are usually involved at a very early stage in policy making. It is the best time to influence any decision. The structure and the content of the draft can be shaped then.

Third, members of advisory bodies are usually top-experts, who issue highly credible and political advice.

However, interests groups, as well as technical and scientific experts and their involvement procedures, are not regulated under the EU legislation. There are already some first steps regarding the involvement of experts into the decision-making procedure, such as

drafted guidelines, best practice examples, experts' database, but those instruments are not legally formalised and not binding for the EU institutions.

In practice, advisory committees are not so influential at all, or at least civil servants and the Commission consider them a necessity to conform to legal obligations; the Commission shapes the drafted decisions itself. Many advisory committees are not even active (e.g. Emission of volatile organic compounds committee (DG ENV) and Reduction in the sulphur content of certain liquid fuels committee (DG ENV)). Those committees have not met for the last couple of years and they seem to have been abandoned. There are three registered advisory committees out of 35 committees established under the auspices of DG Environment. As their opinion is not legally binding, civil servants of the Commission do not try to keep them active. In order to invite members of the committees, a relevant issue needs to emerge, all the needed documents prepared, and other organizational arrangements need to be made. It means additional work, so if there is no need declared in the secondary legislation, the committees become inactive.

In DG Environment case, the committees mentioned above were established to get advice regarding specific technical issues and also to ascertain the political position on the precise issue in each Member State. As soon as the deadlines were met and implementation measures were adopted in basic legal acts, the Commission stopped inviting members of the committees, alleging that there were no issues to discuss. The members of the Committee were not needed unless the Commission decided to revise the implemented legal acts.

*Management committee – financial decisions.* A management committee usually consists of representatives of Member States. It is obliged to provide its opinion on a draft

decision. Subsequently, the Commission may adopt the measures, having an immediate effect. The provided opinion of the management committee is not binding. But, the committee may block the Commission's proposal if a qualified majority is required. Management committees are usually established to decide upon common agriculture and fisheries policies, as well as upon financial instruments (e.g. LIFE Committee (Financial Instrument for the Environment)). The LIFE Committee provides an opinion on projects receiving financial support. However, the projects are chosen by the Commission. In this situation, the representatives of the committee are asked to vote on the prepared list, but they are not asked to draft it.

There are six management committees active under DG Environment. Most of them are consulted, because the rules require it, but civil servants do not regard these committees as an important part of the decision-making process. Although most management committees have to approve projects, which receive financial support from the Commission, they vote on the provided lists.

The influence of the management committees on the decision-making procedure is similar to advisory committees.

*Regulatory committees adopt legally binding opinions and represent the most powerful participant in the decision-making process.* A regulatory committee is the only committee, the opinion of which is binding and it holds the most influential position in the decision-making process. Committees consist of higher-level civil servants, who can take decisions on sensitive issues and compulsory provisions to be eventually implemented by national legislation. Under this procedure, members of a committee need to decide on general measures to implement the basic acts. Due to its influence and decision-making power,

regulatory committees are the most popular committees in the EU legislation implementation system.

On the one hand, an investment of time and scientific or expert knowledge, which might not be taken into account, is not attractive for most experts and civil servants. On the other hand, most of the decisions on the implementation of EU primary legislation for EU basic legal acts need to be implemented by binding national legislation. Political decisions, which come from the EU, might be unattractive to many constituencies, i.e. interests groups, trade unions, businesses, and civil society at large and they will blame the Member State for such decisions. Each Member State has its national interests (with regard to individual decisions) and is keen to tailor decisions to their national background and legal system. Major changes will cost taxpayers money and add work for national civil servants.

Consequently, DG Environment established 26 regulatory committees.<sup>27</sup> These were the most influential, and were usually established in order to guarantee the continuity and stability of scientific and political decisions during the drafting and implementation stages. Regulatory committees had the biggest power to involve technical expertise in the decision-making process. Regulatory committees also had the biggest political power, as this procedure was usually applied to politically sensitive questions and Member States did not want to leave all decisions to the EU institutions.

However, after the Treaty of Lisbon came into force and the comitology legislation was amended, there were only 30 committees left in total.<sup>28</sup>

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<sup>27</sup> Report from the Commission on the working of committees during 2003, COM (2004) 860, [2005] OJ C65 E/01, p. 21.

<sup>28</sup> <<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=List.list&NewSearch=1>> accessed 24 September 2013.

## **8.5. PHASES OF INVOLVEMENT OF COMITOLOGY COMMITTEES IN THE DECISION-MAKING PROCESS.**

The three types of comitology committees – advisory, management and regulatory - operate under the three phases: drafting, adoption and execution. For the comitology committees working under the Commission structure, the most important phase is drafting. In comparison with other phases, experts and national representatives can influence the drafted decisions. In the adoption phase, the Council and the Parliament would not question the base of the scientific decision, as they would need to form their own technical expertise group in order to do that.

The adoption phase will not be discussed in this research analysis, as at this phase, the Council and the Parliament are involved and the comitology committees do not usually participate.

The implementation phase is also no less an important phase, because committees have to decide on the implementation details to be implemented at the national level all over the EU. Even though implementation powers are not formally given to the established committees and they only assist the Commission, usually they decide how to implement adopted legal documents. At the implementation phase, committees have the final decisive power to propose and set technical parameters to be implemented under the adopted legal measure. The *Nitrate Committee* could serve as an example. The already mentioned requests for derogation from the Netherlands and Austria show that the Commission is not obliged to make the final decision. During the voting procedure, some of Member States declared that



due to the fact that the final version of the document was disseminated just a week before the meeting, they did not have sufficient time to submit this document for final approval to the national ministry. So, the ministries have not authorised them to provide any kind of decision and they are not empowered to vote. It shows that at regulatory committee meetings, when the final decision is voted on for implementation, the members are expected to represent the position of national authorities. At this stage national representatives hold the most important power.

Nevertheless, committees working on implementation measures are the most influential. They are staffed by high-level civil servants or policy makers, who are representatives of Member States and have the power to make decisions. Once adopted, the decisions will be implemented into national legal systems.

However, the delegation of powers can be withdrawn. As an example, the *Drinking Water Committee* can be provided. As the result of its evolution, it had gained important powers and might have led to important changes to the European policy on drinking water. It got to the point where important changes had to be introduced. The final decision would have changed the scope of the directive and the relevance of drafted annexes would not have been limited to mere technicalities, which could have lead to an adoption of a major decision at the comitology level. As the comitology committee was authorised to make decisions at minor level, and members did not want to adopt costly changes from this major decision.

## **8.6. PROCEDURES OF THE COMMITTEE MEETINGS.**

Decision-making procedures are more or less similar for all committees. A meeting is chaired by the representative of the Commission, who is usually a high ranking EU civil

servant, i.e. the head of the relevant Unit, responsible for the issues discussed in the specific committee, so as to keep a balance with regard to all members of the committee. In rare cases, when the head of the Unit is not able to attend the meeting, he or she might be replaced by the civil servant, directly responsible to the committee. This is used as a general practice, even though it is not required anywhere. When the managing person of an *EMAS Committee* was asked about the reasons for this practice, the answer was that the political debates and negotiations have to be conducted by a high level civil servant empowered to make a decision. Otherwise, if no agreement occurs during the committee meeting, or if the representatives of the Commission or any Member State cannot vote on the issues, another meeting needs to be convened with all the relevant civil servants. This would be costly in terms of both time and money, especially as some issues need to be decided and implemented urgently. Consequently, committee members will mainly be of the same level to be entitled to make decisions within the authorised limits of power.

The comitology committee meetings observed during the empirical research were dealing with specific issues and none of the meetings were postponed due to the lack of authority. Instead, members of the comitology committees, especially the ones representing large Member States, had to seek approval from their national authorities, when the drafts were altered during the meeting. It seemed that representatives from smaller countries were invested with wider decision-making powers.<sup>29</sup> This may be due to the fact that different experts and civil servants cannot participate at all levels of the decision-making process. Under the circumstances, a Member State can resort to the same person for most stages of the process. During the meeting of the *Eco-label Committee*, some members specified that if the decision was taken, regardless of their opinion, they could revisit it at another level. Another

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<sup>29</sup> At least, this was the impression during the observation period.

issue is that most of the governmental authorities cannot separate experts from civil servants on some issues. Usually the same person works on technical and scientific issues of the draft, and then votes on the proposal. In rare cases, the same person also votes on the proposal at Council level. It is very difficult to alter the situation, due to the lack of experts in some policy areas.

Such wide decision-making power is not granted in all cases: for instance, when a comitology committee is attended by a high-ranking civil servant, he/she is usually authorised to make a decision. In other cases, the decision-making structure at national level is quite limited, so before leaving for such meetings, the representative is given directions on all the possible votes. According to a member of the *Eco-label Committee*, political decisions are usually taken by large countries with the smaller ones unable to change them. When voting on financial obligations of each Member State, the representative has to have formal ministerial approval. In such cases, the decision-making power is more limited.

At the very beginning of each meeting, the chairman draws up an attendance list specifying the authorities or bodies to which the persons designated by Member States belong to. In practice, this is actually a double list: an attendance list for reimbursement of travel expenses and a list of participants. Committees' members request that the attendance list be sent out afterwards. In many cases the list of participants is published on the register. The disclosure of the list depends on the general attitude of the unit and members of the committee. Additionally, members are requested to sign declarations regarding possible conflict of interests. During the *Climate Change Committee* meeting,<sup>30</sup> the chairman simply asked if there was anyone whose participation would have given rise to a conflict of interests

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<sup>30</sup> Held on 20 July 2005.

with regard to a particular item on the agenda. It was left to the members of the committee to decide upon the sensitivity of the issue and their suitability to participate in the meeting. The latter issue concerned mainly Member States representatives who might well belong to an NGO, association or similar sectional interest's organization.

While some of the committees meet 2-3 times per year, others have been established, but have never met,<sup>31</sup> or, at least, they did not meet before the period of the empirical research. Reasons for the comitology committees not meeting or doing so at a random are not recorded by the Commission. The Secretary General cannot analyse this information, as it is neither included in the guidelines nor in the questionnaires, which are required to be filled in by the responsible staff after each meeting of a comitology committee.

The reasons can be guessed. First, the legal provisions establishing the comitology committee have been withdrawn or suspended. Second, the issue has become irrelevant or the Commission has focused its resources on more pressing policies. Third, the issue for which the comitology committee was established has been addressed by the adoption of implementation measures. In this case, the comitology committee is either re-structured or is maintained for another similar issue to arise. This solution is used quite often,<sup>32</sup> as the Commission might otherwise lose access to valuable scientific and technical expertise. This kind of practice was noticed in a couple of committees, which formed a group of experts on specific issues and are keen to keep them in a view to providing scientific knowledge on a constant basis. For instance, the *Eco-label Committee*, where the same or at least a little modified expert group works on different products criteria over many years. The *Water Framework Directive Committee* has also formed a steady expert group, which continues working on different issues.

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<sup>31</sup> e.g. Drinking Water Committee.

<sup>32</sup> Water Framework Directive Committee.

Usually NGOs, stakeholders and other external participants are not allowed to take part in committee meetings, unless they are invited to provide some scientific advice or know-how. For instance, the chairperson of the *European Union Eco-labelling Board* may invite other interested parties to participate, which are not listed in the Regulation (§16).<sup>33</sup> This power is quite common. Comitology committees are allowed to invite scientific, technical, or other experts and interest groups, if members of a committee decide it to be essential. Those experts are not provided with the confidential or non-public information, they are just asked to provide their opinion or scientific/technical data on a specific question. As it was mentioned in the chapter on “*External Participation through Comitology framework*” the involved experts do not have a right to vote or be present during the vote.

The difference between the routine involvement of experts in any comitology committees and the *Eco-labelling Board* is that experts and scientists working under this Board are officially invited and do not depend on the courtesy of official members of the comitology committee. Once decision has more legitimacy than those adopted on the recommendation of experts appearing before comitology committees meetings. Another difference is that experts, invited to appear before a comitology committee, are only asked to provide an opinion; there is little continuity when it comes to the issues addressed. The members of the Eco-labelling board are invited on a more durable basis and their contribution to the work is more thorough. Members of the Board are also asked to vote on the decision. In fact, experts and scientists on this Board are the only ones with such decision-making power.

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<sup>33</sup> Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme [2000] OJ L 237, Annex “Rules of procedure of the European Union Eco-labelling Board (EUEB) of Commission Decision 2000/730/EC”.

Committees do not aim at achieving complete consensus. Most of the discussions have been implemented before the committees' meetings and usually a consensus had already been built. It does not mean that the meetings of comitology committees are irrelevant. Members of comitology committees try to find an agreement before the meeting, on the most sensitive issues at least. It might happen via e-mails, telephone conversations or during other meetings, where different members meet. Possibilities are not exhaustive. The general consent is aimed due to the reason that the Commission cannot arrange monthly meetings on the same issue, and an agreement needs to be reached within the set time limit. Otherwise, the adoption might take too long. Furthermore, it is not possible to guarantee against the change of membership of the committee; new members might disagree with past negotiations. Consequently, the chair and members of the comitology committees try to reach consensus before the official meeting.

If the Commission is worried about the number of votes for a proposal, it can start test-voting. Member States are asked to reveal their voting intention during the "real" voting. On the basis of those results, the decision might be taken to amend the proposal and take these intentions into account. There are other methods to "influence" voting. The Commission can start its "tour de table"<sup>34</sup> in reverse order, in the hope that a strong lead in favour of a proposal might help swing any wavering participant.<sup>35</sup> This procedure was followed in the *Eco-label Committee* meeting, as well as in the *Nitrates Committee*. It is not recognised officially, but it is not prohibited anywhere. Furthermore, the CJEU has even approved it. This kind of voting could help to find a compromise acceptable to all delegations, even though the members are

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<sup>34</sup> "Tour de table" is an expression, describing the way of voting on decisions drafted. Usually, voting takes place in a room, where members of a committee took place during the meeting. As the voting gets announced, the chairman calls each country and asks for its position regarding the voting issue. Typically, before the meeting, the organizers set places for the members in alphabetical order. So, that is where the expression came from – a vote goes around the table as the member states are called in alphabetical order.

<sup>35</sup> A. B. Philip (1998), "The Eco-label Regulatory Committee", in M.P.C.M. van Schendelen (1998), *EU Committee as Influential Policymakers*, Ashgate, p. 172.

expected to approve the initial text, when they vote. It absolutely does not mean that the Commission withdraws its initial proposal and presents a new document. Such a way of voting could help in saving the time of members of a comitology committee as well as civil servants, who can discuss an issue on spot, instead of sending e-mails.

The voting itself is open; soon, all Member States will know one another's position. Sometimes, the results are agreed upon after a break in the proceedings. The large countries request a break and gather in a separate room or in a corner to negotiate an acceptable version of the text. The version, which might be negotiated and amended during the meeting, is finally put to the vote before adoption.

## **8.7. SCOPE OF THE DELEGATED TASKS.**

In this part of the chapter the tasks delegated and the results achieved are discussed. Most comitology committees adopt implementation measures. Some have even been created to perform specific tasks.

Sometimes the tasks, delegated to a specific expert group, a very narrow range of issues to be decided. In other cases, some of the delegated issues might be delivered to other pre-existing bodies, instead of creating a new comitology committee. Committees may also deal with implementation problems, faced by Member States. It provides an extensive overview of the situation when dealing with specific tasks. Whatever the tasks, so long as the committee might set an *ad hoc* group to provide the needed technical support, they are within the scope of the Commission powers.

The analysis of the literature as well as secondary legislation, establishing comitology committees and assigning specific tasks, have specified the list of common tasks.

Those tasks, with the help of experts or other interests groups, have to be implemented:

- technical specifications and standardised methods;
- transmission and processing of data;
- drafting of an indicative plan of measures to be implemented at each Member State;
- adaptation to scientific and technical progress (adaptation mainly concerns annexes to secondary legislation);
- review and updating of guidelines on the implementation of annexes to secondary legislation;
- harmonisation of national measures;
- establishing working plans as well as their annual or regular review;
- setting draft criteria and their periods of validity;
- exchange of information between competent authorities and the Commission;
- exchange of experience concerning the implementation and practical application of a Directive and discuss matters of common interest in the related fields;
- collection and analysis of reports;
- advice to the Commission with respect to the conclusions and amendments agreed to in committees;
- reporting of results regarding the monitoring programmes for compliance with a Directive;
- setting of procedures and methods for evaluation.



This list is not exhaustive. Based on the environment, changing situations and demands, at different times, a comitology committee may be established for a different reason, but the scope remains largely the same: a comitology committee has to draft an implementation measure to ensure that the adopted annexes to secondary legislation are properly applied.

In order to introduce a specific example, the *Water Framework Directive Committee* worked on guidelines to be implemented under the regulatory procedure when the empirical research was conducted. The more general activities are named as follows:

- 1) development of guidance on technical issues;
- 2) ensuring better access to validated data and information, as well as preparing proposals, discussing the findings, co-ordinating the work and enhancing information exchange, application, testing and validation;
- 3) policy development and integration of the Water Framework Directive into other policies;
- 4) revision and updating of the list of priority substances;
- 5) setting controls and environmental standards for new Community law by developing specific daughter directives.

This list is taken out of secondary *acquis communautaire*, and regulates responsibilities and rights of members of comitology committees. Legislative acts also identify areas of responsibilities and actions to be implemented. Accordingly, members of DG Environment comitology committees (examples were taken from legislation, regulating environmental issues) work mostly on the implementation of technical up-to-date issues, drafting, adopting and implementing guidelines, as well as monitoring activities. It is proved once again that comitology committees mainly work on very technical and scientific issues.

They guarantee the implementation of secondary legislation and the stability of whatever primary legislation is adopted by the EU institutions.

It shall be noted that comitology committees cannot initiate anything that is not specifically provided for in secondary legislation. These committees can, and do, discuss all sorts of questions. However, they cannot initiate legislation. All comitology legislation has to have a legal basis in secondary legislation that is adopted by the Council or the Parliament and the Council.

#### **8.8. EXTERNAL PARTICIPATION IN EU DECISION-MAKING PROCESS.**

The second empirical research targeted respondents, related to or working in the area of the environment. In order to get a full picture, the other actors to the decision-making process were asked to participate in the survey. Representatives of national ministries of environment and experts in environmental policies, representatives of NGOs, universities, consultancies, and other stakeholders were invited to participate in this survey by filling in the questionnaire.

21 replies were returned. Respondents were equally divided – 11 represented Europe-wide NGOs or research institutions and private consultancies; and 10 were national civil servants, mainly based in Eastern Europe (Lithuania, Latvia and Estonia). For the most part respondents were males aged 45 and above.

When the respondents were asked whether they participated in the EU decision – making process, more than a half of civil servants (8 respondents) replied that they participated in EU committees and /or working groups meetings and draft solutions from the inception. The same respondents also considered that their main task was to participate in

preparing and representing national positions in different committees and /or working groups. The rest prepared information and reports for colleagues, participating in activities at EU level.

It was interesting to note that some representatives (4 respondents) of Europe-wide NGOs also prepared information and reports for colleagues who participated in EU meetings. It may indicate that transnational NGOs which are active throughout Europe may be part of a complex institutional system, with national experts and others who participate at EU level because of specific knowledge and expertise. Those who participated directly in the EU decision-making process represented various associations and interest groups (5 respondents). The survey also identified that some of the test work or collections of statistical and other data is entrusted to volunteers. Based on their information and experience, the related external participants as well as national and EU administrative bodies are invited to engage further with the topic.

Often representatives from NGOs were personally involved in the EU decision-making process. There were two civil servants who also gave this answer. It seems to confirm the fact that some national civil servants are involved as supranational representatives and experts at the same time with a great deal of behavioural discretion at their disposal. One respondent stated that “some national experts have far too big a say and are not controlled at all”. The more detailed explanation of this type of representatives is provided in the Chapter “External participation through comitology framework”.

Seven civil servants replied that their direct work required them to participate in the EU decision-making process as experts. It means that they did not need to put any additional efforts and prove their qualification in order to be involved in the process. Moreover, it may also be assumed that national authorities take responsibility for deciding the level of expertise

of representatives they send to comitology committee and/or working groups meetings. Three respondents were invited personally as experts in a specific field.

Respondents identified that they usually used the existing research results and knowledge available as well as their background knowledge and experience to make a decision on the subject of the participation. Only few mentioned that they used expert NGO opinion that was open to discussions. It was also noted (mainly by civil servants) that they try to reach consensus on the drafted proposals before the meeting.

When the respondents were asked what kind of input they provide to the decision-making process, the replies covered all the types of inputs: civil servants mainly provide opinions (6 respondents), data (6 respondents) and consultations (4 respondents); as external participants are more active in providing opinions (7 respondents), expertise (7 respondents) and data (6 respondents). Four replies were regarding active involvement in providing decisions, however it was not only replied by civil servants – two external participants defined it as part of their activities.

The analysis of academic literature has raised the issue that opinions, provided by external experts, are not binding on the Commission. This issue was supported in the survey – 8 civil servants asserted that their participation at the highest or medium high level as they participated both in the Council and the Commission work and meetings, while 7 external participants considered their participation low (they participate in the Commission meetings without binding power over the Commission or just providing written information on different requests). Though, when a cross-test question was provided, only one respondent confirmed that the provided opinion and vote bound the EU institutions on specific issues. The majority (13 respondents) replied that the requested opinion was not legally binding.

Only three respondents (civil servants) took the personal responsibility for the decisions they provided.

Civil servants were also more restricted on the opinion that was delivered, as they needed to agree with the authorities or colleagues on the changes during the meetings (9 respondents). External participants had more freedom on the opinion that was delivered or they were not asked to deliver any opinion during the meetings. Nevertheless, it was emphasized once again that it is expected to build a consensus before the voting takes place and the previous agreement is adopted. 14 respondents confirmed the existence of pre-meetings. 16 respondents agreed that members of decision-making or working groups agree on the strategy or the draft of the decision before an official meeting. Participation usually proceeded strictly according the rules, set by the Commission (6 respondents), or it may be eased depending on the importance of the decision (6 respondents).

10 respondents confirmed that expertise is very frequently involved in the decision-making process they attend; and 7 respondents estimated that it is required only sometimes. Only one respondent replied that expertise is never needed in the process. Respondents identified that they are also actively involved in the provision of expertise and scientific know-how themselves, for example, by providing scientific knowledge through different arrangements, such as platforms, workshops and other dialogue mechanisms (9 respondents) or by using scientific knowledge as their own qualification in the daily work (6 respondents). Surprisingly, 10 respondents did not know whether the technical and scientific expertise that they provided was used by the EU institutions and 3 respondents were assured that it was not used at all.

Usually the Commission acquires expertise from the pre-existing expert groups (7 respondents) or organises conferences on a hot topic (5 respondents). It was believed, that the

least popular method to acquire expertise is to invite other interested departments to contribute (1 respondent). Such estimation could be done due to the fact that external participants might not be aware of internal procedures and “the homework” done by the Unit in charge. If the information is beyond the possessed know-how, the Commission usually chooses to purchase it (5 respondents) or just invites external participants who possess this information (4 respondents). It seems that an in-house expertise is not very often checked. One respondent has identified that when the Commission chooses to exclude the part, which needs additional scientific data from the prepared document and continues with the possessed one. If true, such cases may require additional investigation.

Another block of questions related to access to information and its relevance to external participants. The replies were quite diverse. 4 respondents agreed that they got enough support and advocacy from the Commission, as 5 respondents supported this statement only if they manage “to get through”.

As for access to information, 11 respondents marked that the information received is understandable, though the flows of different papers and positions are very high. Nobody identified that the EU provided information is of very high quality and easy to work with. 5 respondents found the information too bureaucratic, not understandable for common people and without relevant scientific information. The same criticism was expressed regarding information intended for civil society – the information centres are not easy accessible, there are too few of them and they provide very generic help (11 respondents). Though, 4 respondents believe that the provided information and one-stop-shops are of high use.

6 respondents did not feel that there was an initiative from the Commission to open a dialogue between experts and civil society. While 8 respondents replied positively, half of the respondents agreed that the Commission provides information and informs civil society on

important issues of public concern at the time. The same frequency was defined regarding an open dialogue between the Commission and external participants, though 5 representatives of NGOs do not agree with this statement.

With regard to risk assessment only 6 respondents were involved in such activities. It was identified by external participants (8 respondents) that they were aware of cases when a national authority or an external participant warned the government of possible risk to be faced. Though, none of the civil servants could specify such case.

It was stated (10 respondents) that the priority in making a decision was to reduce adverse effects to on the environment, human, animal or plant health. The decision on risk assessment is made either on the basis of the respondent's own experience (3 respondents) or on an expertise invited on *ad hoc* basis (3 respondents). Moreover, 13 respondents confirmed that their authorities invited scientists and experts to evaluate scientific data of a risk. If the scientific evaluation stays incomplete, it is usually a political decision on whether to act or not under the existing circumstances (14 respondents), which may be taken either at the minister's level or by the head of the responsible department.

## **IX CHAPTER**

### **CONCLUSIONS**

The thesis aimed to show whether and how external participants were involved in the EU decision-making process using the example of the environment policy. The main conclusion of the thesis is that external participants are not legally allowed to participate directly in the EU environmental decision-making process. However, various EU policies and laws have established the main rules and practices for successful and effective indirect participation. In most cases external experts and other participants are only invited to provide the missing scientific information, which otherwise need to be purchased from external sources.

To conclude, the following findings are highlighted:

- Even though there were a lot of discussions regarding the need for efficient involvement of external participants as well as scientific and technical expertise, the Treaty of Lisbon did not retain the principle of participation. This means that there is a legal gap in the primary legislation concerning the regulation of participation. There might be attempts to solve the demand for scientific and technical expertise by creating a myriad of



communications, policy documents, and initiatives in this domain. Though, the analysis showed that this only creates confusion and contradiction between the implemented documents. The more detailed conclusions are provided in the concluding part of Chapter II “EU law and policy on participation in EU governance”.

As a result, the real “constitutional text” is considered to be the White Paper on European Governance: it is the starting point for the involvement of external participants and the use of scientific and technical knowledge in the EU decision-making process, even though it is not a binding policy document for Member States. This document is strictly followed by the civil servants of the Commission, regardless of the fact that the instruments created under this document are non-binding.

External access to information and justice in the environmental decision-making process is regulated by binding legislative acts; these limit the impact of external participation due the number of rules and restrictions that are imposed on this decision-making process.

- Another important conclusion shall be drawn regarding the existing communication and consultation policies and strategies for external participation in the EU. The established non-binding instruments seem to be applied only on an *ad hoc* basis and the EU system still faces communication problems between civil society and the EU institutions. This is partly because the communication link breaks at the highest level of national authority and it does not reach the civil society. It means that EU governance needs wider and more complex approach to the developing policies as well as effective involvement of all the constituent parts. The same could be said about the consultation culture, as it is not adequately established either. The Commission welcomes efforts to take into account local and regional knowledge, though participation of the latter is left to member states.

There is no feedback on whether and how local and regional opinion and scientific knowledge is used in the EU decision-making process. It diminishes motivation and trust in EU and national administrations. Due to different communication and consultation practices in national administrations, participation might also be different on the same draft implementation measures. It might lead to distrust in the decision-making process and in the possibility for involvement. A more detailed analysis is provided in the concluding part of Chapter II and in Chapter IV “Collection and use of expertise”.

Also, available information is not always accessible to all participants, as the EU institutions are not able to translate all working documents into all official languages. The accessible information is often bureaucratic and not easily understandable. Furthermore, draft documents do not provide the necessary scientific information to understand the background of some of the implemented acts. More detailed conclusions are provided in Chapter III.

- It is believed that comitology committees have the highest potential in attracting technical and scientific knowledge from external sources, though this possibility is not implemented in the primary and secondary legislation, which is analysed in the thesis. External participants are usually involved on an *ad hoc* basis. By rule, only civil servants of Member States may be officially involved in the decision-making process of comitology committees. However, in some cases, external participants were also involved in the process due to a high demand for their technical and scientific knowledge. The low involvement of external participants is based on the assumption that external participants may represent conflicting interest groups and protect their positions. For this reason, they should not be responsible for making decisions. The more detailed conclusions are

provided in the concluding part of Chapter III “External participation through comitology”.

The final decision should be taken by a political body only, but it should be informed by the most reliable and cogent scientific data, the assessment of which should be based on the precautionary principle. The EU Institutions, especially the Commission, are granted a broad discretion regarding the use and implementation of the scientific advice, but they are not ready to deal with the challenges raised by scientific uncertainty or contradictory information. More detailed conclusions are provided in Chapter V “Precautionary principle in collection and use of scientific expertise”.

- Even though EU communications and policies claim to be open to all kinds of participation, external participation is only accepted in an organised form. This can be observed in all kind of EU activity – citizens are also required to form a qualified entity in order to be eligible to submit an EU Citizens’ initiative. Though the criteria of a qualified entity are not set yet, both the EU institutions and the CJEU may decide to stay with those contained in the case-law. The requirement to structure external expertise or interests in this manner may limit this kind of participation.

The rule that involved external experts may not be consulted on politically sensitive issues and are not allowed to vote on relevant decisions is strictly maintained by the Parliament and the Council. The final decision is based on political considerations rather than scientific expertise. External participants are not provided with independent right to implement executive requirements. It is assumed that the organisation of external participation could benefit only if a complete legislative overhaul is implemented in the EU decision-making process.

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## QUESTIONNAIRE – INFO COMPILATION

The aim of the questionnaire is to identify the legal basis of the committees and their legal power in decision making procedure.

1. Name of the committee.
2. Type of the committee:
  - scientific;
  - interest representing;
  - advisory group;
  - expert group;
  - policy-making/implementation;
  - mixture.
3. Responsible DG and responsible persons (chairman, coordinator of committee, responsible in Commission).
4. Activities of the committee:
  - areas of responsibility;
  - main tasks;
  - objectives.
5. Legal basis:
  - legal act, regulating the establishment of the committee;
  - soft law, regarding the activity of the committee;
  - rules of procedure (are they published externally, access over the internet and etc.);
  - coherence with Comitology Committees directive;
  - code of conduct;
  - activity documents (taken decisions, minutes of the meeting and etc.);
  - any court decisions, regarding the committee activities.
6. Operation level/phase:
  - drafting;
  - adoption;
  - execution.
7. Selection of committee members/representatives – composition of the committee:
  - public competition via the published calls for tender (selection criteria);
  - national decision making (member state decides whom to send as a state representative; selection criteria) – relevant national Ministry or public authority;
  - experts at Member state level or socio-professionals;
  - possibility to participate in decision making through committees (NGOs, non-member states, experts and etc.).



8. Participation level/general powers:

- political representation (only representatives from member states?) with socio-economic interests;
- technical representation (technical expertise);
- supranational actor;
- consultative participation;
- forum of reflection;
- constituting good practice for decisions and proposals;
- policy binding/non-binding (compulsory for Commission/non-compulsory);
- reflections and discussions in the Commission;
- voting power.

9. Level of influence:

- committees with importance (0-3);
- committees with importance (3-7);
- committees with importance (7-10)
- possibility to have influence through political willingness.

### STUDY ON EXTERNAL PARTICIPATION IN THE EU DECISION-MAKING PROCESS

## QUESTIONNAIRE

### Invitation to participate

Dear Respondent,

My name is Ingrida Ilgauskiene and I am doing a PhD thesis in the School of Law, University of Birmingham, UK. The topic of my thesis focuses on external participation in the EU decision-making process through the EU established instruments. This empirical research is part of the thesis. The aim of this research is to verify the list of the established EU instruments, which are created by the EU institutions for national civil officers as well as other interested groups, to be used in order to reach the set goals and assess the current situation and recent developments of the 27 Member States in legal measures, implementing the requirements of effective participation in EU decision-making process.

I would greatly appreciate your efforts and time devoted to answer the provided questions, which would be included into the analysis of the research anonymously. **Please mark the most appropriate answer by x.** If you find a couple of answers appropriate to your choice – please mark all the relevant choices of replies to the provided questions. I would greatly appreciate your time for providing additional information, which was not identified in the questions. And please forward this questionnaire to a colleague who is involved in the EU decision-making process and who might not have received this questionnaire.

If you need any further information and comments, please contact at e-mail:

### Data Protection

This questionnaire aims at collecting information on the level of external participation in the EU decision-making process through the EU established instruments in the Member States of the European Union. It is not the purpose of this questionnaire to gather data on the performance of individual administrations in terms of participation in the EU decision-making process.

**Accordingly, all the data you will report in this questionnaire will be treated confidentially and reported only in an aggregate form. It will be impossible to trace, from the data that will be included in my final thesis, the specific arrangements in place in a given administration.**

*1. Which institution do you represent or work in (please write the full name of your institution):*

private consulting company;

research and/or academic institution;

national association of private bodies;

NGO and/or public organization;

SME;

individual person;

national local authorities (commune, municipality, county or similar);

national governmental authority (ministry, department, agency and similar);

other \_\_\_\_\_

2. Which country do you represent (please write down the name of your country you work for or represent):

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3. What is your qualification background?

I have a university degree in natural sciences;

I have a university degree in social sciences;

I have a university degree in IT;

I have a university degree in linguistics;

I have a university degree in humanity studies;

I have post-secondary non-university qualification;

I have professional qualification;

I have a secondary degree;

I have a college degree;

other \_\_\_\_\_

4. Your gender:

Female;

Male.

5. To which age group would you attribute yourself:

less than 18;

18-24;

25-44;

45-64;

65 and more.

6. Do you participate in the EU decision-making process in different (any) institutions:

Yes, I am actively and personally involved in the EU decision-making process;

Yes, I participate in EU committees and/or working groups meetings;

Yes, I prepare information and reports for colleagues, who participate in EU different meetings;

No, I do not participate in EU process – my direct work only concerns national issues;

Other \_\_\_\_\_

7. Are you involved at the very beginning of the stage of drafting solutions to the EU administration:

Yes;

No;

We just need to correct the already defined solutions;

other \_\_\_\_\_

8. To which group of respondents would you attribute yourself?

civil servant;

external expert of the specific area;

stakeholder;

representative of an interest group;

expert, working in national governmental structures;

lobbyist or consultant on EU public affairs;

representative of an NGO and/or public organization;

representative of a private organisation;

representative of a university or other research institution;

other \_\_\_\_\_

9. *How were you chosen as an expert into the EU decision-making process?*

I participated in EU calls for expertise and have won a competition;  
my direct work requires to participate in EU decision-making process as an expert;  
I have been assigned to participate as an expert;  
my client requests me to participate in different meetings;  
I have direct interest to the subject and I was invited to participate as an individual;  
other \_\_\_\_\_

10. *Please explain shortly how do you (the working group you are engaged in) make a decision on the subject of your participation:*

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11. *What kind of input/data you provide to the decision-making process?*

opinion;  
input/data;  
decision;  
expertise;  
consultation;  
other \_\_\_\_\_

12. *How many input/data did you and/or your institution provide for EU institutions per last year:*

none;  
up to 10;  
10-30;  
30-50;  
50-100;  
more than 100.

13. *Which area of decision – making you are involved in?*

environmental issues;  
food and safety;  
industry and energy;  
health and consumers issues;  
agriculture and rural development;  
competition, economic and financial issues;  
employment, social affairs and equal opportunity;  
enterprise and industry;  
home affairs;  
mobility and transport;  
information society and media;  
internal market and services;  
education and culture;  
justice;  
research;  
external relations;  
other \_\_\_\_\_

14. What would be the subject of your participation in the decision-making process:

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15. How would you describe your participation:

I participate as an individual and represent myself;

I participate as an employee of a company, which represents a client;

I participate as a leader of a political party/business association or similar;

I participate as a civil servant, representing a national governmental institution (a member state);

Other \_\_\_\_\_

16. Does your national authority initiate any legal acts to be discussed and adopted by the European Commission?

Very frequently;

Sometimes;

Seldom;

Very rarely;

Never.

17. How would you describe your input in the participation in the EU decision-making process:

I actively participate in preparing and representing national position in different committees and/or working groups;

I am invited to provide scientific know-how and expertise on specified issues;

I am a civil servant's and/or minister's consultant/advisor on EU issues;

I represent the position of various associations and interest groups;

Other \_\_\_\_\_

18. How would you define the level of your participation:

High – I participate in Council session meetings;

Medium high – I participate both at the Commission's and the Council's work;

Medium – I participate in Commission's organised comitology committees and/or working groups meetings and the provided drafted opinions are of high importance;

Medium low – I participate in Commission's organised meetings, but our opinion does not have obligatory power to the Commission;

Low – I just provide written information on different requests from the EU Commission;

Other \_\_\_\_\_

19. Is your participation as a civil-servant or an external participant bound by responsibilities for the provided opinions and decisions for EU administrators?

I need to participate to reach the quorum;

my opinion and vote binds the EU institutions on specific issues;

they request our opinion, but it does not bind them for the final report;

the given responsibility is not legally binding;

we are in person responsible for our decisions;

Other \_\_\_\_\_

20. *Do you need to get a permission from your authorities if there are any changes in voted legal acts during the meeting and you have to vote on the final results?*

Yes, I have to agree with my authorities whatever changes are taken during the meetings in order to vote;

Yes, I have to confer with my colleagues if major changes occur and which might have financial influence for our government;

No, I do not need to arrange anything as we agree on anything before the meeting and usually only minor changes appear;

No, I do not need to contact anyone, as authorities provide all responsibility for me to take a decision;

other \_\_\_\_\_

21. *Might anyone have an impact on the decision-making process you participate in:*

yes, my employer forms the final opinion, which is represented during a meeting;

yes, the opinion I represent, is agreed and confirmed by the head of governmental authorities I am working with;

yes, the opinion is agreed with the members of a working group in the company I work in and I represent it at the EU level;

yes, the opinion is confirmed by the contractor;

no, I do not need to agree on my opinion with anyone;

other \_\_\_\_\_

22. *Are you involved in a risk evaluation and communication to the EU administration?*

Yes;

No.

23. *How is the risk ascertained?*

related expertise is invited on an ad-hoc basis;

the decision is taken on the basis of the own knowledge;

the decision is left to a judicial institution to be decided;

a relevant legal act is framed to solve this issue;

other \_\_\_\_\_

24. *Which of the following definitions have a priority while making a decision:*

firstly, the freedom and rights of individuals, industry and organizations have to be balanced;

the priority in making a decision is a reduction of the risk of adverse effects to the environment, human, animal or plant health;

we base our decision on different values, implied in the local community;

none of the above listed is important in the decision-making process;

other \_\_\_\_\_

25. *Do the authorities of your country identify the potential negative effects to the risks, to believe that harmful effects might occur, even if the likelihood of harm is remote?*

Yes;

No;

I do not know.

26. *Do the authorities invite scientists and experts to evaluate scientific data of a risk which because of insufficiency of the data, their inconclusive or imprecise nature, makes it impossible to determine with sufficient certainty the risk in question:*

Yes;

No;

I do not know.

27. *Who takes a decision at national level whether or not to act when the scientific evaluation is not complete?*

the highest manager of our institution;  
it is usually a political decision;  
only the minister of the relevant Ministry;  
the head of our department;  
the responsible scientist of the possessed scientific data;  
the chair of the ad hoc working group;  
I do not know;  
Other \_\_\_\_\_

28. *Do you think that the national legislation of your country ensures efficient implementation of the rights of the public concerned (the public concerned – the public affected or likely to be affected by, or having interest in, the decision-making procedures)?*

Yes;  
No;  
I do not know.

29. *How often do you attend meetings?*

we have met only once;  
once a year;  
twice a year;  
each quarter;  
every month;  
other \_\_\_\_\_

30. *Do you have pre-meetings before an official meeting date?*

Yes;  
No.

31. *Do members of your decision-making and/or working group agree on a strategy or a draft of the decision before an official meeting?*

Yes;  
No.

32. *In what language are the meetings held and the work documents prepared?*

in one of the working languages (French, German or English);  
only in English;  
we each use our national languages and the translation is provided;  
other \_\_\_\_\_

33. *Have you set your own guidelines to be applied in the EU decision-making process in a working group you are involved:*

Yes;  
No;  
We use the Commission's set guidelines and we have not made any changes to this document.

34. *Do you think you get enough support and advocacy from the EU Commission administration?*

Yes;  
I have to request it myself, and if I manage "to get through" – they are very helpful;  
I have personal contacts, and they are very helpful;  
No, I cannot get through the bureaucracy and they send my request from one civil servant to another;  
No;  
Other \_\_\_\_\_

35. *Do you think that the EU provided information is understandable and of high quality?*

Yes, it is of very high quality and easy to work with;

Yes, it is understandable, but the flows of different papers and positions are very high;

No, the information acceptable is too bureaucratic and no relevant scientific information is available;

No, the language it is written in is not understandable for common people;

No, the information provided is too scientific and technical;

Other \_\_\_\_\_

36. *Do you think that access of information is possible to any participant of the community:*

the established information centers for citizens are hidden in web-jungles;

the provided information is usually out-of-date;

there are too many information boots and all of them provide very generic help;

the provided information is very technical and expertise orientated;

yes, the provided information and one-stop-shops are of high use;

other \_\_\_\_\_

37. *Do you feel that the Commission has initiated an operating dialogue between experts and civil society:*

Yes;

No;

I do not know.

38. *Do you think that the Commission provides information and informs civil society on time on important issues of public concern:*

Yes;

No;

I do not know.

39. *Do you think that an open dialogue between NGOs, industry, other interested groups and government is established with the EU institutions?*

Yes;

No;

I do not know.

40. *How often is expertise involved into the decision-making process you attend?*

Very frequently;

Sometimes;

Seldom;

Very rarely;

Never.

41. *How do you provide your expertise and scientific know-how to the EU institutions?*

I prepare scientific research and reports on hot topics on random basis;

I am invited to meetings whenever EU administrators need a scientific evaluation and advice;

I am included into experts' databases and invited to participate on active projects;

I am invited to provide a feedback on scientific research;

I use my scientific knowledge as my own qualification in my daily work;

I provide my scientific knowledge through different arrangements, such as platforms, workshops and other dialogue mechanisms;

Other \_\_\_\_\_



42. *Is your provided technical and scientific know-how used by the EU institutions administration?*

Yes;

No;

I do not know.

43. *How is the required expertise chosen by the EU administration?*

in-house expertise;

external consultancy;

invite other departments interested to contribute;

using the already formed expert groups;

establish permanent scientific committees;

organising conferences on the active issue;

individually approaching people, having the relevant scientific or technical know-how;

every time individual case might be applied;

other \_\_\_\_\_

44. *If experts require additional data, which is beyond their possessed know-how, does the Commission take one of the following actions:*

it initiates procurement for the needed scientific data to apply it from the outside;

it invites external participants from NGOs, associations, consultation companies and similar;

it tries to find an adequate expertise in-house;

it excludes part, which needs additional scientific data, from the prepared document and continues with the possessed data;

other \_\_\_\_\_

45. *What would be the culture of the participation process you are engaged in:*

strictly according to the rules, set by the EU Commission;

strictly to the rules, established by the national authorities;

the form of participation is set by the client;

participants are able to free themselves from the imposed national traditions and values and find a common decision while judging effectiveness of the taken decisions;

decisions are drafted based on *ad-hoc* basis;

it depends on the importance of the decision;

other \_\_\_\_\_

46. *Was there a case in your practice when a national authority or any external participant has warned the government on possible risk to be faced in the society and/or environment?*

Yes;

No;

I do not know.

*If the answer to the question No. 46 is “yes”, could you please shortly describe the case you have had in mind:*

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47. *Is the decision-making power centralised in your country?*

Yes;

No;

I do not know.

48. *Does the national political sector participate in risk evaluation and management at national level on the taken decisions?*

Yes;

No;

I do not know.

49. *Do regional authorities participate in national governance and decision-making at national level?*

Yes;

No.

50. *Are regional governments ensured responsibilities for delegated functions and the taken decisions?*

Yes;

No;

I do not know.

51. *Do national governmental authorities involve in-house and external expertise in decision-making process?*

Yes;

No;

I do not know.

52. *Are regional governments involved in collection and conclusions of scientific and technical expertise in your country?*

Yes;

No;

I do not know.

53. *Do citizens have an easy access to participation and opinion representation both at regional and national governance level in your country?*

Yes;

No;

I do not know.

54. *Does national governance involve different stakeholders, consultants, interest representatives, experts and similar whenever a decision is being drafted?*

Yes;

No;

I do not know.

55. *Do you think that access to justice on environmental issues is guaranteed in your country?*

it is not clear who could access judicial proceedings in our country;

it is not clearly defined in our national legislation a party, possessing sufficient interest and impairment of a right;

it should be publicly available possibilities on how to get access to justice in our country;

national legislation makes access to justice complicated;

access to justice is only allowed for qualified entities, which are limited in our country;

the public standing is not ruled in our national legislation;

the organization I represent cannot prove to have a sufficient interest or impairment of rights;

other \_\_\_\_\_

**Thank you very much for your time and answers.**