21st Century Comitology

Implementing Committees in the Enlarged European Union

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CHAPTER 1

The Role of Committees in the EU Institutional Balance: Deliberative or Procedural Supranationalism?

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1. INTRODUCTION

The EU committees system constitutes a dense and intricate "jungle", disorientating to those who enter it and misleading to those who observe it from the outside. The first reaction – disorientation leading to disregard – is induced both by the shortage of formal rules and by the chaotic variety of organisational and procedural arrangements. The second response – misunderstanding leading to misrepresentation – is due to two factors. Firstly, the hiatus between form and substance: committees have formal consultative powers that correspond to *de facto* decisional powers. Secondly, the reluctant analysis of structural and procedural details: attempts to conceptualise the role of committees are often based on generic assumptions or thin empirical searches.

The following pages attempt to address and in turn remedy these reactions. The argument is developed in three steps.

My first claim is that the whole system of EU committees (and not just the more familiar comitology) plays a crucial role in the different stages of the supranational law-making process. Not only comitology, but also the other groups of committees are relevant for a full understanding of decisional dynamics in the EU. Moving from this assumption, Part I re-examines the different typologies of EU committees, together with their impact

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on decision-making. This offers the reader both a tentative map of the "jungle" (as a remedy to disorientation), and a clue about the relevance of the "secret governing system"[2] (in order to prevent disregard).

The second claim is that EU committees constitute a decisive element of equilibrium within the European composite legal order. Accordingly, Part II reconsiders their overall contribution to EU decision-making by providing a functional analysis of different groups of committees. The attempt is to show how recurrent generalisations concerning their deliberative styles lead to misunderstandings.

Finally, I examine the impact of committees on the EU institutional balance. I argue that – rather than underestimating committees as a source of intergovernmentalism,[3] or overestimating them as a promising experiment of *deliberative supranationalism*[4] – it seems more appropriate to explain the impact of committees on the EU decision-making in procedural terms. Therefore, Part III critically reviews the existing perspectives and advances a different conceptualisation, based on the notion of *procedural supranationalism*.[5]

2. RE-EXAMINATION. EUROPEAN POLYSYNODY

Polysynody has long been the landmark of different systems of government.

The term "*polisynodie*"[6] was coined by the Abbé de Saint-Pierre in the first half of the XVIII century.[7] Following his advice, soon after the death of Luis XIV, Philippe of Orléans implemented a reform of the central government informed by a collegial model.[8] He suppressed all the ministries

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2 L. Kirk (2003) "Kinnock Criticises Europe's Secret Governing System", *EU Observer* (22 April).

3 J. Weiler (1985) "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law*, 1, 267 ff., and *ibid.* (1985) *Il Sistema Comunitario Europeo* (Bologna: Mulino). See also *ibid.* (1999) "Epilogue: "Comitology" as Revolution – Infranationalism, Constitutionalism and Democracy", in C. Joerges & E. Vos (eds) (1999) *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart), pp. 343-46.

4 I refer to the well-known article of C. Joerges & J. Neyer (1997) "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", *European Law Journal*, 3, 273 ff.

5 A broader illustration of this opinion, together with an in-depth analysis of the different kinds of European committees, can be found in M. Savino (2005) *I comitati dell'Unione Europea. La Collegialità Amministrativa negli Ordinamenti Compositi* (Milano: Giuffrè).

6 The word derives from the ancient Greek "πολυ-" (many) and "συνοδος" (congress, council).

and created eight councils, administering specific sectors (foreign policy, justice, finance, war, navy, commerce, police and religion) under the supervision of a ninth council, exerting decisional power. In the event however, the French "polysynody" was short-lived. It lasted less than three years, from 1715 to 1718, when the vertical ministerial system was re-established.[9]

A prior and much more stable polysynody existed during the XVI and XVII centuries in the Spanish Empire. Here, central government, exposed to the convergent pressures of polycentrism and multi-territorialism, was organised into a complex set of collegial bodies, surrounding the main council (*Consejo real de Castilla*). Some colleges had jurisdiction over the whole territory of the empire: the *Consejo de estado*, for instance, was competent for high politics, while the *Consejo de guerra* had the task of supervising military forces and justice. Other colleges were instead entrusted with a territorial jurisdiction: among the most relevant, the *Consejo de Italia*, established in 1555, had a horizontal competence over different sectors (finance, commerce, customs, etc.).[10] Similar bodies were also created in order to administer other territories, such as Aragon (*Consejo de Aragon*), Navarre (*Consejo de Navarra*), Portugal (*Consejo de Portugal*), Flanders (*Consejo de Fiandres*) and the American colonies (*Consejo de Indias*). Thanks to this arrangement, the Spanish monarchy was able to manage a stable composite order, where polysynody worked as an element of cohesion among semi-autonomous, if not antagonistic, forces.[11] It was only

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Charles-Irénée Castel, Abbé de Saint-Pierre (1658-1743) theorised polysinody as a system of government in his *Discours sur la Polysynodie* (Amsterdam: Tonsson, 1719), translated in Italian and published in G. Roggerone (ed.) (1996), *Scritti Politici: per la Pace Perpetua e sulla Polisinodia* (Lecce: Milella), p. 149 ff. This theory attracted the interest of Jean-Jacques Rousseau, who wrote a *Jugement sur la Polysynodie*, published in J. Rousseau (1964) *Oeuvres Complètes, Vol. III: Du Contrat Social. Ecrits Politiques* (Paris: Gallimard). The most important biographies on the Abbé de Saint-Pierre are: J. Drouet (1912) *L'Abbé de Saint-Pierre. L'Homme et l'Oeuvre* (Paris: Champion) and M. Perkins (1959) *The Moral and Political Philosophy of the Abbé de Saint-Pierre* (Genève: Droz).

By "collegial model" I mean an institutional arrangement based on "colleges", i.e. administrative bodies whose membership is attributed to more than one person. Given this very basic meaning, hereinafter I will sometimes refer to "colleges" as equivalent to "committees" or "groups" which are part of the EU institutional setting.

On the French polysynody, see; M. Antoine (1971) *Le Conseil du Roi sous le Règne de Louis XV* (Genève: Droz); and R. Mousnier (ed.) (1970) *Le Conseil du Roi de Louis XII à la Révolution.* (Paris: Presses Universitaires de France); and W. Reinhard (2001) *Storia del Potere Politico in Europa* (Bologna: Mulino), pp. 206-07.

M. Rivero Rodríguez (1992) "La Fundación del Consejo de Italia: Corte, Grupos de Poder y Periferia (1536-1559)", in J. Martínez Millán (ed.) *Instituciones y Elites de Poder en la Monarquía* (Madrid: Universidad Autónoma de Madrid), p. 199 ff.

under the Bourbons, when the territories lost their autonomy, that the Spanish polysynody declined and a hierarchical system of power (in the hands of State secretaries, i.e. ministers) gradually superseded it during the XVIII century.[12]

In the present, committees perform a similar function of stabilisation within various composite systems. Transgovernmental relations are institutionalised by means of collegial bodies in several federations, such as Germany, Canada and Switzerland. Another example is provided by the global legal order, where numerous international organisations and regulatory networks are built on sets of transgovernmental colleges.[13]

In this respect, however, the most remarkable experience remains the European one. Some 1500 committees populate the EU institutional arena. In the initiative/initial phase interventions are made not only by national administrations (through expert governmental committees), but also by representatives of social and economic interests (by means of interest committees), and, when risk regulation is concerned, independent scientists (scientific committees). In the legislative phase, Council committees or *groupes de travail* are called to examine the Commission proposals and to prepare ministers' decisions. In the phase of execution, comitology – the most familiar and formalised group – assists the Commission in the elaboration and approval of implementing measures. These different components of the European polysynody clearly merit closer examination.

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11 J. Vicens Vives (1971) "La Struttura Amministrativa Statale nei Secoli XVI e XVII", in E. Rotelli and P. Schiera (eds), *Lo Stato Moderno, Vol. I: Dal Medioevo all'Età Moderna* (Bologna: Mulino), p. 235.

12 W. Reinhard (2001) *Storia del potere politico in Europa* (Bologna: Mulino), p. 207 f. On the Spanish polysinody, see also F. Tomás y Valiente (1982) "El Gobierno de la Monarquía y la Administración de los Reinos en la España del Siglo XVII", J. Jover Zamora (ed.) *Historia de España Menéndez Pidal, Vol. XXV: La España de Felipe IV* (Madrid: Espasa Calpe), p. 1 ff.; J. Bermejo Cabrero (1983) "Notas sobre Juntas del Antiguo Régimen", in *Actas del IV Symposium de Historia de la Administración* (Madrid: Instituto de Estudios de Administración Pública), p. 93 ff.

13 For a structural and functional comparison of global and European committees, see M. Savino (2006) "The Role of Transnational Committees in the European and Global Orders", *Global Jurist Advances,* 6, available at http://www.bepress.com/gj/advances/vol6/iss3/art5/. See also *ibid.* (2005) *I Comitati dell'Unione Europea* (Milano: Giuffrè), Chapter 1, where European committees are compared both to the global committees and to transgovernmental networks within the above-mentioned federal systems.

2.1 The Initiative Phase: Expert Governmental Committees, Interest Committees and Scientific Committees

Expert governmental committees constitute the most chaotic group of the European polysynody. A plurality of factors – the lack of general rules and structural models, the high degree of informality, the power of both the Commission and the Council to set up auxiliary bodies on *ad hoc* basis without legislative authorisation, combined with the impressive number of colleges (more than one thousand)[14] – account for the resistance of scholars to enter this intricate part of the "jungle". Yet, failure to do so leads to the neglect of the highly influential role played by these colleges.

In principle, according to Articles 251 and 252 of the EC Treaty, the Commission enjoys an exclusive power of initiative. In practice, however, this power is shared with a series of mainly transgovernmental bodies, and is thereby "re-nationalized".

When a proposal has to be elaborated, the Commission urges the cooperation of national administrations and other experts in order to obtain the technical and political information necessary to carry out its task. This cooperation is institutionalised by committees of government experts. These specialised colleges are established by the Commission itself, either as formal bodies or (more often) as informal ones.[15] Their main – yet, not

[14] In the second half of 2005, as a result of a commitment made by the Commission President to the European Parliament in November 2004, the Commission set up a register of expert groups, with the aim of providing a transparent overview of the advisory bodies that assist it and its services in preparing legislative proposals and policy initiatives. See European Commission (2005) *Framework for Commission's Expert Groups: Horizontal Rules and Public Register*, C(2005)2817 (Brussels: European Commission), 27.07.2005, and *ibid.* (2005) *Commission Staff Working Paper Framework for Commission's Expert Groups: Horizontal Rules and Public Register*, SEC(2005)1004 (Brussels: European Commission), 27.07.2005. The precise number of expert committees, according to the newly established register is 1252. The complete list is available at: http://ec.europa.eu/transparency/regexpert/index.cfm. This list is mainly comprised of expert committees made up of government experts or national officials, and thus are strictly transgovernmental. Yet, there are also few colleges consisting of scientists or academics and other colleges composed of interest groups representatives (for example, representatives of companies, trade unions, employers federations, industry associations, consumer groups, NGOs and other civil society organisations); still others consist in a mix of national officials and/or scientists and/or interest groups representatives. I essentially refer to the first kind of expert committees, which I term "expert governmental committees".

[15] The Commission adopts a formal decision in the case of high-level colleges or when another formal act (a legislative proposal, a communication, a white or green paper) lays down the task entrusted with the formally-established committee. In the remaining (and largely predominant) cases, the college is informally set up by a Commission department, with the agreement of the Secretariat-General.

exclusive – task is to assist the Commission's Directorate Generals in the drafting of specific proposals. These bodies are usually chaired by the Commission (less frequently, by a member of the college) and are composed of officials or other experts sent to Brussels by the relevant national administrative units.

Their functions vary to a significant extent. A first important task is policy formulation. Some colleges (in particular, the so-called "high level" committees) assist the Commission – and sometimes the Council – in shaping general policies.[16] Their role is "pre-political": they are composed of high national officials, their consultation enables the Commission both to identify those initiatives likely to be supported in the Council, and to obtain a preliminary commitment from actors that will play a crucial role in the definition of domestic positions.

A second function concerns the elaboration of legal texts. Together with the European officials working in the unit that drafts the proposal, most of these colleges have the mandate to analyse the concrete options available and their potential impact on the domestic level. In such cases, different ideas and national solutions are discussed, combined and adjusted to the supranational needs. This exchange not only helps to spread the best practices, but also contributes to prevent potential clashes of Community law with domestic norms, constitutional principles and/or implementing procedures. A "contrapunctual law",[17] i.e. a *ius commune* compatible with national *iura particularia*, is thereby elaborated.[18]

The same bodies also usually perform a third task: monitoring implementation. Once the proposal has been approved, these specialised committees shift their focus from the phase of initiative to the phase of domestic

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16 This is also the case of the "European groups of regulators", collegial *fora* where the directors of the domestic regulatory agencies periodically meet. These colleges have been set up in the telecommunications, energy and financial sectors not only to advise the Commission on general policy issue, but also to promote coordination and to review major problems of implementation. See e.g. Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, *Offical Journal,* L 200, 20.07.2002, 38-40, and Commission Decision 2003/796/EC of 11 November 2003, establishing the European Regulators Group for Electricity and Gas, *Official Journal*, L 296, 14.11.2003, 34-35.

17 The expression is borrowed from M. Poiares Maduro (2003) "Europe and the Constitution: What if This Is as Good as It Gets?", in J. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press), p. 98. See *amplius* M. Maduro (2003) "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed.) *Sovereignty in Transition.* (Oxford: Hart), pp. 501 ff.

18 When the Commission deals with highly technical proposals, it is not uncommon that *ad hoc* committees or sub-committees are established to draft a preliminary version of the legal text.

execution. During their meetings, the main problems of interpretation and implementation of European norms are addressed, in order to find the appropriate solution. Moreover, all pending infringement procedures are reviewed and, eventually, settled.[19] There is no need to stress the relevance of this supervisory activity for the Commission: due to the shortage of human resources, it would not be able to efficiently act as "Guardian of the Treaty" without the assistance of these colleges.[20]

It is therefore difficult to deny the significant impact expert governmental committees exert on the European decision-making. These are the *fora* where EU law takes its first shape, where a "pre-political" consensus on Commission's proposals is reached, and where the main problems of implementation are solved.

Interest committees constitute a radically different set of colleges. Their only similarity to the previous group of committees concerns the phase of intervention: interest committees too tend to intervene in the initiative phase to express their opinion on – and, hence, to strengthen the legitimacy of – Commission's proposals. Yet, their structure, functions and influence are quite distinct.

First of all, interest committee are not transgovernmental bodies (i.e. composed of national officials), but rather transnational ones. As such their members are representatives of civil society.

In order to analyse their composition more closely, we need to distinguish two categories of interest committees. The first includes colleges with a bipartite structure: their members are representatives of rival social parties (usually workers and employers, organised at the European level) in a particular socio-economic policy area. As for the system of appointment, members are usually selected on a proposal from social partner organisations.[21] The second category includes tripartite committees. These bodies are composed not only of representatives of national (instead of European) interest groups, but also of representatives of domestic governments. The power of appointment is entrusted to governments, acting either individually or collectively in the Council.[22] Despite the lack of reliable figures, the overall number of interest committees is well over a hundred: around twenty are tripartite colleges, set up by the Council, while the others are

[19] See, for instance, Article 2 of Council Decision 71/306/EEC of concerning the Supervisory Role of the Committee for Public Procurement, Official Journal, L 185, 16.08.1971.

[20] On the issue, A. Gil Ibáñez (1998) "Commission Tools for the Supervision and Enforcement of EC Law Other than Article 169 EC Treaty: An Attempt at Systematization", *Jean Monnet Working Papers*, No. 12, especially para. 5.1 and 8. See also *ibid.* (1999) *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Oxford: Hart).

bipartite, established by the Commission.[23]

Interest committees basically perform a double function. Firstly, they assist the Commission in formulating regulatory policies that require the support of social and economic actors. Secondly, they promote the so-called European social dialogue, i.e. the dialogue between the social parties in specific policy sectors.

It is important to note that with the exception of the sectoral dialogue committees (whose consultation is prescribed by Article 138 EC Treaty), the opinions of these colleges are neither binding, nor mandatory. Both the lack of systematic consultation and the absence of interest committees in many regulatory sectors reveal the incompleteness of this embryonic corporatist solution. The same applies to the weak influence interest committees exert on the supranational decision-making.

Scientific committees are colleges composed of scientists, university professors and other independent experts, selected according to criteria of excellence and independence from national governments. Thus, unlike the rest of the European polysynody, these committees are non-representative: members act in their personal capacity and care about a unitary interest,

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21 Article 4, Commission Decision 98/500/EC of 20 May 1998 on the Establishment of Sectoral Dialogue Committees promoting the Dialogue between the Social Partners at European Level, *Official Journal*, L 225, 12.08.1998, 27-28. According to Article 1, social partners organisations are those representing both sides of industry and fulfilling the following criteria:
(a) they shall relate to specific sectors or categories and be organised at European level;
(b) they shall consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States;
(c) they shall have adequate structures to ensure their effective participation in the work of the Committees.
In few other cases – for instance, in the case of the European energy and transport forum – the selection is based on a call for applications published in the *Official Journal of the European Communities* (Article 3, para. 8 of Commission Decision 2001/546/EC of 11 July 2001 setting up a Consultative Committee, to be known as the "European Energy and Transport Forum", *Offical Journal*, L 195, 19.07.2001, 58-60).

22 See, for instance, Article 1, para. 4 of Council decision 2004/223/EC of 26 February 2004 laying down the Rules of the Advisory Committee on Vocational Training, *Official Journal*, L 68, 06.03.2004, 25-26.

23 In the list of consultative bodies of the Commission, available at: http://ec.europa.eu/civil_society/coneccs/organe_consultatif/start_bodies.cfm?CL=en, appear 134 committees. Among these bipartite colleges, numerous Sectoral Dialogue Committees, promoting the dialogue between the social partners at European level, have been established by Commission Decision 98/500/EC, while thirty-one committees are active in the agriculture sector, and most of them have been set up by Commission Decision 2004/391/EC on the Advisory Groups dealing with Matters covered by the Common Agricultural Policy, *Official Journal*, L 120, 24.04.2004, 50.

which is not external to the body.

Following the BSE crisis, scientific committees have been reformed and their independence enhanced. They presently number around thirty. The majority have become internal bodies of European agencies set up for scientific advice.[24]

The "constitutional" relevance of scientific committees stems from the provision of the EC Treaty according to which

> The Commission, in its proposals [...] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.[25]

Their main task is to provide the Commission and the other European legislative authorities with the necessary scientific advice in the fields of risk regulation. Accordingly, scientific committees intervene in the phase of elaboration of legislative and executive measures, and carry out the required risk assessment. In principle this technical activity is separate from risk management.[26] Yet, this latter discretionary activity, entrusted with politically responsible institutions (mainly the Commission), implies choices of values (concerning the social acceptance of a risk) that are inevitably conditioned by scientific committees. Their opinion heavily affects the decision-making output.

The coordination of the national authorities competent for risk assessment in a given sector is an ancillary task performed by these colleges. The aim is to facilitate the exchange of scientific knowledge and the gathering of information necessary for the adoption of political decisions at both the national and supranational level.

The role of scientific committees is thus relevant in at least two respects. On the one hand, they promote the constitution of European networks of regulation by information. On the other, they provide Community

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[24] Fifteen permanent committees are active in the health and safety sector: nine work within the European agency for food safety, three colleges are part of the European medicines agency (EMEA), and the remaining three are consultative bodies of the Commission Directorate-General for health and consumer protection. In addition, twelve scientific committees support the environment and the human and animal safety policies.

[25] Article 95, para. 3, of the EC Treaty.

[26] See, e.g., *Communication from the Commission on the Precautionary Principle*, COM(2000) 1 final (Brussels: European Commission), 02.02.2000.

institutions with the expertise necessary to pursue a double – and, to a certain extent, contradictory – strategy: in the regulatory competition with national authorities, to let the *grundnorm* of market integration prevail; in the regulatory competition at global level, to ensure the precautionary principle insures a high degree of consumer protection.

2.2 The Legislative Phase: Council Committees

In the legislative phase, a second group of transgovernmental bodies intervenes, namely *Council committees* or *groupes de travail*. These committees number over a 150[27]. Under the coordination of the Committee of permanent representatives (Coreper), they prepare all the Council decisions.

The committee meetings are chaired by the presidency of the Council (i.e. by an official of the Member State holding the presidency), and are attended by both representatives of the Commission and national delegations of officials. The formal membership is restricted to the national delegations, whose duty is to protect domestic interests and, specifically, to represent the positions of Member States. Nonetheless, the Commission is constantly associated with the work: its delegation has the important task of illustrating the content of the proposals and evaluating (and eventually accepting) the amendments required by national representatives.

Whilst arguing and problem-solving are the predominant styles of discussion within committees in the initiative phase, this radically changes in the legislative phase. Here nothing resembles the popular idea of arguing and deliberation, too often generically associated with the transgovernmental phenomenon. What takes place is rather bargaining and negotiation between national interests. As a general rule (although with certain exceptions), national officials receive instructions from the capitals, and provide an account of the positions expressed in committee meetings to their superior. Sometimes divergent domestic positions lead to clashes, forcing the Commission to withdraw the proposal. More often, the joint efforts of the Commission and the Council presidency gradually bring Member States positions closer and lead to consensus.

When all the delegations agree on the legislative proposal, the preparatory function carried out by the committee actually becomes decisional in

27 In Council of the European Union (2007) *List of Council Preparatory Bodies*, doc. no. 11761/07 (Brussels: General Secretariat of the Council of the European Union), 13. 07.2007, 169 committees are mentioned. The total figure is higher if one considers subgroups and the different formations in which many Council working parties actually meet.

character. Within these colleges, consensus means substantive decision. After a so-called double-check from the Coreper, the *dossier* agreed upon at committee level is included among the "A" points of the Council agenda and merely rubber-stamped by the ministers without any further discussion.[28]

According to a careful appraisal, 70-75 per cent of Community legislation is passed at committee level and another 10-15 per cent at Coreper level[29]. Others ascribe committees a higher (90 per cent)[30] or lower (65 per cent)[31] decisional efficiency. In any case, it seems difficult to deny that within these colleges, supranational and domestic officials determine over three-quarters of Council measures, while ministers discuss only the few remaining controversial *dossiers*. Council committees hold a *de facto* decisional power.

2.3 The Executive Phase: Comitology

Comitology is the most familiar and hotly debated expression of transgovernmental power within the EU. Since this book is devoted to this group of committee, its characteristics are not reiterated here. It is enough to recall that the participation of Member States in the executive phase is guaranteed by means of 250 comitology committees;[32] and that the lack of unfavourable opinions delivered by these colleges[33] shows the common interest of the Commission and national administrations in defining executive measures whose application will be feasible at the domestic level: "The Commission is flexible and would rather amend its draft text in order to accommodate Committee discussion than adopt legislation that would be

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28 Each minister can ask to discuss an "A" point, but this power is hardly used, as empirical studies clearly demonstrate: see, in particular, M. Van Schendelen (1996) "'The Council Decides': Does the Council Decide?", *Journal of Common Market Studies*, 34, 532 ff.

29 F. Hayes-Renshaw & H. Wallace (1997) *The Council of Ministers* (London: MacMillan), p. 78. See also J. Lewis (2003) "Informal Integration and the Supranational Construction of the Council", *Journal of European Public Policy*, 10, 1009, giving the same estimate.

30 A. Maurer (2003) "Committees in the EU System: A Deliberative Perspective", in E. Eriksen, C. Joerges & J. Neyer (2003) *European Governance, Deliberation and the Quest For Democratisation* (Oslo: Arena), p. 345, and D. Rometsch & W. Wessels (1994) "The Commission and the Council of Ministers", in G. Edwards and D. Spence (eds) *The European Commission* (London: Longman), p. 213.

31 See Van Schendelen (1996) *supra* n. 28, p. 532.

32 European Commission (2006) *Report from the Commission on the Working of the Committees in 2005*, COM(2006)446 final (Brussels: European Commission), 09.08.2006, p. 10, tab. I.

ineffective".[34]

Comitology committees also exert a substantive decisional power: indeed they are a *fora* in which national administrations, together with the Commission, co-decide the content of supranational measures.

3. RE-CONSTRUCTION. EU COMMITTEES "PONDER" AND "COMPOSE"

As Part I shows, with the sole exception of interest committees (whose consultation is neither mandatory, nor very influential), all the other kinds of colleges (both the scientific and the various transgovernmental ones) exert de facto decisional powers. In fact, they bear most of the burden deriving from European law-making. Proposals, eventually based on the opinion of scientific committees, are shaped within expert governmental committees. These are then frequently passed as legislation by Council working parties and finally executed by means of secondary measures discussed and refined within comitology.[35]

This picture, based on a *quantitative* assessment of the role played by European polysynody, now requires a *qualitative* characterisation. Part II deals with the following question: which functions do committees carry out within the EU law-making process?

The answer is based on a distinction borrowed from Italian literature on administrative collegiality. Already in the 1950s, important studies on this issue began to functionally distinguish two basic kinds of bodies: colleges whose task was to "ponder", i.e. to evaluate and enhance the technical content of a decision (*collegi di ponderazione*); and colleges established in order to "compose", i.e. to prevent political conflicts (*collegi di composizione*).[36]

Moving from this categorisation, I will argue: *a)* that committees inter-

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[33] See European Commission *supra* n. 32, p. 6, stating that
> a total of 11 cases of referrals to the Council were reported in 2005....These 11 referrals in 2005 occurred in four policy sectors: Health and Consumer Protection (5), Environment (4), Europe Aid (1) and Statistics (1). The figure represents a small percentage of less than 0.5 % of the total number of implementing measures adopted by the Commission under the management or regulatory procedure (2 637).

[34] C. Trotman (1995) "Agricultural Policy Management", *Common Market Law Review*, 32, 1395.

[35] The constitutional concerns raised by such a "technocratic" decision-making system are dealt with elsewhere, in M. Savino (2005) "The Constitutional Legitimacy of the EU Committees, *Cahiers Européens de Sciences* Po, no. 3, available at: www. portedeurope.org/IMG/pdf/TheConstitutional LegitimacySAVINO.pdf.

vening in the initiative phase – namely, scientific committee and expert governmental committees – carry out a *pondering function*, for they are consulted in order to strengthen the technical consistency of Commission's proposals; *b)* that colleges intervening in the following phases of the decision-making – Council committees and comitology – exert, by contrast, a *composing function*, for they settle potential clashes between national and supranational interests before the *dossiers* reach the political stage (i.e. the meetings of national ministers). It has been observed that

> EU committees embody primarily three decision-making dynamics: 1) defending nation state preferences (intergovernmentalism), 2) providing neutral expertise (functionalism), and 3) defending the "common European good" (supranationalism).[37]

The aim of the following reconstruction is to assess how those dynamics coexist and complement each other.[38]

3.1 Pondering: Enhancing the Quality of European Law

The task of pondering a decision is typically entrusted with colleges characterised by a specific feature: the absence of members representing heterogeneous interests. Within such bodies, all the components have the institutional duty to care about the same interest.[39]

Scientific committees are the only EU committee group that perfectly fits within this model. Their members do not represent any external interest. Their exclusive duty is to contribute to the accomplishment of a European

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[36] This distinction – which partially resembles the abused opposition between arguing and bargaining – was originally sketched by M. Giannini (1950) *Lezioni di Diritto Amministrativo, Vol. I* (Milano: Giuffrè), p. 204. It was later exhaustively developed and refined by S. Valentini (1980) *La Collegialità nella Teoria dell'Organizzazione* (Milano: Giuffrè), p. 188 ff. See also L. Galateria (1956) *Gli Organi Collegiali Amministrativi, Vol. I: La Struttura* (Milano: Giuffrè), p. 16 ff., and U. Gargiulo (1962) *I Collegi Amministrativi* (Napoli: Jovene), p. 123 ff.

[37] J. Trondal (2003) "An Institutionalist Perspective on EU Committee Decision Making", *Center of European Studies Working Papers*, No. 6, available at: www.hia.no/oksam/ces/, p. 5. Also in B. Reinalda & B. Verbeek (eds) (2004) *Decision Making within International Organizations* (London: Routledge), p. 154 ff.

[38] To my knowledge the only similar attempt has been made by T. Gehring (1999) "Bargaining, Arguing and Functional Differentiation of Decision-making: The Role of Committees in European Environmental Process Regulation", in C. Joerges & E. Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart), p. 195 ff.

[39] Valentini, *supra* n. 36, p. 195.

policy (and thus of a supranational interest) by contributing with their expertise to the task of risk assessment.

This structural feature inevitably conditions the way such colleges deliberate. Given the non-representative nature of committee members, there is no room for decisional styles like bargaining or negotiation. A *dossier* is examined not to strike a balance between contrasting interests, but rather to exchange opinions and technical information in order to reach a better decision. This is where a deliberative approach in its pure form appears at European level: the decisions of scientific committees are shaped by the ability to influence the views of others and the use of persuasive technical arguments.

Our first conclusion is therefore that scientific committees are established to perform a pondering function: their task is to review, by arguing, the scientific consistency of risk regulations proposed by the Commission. The overall outcome is the enhanced rationality of European law.

Despite their different structure *expert governmental committees*, carry out a very similar function. Structurally, these colleges are composed of national experts (mainly, officials), chosen by the competent domestic administrations. They do not intervene in their personal capacity; on the contrary, they are sent to Brussels with the mandate (*munus*) to promote the interests of their respective national authority.[40] Delegates are thus concerned about domestic interests, potentially divergent one from the other and with regard to the supranational interest.

This structural heterogeneity of interests clearly constitutes a precondition to perform a *composing* function: representative bodies typically compose. Yet, the concrete observation of deliberative dynamics leads to a divergent conclusion. Within these colleges a *pondering* function, based on arguing and problem solving, tends to prevail. Two factors contribute to this unexpected result.

First, a college is able to compose only if potentially conflicting interests are sufficiently identified. Yet, expert governmental committees are consulted at a stage of the decision-making process – the initiative – when national positions are not yet defined. The mandate national delegates receive is empty: they have only a generic duty to consider and promote

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[40] Members of these committeees are, in fact, appointed by as representatives of a domestic public authority (national or infranational). There are, however, expert committees made up of members acting in their personal capacity, and advising the Commission independently from any outside instructions. It is probably to this smaller group of non-governmenatal expert committees that some authors – e.g. D. Rometsch & W. Wessels, *supra* n. 30, p. 213 – refer, when they affirm that expert committee members act in their personal capacity.

domestic interests. Inevitably, committee activity aims to compose interests only to a very limited extent, i.e. the extent to which national interests can be identified even before the Commission puts forward a proposal.

Second, in order to compose, a final decision is required. Yet, these kinds of committees do not adopt formal opinions. Internal rules of procedures do not provide for a voting procedure. When the Commission ask the college to vote, the only purpose is to obtain a clearer picture of the different positions. Moreover, committee unanimous or majoritarian positions, even if recorded in the minutes, by no means serve to bind the Commission.[41]

Under such conditions, the Commission is more interested in gathering information than in reaching a (premature) consensus. National delegates constitute not so much political counterparts to convince, but, rather, sources of technical and political advice to exploit. Their consultation allows the Commission to elaborate a technically consistent and politically balanced proposal, and, hence, to find better solutions to common European problems.

To sum up, scientific and expert governmental committees provide *fora* where Commission's initiatives are tested both against scientific evidence and against domestic officials' expertise. The overall aim is twofold. Firstly, this pondering activity enhances the "quality" of European law. Secondly, it also paves the way for the subsequent legislative or executive negotiation. In that respect, the establishment of colleges having a pondering function constitutes a mechanism that prepares, facilitates and, hence, complements the composing role of the remaining European polysynody.

3.2 Composing: Preventing Political Conflicts

Council committees and comitology are responsible for examining the measures (respectively, the legislative and the executive ones) proposed by the Commission. In both kinds of colleges, members represent potentially

[41] On the non-binding nature of these committee opinions, see, e.g., P. Bursens, J. Beyers & B. Kerremans (1998) "The Environment Policy Review Group and the General Consultative Forum", in M. van Schendelen (ed.), *EU Committees as Influential Policymakers* (Aldershot: Ashgate), pp. 30-31, explaining that

> [t]he EPRG does not aim to produce opinion or recommendations. The only formal results are the "chairman's conclusions", which are the personal interpretations of discussions and viewpoints given by delegations. This document has no official status and is, in addition to delegations, distributed only within limited sections of DG XI. It is not communicated to other DGs, the Parliament or any other institution.

conflicting domestic interests. Their role consists in preventing such conflicts, the likelihood of which increases as approval approaches.

Unlike expert governmental committees, both comitology and Council committees conclude the examination of the dossier with a final deliberation. In the case of comitology, the opinion is adopted according to the Council system of qualified majority voting.[42] Instead council committees follow the unwritten rule of consensus: the decision is taken when everybody agrees; when the agreement cannot be reached, the positions are recorded in the minutes and the *dossier* is shifted to the Coreper (and eventually Council) level for further negotiation.

A peculiar feature should be noted: while comitology adopts the Council voting system, Council committees do not. An interesting implication thereby arises, for the voting system affects the capacity of the college to compose. When the majority rule is available, this capacity is strengthened: majority voting becomes the key mechanism of composition, since composition itself requires the position of the many to prevail on the position of the few.[43] What, then, happens in the case of Council committees, where consensus – not majority – is the rule?

Majority rules are necessary to composition only when domestic interests have already come into conflict. It is important, in other words, to distinguish *existing* conflicts from merely *potential* ones: majority is required to settle the former, not the latter.

Accordingly, within Council committees, a veto raised by a single delegation blocks the decision and shifts the composition of the *existing* conflict from the administrative level to the political one, i.e. to the Council. However, the rule of consensus does not exclude a preventive composition, i.e. the balancing of national and supranational interests before the clash and in order to prevent it. Therefore, the composing function of Council committees should be understood as a cooperative process of conflict prevention, driven by the joint efforts of the Commission and the presidency to accommodate the proposal to reasonable national demands.

In contrast, the capacity of comitology to compose is enhanced by qualified majority voting. Not only is it possible to balance potentially divergent national interests, and thereby to prevent conflicts. It is also possible to solve an existing conflict deriving from the firm opposition of few States, in

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42 Article 4, para. 2, Article 5, para. 2, and Article 5a, para. 2, of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [the so-called "Comitology Decision"; setting up the new regulatory procedure with scrutiny], as amended by Decision 2006/512/EC, *Official Journal*, C 255, 4-8.

43 Valentini, *supra* n. 36, p. 297.

so far as that opposition does not amount to a blocking minority.

The different composing capacity of these two kinds of colleges has its own rationale. The need to find an agreement at the administrative (i.e. committee) level and, hence, to prevent a politicisation of the issue, is stronger in the executive than in the legislative phase: executive measures concern the solution of problems that are administrative in character; it would be counter-productive – both in terms of efficiency and in terms of effectiveness – to devolve the decision to the Council (as has occurred in the very few cases of an unfavourable opinion of the committee).[44]

In theory, the difference is clear: while for Council committees "composition" means *preventive settlement of a potential conflict*; for comitology "composition" has a broader meaning, including the *settlement of an existing conflict*. In practice, however, the difference fades, for both in Council committees and comitology cooperation and consensus prevail.

In the former bodies, the supranational interest, generally perceived as primary, bolsters the cooperation of the Commission and the rotating presidency with national delegations. Domestic instructions often contain a margin of flexibility that allows delegates to accept a reasonable sacrifice of national interests, when the proposal brings a compensatory satisfaction of the same. Conversely, when the capitals send instructions that are strict or adverse to the proposal, the lack of unanimity forces the college to pass the decision "to the top". Yet, as the figures above show, in most cases this outcome – the politicisation of the legislative decision – is avoided because of successful committee action. This confirms that at transgovernmental level, unanimity does not prevent a college from composing, and, at the same time, from helping to nourish cooperative dynamics.

Cooperation is also a predominant feature of comitology decision-making. In fact it is driven by a collective effort – on the part of the Commission and national administrations represented in the body – to adopt European measures that will not entail high implementation costs. High costs, in fact, put domestic administrations in an unpleasant situation: they must either pay, or not comply. In turn, such a situation would inevitably affect both the uniform implementation of EC law and the (severely limited) ability of the Commission to deal with systematic non-compliance. This convergent (domestic and European) interest in a punctual execution of EU law accounts not only for the lack of unfavourable opinions, but also for the rare

[44] When the committee does not deliver a positive opinion, the newly established regulatory procedure with scrutiny can also lead to the direct involvement of the European Parliament. This occurs *if* one of the following two conditions is fulfilled: either the Council envisages adopting the proposed measure, or it fails to act within a two-month period (Article 5a, para. 4, sub *d-g*, Council Decision 1999/468/EC).

resort to vote: comitology colleges tend to adopt decisions by consensus. Therefore, as far as modes of composition are concerned, in practice the abstract difference between comitology and Council committees shrinks.

A final remark is in order. As already mentioned, when one of these kinds of committee fails to reach an agreement, the power to decide is referred to the Council.[45] Such a transferral of power implies a "functional divide" among administrative and political colleges. Administrative colleges perform the double task of enhancing the rationality of Commission's proposal (pondering) and defusing potential clashes between national and supranational interests (composing). Political colleges, by contrast, are responsible for managing and eventually assuaging conflicts that have already erupted. For when preventive composition at committee level fails, the margins for a consensual agreement shrink, and an opposition emerges among "friends" and "enemies".[46] The attempt to balance interests by means of legal-rational administrative tools gives way to political dynamics based on package deals or distributive choices. Conflicts of interests are intrinsic to political bargaining, since bargaining produces winners and losers. The management of such conflicts requires the intervention of a college bearing political responsibility, namely the Council.

In conclusion, the role of committees in the EU decision-making can be summarised as follows. Some colleges – scientific committees and expert governmental committees – intervene in the initiative phase to enhance the quality of EU law and to facilitate the subsequent decisional phases. Other colleges, such as Council committees and comitology, intervene in the legislative and executive phases in order to elaborate consensual decisions and to insure the involvement of national administrations in the supranational law-making. As a consequence, on the one hand, the European polysynody prevents the rise of political conflicts (to the benefit of decision-making efficiency); on the other, it enhances the level of domestic compliance (to the advantage of EU law effectiveness).

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45 Even in the case of comitology, according to the management and regulatory procedures (Article 4 and 5 of the Comitology Decision), an unfavourable opinion of the committee means that the decision will be referred to the Council. National ministers can amend the measure proposed by the Commission within a given time limit (usually three months).

46 C. Schmitt (1932) "Il Concetto di 'Politico'", now in C. Schmitt (1972) *Le Categorie del "Politico"* (Bologna: Mulino), p. 101 ff.

4. RE-CONCEPTUALISATION. COMMITTEES AND EUROPEAN SUPRANATIONALISM: DELIBERATIVE OR PROCEDURAL?

Building on these conclusions, Part III evaluates the impact of European polysynody on the EU institutional balance: how do committees affect relations between the supranational institution, who is responsible for promoting the common interest and the intergovernmental institution which represents national interests? The answer to these questions provides a basis to critically review the ongoing debate on *infranationalism*[47] vs *deliberative supranationalism*[48] and suggests a way out in the form of a different conceptualisation of committees as a *procedural* third dimension of European supranationalism.

4.1 Between "Normative" and "Decisional": The Third Character of EU Supranationalism

According to a well-known view, the Community system is based on the "interaction of low decisional and high normative supranationalism".[49] Normative supranational is high because of EC law supremacy and direct effect: thanks to these principles, created by the ECJ, the European legal order is moving closer to a federal system. Yet, the level of decisional supranationalism is low, since the decision-making process is controlled by Members States through the Council. Intergovernmental dynamics, thus, prevail, according to a compensative logic: "the harder the law, the harder the law-making".[50]

Within this conceptual framework, committees are conceived as an intergovernmental factor that weakens the autonomy of the Commission and shifts the institutional balance in favour of the Council. The Coreper and the Council committees, for instance, would erode the Commission's power of initiative by subjecting it to stricter intergovernmental control. For similar reasons, comitology would limit the discretion of the Commission in the adoption of executive measures.[51]

My claim is that this influential view both misunderstands and underes-

[47] On the concept of "infranationalism", see J. Weiler (1999) "Epilogue", *supra* n. 3.
[48] Joerges & J. Neyer (1997) *supra* n. 4.
[49] See e.g. J. Weiler (1981) "The Community System", *supra* n. 3, 304-305.
[50] See J. Weiler (1991) "The Transformation of Europe", *Yale Law Journal*, 100, 2426, asserting that "The 'harder' the law in terms of its binding effect both on and within the states, the less willing states are to give up their prerogative to control the emergence of such law or the law's 'opposability' to them".

timates the impact of committees on the balance between the Commission and the Council.

Misunderstandings first: It is true that committees provide a mechanism indeed, the most capillary to promote national interests at Community level. As we have seen, most European committees are transgovernmental in character, they are composed of national officials whose duty is to defend the domestic position. Moreover, transgovernmental committees are literally everywhere in the EU and, as we have seen, they consistently intervene in all the stages of the law-making process.

Yet, this observation by no means implies that committees make the European decision-making more harshly intergovernmental, i.e. subject to domestic particularistic interests. On the contrary, committees provide an institutionalised mechanism to uphold supranational interests. The procedures followed both by comitology and Council committees not only concede the Commission (agent) significant margins of bureaucratic drift with regard to the Council (principal).[52] They also promote – as I shall further clarify[53] – the "daily" adjustment of the supranational interest to the national ones, at the same time safeguarding the pre-eminence of the former. According to my understanding, therefore, far from shifting the balance in favour of the transgovernmental institution, committees strengthen the overall supranational orientation of the EU law-making.

Turning to reasons of disregard, the view described above underestimates the impact of committees on the institutional balance for it conceives "normative supranationalism" and "decisional intergovernmentalism" as the only relevant variables. This well-known problem is related to the "joint-decision trap".[54] The conceptualisation of European supranational-

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51 See J. Weiler (1981) "The Community System", *supra* n. 3, pp. 285, 288; (1985) *Il Sistema Comunitario Europeo* (Bologna: Mulino), p. 74 ff., especially at 82-83; and (1991) "The Transformation of Europe", *supra* n. 48, 2424.

52 A. Ballman, D. Epstein & S. O'Halloran (2002) "Delegation, Comitology and the Separation of Powers in the European Union", *International Organization*, 56, 551 ff., applying the principal-agent model to comitology and reaching unexpected conclusions:

> the Commission, and by extension the Parliament, might actually welcome the presence of comitology committees in the policymaking process, as they give the Commission more leverage in its bargaining vis-à-vis the Council....The dynamics of this process have been misunderstood, insofar as comitology committees have been accused of subverting the Commission's policies. In fact, relative to a situation where Commission proposals are referred directly to the Council with no intervening committees, the comitology committees move outcomes closer to the Commission's (more integrationist) preferences, and away from the Council's. Thus...the committees are an instrument of greater, rather than less, integration in the EU (567, 571).

53 *Infra*, Part III.2.

ism in dualistic terms only partially accounts for this problem and its solution. If the deepening of normative supranationalism entails a hardening of intergovernmental decisional dynamics, a joint-decision trap appears unavoidable. Yet, how can we then explain the fact that, despite such a trap, the European system continues to display such a remarkable problem-solving capacity, far beyond the "lowest common denominator"?

Certainly, the gradual shift from unanimity to qualified majority voting in the Council and the rise of the European Parliament as co-legislator suggest a possible answer. Yet, this is incomplete. It is necessary – in my view – to move beyond the dualism normative supranationalism versus decisional intergovernmentalism, and to include a third character of European supranationalism in the reconstruction: the transgovernmental dimension.[55] As has been shown above, the bulk of European decisions, both legislative and executive, are taken within highly cooperative transgovernmental colleges. Committees represent, indeed, the "secret" of the European decision-making efficiency. More than qualified majority voting, it is the role of transgovernmental bodies that helps to explain how the joint-decision trap is bypassed.[56]

The tension arising from the erosion of domestic normative powers (due to supremacy, direct effect and pre-emption of EC law) and the risk of decisional deadlocks (induced by intergovernmental dynamics) is managed, in the daily institutional routine, by the national and supranational officials within the committees. If that is the case, the idea that committees tend to shift the institutional balance towards the intergovernmental side of the European spectrum seems questionable and reveals a double flaw. First, it reproduces the misleading idea of the *State-as-a-unit*: just as domestic administrations would emanate from their government, similarly European committees would be a mere projection of the Council. By contrast, committees are transgovernmental bodies following dynamics and performing tasks that are different from the intergovernmental ones.[57] The second flaw

[54] The obliged reference is to F. Scharpf (1988) "The Joint-Decision Trap: Lessons from German Federalism and European Integration", *Public Administration*, 66, 265, 267, explaining that intergovernmental negotiations lead to sub-optimal decisions, "which are unable to achieve realizable common gains or to prevent avoidable common losses". Moreover, since intergovernmentalism allows national interests to systematically dominate, "joint-decision systems are a 'trap' in yet another, and more important sense. They are able to block their own further institutional evolution".

[55] A similar attempt, though divergent in its conclusion, has been made by C. Joerges & J. Neyer (1997) "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology", *3 European Law Journal*, 273-99, and, in a divergent perspective, by J. De Areilza (1995) "Sovereignty or Management? The Dual Character of EC's Supranationalism – Revisited", *Jean Monnet Working Papers*, no. 2.

lies in the bi-dimensional characterisation of European institutional balance: beyond or, rather, between "normative supranationalism" and "decisional intergovernmentalism", there is an autonomous third dimension of European supranationalism. Its features now require clarification.

4.2 Committees and Their Supranationalism: "Deliberative" or "Procedural"?

The correlation between committees and European supranationalism relies on a paradox. On the one hand, committees are bodies representing national interests. On the other, such colleges uphold the common interest and thereby strengthen the supranational character of the decision-making. The first side of the paradox is less problematic: as illustrated in Part I, transgovernmental committees are *structurally* designed to filter national interests into the European decision-making. The other side of the paradox is more controversial. How do committees balance the protection of national interests with the promotion of the common or supranational interest?

Pars destruens. One of the most intriguing and debated answers points to *deliberative supranationalism.* According to my understanding of this view, the function of committees is to provide rational solutions to common problems, thereby enhancing European problem-solving capacity. In committee meetings, a deliberative style would prevail, based on arguing that

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56 See already F. Scharpf, *supra* n. 54, p. 272, suggesting a similar explanatory attempt:
> "Problem solving" is, after all, a style of decision making that is frequently encountered in decision situations which are formally operating under hierarchical or majority decision rules, even though there may be de facto unanimity for most practical purposes. Indeed, it may be the secret of their success: "participative management" (as distinguished from "*lassez-faire* management") is likely to profit from the creativity and intelligence of employees precisely because disintegrative tendencies are held in check by a hierarchical authority that has abdicated some, but not all, of its functions.

See also, more recently, A. Héritier (1999) *Policy-making and Diversity in Europe: Escaping Deadlock* (Cambridge: Cambridge University Press), pp. 1-2 and *passim*, illustrating the various "subterfuges" that prevent decisional deadlocks and "become second nature to European policy-making"; and J. Neyer (2004) "Explaining the Unexpected: Efficiency and Effectiveness in European Decision-Making", *Journal of European Public Policy,* 11, 19 ff., analyzing the contribution committees give to the high functional standards of EU decision-making.

57 It is sufficient, here, to mention R. Keohane & J. Nye (1970) *Transnational Relations and World Politics* (Cambridge: Harvard University Press); (1974) "Transgovernmental Relations and International Organizations", *World Politics*, 27, 39 ff.; K. Kaiser (1971) "Transnational Politics: Toward a Theory of Multinational Politics", *International Organization*, 25, 790 ff.

national interests would be of secondary relevance, in so far as they lead to sub-optimal decisions. This "shift from 'power to reason'", would in fact imply that "the motives of decision-makers become irrelevant" and this, in turn, would strengthen the supranational orientation of European law-making.[58]

This descriptive remark seems questionable for two reasons. First, it neglects the hierarchical and supervisory mechanisms of accountability that are imposed on national officials taking parts into (transgovernmental) committee meetings. In those *fora*, domestic civil servants cannot freely "argue" and discuss a supranational issue, since they have the duty to represent and uphold their Members States' position. They act according to a specific *munus* or mandate, which is relevant to the domestic hierarchical relations: its infringement could entail disciplinary consequences. An internal chain of accountability therefore prevents national officials from leaving aside both the instructions received and their broader duty to defend national interests.[59]

Second, the deliberative explanatory attempt – based on quite meagre empirical research, limited to a single highly technical sector (foodstuff safety), where scientific committees are powerful actors – falls short of acknowledging the basic functional distinction between European committees that "ponder" and European committees that "compose".[60] Arguing

[58] Quotations are from C. Joerges & J. Neyer, *supra* n. 4, pp. 281-82. As Joerges himself argues in a recent restatement, the label "deliberative supranationalism" is meant to point to something different from the reality he discovered. The reality is that comitology improves European problem-solving capacity, and thereby softens the tension between unity and diversity in the EU. The consequent normative claim – to which "deliberative supranationalism" is specifically devoted – is "a quest for a 'constitutionalisation' of comitology, *i.e.* for the improvement of a legal framework, which would stabilize the deliberative potential of comitology": C. Joerges (2006) "'Deliberative Political Processes' Revisited: What Have We Learnt about the Legitimacy of Supranational Decision-Making", *Journal of Common Market Studies*, 44, 784; for other responses to criticisms, C. Joerges (2002) "'Deliberative Supranationalism' – Two Defences", *European Law Journal*, 8, 146 ff.; "'Good Governance' in the European Internal Market – Two Competing Legal Conceptualisations of European Integration and their Synthesis", in A. von Bogdandy, P. Mavroidis & Y. Mény (eds), *European Integration and International Coordination* (The Hague: Kluwer), p. 219 ff. Brief, far from asserting the democratic nature of comitology decision-making, Joerges' claim is that this problem-solving capacity needs to be preserved by establishing new legal guarantees. The adjective "deliberative", thus, does not describe the actual quality of the European regulatory model, but, rather, one of the possible ways to strengthen comitology constitutional pedigree. What I question here is the deliberative approach in its descriptive or explanatory attempt: namely, the generalizing idea that the shift from politics (the Council) to administration (committees) would produce a parallel shift from bargaining to arguing, from the protection of national interests to the power of reason.

can be the prevailing style in the former, i.e. in scientific and expert governmental committees, while the same is not true for the other kinds of committees (comitology and Council committees), where national officials are bound by national instructions and hierarchical control. Therefore, it would be an incautious generalisation to assert that deliberative interactions systematically prevail.

Another common explanation of the supranational orientation of EU committees is sociological. Processes of "re-socialisation" take place at European level and lead to the gradual formation of a shared identity or "*esprit de corps*" within the committee. However, scholars have defused the controversial problem of "dual loyalty", showing that such a supranational identity is not built at the expenses of the national one.[61] In any case, the same objections just raised against deliberative supranationalism apply: since they are subject to administrative constraints, national officials, whatever supranational identity they develop, could not foster the latter to the detriment of the national interests.

Pars costruens. I argue that a more accurate clarification of the paradox can be found elsewhere, namely in the procedural dimension. In order to support this claim, it is necessary to observe both the "external" procedures and the "internal" functioning of those groups of colleges exerting decisional powers (Council committees and comitology).

To begin with, the Commission enjoys, both in the legislative phase (before Council committees) and in the executive phase (before comitology), three *exclusive* procedural "rights": to advance, to amend and to withdraw a proposal. The first right – of initiative – allows the Commission to

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59 There are cases in which instructions are lacking or flexible and obligations are so generic that they do not amount to a significant constraint. And there could be cases – also confirmed by the practice – in which diplomatic dynamics (the need, for instance, to establish alliances) justify a certain margin of discretion on the delegate. However, even in such cases, the decision-making logic is far from being merely deliberative, in so far as the national representative has to render account of the way she protected the domestic interest.

60 See *supra*, Part II, where this functional distinction is more carefully analysed.

61 L. Lindberg (1963) *The Political Dynamics of European Economic Integration* (Stanford: Stanford University Press), pp. 77-79 was the first to highlight the problem of dual loyalty. The seminal work on the issue is L. Scheinman & W. Feld (1972) "The European Economic Community and National Civil Servants of the Member States", *International Organization,* 26, 121 ff. More recently, an abundant literature has flourished, mainly produced by the School of Oslo: see, for instance, M. Egeberg, G. Schäfer & J. Trondal (2003) "The Many Faces of EU Committee Governance", *West European Politics,* 26, 19 ff.; J. Trondal & F. Veggeland (2003) "Access, Voice and Loyalty: The Representation of Domestic Civil Servants in EU Committees", *Journal of European Public Policy,* 10, 59 ff.

act strategically: the supranational institution can take into account national interests and political inputs, in order to put forward draft measures that will be likely to gather consensus. The second right – of amendment – gives the Commission an exclusive control over every measure and its single provisions.[62] The third right – of withdrawal – gives the Commission the power to prevent a negative opinion. The Commission's will is crucial, since its cooperation is necessary for the committee to decide. When its draft measure does not meet a sufficient consent among committee members, supranational officials can either adjust it to national demands or simply withdraw it.

The internal functioning of committees also strengthens the supranational position significantly. The Commission, in fact, is entrusted with a set of powers in order to shape and control the work of the college, both in advance and in progress. First, the Commission – either autonomously (in comitology) or in agreement with the presidency (in Council committees) – has the power to set the agenda: supranational representatives can, thus, prepare the negotiation strategy in advance, for example/instance, by choosing which *dossiers* to discuss together in the same meeting. Second, both in comitology and in Council committees, a group of well-prepared Commission officials illustrates purpose and content of the initiatives in discussion, squaring the ground for subsequent negotiations. Moreover, in comitology bodies, supranationalism is enhanced, since it is a representative of the Commission that chairs the meetings: she/he drives the discussion and decides whether and when to stop the discussion, to call for a formal voting and/or to push national delegates to consensus. In short, the Commission is the most powerful actor both within comitology colleges and (perhaps to a more limited extent) within Council committees.

The combination of these "external" and "internal" procedural powers, amount to what I refer to as "*procedural supranationalism*". I claim that committees, conceived as a third dimension of European supranationalism (*supra*, Part III.1), influence decisional outcomes not because their members "argue", but rather because their decisions are shaped by proceedings

[62] There are two minor exceptions in the legislative procedure: a) the Council has the power to amend the proposal, even against the Commission's will, yet only by unanimity (Article 250, para. 1, of the EC Treaty); b) once the last stage of the codecision procedure is reached, the Conciliation Committee can define a joint text, that has to be approved by a qualified majority of the Members of the Council and by a majority of the representatives of the European Parliament (Article 251, para. 4, of the EC Treaty). It should be noted that none of these exceptions apply to the preparatory stage carried out before the Council committees. This confirms the strength of Commission position within transgovernmental colleges.

with a supranational bias. This claim – crucial in my attempt to re-conceptualise EU committees' supranationalism – requires careful development.

European decision-making has a dual basic goal: the first is to ensure that domestic interests are taken into consideration and preserved; the second is to reach decisions beyond the "lower common denominator" in order to avoid the common interest being moulded merely by national egoisms. In this respect, committees play a decisive role. The first goal is satisfied by decisional power-sharing: committees are – as already pointed out in Part I – *fora* where the domestic administrations and the Commission co-decide, since they cooperatively adjust supranational measures to the needs of Member States. In order to achieve the second goal, the Commission (to which the care of common interests is entrusted) is empowered with a position of procedural pre-eminence within committees. How? The analogy with national administrative procedures provides a clarification.

The position of the Commission in a committee procedure strikingly resembles the position of an administration *chef de file* in a basic internal administrative proceeding.[63] Both the Commission (within committee procedures) and the administration *chef de file* (within domestic proceedings) have the duty to uphold a *primary* interest: the one they institutionally care about. To this end, both are given the power to initiate, amend, withdraw and adopt a measure. Yet, neither of the two can proceed autonomously, for their individual primary interests must be adjusted to competing ones. Both the Commission and the domestic authority *chef de file*, must therefore consult other administrations that care about related (*secondary*) public interests. Both, finally, are responsible for balancing those *secondary* public interests, in order to maximise them to the extent that the *primary* interest allows. In an evident parallel with the continental administrative model, supranational regulatory discretion is constrained by procedures in which the Community interest is given a procedural primacy, while national interests, represented by committee members, are given a secondary relevance.

The activity of these groups of committees, is not therefore, (and, in the near future, will not be) carried out in the ways suggested by the *deliberative supranationalism*, namely arguing. It is rather shaped according to the modes of administrative discretion, involving the adjustment of a primary interest (the supranational one) to competing secondary interests (national

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63 I refer to legal orders where ministerial systems are predominant, as is the case in the main systems of continental Europe. Here, administrative procedures are shaped in order to balance a primary public interest, attached to the ministry that takes the initiative, with competing public interests, whose care is entrusted to other ministries that have to be consulted in order to take the final decision. This very basic procedural scheme is regulated, for instance, in the Italian law n. 241/1990 of 7 August 1990.

ones). Just like a domestic administration *chef de file*, the Commission has the duty to assess the extent to which the promotion of a common good can be tempered with the protection of national interests. It is precisely this procedural method that characterises transgovernmental decision-making in the EU. And it is precisely this administrative feature that identifies the contribution of committees to European supranationalism.

Procedural supranationalism does not deny that supranational resocialising processes have an impact on the orientation of national delegates and, hence, can influence committee decisions. Nor does it deny that arguing and problem solving are very relevant decisional styles in (certain stages of) the European decision-making.[64] Yet, emphasis is put on the procedural dimension. It is this aspect that more deeply – *structurally* – affects the European institutional balance, since it strengthens the position of the Commission *vis-à-vis* national delegates, of common interests *vis-à-vis* domestic ones, and of supranationalism *vis-à-vis* intergovernmentalism.[65]

European polysynody, in this perspective, is not just a mechanism to shift the burden of conflict mediation from politics to administrative "clearing houses".[66] It is something more and qualitatively different. It is an institutionalised process where two seemingly irreconcilable demands are accommodated: the demand to safeguard domestic interests and the competing demand to ensure that the common interest will prevail over particularistic ones.

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64 As I argue in Part II, arguing and problem-solving are predominant in the initiative phase, that is both in scientific committees and in expert governmental committees.

65 Procedural supranationalism gives legal substance to a politologic view advanced more than forty years ago by Ernst Haas, and resumed by R. Keohane & S. Hoffman (1990) "Conclusions: Community Politics and Institutional Change", in W. Wallace (ed.), *The Dynamics of European Integration.* (London: Pinder), p. 280. According to the latter authors, for the European decision-making process

> the most appropriate label, perhaps surprisingly, is Ernst Haas's notion of "supranationality"...For Haas, supranationality did not mean that Community institutions exercise authority over national governments...Supranationality refers to a process or style of decision-making, "a cumulative pattern of accommodation in which the participants refrain from unconditionally vetoing proposals and instead seek to attain agreement by means of compromises upgrading common interests".

(the sentence quoted by Keohane and Hoffman is borrowed from E. Haas, "Technocracy, Pluralism and the New Europe", in S. Graubard (ed.), *A New Europe?*. (Boston: Houghton Mifflin), p. 66).

66 As is often the case at state level. See, for instance, M. Cammelli (1980) *L'Amministrazione per Collegi. Organizzazione Amministrativa e Interessi Pubblici* (Bologna: Mulino), p. 151.

5. CONCLUSIONS

The re-examination, re-construction and re-conceptualisation of EU committees have led, respectively, to the following conclusions.

First, committees are fragmented and obscure but nonetheless crucial, law-making actors. As Part I shows, together with the European institutions these bodies share the power to initiate, approve and execute legislation. Since most of them are transgovernmental in character, national administrations are involved in all the stages of the Community law-making. Such an objective reality – where supranational powers are constantly "re-nationalized" by means of committees – is consistent with the idea that, far from resembling a federal State, the EU has a composite nature, whose building blocks are still the States.[67]

Secondly, as I suggest in Part II, some colleges (scientific committees and expert intergovernmental committees) intervene in the initiative phase in order to "ponder" Commission's proposals, by subjecting them to pre-political, administrative, technical and scientific scrutiny (*pondering function*). Other colleges (Council committees and comitology), by contrast, intervene in the following phases to "compose" potential conflicts of interests, hence preventing the politicisation of law-making issues (*composing function*). One implication of this is that the deliberative approach accounts well for the first kind of dynamics, based on arguing, but offers a far less convincing explanation for the second ones, where national interests matter.

Third, the "*dual* character of European supranationalism"[68] can be also understood as *triple*. As I argue in Part III, the EU institutional balance is not based on a bi-dimensional equilibrium: between normative *supranationalism* and decisional *intergovernmentalism* there is a third *transgovernmental* dimension that silently mediates, enhancing the overall stability of the system. This third dimension of European supranationalism is *procedural* in character. The committee decision-making process is structured in a way as to reconcile the need to balance supranational interests with domestic ones with the opposing need to safeguard the primacy of a common interest *vis-à-vis* particularistic ones.

Some decades ago, a privileged observer – a former commissioner – sharply depicted the problem-solving capacity of the Council as follows:

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67 For this characterisation of the European legal order, S. Cassese (2003) *Lo Spazio Giuridico Globale* (Roma and Bari: Laterza), p. 55 ff., and (2002) *La Crisi dello Stato* (Roma and Bari: Laterza), p. 67 ff. See also G. della Cananea (2003) *L'Unione Europea. Un Ordinamento Composito* (Roma and Bari: Laterza).

68 J. Weiler (1981) "The Community System", *supra* n. 3.

> [s]ince it is [...] made up of representatives of Member States, and they, as Ministers, are at the same time responsible to their national parliaments, conflicts of aims arise when the Community's interests appear to be, or indeed are, inconsistent with national interests. These conflicts are unavoidable in a community in the making; the fate of the Community depends upon whether they can be resolved.[69]

If that is true, we should perhaps recognise that committees, with their daily action of conflict prevention, have significantly contributed to preserve "the fate of the Community".

[69] H. von der Groeben (1987) *The European Community: The Formative years. The Struggle to Establish the Common Market and the Political Union (1958-1966)* (Luxembourg: Office for Official Publications of the European Communities), p. 32.