

Comitology after Amsterdam: A Comparative Analysis of the Delegation of Legislative Powers*¹

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Introduction

The Intergovernmental Conference in Amsterdam failed – amongst other institutional questions – to address the issue of comitology.² The purpose of this article is to carry out a comparative analysis of executive law-making in other legal systems with the aim of arriving at a conclusion as to whether or not this must be regarded as a major shortcoming.

In 1996 the European Commission adopted – in addition to numerous decisions – 2,341 regulations and 2,806 directives, being legal acts with general application, whereas the Council adopted 484 legal acts in total.³ In terms of mere quantity, the Commission is thus the Community's main law-maker. In many of these cases the Commission's legal acts were adopted after the Council had conferred implementation powers on the Commission and a so-called comitology committee, composed of representatives of the Member States, had given its opinion on a Commission proposal.

Executive law-making at EC level with the participation of national government officials has repeatedly been criticised as undemocratic.⁴ It indeed raises fundamental questions with respect to the principle of separation of powers and the possibility of delegating powers. It seems, however, appropriate to consider these questions not only with regard to the EC, but also from a comparative point of view with respect to the legal systems in the Member States and the U.S.: Law-making by the executive exists not only in the EC, but also in the Member States themselves – and in the United States of America: parliaments adopt primary legislation in the form of an 'Act' (U.S., UK), a '*loi*' (France) or a '*Gesetz*' (Germany), whereas secondary legislation is enacted by the governments in the form of an 'Order' or a 'Regulation' (U.S., UK), an '*ordonnance*' (France) or a '*Rechtsverordnung*' (Germany).⁵

In certain cases a comparison between national and EC law involves specific difficulties because the two levels differ in many respects.⁶ As far as the separation and delegation of legislative powers is concerned, the following observations will, however, show that this is only (partly) the case with respect to the question of parliamentary control.

The purpose of this article is thus to examine whether executive law-making in the EC is fundamentally different from that in France, Germany, the UK (which shall be used as examples of Member States) and the U.S. with regard to the following questions:

- Is there a principle of separation of powers in EC law?

- Why is a delegation of powers from the Council to the Commission possible?
- Are there any limits for such a delegation of powers?
- What justification is there for the comitology committee structure?
- Should the European Parliament have more rights in controlling the Commission in its law-making?

1. The principle of separation of powers

A basic feature of the constitutions of the Member States and the U.S. is the principle of separation of powers:

The American constitution of 1787 is the textbook example in that respect: Its first three articles designate the organs in which the legislative, the executive and the judicial power are 'vested' (the Congress, the President, the Supreme Court and such lower Courts as Congress may from time to time establish).

But also the French, German and British Constitutions are based on that principle:

The 1789 French *Déclaration des droits de l'homme et du citoyen*, to which the present 1958 Fifth Constitution commits itself in its Preamble, even proclaimed that 'a society where the separation is not established is no society at all'.

The 1949 German *Grundgesetz* establishes, in Art. 20 (2), that 'all state authority shall be exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary'. The principle of separation of powers is a basic constitutional principle which according to Article 79 (3) of the *Grundgesetz* cannot be amended.

In the unwritten British Constitution the principle also exists, but refers mainly to the independence of the judiciary, as executive and legislative powers are closely intermingled.⁷

In contrast to the abovementioned, in the EC the existence of a principle of separation of powers in this form has been expressly rejected by the European Court of Justice:⁸ The UK argued in an annulment procedure that a Commission directive was void because it was 'clear from the Treaty provisions governing the institutions that all original law-making power is vested in the Council, whilst the Commission has only powers of surveillance and implementation'. According to the Court of Justice there is, however, 'no basis for that argument in the Treaty provisions governing the institutions'. Article 4 of the Treaty provides, however, that 'each institution shall act within the limits of the powers conferred on it by this Treaty'. Referring to Articles 4, 145, 155 and 189 of the Treaty, the Court ruled that 'the limits of the powers conferred' on an

* Un bref résumé de cet article en français figure à la fin.

institution 'are to be inferred not from a *general principle*, but from an interpretation of the particular provision in question'.

The Treaty provisions do, indeed, not distinguish between legislative, executive and judicial powers. The Court of Justice has, however, ruled that the legislative scheme of the Treaty, and in particular the last paragraph of Article 155, establishes a distinction between the *measures directly based on the Treaty itself* and *derived law intended to ensure their implementation*.⁹ It has been suggested¹⁰ that measures directly based on the Treaty itself should be considered as legislative acts, whereas derived law should be considered as executive acts.

Under that presumption, there is a functional separation of powers inherent in the EC Treaty:

The *legislative power* (that is the power to enact measures directly based on the Treaty itself) lies – depending on the relevant procedure – with the Council, the European Parliament acting jointly with the Council, and – in a few cases¹¹ – with the Commission.

The *executive power* (that is the power to implement the legislative acts) lies – as far as the Community executes its legislation itself, and not the Member States – with the Council which, however, according to Article 145 must confer it to the Commission and may reserve the right to exercise directly implementing powers itself only in specific cases.

The *judicial power* (that is the power to review the legality of legislative and executive acts under Article 173 and the power to interpret EC law under Article 177) lies with the European Court of Justice.

2. Possibility of a delegation of powers

In the U.S. the question as to whether Congress can delegate its law-making powers to the Government has long been disputed since the Constitution is silent in that respect.

In 1690 John Locke wrote:

'... the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others'.¹²

In 1892 the Supreme Court ruled in accordance with Locke's principle

'that Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the Constitution'.¹³

It was only in 1928 that the Supreme Court ruled that a delegation of legislative authority was possible:

'The rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power,

and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President ... This is not to say that the three branches are not *coordinate parts of one government* and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed *according to common sense and the inherent necessities of the governmental co-ordination*'¹⁴ [*italics added by the author in all citations*].

In a European context such a discussion could not arise: Article 155 EC Treaty provides that 'the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter'. After the amendments made to the Treaty by the Single European Act in 1987 Article 145 EC Treaty now provides not only for the possibility, but even for an obligation to transfer powers: '... the Council shall ... confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down'.

This does, however, of course not mean that the community legislator is not free to regulate all the details of the matter to be dealt with: the use of Article 145 EC under which the Council can delegate implementation powers to the Commission is optional.¹⁵

On the other hand, the European Court of Justice has given the concept of implementation a wide interpretation: It 'comprises both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application'.¹⁶ As a consequence, the Council can delegate to the Commission the power to enact rules of general application.

This is also the case in the Member States:

The British Parliament¹⁷ as well as the German *Bundestag* (according to Article 80 of the *Grundgesetz*) can delegate to the Government the power to make law.

Similarly, Art. 21 of the French Constitution provides that the Prime Minister 'ensures the implementation of enactments' which also includes the 'power to make regulations'. But French law goes even further: apart from this subordinate law-making power, there is also an autonomous law-making power of the executive which is unique compared to American, British, EC and German law: Art. 37 of the French Constitution provides that matters other than those which fall within the domain of legislation (which is enacted by Parliament only as regards those matters listed in Art. 34) are regulatory in character and are therefore dealt with by government decrees. Apart from this general delegation of law-making powers to the government by the Constitution itself there is also the possibility for the

Parliament to confer legislative powers on the Government in specific cases: Art. 38 of the Constitution provides that 'in order to carry out its programme, the Government may ask Parliament to authorise it, for a limited period, to take by means of ordinances measures which normally fall within the domain of legislation'.

The fact that European, American, British, French and German constitutional law permits the delegation of legislative powers to the executive, shows that the U.S. Supreme Court's assumption that there is an 'inherent necessity' to delegate law-making powers to the executive is correct.

3. Limits to a delegation of powers

In the Köster case¹⁸ of 1970 the ECJ was asked whether there were any limits to the delegation of powers from the Council to the Commission:

Council Regulation 19/62¹⁹ which was adopted on the basis of Art. 43 (2) of the EEC Treaty made all importation and exportation of cereals subject to the presentation of an import or export licence. It also provided that *import* licences were only to be issued subject to the lodging of a deposit which would be forfeited if the importation did not take place within a certain prescribed period. It was further stipulated that the detailed rules for the application of these provisions had to be adopted in accordance with a management committee procedure. In accordance with this procedure and in implementing of the Council Regulation, the Commission adopted Regulation 102/64²⁰ which laid down that *import and export* licences could only be obtained after a deposit had been lodged which would be forfeited if the import or export was not effected within the period stipulated in the respective licence.

The German company Köster obtained such an export licence after having lodged the required deposit of 2,400 DM. Since the export was not effected within the period of validity, the deposit was declared forfeited by the competent German authority. Köster appealed against this decision to an administrative court; arguing that only the Council could have adopted the Regulation 102/64 in accordance with the procedure laid down in Art. 43 (2) of the Treaty, but not the Commission according to a different procedure. The German court referred this question to the European Court of Justice which rejected Köster's argument, stating that:

'It is sufficient ... that the *basic elements of the matter to be dealt with* have been adopted in accordance with the procedure laid down (by the Treaty). On the other hand, the *provisions implementing the basic regulations* may be adopted according to a (different) procedure, either by the Council itself or by the Commission by virtue of an authorisation complying with Article 155'.

This follows 'both from the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155' and 'the legal concepts recognised in all the Member States'.

Also in the U.S. and Germany the legislator is not free to delegate all law-making powers to the executive. There are, however, two different concepts of setting limits to the legislator in transferring powers to the executive: In the EC, the basic principle is that only *implementation* powers can be delegated, which means that what may be conferred and what not must be delineated by interpretation of the term implementation. The concepts in the U.S. and in Germany are different: They seek to ascertain not which powers can be delegated, but which elements of a matter must be dealt with by the Parliament.

The U.S. Supreme Court has ruled as follows:

'... the most that may be asked under the separation-of-powers doctrine is that Congress lay down the *general policy and standards* that animate the law, leaving the agency to refine those standards, 'fill in the blanks', or apply the standards to particular cases'. This principle 'ensures to the extent consistent with orderly governmental administration that *important choices of social policy are made by Congress*, the branch of our Government most responsive to the popular will'.²¹

The German approach is very similar: According to the '*Wesentlichkeitstheorie*' (*theory of 'essentialness'*) and the doctrine of legislative reservation which were developed by the German Constitutional Court, essential questions of a particular matter must be regulated by an act of Parliament.²²

Yet, although the German and American courts ask which elements must be regulated by the legislator, whereas the ECJ asks which elements are of an implementing nature so that the executive can deal with them, it is striking to observe that the conclusions reached by all the three courts are practically identical: *Important/essential choices* must be made by the legislator, whereas everything else can be dealt with by the executive.

The position is different in France and the UK: Under British law the Parliament is free to decide which powers should be delegated and Art. 38 of the French Constitution also sets no limits concerning the delegation of legislative powers.

It is interesting to observe that in practice the courts have hardly ever invalidated law made by the executive on the ground that it regulated an essential element of a subject:

There is not a single such case in the jurisprudence of the ECJ.²³

In the case law of the U.S. Supreme Court which is very comprehensive in that respect there are only two cases (from the mid 1930s) where the Supreme Court invalidated delegations of legislative powers.²⁴

The German *Bundesverfassungsgericht* has on several occasions invalidated delegations of law-making power to the executive.²⁵ This jurisprudence has provoked mixed reactions: Whereas some think that the 'Germans have worked hard to maintain' something

that the Americans have 'lost',²⁶ others argue that it has become practically impossible to predict opinions of the Court in a specific case.²⁷

In summing up, it can be recorded that the highest U.S., EC and – to a lesser extent – German courts have exercised judicial restraint to a considerable extent when they have been asked to rule on the limits of delegated rule-making.

4. Federal aspects

Another important question is whether in federal systems like Germany, the U.S. or the EC the *Länder*, states or Member States have the power to participate in the executive law-making process:

This is the case in the EC under the comitology system which was established in the EC in the early 1960s as a matter of necessity, because the Council did not have the necessary resources to take all the implementing measures itself, but also wanted to keep control over the way the Commission implements the law.²⁸ In certain cases (I and IIa-Committees) the Commission is relatively free in its implementation, whereas it must avoid a negative opinion of the competent Committee in other cases (IIb-Committees) or even needs the Committee's approval on a certain proposal (in IIIa and IIIb-Committees). That this system does not distort the Community's institutional structure, because the committees do not have the power to take decisions in place of the Commission or the Council, was acknowledged by the Court of Justice in the Köster case:²⁹

'The function of the management Committee is to ensure permanent consultation in order to guide the Commission in the exercise of the powers conferred on it by the Council and to enable the latter to substitute its own action for that of the Commission. The Management Committee does therefore not have the power to take a decision in place of the Commission or the Council. Consequently, without distorting the Community structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary'.

In 1987, with the amendment of Article 145 EC Treaty and the adoption of the *comitology decision*,³⁰ the established practice was put on a firm legal basis.³¹ There are striking similarities to the German system: According to Article 80 (2) of the *Grundgesetz* practically all government regulations need the consent of the *Bundesrat*³² (the second chamber of the German Parliament in which the *Länder* are represented with varying numbers of votes according to their size).³³ The only difference with the comitology system is that in Germany the 'parent' institution itself is asked for its consent, whereas the Council does not itself give its opinion on a proposal from the Commission: It has

instead set up committees, which are however, like the Council, composed of representatives of the Member States who speak in their interests and whose votes have the same weight as those of the Ministers in the Council.

In the U.S., on the other hand, there is no similar system of participation for the States: here no institution or committee structure has been established to represent the opinions of the State Governments.

5. Parliamentary control – 'Modus vivendi' – Treaty of Amsterdam

Finally we shall consider the question as to which degree of parliamentary control there is over the way the executive exercises its implementing powers:

In the U.S. until 1983 it was possible for Congress to delegate law-making powers to the executive (and in particular government agencies) under certain conditions: legislative proposals from the agencies had to be transmitted to Congress and took effect only if neither the Senate nor the House of Representatives rejected them during the two following sessions. This practice which had been used 295 times in 196 different statutes since 1932 was challenged and found to be invalid by the Supreme Court³⁴ because it violated the principle of separation of powers:

The question was whether a veto of the House of Representatives against a decision of the Department of Justice's Immigration and Naturalization Service to suspend the deportation of a Mr. Chadha violated the principle of the separation of powers. The right of veto for both the House and the Senate was part of the Immigration and Nationality Act. The Supreme Court found it to be unconstitutional:

'The constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. ... Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable. ... Congress made a deliberate choice to delegate to the executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. ... This choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Article I (of the Constitution). Disagreement with the Attorney General's decision on Chadha's deportation ... no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves decisions that Congress can implement in only one way: bicameral passage followed by presentment to the President. *Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked*'.

Justice White dissented with the opinion of the Court on the following grounds:

‘The history of the legislative veto makes clear that it has not been a sword with which Congress has struck out to aggrandise itself at the expense of the other branches. Rather, the veto has been a *means of defense, a reservation of ultimate authority* necessary if Congress is to fulfill its designated role under Article I as the nation’s lawmaker. While the President has often objected to particular legislative vetoes, generally those left in the hands of congressional committees, the Executive has more often agreed to legislative review as the price for broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to *retain a check on the exercise of delegated authority*’.

The German *Bundestag* has in certain cases also made the adoption of government regulations dependent upon prior consultation, non-objection or even consent of the *Bundestag*:³⁵ This practice was challenged before the *Bundesverfassungsgericht* which had concerns similar to those of the U.S. Supreme Court. The German court tried, however, to find a middle path between the two opposite positions of the U.S. Supreme Court’s majority and Justice White: It found a conditional delegation of powers to be compatible with the principle of separation of powers at least in certain fields:

‘Authorizations for the adoption of regulations which are made dependent on the consent of the *Bundestag* do not contribute to a clear separation of the responsibilities of the executive and the legislature. From the fact that Art. 80 (1) *Grundgesetz* does not expressly allow them, does, however, not follow that they are unlawful. Nor does this follow from the principle of separation of powers: also as far as legislation is concerned, the competences of the legislature and the executive are interlinked in many ways. Although the *Grundgesetz* reserves legislation in principle to the legislature, there is an exception to this principle in that there is the possibility of authorizing the executive to legislate (Art. 80 *Grundgesetz*). Such authorizations can be seen as a minus in comparison to a full delegation of legislation to the executive. They are compatible with the *Grundgesetz at least in such areas where it must be acknowledged that the legislature has a legitimate interest in delegating the law-making to the executive* on the one hand, but on the other hand, because of the importance of the regulations to be made, *to retain decisive influence over the adoption and the content of the regulations*’.³⁶

The British Parliament has very strong powers to control executive law-making (which, because of the supremacy of Parliament, cannot be challenged in a court): There are two forms of parliamentary review of

delegated legislation:³⁷ Under the affirmative procedure, draft delegated legislation will not take effect until there has been an express approval by Parliament. Under the negative procedure, delegated legislation will take effect unless within forty days of it having been put before Parliament it has been expressly rejected by Parliament.

In the French system, which is unique in granting original law-making powers to the government, there is no parliamentary control of executive law-making.

In the EC the Parliament’s rights in controlling the Commission in the implementation of EC law are very limited, but not for the same reasons as in the U.S.:

The European Parliament followed the development of the comitology system with mistrust from the very beginning, since measures of considerable importance were adopted without any parliamentary participation. For many years it used the political, budgetary and jurisdictional means at its disposal to counteract the spread of comitology.³⁸ After failed attempts to increase its rights by freezing parts of the budget for the committees, it was, however, only in 1993 that the Parliament also acquired legal arguments in favour of a change: with the introduction of the co-decision procedure (Art. 189b EC), the Parliament became a co-legislator in certain fields. The implication for the Parliament was clear: not only the law-making, but also the delegation of implementing powers was now a joint competence of the Council and the Parliament: Art. 145 EC was not applicable to acts passed under Art. 189b since it referred only to acts passed by the Council, but not by the Council and the European Parliament jointly. Not only should the Parliament have an equal say on which competences should be delegated and which form of delegation should be chosen; the Parliament should also have the same rights as the Council in controlling the Commission in exercising the delegated implementing powers.³⁹

The Council, however, did not agree with this interpretation of the changes made by the Maastricht Treaty. Commission, Council and Parliament found a provisional agreement, the so-called *modus vivendi*:⁴⁰ It provides that the Commission shall send any draft *general* implementing act not only to the comitology committee, but also to the appropriate committee of the European Parliament, the comments of which the *Commission shall take account of as far as possible*;⁴¹ furthermore the *Council shall adopt a draft general implementing act which has been referred to it in accordance with an implementing procedure only after informing the European Parliament, setting a reasonable time limit for obtaining its opinion, and, in the event of an unfavourable opinion, taking due account of the European Parliament’s point of view without delay, in order to seek a solution in the appropriate framework*.⁴²

A definitive solution was left to the 1996 IGC.⁴³ The draft Treaty of Amsterdam leaves this question, however, unsolved: A declaration to the Final Act⁴⁴ ‘calls on the Commission to submit to the Council by the end of 1998 at the latest a proposal to amend’ the comitology decision. This may be seen as an indication that major changes

will not occur.

There would, however, be no legal limits to an increase in the rights of the European Parliament comparable to those in the U.S. (or to a lesser extent in Germany): Article 4 EC Treaty does not set any limits to Treaty amendments which shift the power balance between the institutions. Therefore the European Parliament could be placed on an equal footing with the Council in comitology by an amendment of Article 145 EC, maybe even by an amendment of the comitology decision.

One may finally wonder why in national legal systems there is nothing comparable to this power struggle between the EC institutions. The answer is simple, but reveals a fundamental difference of the Parliament's role in national and European law. Whereas in national systems the Parliament is the legislator and thus free to decide whether or not to delegate powers to the executive, the European Parliament has only been a co-legislator together with the Council since 1993, and only in certain cases. If, on the other hand, the Council alone decides to delegate powers to the Commission in cases where the Parliament is not a co-legislator, it deprives the Parliament of its right to be consulted without there being any chance for the Parliament to prevent that.

Conclusion

A comparison of the comitology system in the EC with the delegation of powers in France, Germany, the UK and the U.S. shows the following:

Even though the EC legal system does not contain a clear-cut principle of separation of powers, there is a functional separation of powers, under which as a rule it is the Council and the European Parliament which adopt legislative measures directly based on the Treaty, whereas the Commission has executive or implementation powers.

As in the U.S. and the Member States the EC legislator (Council) can delegate law-making powers to the executive (Commission) under Article 145 EC Treaty. The American, EC and German systems have (very similar) limits for a delegation of powers. In France and the UK there are no such limits.

In Germany the *Länder* can participate in delegated law-making in the *Bundesrat* in a very similar way to the Member States in the comitology system. In the U.S. there is no similar structure.

In the UK and in Germany the Parliaments have certain rights in controlling the executive in its implementation. In the EC these rights are still very limited. There are no such rights in France and the U.S. (where this is even considered as unconstitutional).

The comitology system therefore has striking similarities with the other systems with which we have compared it without being identical to any of them. Within the last 40 years or so it has become a system of executive law-making of its own which is, however, built on existing legal and political principles: Like in other legal systems, it soon became evident that executive law-making is a question of necessity since the legislator

often lacks resources and expertise to regulate all details of a subject matter himself. The Court of Justice has recognised that necessity but has set limits to executive law-making for reasons of democratic accountability. The committee structure meets the need of acceptability of community rules to the Member States. The fact that the EP has only very limited rights to participate in the executive law-making process can be interpreted in two different ways: With regard to France and the U.S., there is no need for a change: Once law-making powers have been delegated to the executive, there is no more necessity for the executive to ask for parliamentary consent; on the contrary, this can even be regarded as a violation of the principle of separation of powers. With a view to Germany and the UK, the European Parliament's very limited rights can be seen as a lack of democratic control and be explained by the fact that the European Parliament is not yet a full legislative body in its own right.

In summing up, the comitology structure reflects in particular three features:

First, that the EC is – like the Member States and the U.S. – a Community *based on law and the principle of separated powers with limited competences*, which includes, however, a (*limited*) possibility of delegating legislative powers to the executive.

Secondly, it represents a *mixture of the executive law-making systems* of the larger Member States (as far as parliamentary rights of control are concerned).

Finally, it reflects the fact that despite (or because of) the development of the EC into a system which has many federal features, the interests of the Member States are taken into account not only in the process of making secondary, but also tertiary law (as far as the existence of the committee structure is concerned).

The comitology system did not develop by mere coincidence, but there are good reasons for each one of its features. The comparison with the British, French, German and U.S. system of delegating powers shows that it is certainly no more undemocratic than those.⁴⁵ Since none of its three key features is very likely to change fundamentally (and it is very questionable whether that would be desirable in every case), it can be expected that the comitology system will remain an important part of EC law-making for many years to come.

RÉSUMÉ

La comitologie après Amsterdam

La Conférence intergouvernementale d'Amsterdam n'a pas réussi à traiter de la question de la comitologie, ni d'ailleurs d'un certain nombre d'autres questions institutionnelles. Le but de cet article est d'effectuer une analyse comparative du processus d'élaboration des lois par l'exécutif dans d'autres systèmes juridiques afin d'arriver à une conclusion sur la question de savoir s'il faut y voir une déficience majeure. En 1996, la Commission européenne a adopté – à côté de nombreuses décisions – 2.341 règlements et 2.086

directives, c'est-à-dire des actes d'application générale, alors que le Conseil a adopté 484 actes au total. En termes purement quantitatifs, la Commission est donc le principal législateur dans la Communauté. Dans bon nombre de cas, les actes de la Commission sont adoptés après que le Conseil ait conféré des pouvoirs d'exécution à la Commission et après qu'un comité, composé de représentants des Etats membres, ait donné son avis ou son feu vert sur une proposition de la Commission selon un ensemble de règles que l'on regroupe sous le vocable de la "comitologie". Ce processus d'élaboration des lois par l'exécutif au niveau de la CE, auquel participent des fonctionnaires des gouvernements nationaux, a été critiqué à plusieurs reprises comme n'étant pas démocratique. En effet, il soulève des questions fondamentales par rapport au principe de séparation des pouvoirs et à la possibilité de déléguer des pouvoirs.

Ce processus d'élaboration des lois par l'exécutif existe non seulement dans la CE, mais aussi dans les Etats membres – et aux Etats-Unis d'Amérique. Les parlements adoptent la législation primaire sous forme d'un "Act" (US, UK), de loi (France) ou de "Gesetz" (en Allemagne), alors que la législation dérivée est adoptée par les gouvernements sous forme d'un "order" ou "regulation" (US, UK), d'ordonnance (France) ou de *Rechtverordnung* (Allemagne). Dès lors, il convient tout particulièrement de se pencher sur ces questions non seulement par rapport à la CE, mais aussi sous un angle comparatif en ce qui concerne les systèmes juridiques dans les Etats membres et aux Etats-Unis. Cet article montre qu'en la matière, le processus communautaire ne diffère fondamentalement pas du système que l'on rencontre en France, en Allemagne, au Royaume-Uni (qui seront utilisés comme exemples pour les Etats membres) et aux Etats-Unis.

NOTES

- ¹ This article will also be published in the next issue of *Maastricht Journal of European and Comparative Law* 1997.
- ² Document CONF 4004/97, Declaration No. 31, AF/TA/en 44.
- ³ European Commission, *General Report on the Activities of the European Union*, 1996, Office for Official Publications of the European Communities, 1997, p. 424, 426.
- ⁴ Cp. e.g. Trotman, *Agricultural Policy Management: A Lesson in Unaccountability*, *Common Market Law Review* 1995, p. 1385; Blumann/Adam, *La politique agricole commune dans la tourmente: la crise de la "vache folle"*, *Revue trimestrielle de droit européen* 1997, p. 239.
- ⁵ Note that in the EC that difference in terminology does not exist: According to Art. 189 EC Treaty the Council and the Commission 'shall make regulations and issue directives'.
- ⁶ Dehousse, *Comparing National and EC Law: The Problem of the Level of Analysis*, *American Journal of Comparative Law* 1994, p. 761.
- ⁷ Finer et al, *Comparing Constitutions*, Clarendon Press, 1995, p. 21.
- ⁸ Joined Cases 188 to 190/80, *France, Italy and United Kingdom v. Commission*, [1982] ECR 2545, 2573.
- ⁹ Case 25/70, *Einfuhrstelle v. Köster*, [1970] ECR 1161.
- ¹⁰ Lenaerts, *Regulating the regulatory process: "delegation of powers" in the European Community*, *European Law Review* 1993, p. 23.

- ¹¹ Cp. e.g. Articles 48 (3) and 90 (3).
- ¹² J. Locke, *Second Treatise on Civil Government* § 141 (1690).
- ¹³ *Field v. Clark*, 143 U.S. 649, 692 (1892).
- ¹⁴ *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928).
- ¹⁵ Case 25/70, *Einfuhrstelle v. Köster*, [1970] ECR 1161, No. 9 (referring to Article 155).
- ¹⁶ Case 16/88, *Commission v. Council*, [1989] ECR 3457.
- ¹⁷ Macroy, *Sources and Categories of legal acts – Britain*, in: Winter, *Sources and Categories of European Union Law*, Nomos, 1996, p. 78.
- ¹⁸ Case 25/70, *Einfuhrstelle v. Köster*, [1970] ECR 1161, No. 6.
- ¹⁹ [1962] O.J., p. 933.
- ²⁰ [1964] O.J., p. 2125.
- ²¹ *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).
- ²² Ladeur, *Sources and Categories of Legal Acts – Germany*, in: Winter, *Sources and Categories of European Union Law*, Nomos, 1996, p. 241.
- ²³ Cp. Türk, *Case Law in the Area of the Implementation of EC Law*, in: Pedler/Schaefer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, EIPA, 1996, p. 167.
- ²⁴ Gellhorn et al, *Administrative law*, The Foundation Press, 1987, p. 71: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
- ²⁵ Cp. Pieroth, *Grundgesetz*, Art. 80, No. 13.
- ²⁶ Currie, *Separation of Powers in the Federal Republic of Germany*, *American Journal of Comparative Law* 1993, p. 201.
- ²⁷ Cp. von Münch, *Grundgesetz*, Art. 80, No. 23.
- ²⁸ Cp. Demmke et al, *The History of Comitology*, in: Pedler/Schaefer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, EIPA, 1996, p. 61.
- ²⁹ Cp. Fn. 8.
- ³⁰ Council Decision 87/373 of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, [1987] O.J. L 197/33.
- ³¹ Cp. for details: Demmke et al, Fn. 27, p. 65.
- ³² Maunz in: Maunz, Dürig, Herzog, Scholz, *Grundgesetz*, Art. 80, No. 58.
- ³³ Cp. Art. 51 of the German Constitution: The *Länder* have between 3 and 6 votes.
- ³⁴ *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
- ³⁵ Maunz (Fn. 31), No. 60, 61.
- ³⁶ BVerfGE 8, 274, 319 -322.
- ³⁷ Macroy, *Sources and Categories of Legal Acts – Britain* (cp. Fn. 16), p. 83.
- ³⁸ Cp. Bradley, *The European Parliament and Comitology: On the Road to Nowhere?*, *European Law Journal* 1997, p. 230.
- ³⁹ Fn. 27, p. 75.
- ⁴⁰ Modus vivendi of 20 December 1994 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, [1979] O.J. C102/1.
- ⁴¹ No. 4 and 6.
- ⁴² No. 5.
- ⁴³ No. 3.
- ⁴⁴ Document CONF 4004/97, Declaration No. 31, AF/TA/en 44.
- ⁴⁵ Similar evaluations of the comitology structure are made by: Joerges/Neyer, *From Intergovernmental Bargaining to Deliberate Political Processes: The Constitutionalisation of Comitology*, *European Law Journal* 1997, p. 273; Landfried, *Beyond Technocratic Governance: The Case of Biotechnology*, *European Law Journal* 1997, p. 255; Vos, *The Rise of Committees*, *European Law Journal* 1997, p. 210. □