Chapter 5

OVERSIGHT

ADMINISTRATIVE LAW OF THE EUROPEAN UNION

CHAPTER 5: OVERSIGHT

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Introduction and Executive Summary

The purpose of this report is to analyze the oversight processes, mechanisms and approaches used in the European Union ("EU") to control, influence and implement the regulatory powers exercised by the European Commission. As this report will show, the concept of oversight operates quite differently in the EU from what we are familiar with in the United States. As a great oversimplification, "oversight" in the United States is generally construed as a reference to the review by senior officials (or political entities) who operate above and beyond the department/agency/bureau that is responsible for the technical development and drafting of a regulation, and generally to engage after the agency's "expert" work is largely done. In the EU, oversight tends to be more collaborative and informal than in the United States, and much of it tends to be incorporated directly into the development and drafting process for each regulation (before a near final product is submitted to the political decision-makers). Commission entities that are integrally involved in the drafting of the regulations in the first place are also crucial to providing a vehicle for "outside" oversight (chiefly from Member State representatives and experts, and interaction with the EU Council). Oversight thus occurs at various points and times in the EU regulatory development process. Oversight, broadly defined, can also occur after the fact, taking the form of critique by parliamentary committees at the European and national levels, or scrutiny of the implementation of commission rules and directives by, for example, ombudsman processes. This report takes a comprehensive approach to oversight and we examine the various ways or mechanisms by which oversight can occur, the various players involved and multiple

points of entry where oversight can be invoked in EU regulatory processes. For this reason, there will undoubtedly be some overlap with the descriptions of the regulatory processes and players relevant to oversight with other reports in this project. For example, readers already familiar with Commission assessment procedures from their discussion in the rulemaking report, should feel free to skip those sections here.

There is, in short, a veritable proliferation of oversight emanating from the Member State national governments (acting independently), the Heads of State (acting through the European Council, which must not be confused with the Council of the European Union mentioned below), the European Parliament (which has evolving legislative and oversight responsibilities), the Council of the European Union (comprising Member State representatives at the ministerial and sub-ministerial levels, and referred to herein as "the EU Council," or simply "the Council"), the European Commission (which carries out both core legislative and executive functions), committees of experts drawn from the Member States and organized into ad hoc advisory and review committees in a process known as "comitology," administrative agencies, and various other committees, secretariats and ombudsmen.

We must admit to experiencing considerable difficulty in determining what we should consider to be the proper object(s) of oversight for purposes of our report. The answer is not entirely clear because "regulatory" policies are embodied in "primary" legislative acts adopted by the EU Council (occasionally with the co-decision of the EU Parliament) based on proposals initiated by the Commission as well as in "secondary" legislation, or implementing measures, undertaken by the Commission in the exercise of delegated powers. Ultimately, we have elected to focus primarily on oversight of the

Commission's implementing acts because this most closely parallels the rulemaking functions of U.S. administrative agencies that interpret, elaborate upon and implement statutory laws through the exercise of delegated authority. We recognize, however, that focusing on this particular slice of the regulatory pie does not accurately reflect the entire picture – especially since the Commission initiates and drafts not only the legislative proposals that ultimately delegate regulatory power back to the Commission, but also legislative proposals that are, in effect, self-implementing regulatory policies.

While there are various checks and balances in the EU regulatory system, clarity, simplicity and formality would not be foremost amount them. We have perceived that the diffusion of responsibility for oversight may contribute to a deficit in democratic accountability.

It is useful at the very outset to clarify some basic terms we shall use throughout this report and briefly describe the process by which rules are developed. We will define our terms even more fully below, as well as identify the key players more fully; for now, however, it is important to understand some of the fundamental differences that will be reflected in this report.

When we use the term "rules" in the United States, we generally are referring to the rules made by administrative agencies pursuant to their rulemaking powers delegated to them by Congress. The reasons for delegating rulemaking power to administrative agencies are well known and similar in most legal systems. Primary legislation (i.e. laws made by legislatures according to their constitutional powers) often must be complemented by secondary legislation, or rules, because, for example, legislators in

representative democracies lack the time and expertise to regulate in detail every question that may arise with respect to a given subject matter. Similarly, detailed rules may have to be amended expeditiously, and lengthy parliamentary or legislative processes are inadequate when it is necessary to act quickly.

Thus, the EU recognized the need to delegate the adoption of technical regulations to the Commission, an essentially executive body, because the lawmaking procedures of the Council and European Parliament were considered inappropriate to deal with highly detailed and technical areas of regulation. Therefore, the Council (as the primary EU lawmaker) delegated the power to adopt detailed regulation on certain matters to the Commission, pursuant to Article 211 TEC (ex-155 EEC).[1] These rules (which can take the form of regulations as well as individual decisions, see Article 249 TEC[2]) adopted by the Commission can be described as secondary legislation, as opposed to primary legislation adopted according to Articles 251, 252. For our purposes, we shall refer to the legislation crafted by the Council and the European Parliament as primary legislation and the rules produced by the Commission in accordance with the powers delegated to it by the Council and Parliament as secondary, or delegated, rules.

This report takes a functional view of oversight in the EU. As will be developed more fully below, we have identified five types of oversight criteria: political, legal, financial, technocratic and quality control. This report seeks to identify the points in the regulatory process where one or more of these types of oversight can occur and the

[1] Before the adoption of the Single European Act in 1987, this delegation of implementing power to the Commission occurred on a voluntary basis. The Single European Act made it mandatory for the Council to delegate implementing powers to the Commission.

[2] Regulations and decisions differ as to the addressee of the rule: Regulations are generally applicable while decisions are usually directed at a certain individual. This practical distinction, however, often becomes blurred in practical application.

institutions and institutional mechanisms that allow this to take place. As noted above, there are, in fact, many opportunities for oversight to occur, both in primary legislation, crafted by the Council and the European Parliament, as well as in the development of secondary rules adopted by the Commission in accordance with the delegation of power made to it by the Council and the Parliament – i.e., those most comparable to delegated rulemaking power in the United States, and after the fact too, when the rules are actually implemented and applied.

Oversight criteria and standards at the primary legislative stage conjure up comparisons to constitutional oversight mechanisms in the U.S. system, such as advice and consent by the Senate on agency appointments, oversight of agency activities by Congress and, especially, careful legislative drafting of delegation clauses to limit agency discretion. As we shall see, when the Council delegates authority to the Commission to promulgate secondary rules, it usually does so with specific procedural requirements, typically specifying a detailed committee procedure – referred to as "comitology" – to carry out and oversee its rulemaking responsibilities.

It is important to recognize that separation of functions or powers, as we use these concepts in a U.S. Constitutional context, is not as clear cut in the EU. The power to develop and adopt primary legislation is shared among the Council, the Commission, and the Parliament, while the power to adopt secondary (implementing) rules (which is typically a power vested in the executive branch of government) is largely the role of the Commission, but with the assistance of a "comitology" committee. Also, the Member States can play a role in this "executive process" through their participation in the comitology process and their responsibility for executing the primary legislation that has

been initiated and then amended by the Commission, in cooperation with the Council and the Parliament. That being said, the Commission is the crucial engine of the European Community's regulatory activity. It can initiate and amend the text of primary legislation and can withdraw matters from consideration, as well as craft the implementing regulations.

It should be clear from the above that to understand the conduct of oversight in the EU, it is necessary to understand EU regulatory processes themselves, in particular, the processes by which rules are made – both primary legislation (which are sometimes rather detailed, but sometimes take the form of what we would consider framework legislation) as well as secondary or delegated rules. In so doing, we do not intend to duplicate the work done by the Rulemaking Working Group but only to identify those points in the process where the functional exercise of oversight can be injected to influence the outcome. We shall also examine the mechanisms that are used to accomplish this, the type of oversight they make possible, and the participants who invoke them.

We begin, first, with some basic questions whose answers will enable us to define our terms more precisely and, ultimately, the parameters of this report. Part I addresses two questions: (1) what precisely is subject to oversight? In other words what is being overseen? and (2) what do we mean by oversight? What criteria are employed in providing oversight in an EU context? Part II then examines more fully the players involved in these oversight processes and, in particular, the mechanisms they use to provide this kind of input. Part III then examines oversight in various regulatory contexts. There are, for example, various legislative committees, ombudsmen processes

and administrative agencies that carry out regulatory functions. As we shall see, however, their discretion usually is tightly controlled and their regulatory impact is minimal compared to that of the Commission. More important, as we shall see below, regulatory administrative agencies as we know them in the U. S. do not exist in the EU. Yet, they also suggest a context within which what we call oversight would be particularly relevant. Still another context for understanding oversight more broadly in the EU, especially after regulations have gone into effect, involves the ombudsman processes available in the E. C. Citizens have, through these processes, the opportunity to assess the success or failure of Commission regulation as it applies to them and to make their critical views known.

It is worth considering where parallels exist with the US system of oversight, and as important, where they do not. First, there is no Administrative Procedure Act or any other legislation in the EU that establishes baseline criteria for the lawfulness of regulations – that is, no law that sets forth the procedures or the standards for regulating the regulators.

Second, there is no direct analogue to the Office of Management and Budget's Office of Information and Regulatory Affairs, and there is no direct parallel to Executive Order No. 12866, that provides regulatory philosophies and principles, as well as the authorization for OIRA clearance of agency rules. We understand that there is increasing interest in an OIRA approach to oversight and a proposal to this effect mat soon be considered. We shall add that proposal to this report when it becomes available. As will be discussed more fully below, there is currently a Secretariat General ("SG") within the Commission, an office comprised of staff members who work directly for the President

of the Commission. The SG views itself as loosely managing the Commission's regulatory activity and it engages in "soft policing" of the work of the Commission's various divisions.

Third, there is no analogue to the Congressional Review Act – which, to be sure, has not been a dynamic source of political oversight with respect to the production of regulations in the United States – nor to the ways Congress does exercise substantial input over regulations, namely, oversight hearings and budgetary control. As will be described below, the Council and Parliament have extensive participation in the rulemaking process itself. The Council's role is interwoven throughout the Commission's work. The Parliament has recently achieved a "right of scrutiny" over the Commission's regulatory work, which enables it to exercise considerable jawboning influence – including on behalf of affected constituents. And the Parliament has the formal power to sue the Commission before the European Court of Justice for an act of annulment declaring the Commission action to be *ultra vires,* a subject within the province of the Juridical Review Working Group. For our purposes, we note that while no such pleading has been filed by the Parliament in the last five years, the constraint seems to be genuinely internalized by the relevant players.

Fourth, administrative agencies in the EU are not like those in the United States or most other nations. Regulatory agencies, in general, exercise discretionary power within their statutory areas and usually develop agency policy through either adjudication or rulemaking. None of the EU agencies created to date are regulatory agencies as we commonly use this term. The primary reason is that there are legal constraints to the

delegation of discretionary power as set forth in *Meroni & Co. v High Authority* [3] In that case, the European Court of Justice held that delegation was unlawful because a delegating authority could not confer on another body powers different from those possessed by the delegator under the Treaty involved. If the high authority had exercised the power the agency did in this case, it would have been subject to the treaty's requirements that reasons be given, data published, etc. Agencies avoided these constraints and, in effect, had more power than the High authority did under the Treaty. More fundamentally, the ECJ also held it was not possible to delegate power involving a wide margin of discretion. As the court stated:

> The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.
>
> A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.[4]

In short, the regulatory focus remains very much on the Commission itself, and as we shall see below, the perceived need for unity and integrity in the executive functions of the Commission reinforce lawmaking approaches that enable the Commission to play a central role.

Why Is Oversight Necessary (or Important)?

Objectives and Categories of Oversight

[3] [1958] ECR 133.
[4] Ibid. p. 152.

The most important and, from an analytical point of view, the most perplexing difference between oversight in the EU and in the U.S. is that in the EU, much of it can be largely subsumed within the regulatory development process itself rather than added on after the fundamental regulatory process is concluded. Moreover, it is often so self-contained that, as we shall see, the Commission does much of the overseeing as well as the regulating itself. As William Butler Yeats, once remarked: "O body swayed to music, O brightening glance, How can we know the dancer from the dance?"

To separate out oversight functions from the regulatory process, it will be necessary to differentiate among various types of oversight goals, the institutional players that can assert them, the points of entry in the process where this can occur and the mechanisms used to provide this kind of input.

We identify five functions traditionally provided by oversight processes. These include the injection of political judgment, legal limitations, financial accountability, technical expertise, and quality control. These oversight functions obviously can and often do overlap with one another, for they are not completely separate and distinct. And they can occur during the creation of the rule or after the fact, when it is being applied. Clearly, as we shall see below, quality control is most often associated with after the fact oversight or, in effect, a monitoring function; financial accountability is relevant throughout the process and political judgment, at least as it involves whether the Commission should act at all, is most relevant before the regulation is finalized and applied. Moreover, some criteria are more likely to be applied by some institutions than others. For example, political judgments will be made by the Council and the Parliament as they deliberate on whether or not to regulate an area at all at the Commission level;

financial accountability will come through various legislative oversight committees at the European and national levels; technical expertise is usually closely associated with comitology as well as certain administrative agencies; legal oversight is, of course connected primarily to the courts and judicial review while quality control is clearly an important role for ombudsmen to play.

The criteria we identify below apply across the board; that is, they apply to all Commission rules, regulations and directives, no matter what the substantive subject matter of the regulation involved. In the next part, we will examine the oversight role of each of the institutional players involved in the rulemaking processes and the mechanisms they use to apply the criteria we shall now identify.

(1). Political Oversight. In its 2003 Report, "Better Lawmaking 2003," the Commission stated:

> Improving legislative processes and output is a permanent challenge for the Union. It calls for mutually supporting actions. One is to ensure compliance with the principles of subsidiarity and proportionality. . . .[5]

Simply stated, as used in this context, the first term – subsidiarity – relates to whether the action should properly be taken at the level of the EU – and the test, again simply stated, is that if the Member States can do it, then the EU should stay its hand – and the term proportionality relates to maintaining a balance between the intensity of the EU regulatory activity and the purposes to be served, assuming EU activity is appropriate. The Commission has expressed the two principles as follows:

> Special care will be needed to determine whether EU intervention is justified (principle of subsidiarity), and that the policy options do not go beyond what is necessary to achieve the objectives (. . . principle of proportionality. . .).[6]

[5]Report From The Commission, "Better Lawmaking 2003," p.3.

These two criteria—subsidiarity and proportionality—clearly impose legal limits on the Commission's jurisdictional powers,[7] but since there is some political judgment concerning not only where the line between EU and Member States authority might be as well as degrees of intensity of activity involved in the development of any given rules, we refer to these criteria as political as well as legal. Moreover, as we shall see below, disagreement over subsidiarity or proportionality can provide the basis for political resistance to Commission proposals by the Council or European Parliament during legislative negotiations without the necessity of challenging primary legislation in the European Court of Justice.

Article 5 EC states:

> The Community shall act within the limits of the powers conferred upon it by this treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this treaty.[8]

This provision recognizes, in effect, a kind of federalism designed, at least originally, to limit the competences of the EU as such. It invokes a comparative efficiency test in which the question posed is whether it is better for the regulatory action to be taken by the Community or the Member States.

If it is decided that action by the Community is warranted, then the concept of proportionality comes into play: what should be the intensity of the Community

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[6] European Commission, "Impact Assessment Guidelines," SEC (2005) 791, at 8.

[7] Political and Legal Oversight play a more significant role in the adoption of primary legislation, compared to the smaller role they play in the adoption of secondary legislation.

[8] Article 5 EC; Craig and DeBurca, p. 132.

measures?[9] The proportionality principle in Article 5 not only prevents the EU from interfering with the Member States' sovereignty but it also protects individuals from disproportionate E.C. regulation.

The Commission is, thus, to intervene only in those matters best handled at the European level and, then, only to the extent necessary to deal with those problems. Here, as we shall see below, the input of the European Parliament, the Council, and the Member States through their national parliaments, not to speak of regional and sub national groups, is usually on the basis of whether a regulation is appropriate at the European level and how far it should go in reaching its goals. (These very same criteria are also important if one views oversight as implementation. Given a rule that is appropriate for the European level and of correct proportions, is it being implemented in a reasonable way by the Member States?)

As the Commission's report, "Better Lawmaking 2003" makes clear, subsidiarity is a dynamic concept as the relative competencies of the Member States and the Commission change over time, depending upon the issues involved. Similarly, proportionality leaves considerable discretion to the European Parliament and in most cases there will be a range of options that comply with the proportionality principle. Both subsidiarity and proportionality require political judgments made by all of the institutions involved in the regulatory process.[10]

[9] Craig and De Burca, p. 136.

[10] In its document addressing "The Operating Framework for the European Regulatory Agencies," the Commission notes the following potential means of oversight: "Relations with the Commission"; Administrative Supervision" (by the European Ombudsman); "Political supervision" (by the European Parliament and Council); "Financial supervision" (by the Court of Auditors); and "Judicial supervision." Communication from the Commission, COM (2002) 718, at 12-14.

(2). Legal Oversight. Legal oversight includes not only judicial review, which is not within the scope of our report, but also the use of *ultra vires* arguments by the Council or the European Parliament if they believe a rule to be outside the scope of the Commission's power. Either the Council or the Parliament can question the political as well as the legal validity of a rule before the rule takes effect or even is finalized. Clearly, the scope of the substantive treaty provisions involved are relevant to determine the permissible and more legitimate range of choices Such legal criteria are also part of the political process too, of course, since it seldom is clear just where the legal lines are to be drawn and final outcomes are undoubtedly subject to extensive negotiation.

(3). Technical Oversight. If oversight has a particular intensity in the EU, it comes from technical oversight. This is achieved primarily through various committee structures and, especially, what is referred to as "comitology"; i.e., committees, consisting of representatives of the Member States who have technical expertise in the relevant subject matter, and chaired by a representative of the Commission, assist the Commission in implementing Community legislation by providing advice under procedures which can often enable the Council to take over the work of implementation. This method of collaboration allows the Commission, which is acting in an executive capacity, to work with committees made up of Member States' representatives and the Council who all participate in implementation. As we develop more fully who the players are in these processes and what roles they play, we note that technical committees at all levels—the Commission level, the European Parliament, the Council—play important roles.

The technical criteria will vary with the substance of the regulation involved. Specifically, technical oversight includes a technical assessment of the regulatory means employed to achieve the regulatory goals involved. Given the problem that is to be solved, what is the best practical way to do this?

The Council prescribes specific "comitology" procedures in the primary legislation that delegates rulemaking authority to the Commission. For example, Council Regulation (EEC) No. 315193 of 8 February 1993 laying down Community procedures for "contaminants in food" provides the following detailed comitology procedures to inform the Commission's work and cabin its discretion:

> The Commission shall be assisted by the Standing Committee for Foodstuffs, hereinafter referred to as 'the Committee'.
>
> The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.
>
> The Commission shall adopt the measure envisaged if they are in accordance with the opinion of the committee.
>
> If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.
>
> If, on the expiry of a period of three months from the date of referred to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission, save where the Council has decided against the said measures by a simple majority.

(4). Budgetary or Financial Oversight. The EC's budgetary procedures are very complex and while the Council and the Parliament are referred to as the two arms of the process, the EC Treaty accords all three institutions—the Commission, the Council and

the Parliament with significant responsibilities. Article 272 EC provides the outline for the procedure by which the Commission prepares its Preliminary Draft Budget (PDB). The Inter-institutional Agreement on Budgetary Discipline and Improvement of the Budgetary Procedure provides for a trialogue among delegations from the Commission, Council and Parliament before the Commission can approve it. The PDB is then considered by the Council where the voting is by a qualified majority. If there appears to be conflict between the Council and the Parliament over the division between compulsory and non-compulsory spending (the Parliament has the last word on non-compulsory spending and the Council on compulsory spending), the Inter-institutional agreement provides for conciliation procedures between representatives of both institutions plus the Commission. When the Council approves the PDB it goes to the Parliament for a first formal reading. Parliament can accept it or propose amendments to provisions dealing with non-compulsory spending or modifications to compulsory expenditure. The PDB then goes back to the Council for a second reading where it can reject Parliament's amendments, reject modifications to compulsory expenditure or accept the modifications to compulsory expenditure. It is clear the Council and the Parliament have a real say in the budget. They can both use these negotiations to press for policies that each favors and thus, temper the power of the Commission.[11]

Financial or budgetary oversight also involves a Court of Auditors. The Court of Auditors is governed by Articles 246-248 EC. It consists of one national from each member state; the term of office is 6 years, renewable and appointments are staggered. The treaty provides that the Court is to "examine the accounts of all revenue and expenditure of the Community" and of the bodies set up by the Community, where that is

[11] Paul Craig and Grainne De Burca, EU Law, third edition, pps. 107-108.

permitted. The Parliament and Council are to be provided by the Court with a statement of assurance as to the reliability of the accounts and legality of transactions and any cases of irregularity are to be reported. The Court may submit observations on specific questions or deliver opinions at the request of the other institutions, especially when it is consulted under the treaty on specific legislative proposals. It has been suggested that by comparison with other institutions the Court of Auditors is a low-key player that does not have good relations with the Commission, Parliament or the Council. Moreover, it is virtually unknown to most national parliaments.[12]

(5). Quality Control. These criteria are closer to U.S. ideas about oversight. Is the proposed rule likely to do what it says it will do? What are the economic, social and environmental consequences of the proposed rule? Have the circumstances changed so that a revision or withdrawal of the rule is now in order? Indeed, the 2003 Commission Report referred to above states that in improving legislative output and processes, there was a need to work on what the report called "the quality and accessibility of Union legislation".[13] There are various criteria that may come into play here, including the simplicity, clarity and coherence of Commission rules. As we shall see below, one of the mechanisms by which such impacts and criteria are assessed involves a new impact assessment set of procedures recently implemented by the Commission. Another is the use of ombudsmen processes.

[12] Craig and De Burca, pps. 102-103.
[13] Better Lawmaking 2003, p.3.

What Is Overseen? [14]

To what work product and processes does oversight apply in the EU?

Our focus in this report is primarily on secondary rules issued by the Commission at various points in the regulatory process, including the creation and application of the rules involved—in other word, before and after the fact. How do the institutions involved in the regulatory process, including the Commission itself, exercise oversight authority and how do they do it; that is, to what ends or by what criteria is influence brought to bear on Commission regulation? To begin with, the terms—rules, regulations and directives—need to be defined and distinguished more clearly from U. S. terms as well as other types of Community Law. Moreover, as we shall see, the oversight criteria, the players, and the mechanisms available to these players will and do vary depending upon whether we are talking about a primary or secondary rules. We shall then turn to the oversight criteria used to influence their development by those involved in the EU regulatory process. By oversight criteria we mean standards or guidelines that apply to the substance of all EU regulations, rules or directives, primary or secondary. As noted above and as we shall develop more fully below, we have identified at least five types of oversight criteria—political criteria, legal criteria, financial criteria, technocratic criteria and quality control criteria.

Article 249 EC provides:

[14] This Section as well as the descriptive aspects of Parts I and II draw heavily and almost exclusively on Paul Craig and Grainne De Burca, EU Law, Text, Cases and Materials (3rd ed. Oxford Univ. Press). The descriptions of institutions and the mechanisms they employ come directly from Craig and De Burca. Our functional approach to oversight, however and the types of oversight we identify are our own attempt to translate this concept in a way that makes sense in the EU context and is comprehensible to U.S. lawyers.

> In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force.

Our focus is, as noted above, on secondary legislation which can take the form of regulations or decisions. These secondary norms, which are most analogous to what we mean by rules in the United States, are the rules designed to flesh out the principles contained in the framework legislation.[15] But as Paul Craig notes, this does not mean they are necessarily narrow in their focus.

> The secondary norms that are enacted will perforce vary depending upon the subject matter of the primary legislation and the nature of the issue that requires elucidation. On some occasions, the secondary measure will be an individualized decision, made by the person to whom authority has been delegated by the primary legislation. In other instances the secondary norm will be legislative in nature. It will take the form of a general rule that is intended to apply to all those falling within a certain factual situation. The terminology used to describe such norms varies as between legal systems. Some employ the language of delegated or secondary legislation. Others prefer the appellation rulemaking. Yet others use terminology such as directive.[16]

"Regulations," as used in Article 249 EC above, are measures of general applicability to all states and individuals in the EC's jurisdiction; they are abstract norms which are not directed at a particular person. More important, the phrase "directly applicable" in Article 249 EC means that these regulations are self-executing and binding in and on Member States when they are issued. "Directly applicable" also means that the

[15] Id.

[16] Paul Craig, EU Administrative Law, draft chapter 4, p.3 (forthcoming, OUP, 2006).

regulations create enforceable rights and obligations for private parties. They need not be incorporated into national law by the passage of a statute at the national level. In effect: a regulation is automatically a part of the national order and national legislatures need not and, in fact, cannot pass any measure that presumes to transform a Community regulation into national law.[17]

"Directives" as used in Article 249 *EC,* differ from regulations in two ways. They are binding as to the end to be reached, but they leave individual states with a choice as to the form and method for how this end is to be reached.[18] Directives can be extremely detailed, however, leaving the states with little flexibility. More important, they are enforceable in court, but only if a state has not implemented them or if it has implemented them but, arguably, has not done so in a manner that complies with the directive. This raises an aspect of oversight that involves implementation, which can be very important in the EU. Indeed, given the purposes of the EU —*i.e.*, economic union and now political union—such goals turn on the extent to which Member States carry out the rules and directives of the Commission. What oversight processes and mechanisms are involved in this process? We shall return to this question in Part III.

For now, we shall deal with rules and ask: what criteria are used in effect as the functional equivalent of oversight processes to legitimize the rules issued by the Commission and what types of processes or mechanisms are used to apply or inject these criteria into the regulatory process?

[17]Craig and De Burca, p. 113 (3rd ed.).
[18] Craig and De Burca, p.114-115.

Part I

Where Do the Authority and Mechanisms to Oversee Come From?

What formal documents and legal authorities authorize, require, or govern oversight in the EU? Inherent in the descriptions above are the mechanisms by which oversight functions are brought to bear in the legislative processes of the EU. The purpose here is to articulate the various ways that political, legal, financial, technical and quality control issues can work their way into the Commission's decision-making processes in the EU. As we shall see, there is a type of one-house veto in effect since the co-decision procedure gives the Council and the EP the chance to end or influence the regulatory process just as failure to pass a bill in the House of Representatives or the Senate would. Moreover, the kind of voting process involved is another mechanism with profound implications for Commission power. If a unanimous vote of the Council or EP is required, the practical opportunity for those bodies to influence policy development will be more limited, whereas majority voting makes it easier for differing political, technical or legal views on the part of the Council or EP to be weighed by the Commission. Finally, the ability of comitology committees to help shape and influence the regulatory outcomes of the Commission is crucial to the way different views, especially technical approaches to problems, are incorporated into the decision-making process. We then turn to other, less "constitutional" and more administrative quality controls, such as the Commission's own assessment procedures and then other after the fact oversight activities by various other EU bodies.

(1). Primary Legislation and Article 251 EC. It has long been a commonplace assertion that when it comes to primary legislation, the Commission proposes and the Council disposes. Over time, however, the role of the EP has grown to the point that the most common legislative process is the co-decision procedure contained in Article 251 EC. This procedure is designed to prevent a measure from being adopted without the approval of the Council and the EP by placing emphasis on the reaching of a jointly approved text.[19] Article 251 applies to most of the important legislation initiated by the Commission. Under its provisions, the EP has two readings of any primary measure proposed by the Commission. After the first, the EP gives the Council its opinion of the rule before the Council adopts a position. A second reading takes place if the Council does not adopt all of the amendments coming from the EP's first reading or if the Council has amendments of its own (which it must pass unanimously in the Council). If there is no agreement, a Conciliation Committee is formed and the EP and the Council must approve the joint text from that Committee. The co-decision procedure has also been modified in practice through what Craig & Burca call the institutionalization of trialogues. These are informal meetings that precede and can exist along side formal meetings of the Conciliation Committee. The trialogue contains representatives from the Council, the EP, and the Commission (usually no more than ten, total). Its purpose is to facilitate compromise.

As noted above, not all decisions are subject to co-decision. Some laws are passed under an assent process—the Council acts after attaining the assent of the EP. The assent procedure gives the EP the power to delay or reject, but not propose amendments.

[19] Craig and De Burca, pps. 144-147.

Under Article 208, the Council can request the Commission to undertake any studies the Council considers desirable for the passage of future legislation. The EP, pursuant to Article 192 EC, also has some ability to spur the legislative process. If a majority of the EP agrees, it can request that the Commission submit a legislative proposal. The Commission often feels strong pressure to bring forth the legislation suggested by the Council or EP.

Thus, with respect to primary legislation, the Commission proposes, but either or both the Council or the EP can reject the regulatory action, and either or both can call for the Commission to consider developing new regulatory proposals, which the Commission will most likely offer up. The considerations that enter the calculus are most likely political, legal or technical.

(2). Secondary Rules and Comitology. The above processes deal with primary norms or rules and framework legislation. But much of what the Commission produces are secondary rules more similar to those issued by U.S. administrative agencies. What are the mechanisms for the injection of oversight functions at this stage of the process?

The most obvious mechanism for oversight and one that is different from what we have in the United States is a system known as "comitology." When the Council delegates to the Commission the power to issue rules to carry out the goals of the primary legislation involved, it does not issue, as it were, a blank check. Rather it makes the exercise of delegated legislative power subject to institutional constraints in the form of committees through which Member State interests are represented. This is typically done because, while there may be agreement on the general norms, there often are

disagreements among the States as to the content of these more detailed rules. The devil, as they say, is in the details. The Council thus conditions the exercise of delegated power on the participation, review and approval of a committee composed of numerous national representatives of the Member States with expertise in the relevant subject matter.

The legal basis for this procedure can be found in the Single European Act of 1987, which codified already existing E.C. lawmaking reality for the delegation of powers to the Commission. Article 202 (ex Article 145) now provides in its third indent that

- Implementation of primary legislation shall normally be the task of the Commission; only under exceptional circumstances shall the Council adopt secondary legislation which implements primary legislation
- The Council is permitted to make the exercise of the delegated power subject to certain (procedural) requirements
- These requirements have to be laid down in advance .

The 1999 Comitology Decision[20] lays down in abstract the procedural requirements that apply whenever the Commission uses its implementing powers under primary EU legislation A negative opinion of the Committee deprives the Commission of the right to adopt the measure unilaterally (at least under certain circumstances, as discussed below), and gives the Council the ability to approve a different or amended implementing regulation. (Council Decision 1999/468/CE.) According to one source, the comitology process was established by the Council "to curb excessive bureaucratic discretion on the part of the Commission in carrying out the legislative tasks delegated to

[20]Council Decision laying down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, Dec. 1999/468,[1999] OJ L184/23.

it by the Member States. To prevent decisions enacted by the Commission from departing from the desires of Member States, and to deal with the trade-off between the gains achieved by delegating policy to the Commission and the costs incurred with the problem of agency, the Council entrusted the task of monitoring the Commission to agents – the respective management and regulatory committees."[21] In other words, the primary E.C. lawmakers, the Council and to a lesser extent the EP, ensure that the Commission makes proper use of its delegated powers in political, legal, technical and qualitative terms, not by judging the Commission regulation after the fact, but rather by giving the Member States an active role in framing these rules through Committees composed of Member States representatives.[22] Hence, where a primary legislative Act of the Council and the EP refers to the Comitology Procedure, the Commission can only adopt secondary legislation if it complies with one of the three procedures set forth in the Comitology Decision.[23]

The three procedures under the Comitology Decision, in order of the least to the greatest amount of Committee (and therefore Member States and EP) influence on the outcome are: The advisory procedure, the management procedure and the regulatory procedure. Ultimately, the basic instrument – the primary legislation - determines which procedure will be applicable. However, Article 2 of the Comitology Decision provides general guidelines as to when each of the procedures apply. The different procedures are as follows:

[21] M. Egan & D. Wolf, "Regulation and Comitology: The EC Committee System in Regulatory Perspective," 4 Colum. J. Eur. L 499, p.9 (Summer 1998).

[22] These Committees are not mentioned in the Treaty. However the validity of the creation of these Committees is undisputed since the ECJ decision in Koster, C-25/70, ECR 1970, 1161.

[23] Of course, the Council and the EP can decide not to make the exercise of implementing power subject to any requirements whatsoever. The only control over the Commission's exercise of its power would then be judicial review.

The *advisory procedure*, which is to be employed when this is deemed necessary, affords the Member States' the smallest influence. While the Commission has to take the "utmost account" of the Committee's opinion, it is not legally bound by it. If the Commission disagrees with the Committee's opinion on legal, technical, political or other matters, the Commission trumps the Committee's opinion.

The *management procedure* applies when the Commission takes *management decisions* to implement agricultural and fisheries policies. Here, the opinion of the Member States' Committee has stronger implications for the further rulemaking process. If the Member States' Committee disagrees with the Commission's proposal in legal, technical or political terms, the Commission has to so inform the Council (which had delegated the implementing power in the first place), and the power to adopt secondary regulations is transferred back to the Council. If a qualified majority in the Council[24] can agree on the rather technical implementing legislation, the Council adopts the secondary rules; if the Council is unable to reach a qualified majority, the original Commission draft will be adopted. In any event, the Member States can influence secondary rules under the management procedure at two stages: They can first try to influence the Commission during the negotiations in the Comitology Committees;[25] and second, if the Commission does not follow the Committee's opinion, then the Council has an opportunity to agree on the subject and adopt a secondary rule.

The *regulatory procedure*, under which the Member States (through the Committees) and the EP have the greatest influence, is applicable in cases where the Commission is empowered to implement essential provisions of the primary legislation

[24] Which consists – one should bear in mind – of the national ministers of a particular matter, e.g. agriculture.

by adopting rules of general application. This procedure is often used in politically sensitive matters (such as decisions relating to Genetically Modified Organisms). The regulatory procedure operates in the same way as the management procedure, except for two important differences: The Commission can adopt a measure only if the Member States' Committee expressly approves the Commission draft;[26] if the Committee's opinion is negative or if there is no opinion at all, the Commission has to inform the Council as well as, significantly, the EP.

What is remarkable in terms of oversight is that the EP, once a Commission draft is communicated to it, exercises a specific form of legal oversight. It has the right to consider if the proposed Commission regulation (which was not approved by the Member States' Committee) exceeds the Commission's powers under the primary legislation which delegates the power to the Commission.[27] If in the EP's opinion this is the case, the EP communicates this opinion to the Council. The Council, when faced with the disputed regulation, has the power to adopt the proposed regulation even against objections by the Committee (and the EP). If the Council objects to the proposed regulation, the Commission has the opportunity to re-examine the proposal. If the Council neither adopts nor objects to the proposal, the original Commission proposal is adopted.

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[25] The Commission always has a representative in a Committee.

[26] This differs from the Management procedure in the case in which the Committee issues no opinion at all; under the Management procedure, the Commission can proceed. Under the Regulatory procedure, the Commission must inform the Council.

[27] The obligation to communicate to the EP, however, only applies if the primary piece of legislation from which the Commission derives its regulatory power, was adopted under the co-decision procedure. This is against the background that the EP is anxious to maintain – in practice – its relatively new powers under Article 251. These powers could be undermined if the Commission is the ultimate legislator in a certain Community field.

As is the case in the management procedure, the Member States have input in the development of regulations at two stages of the process: Through the Committees and through the Council. In addition, the EP has the right to raise legal objections concerning a Commission proposal, and as noted above, the EP is entitled to receive from the Commission—on a regular basis—information about the Committee proceedings if they are conducted under a primary measure which was adopted according to the co-decision procedure.[28]

In 2000, the Commission and the EP concluded an agreement which specifies the Commission's obligations under Article 7 of the Comitology Decision. According to that agreement, the Commission is to provide the draft agendas for the Committees' meetings as well the draft implementing measures it has prepared for the Committees to discuss. The EP is to be provided with that information at the same time as the Committees themselves. In addition, the EP has the right to be informed about the results of voting in the Committees as well as with summary records of the Committee meetings.

In sum, the Comitology process provides ample opportunity for input – especially of technical and scientific views – from the Member States. To be sure, it operates very differently from the Unfunded Mandates Reform Act in the United States, which gives states a formal hook to complain if executive regulations impose burdens on the states without providing the material resources to get the job done. The U.S. administrative agencies are required to consult with representatives of the states (and local and tribal governments) and to describe in some detail the agencies' response to the concerns expressed during these consultations. But the U.S. agencies are free to reject the state, local or tribal governments' views so long as the agencies explain why they declined to

[28] Article 7 of the Comitology Decision of 1999.

accept their suggestions. In the EU, while Member States have to date shown relatively less intense interest in regulation than one would expect – possibly because of the difficulty in keeping up with all the activity in Brussels and developing substantive reactions to regulatory proposals in real time – they are provided through the Comitology process with extensive expert, technocratic participation in the regulatory decision-making process itself.

Second, it bears emphasis that the Comitology process appears to be the EU's principal mechanism to balance its competing interests in building both expertise and accountability into regulatory work product. To date, the EU's trade-off seems to have favored "expertise." In the future, it is likely that "accountability" will figure more prominently.[29] Indeed, current reform proposals for the Comitology system[30] strongly focus on the EP's role in the oversight of Commission and Committee action. It is generally viewed as desirable to increase the EP's scrutinizing powers, as its role in the primary lawmaking process has been strengthened.

(3). The Commission's impact assessment procedure. In 2002, the Commission adopted a number of procedural enhancements to improve the regulatory process. In its "Action Plan 'Simplifying and improving the regulatory process,'" the Commission "put in place an internal network for 'better lawmaking' which . . . involve[s] all the Directorates-General which have regulatory responsibilities and [is] coordinated by the Secretariat General." COM (2002) 278 final, at 10. The network's mandate includes

[29] *See* R. Corbett, F. Jacobs & M. Shackleton, "The European Parliament at Fifty: A View from the Inside" JCMS 2003 Vol. 41, no. 2, pp. 353-73, at p. 366.

[30] Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission /* COM/2002/0719 final.

"monitoring compliance with the principles of subsidiarity and proportionality," and "[w]hen necessary, any such matter calling for policy negotiation will be referred by the network, via the Secretariat-General, to the Directorates-General or even the College "of Commissioners." Id.

The Commissions also adopted regulatory "impact assessment guidelines in 2002. These guidelines were replaced in 2005 with an even more detailed set of procedural controls over rulemaking. The 2005 Impact Assessment Guidelines," which apply to primary legislation that is initiated by the Commission, establish principles and procedures for assessing and comparing regulatory policy options and for incorporating "stakeholder consultation and collection of expertise." SEC (2005) 791, at 4. "The College of Commissioners will take the IA [impact assessment] findings into consideration in its deliberations. The IA will not, however, dictate the contents of the final decision. The adoption of a policy proposal is a political decision that belongs solely to the College, not to officials or technical experts." Id. This language plainly indicates that, ultimately, oversight of the Commission's work rests largely with the College, though with substantial review and input from the Council, EP and Member States in accordance with the processes described earlier.

The IA Guidelines document also makes clear the Secretarial General is primarily responsible for assisting the Commission exercise its oversight and decision-making authority. This role is described in the Commission's 2005 Impact Assessment Guidelines document as follows:

> If [legislative] action is deemed necessary, a proposal will be drafted and entered into formal Inter-Service Consultation (ISC), together with the IA report and its annexes. In addition, the Explanatory Memorandum accompanying the draft proposal will briefly set out the options considered, their potential economic,

> social and environmental impacts, as well as the website address where the final IA report will be accessible. Since the Secretariat General will consider the quality of the IA report as port of the formal Inter-Service Consultation procedure, it is important that it is kept up to date with progress on the IA throughout the process, either as part of the Inter-Service Steering Group or on an ad hoc basis. If the IA report subjected to ISC does not reach a satisfactory level of quality, a suspended or unfavorable opinion may be issued. Once over the hurdle of Inter-Service Consultation, the IA report accompanies the draft proposal submitted to the College of Commissioners. It is possible that one or more of the Groups of Commissioners will examine the proposal and the impact assessment prior to the College's deliberation. * * * The completed IA report is published on the Europa impact assessment website along with the (legislative) proposal. This will be done by the Secretariat General. In very rare circumstances, such as when international negotiations are involved, a decision to restrict or delay the publication may be considered. Please consult the Secretariat General (SG.H.2) for further information and guidance.[31]

In addition to assuring quality standards for IAs, and controlling the timing of publication of completed IA reports, the Secretariat General is also "responsible for the Commission's minimum standards for consultation of external parties."[32] .

Indeed, "consultations" would appear to be one of the most relevant forms of "soft" (*i.e.*, persuasive but non-binding) oversight that applies, at least in principle, throughout the EU's policy making and implementing processes. The Commission discusses "consultation" as follows in its document "Toward a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission":

> Consultation mechanisms form part of the activities of all European Institutions throughout the legislative cycle, from the phase of policy-shaping to a Commission proposal to final adoption of a measure by the legislature and its implementation. Depending on the issues at stake, these consultations are aimed at providing opportunities for input in particular from representatives of regional and local authorities, civil society organizations, undertakings and associations of undertakings, individual citizens concerned, academics or technical experts, as well as interested parties in third countries.

[31] Id. at 14-15 (footnotes omitted).
[32] Id. at 5.

> In terms of institutionalized consultation mechanisms, the Commission, the Parliament and the Council are assisted by special institutionalized advisory bodies, i.e. the Economic and Social Committee (ESC) and the Committee of the Regions (CoR).[33]

The Economic and Social Committee and the Committee of the Regions, which are mentioned in the preceding quote from the Commission's document on "consultation" can and do issue substantive opinions commenting and advising on the regulatory work of the Commission. Given their institutionalized role in the EU policy process, these Committees offer another form of oversight of the Commission's regulatory proposals.

(4). The Economic and Social Committee (ECOSOC). Article 7(2) of the EC Treaty provides for an Economic and Social Committee (ECOSOC) to assist the Council and the Commission. It is an advisory body representing various functional interests. Article 257 as modified by the Treaty of Nice provides that the ECOSOC is to consist of various components of "civil society" in European and national discourse, such as representatives of producers, farmers, dealers, craftsman, professional occupations, consumers and the general interest. The ECOSOC has 224 members with each country having a specified number of members ranging from as few as 6 to as many as 24.The council appoints the members for four year renewable terms on the basis of proposals from the Member states.

The members of this committee are completely independent and cannot be bound by mandatory instructions. They must act in the general interest of the Community. The EOCSOC operates with a number of committees and pursuant to Treaty they must be

[33] COM (220) 277 final, at 4.

consulted in certain matters; the Commission and Council may consult it voluntarily on other issues as may the Parliament. As Craig and De Burca point out, the EOCSOC has not traditionally been very influential, but its recent emphasis on civil society coupled with a greater desire to enhance EU legitimacy is beginning to change its status and significance.[34]

(5). The Committee on Regions. This Committee was established to represent regional and local bodies, in part as a way of counteracting the tendency toward centralization on the part of the EU. The total number of members is the same as the EOCSOC as is the allocation of seats among the member states. No member of the Committee can be a member of parliament but all members must be, pursuant to Article 263, "representatives of regional or local bodies" with electoral accountability. They too are independent required only to act in the general interest of the community. When a treaty so specifies, the Council and the commission must consult the Committee on Regions and it may voluntarily be consulted as well, by the Council, the Commission and the EP, particularly when matters involving cross-border cooperation are involved. Given the fact that the legitimacy of the Commission is seen to be enhanced by greater sub-national and local involvement in EU policy making, the status of the Committee on Regions is growing. The input these groups can provide constitutes another form of oversight of the Commission's decisions to implement certain regulations in a particular way or form. This is another form of oversight[35].

[34] Craig and De Burca, pps. 104-105.
[35] Ibid. at 24.

Part II

What Other Institutions Conduct Oversight and How Do They Do It?

There are five principal institutions entrusted with the tasks of the European Union: the Commission, the Council, the European Parliament, the Court of Auditors and the Court of Justice. In addition, the European Council – comprised of the Heads of State or government of the Member States (not to be confused with the ministerial-level EU Council) – may, of course, play a role on any regulatory issue in which it wishes to become involved at any time.[36] Since our focus is primarily on legislation and rules, regulations and directives, we focus on the Commission, the EU Council and the Parliament and not the Courts. Moreover, we shall also consider the role of EU Member States in the regulatory process, as well as the role of regional and sub-state entities. In so doing, it is important to recognize that the traditional division of governmental functions into categories of legislative, executive, administrative and judicial does not apply here as neatly as in the United States. "Many of these duties are shared between different institutions in a manner that renders it impossible to describe any one of them as the sole legislator, or the sole executive. In this sense the Community does not conform to any

[36] The European Council itself operates above the level of the EU Council. It consists of the Heads of State or Government of the Member States, plus the President of the Commission. It is augmented by the Member States' foreign ministers and by another member of the Commission. The European Council is not substantially involved in "regulatory" matters. Rather, the European Council exists to resolve serious conflicts at the highest levels. Budget issues and the respective contributions of each Member State are often dealt with in this way. One of the most important issues dealt with at this level is the future development and direction of the Community and Union itself. The European Council will often confirm important changes in the institutional structure of the Community and provide guidance for significant constitutional initiatives. Another agenda item is often the state of the European economy as a whole. In short, the European Council focuses on system-wide issues of major significance.

rigid separation of powers principle of the sort which has shaped certain domestic political systems."[37]

(1). The Commission. The Commission consists of a President and numerous Commissioners responsible for different policy areas. The President and Commissioners sit as "College" to review and approve legislative proposals. As mentioned above, there is also a Secretariat General (SG) that assists the Commission. The SG staff provides internal coordination and control functions for the Commission's regulatory work, and publishes internal guidance and manuals to structure the substantive work of staff members. The SG does not have red light/green light authority to stop regulations in their tracks, but the SG does control the regulatory "file" that will be advanced to the "College" for approval. The SG views its mandate as not only maintaining quality control over the Commission's regulatory product, but also assuring coherence of the regulatory work product with the political agenda of the President of the Commission as well as of the relevant Commissioner (as expressed in numerous policy papers or program statements issued by the various Commissioners).

The Commission has legislative, executive, administrative and judicial powers. We shall concentrate on its legislative role, which is central to the legislative process of the EU. The Commission has the right to initiate legislation, to which the Council and the European Parliament (we discuss them below) respond. It is the Commission that thus charts the policy for the EU and sets its course, as it were, for the coming year or more. In so doing, it also develops the general policies and strategies to carry out its agenda. Finally and, for our purposes, perhaps most importantly, the Commission

[37]Craig and De Burca, p. 54.

exercises delegated powers within certain substantive areas —that is, once framework legislation has been enacted, the Council (see below) will delegate power to the Commission to regulate—i.e., make secondary rules. In addition, the Commission's executive duties include a substantial role in establishing the EU's budget, including issues involving agricultural support and policies designed to deal with the poorer regions of the EU. And the Commission also administers its policies, often supervising the ways its policies are or are not implemented by the Member States; as we shall see in Part III, this is another way in which oversight occurs, albeit this is oversight of the Member States by the Commission.

For our purposes, the question is: at what points in the Commission's legislative process are the various political, legal, technical and quality concerns and control capable of being injected in an influential way?

(2). The Council. Article 203 EC states that the Council shall consist of a representative of each Member State (at a ministerial level) who is authorized to commit the government of that State. The members of the Council are politicians, not civil servants. They meet from 80 to 100 times a year and organize themselves in terms of subject matter, with different Ministers attending from the Member States depending on the subject of the meeting. For example, there is an Economics and Finance Council, which is concerned with matters relating to economic matters and the Monetary Union, and there are various Technical Councils, such as Transport and Telecommunications, Consumer Affairs, Justice, etc. The Ministers responsible for these issues within their

States will attend the Council meetings and they will be supported by a delegation of their national officials who have expertise in these particular areas.

Article 203 EC provides for a rotating presidency of the Council to be held by each Member State for six months. Of particular importance to us is the fact that there is increasing recognition of the need for more coordination among all EU institutions. An important part of this coordination effort within the Council comes from the Committee of Permanent Representations (COREPER). Article 207 EC states that the work of the Council is to be prepared by COREPER and that it shall carry out the tasks assigned to it by the Council. It is the Council's agent and has no independent power of its own. It is staffed by senior national officials and operates in two ways. COREPER II consists of permanent representatives who are of ambassadorial rank. It deals with contentious issues such as economic policy and foreign affairs. And it performs an important liaison role with national governments. In that sense it is an important point of entry for national constituencies who may wish to influence the Commission policy.

Of greater relevance for us is COREPER I, which is staffed by deputy permanent representatives and is responsible for issues such as environment, social affairs, the internal market, and transport. COREPER is crucial for our purposes since it considers and digests draft legislative proposals that emanate from the Commission and it helps set the agenda for Council meetings. Also important for our purposes is the fact that a large number of working groups – nearly 200 – feed into COREPER. One commentator describes them as the lifeblood of the Council. These groups are composed of national experts from the Member States or from Permanent Representations. Significantly, however, COREPER and the Council committees it coordinates only review primary

legislation, and not secondary or implementing measures adopted by the Commission pursuant to its delegated power.

The Council has its own Secretariat with a staff of 2500 that provides administrative services to the Council, COREPER and the working groups

The Council's powers are set forth in Article 202 EC. First and foremost, the Council will have to vote its approval of Commission legislative initiatives before they become law. This can be done by unanimity, qualified or simple majority vote, depending upon the requirements set forth in a particular Treaty Article. In addition, COREPER and the working groups have given the Council the ability to be proactive and do more than just react to Commission proposals. For example, the Council can request, pursuant to Article 208 EC, that the Commission undertake any studies which the Council considers desirable, and to submit to it any appropriate legislative proposals. Again from an oversight point of view, these are important points of entry, as it were, for political, legal, technical, and quality control views and approaches that seek to influence the Commission. As Craig & DeBurca point out: "it is now common for such delegations of power to be subject to the condition that the Commission action is acceptable to committees staffed by national representatives. This operates as a mechanism whereby the Council can ensure that the detail of the delegated legislation is in conformity with its own wishes."[38]

The conventional wisdom about the regulation-creating process of the EU is that the Commission was in the driver's seat, but the balance within the Community is a dynamic one and the institutional opportunities exist within the Council to inject many of the oversight criteria set forth above.

(3). The European Parliament ("EP"). While the Council represents the Member States, the EP represents the people of Europe. It is the only directly elected European institution.[39] Currently, there are over 626 members of Parliament. The EP's functions include legislation—jointly with the Council pursuant to a co-decision procedure—budgetary functions, political control and consultation. For our purposes, the most important of these is legislation and political control, which we discuss below. It should be noted, however, that the budgetary authority that it shares with the Council also provides significant power over the EU's regulating activity.

During the process of European integration, the EP's legislative powers have steadily grown. It is a co-legislator with the Council for legislation involving multiple Treaties. In other areas, it participates with the Council through a form of consultation, cooperation or assent. Although the EP has no power of legislative initiative, it has the right pursuant to Article 192EC to request the Commission to submit a proposal on any matter on which the Parliament thinks Community legislation may be necessary.

The EP also exercises political control over the executive power exercised by the Commission. It has also long had the power to censure the Commission and require its resignation, although as Craig & DeBurca note: "The Parliament's power of censure has never actually been used, though various motions of censure have been tabled and debated. The EP also participates in the Commission's appointment; The EP has the right to be consulted and approve the Commission President as well as the entire slate of Commissioners proposed by the President.

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[38]Craig and DeBurca, p.69.
[39] Article 190 EC.

The EP monitors the activities of the Commission as well as other institutions by asking oral and written questions and establishing committees of inquiry. The EP can also appoint an Ombudsman to receive complaints from EU citizens or resident third-country nationals or legal persons concerning "instances of maladministration in the activities of the Community institutions or bodies" as well as to "conduct inquiries for which he finds grounds either on his own initiative or on the basis of complaints submitted to him direct or through a member of the European Parliament." [Alan, do we have a cite for this quote?]Finally, it should be noted that the EP has a right to litigate and to intervene in any case just like other EU institutions.

(4). Parliamentary oversight committees. The bulk of legislative work of the European Parliament is undertaken by its standing committees. These committees are subject matter based. The Parliament has seventeen committees on matters including, for example, foreign affairs, human rights, legal affairs and internal markets; citizens' freedom and rights and home affairs. They also include budgetary committees and budgetary control. As we shall see below, they prepare the work for the Parliament's plenary sessions and are extremely important in this regard. It should also be noted that theses standing committees are not the only committees involved in the Parliament's legislative process; there are any number of subcommittees also involved and temporary committees or, as we shall also see below, so-called committees of inquiry.

These standing and temporary committees provide the initial draft report on legislation submitted to the parliament pursuant to Article 251 or 252 EC. A rapporteur for the committee is named and given the responsibility of writing the committee report.

The rapporteur can seek assistance from the Parliament's secretariat, which consists of approximately 3500 staff headed by a secretary general; from the secretariat of his or hers own political group (members of parliament sit in Parliament according to political grouping rather than nationality) or from the research services available to each Member of Parliament. The rapporteur presents this report to the committee in charge and it usually has report has four parts: possible amendments to the Commission's proposal; a draft legislative resolution to make any of the changes recommended; an explanatory statement for these changes; and any relevant back up reports or "Annexes". The committee will then advise the Members as a whole how they should vote on this legislation in their plenary session and the rapporteur involved acts as the committee's spokesperson. This same committee will also examine the proposed legislation in light of the common position adopted by the Council under article 251.

It then usually falls to the Commission to find a position acceptable to the Parliament and the Council and itself. This process, sparked by EP standing committees, is clearly another point of entry, if you will, for debate and compromise over the political, legal, financial and technical efficacy of the legislation involved. The nature of the standing committees are quite broad and some, like the budgetary committees, deal very directly with the some of the oversight criteria outlined above. All of them provide an opportunity for opinions to be voiced concerning the political, technical or legal efficacy of the proposed legislation under review.[40]

(5). Questions, Committees of Inquiry and the Power to Censure. The EP can also monitor the activity of the Commission by asking oral or submitting written

questions the Commission.[41] And, as noted above, not all Parliamentary committees are standing committees; some are temporary in nature and designed to deal with very specific concerns. It had long been established that there could be committees of inquiry established as well as a right to petition the EP. These practices were given treaty status, as we shall see further below, at Maastrict and are now institutionalized in Articles 193 and 194 EC.

Parliament also has the power to censure. Specifically, it has the right to vote a motion of censure against the Commission. "A double majority is required for a motion of censure to succeed: a majority of the component Members of Parliament and two-thirds of the votes cast."[42] Once that motion is adopted, the Commission must resign as a body.[43]. "Six censure motions have been tabled since Parliament was directly elected in 1979, but so far none has been adopted. This power has long thought of as the "nuclear option", but it was narrowly avoided in 1999 when the Commission willingly resigned in order to avoid the political embarrassment of censure.[44]

Though Parliament's official power is limited to the drastic step of forcing the resignation of the entire Commission, it does, however, have the more surgical ability to formally reprimand and individual commissioner. Such a reprimand has no legal effect, but can notify the President of the Commission of its displeasure. After the treaty of Niece in 2000, the President was granted the power to remove an individual Commissioner, after obtaining approval from the Commission. This mechanism can be

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[40] Craig and De Burca, p. 166.
[41] See Articles 197 and 110 EC
[42] Youri Devuyst, *The European Union's Constitutional Order? Between Community Method and AdHoc Compromise*, 18 Berkeley J. Int'l L. 1, 37 (2000). Youri Devuyst, *The European Union's Constitutional Order? Between Community Method and AdHoc Compromise*, 18 Berkeley J. Int'l L. 1, 37 (2000).
[43] Id.

used by the EP to bring about the resignation of an individual Commissioner; however, the EP still lacks the ability to do so unilaterally.

The motion of censure weapon has been reinforced since the Treaty of Maastricht granted Parliament the right to establish temporary Committees of Inquiry to investigate alleged contraventions or mismanagement in the implementation of Community law."[45] *Id.* The European Parliament can "at the request of one quarter of its Members, set up a temporary committee of inquiry to investigate alleged contraventions or maladministration in the implementation of Community law which would appear to be the act of an institution or a body of the European Communities, of a public administrative body of a Member State or of persons empowered by Community law to implement that law."[46] The committees conduct public hearings, with necessary steps taken to protect information of a secret or confidential nature, and ultimately submit a report of their findings to Parliament.

(6). European Ombudsman. The Maastrict treaty also provides for the appointment of an Omdudsman by the European Parliament. The function of this officer is to receive complaints from EU citizens or resident third-country nationals or legal persons concerning "instances of maladministration in the activities of the Community institutions or bodies" as well as to "conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a

[44] See N. Nugent, *The European Commission*, New York 2001.
[45] Id.
[46] Rules of Procedure of the European Parliament
http://www.europarl.europa.eu/omk/sipade3?PROG=RULES-EP&L=EN&REF=ANN-08

member of the EP."[47] The major limitation on the Ombudsman's jurisdiction is that it deals only with EU institutions and not national institutions, though many of the complaints have to do with national as opposed to EU institutions. The office of Ombudsman has been hailed a success and as Craig and De Burca have noted, the "office is increasingly seen as a source of administrative norms rather than simply a mediation facility for individual complaints."[48]

As Paola Michelle Koo notes, the European Ombudsman "works to reinforce the rule of law."[49] He also "helps make the [EU] more accountable to all its citizens by providing an independent critical appraisal of the quality of administration by Community institutions and bodies and a stimulus towards improvement."[50] Since its inception in 1995, the office of the European Ombudsman has resolved over 10,000 complaints. When the Ombudsman receives a complaint, it contacts the relevant institution in hopes that the problem will be settled immediately by the institution. The Ombudsman will then attempt to find a friendly solution, after which it will draft a recommendation. When an institution fails to follow the recommendations of the Ombudsman, a special report to the EP will be sent (this is in addition to the annual report sent to the EP detailing the outcomes of its inquiries). Six such reports have been sent to date.

[47] Art. 138e.
[48] Craig and De Burca, pp. 84-85.
[49] *The Struggle for Democratic Legitimacy within the European Union*, 19 B.U. Int'l L.J. 111, 127 (2001).
[50] Katja Heede, Enhancing the Accountability of Community Institutions and Bodies: The Role of the *European Ombudsman***,** 3 Eur. Pub. L. 587 (1997)).

In addition to complaint investigation, the Ombudsman has been involved greatly in attempts to develop a codification of administrative law for the EU.[51] The Ombudsman drafted the European Code of Good Administrative Behavior. This code "tells citizens what they have the right to expect from the EU administration and gives guidance to officials on how to behave in dealing with the public."[52] While the European Charter on Human Rights gives the Ombudsman the power to hear complaints, "this Code is intended to explain in more detail what the Charter's right to good administration should mean in practice."[53] It was approved by the European Parliament in September 2001. Both the Ombudsman and the EP have called on the Commission to create a European administrative law based on this code.

One great drawback on the Ombudsman's power (as noted above) is the jurisdictional limitations to which he is confined. He deals only with the EU institutions and not national or regional ones. However, the Ombudsman maintains regular contact with national and regional Ombudsman (12 EU state Ombudsman as well as regional ombudsman and petition committees operating in 6 EU states). This contact is maintained through an unofficial liaison network. The liaison officers meet in seminars, have a newsletter and website, as well as internet summits.[54]

Through this informal and non binding relationship with other ombudsman, the European Ombudsman enjoys very broad powers of investigation and can provide an informal oversight of administration. Simone Cadeddu notes that the "Ombudsman

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[51] *See* Julie Ponce, *ADMINISTRATION: Good Administration and Administrative Procedures*, 12 Ind. J. Global Leg. Stud. 551, 565, 566 (2005).

[52] Id.

[53] *The European Code of Good Administrative Behavior*, available at http://www.ombudsman.europa.eu/code/pdf/en/code2005_en.pdf, 7

[54] *See* The European Ombudsman General Information, *What can the European Ombudsman do for you?* available at http://www.ombudsman.europa.eu/guide/en/default.htm.

considers himself a "controller" of Community administrative procedures," and in observing the Ombudsman's interests in resolving instances of administrative maladministration, "the role of the Ombudsman could be compared to appellate-level administrative proceedings."[55]

It is important to remember, however, that the decisions of the Ombudsman are not binding. This results in situations where complainants may receive no relief.[56] The Ombudsman currently shines the light on problems while it waits for a law that would give it real teeth.

(7). National Parliaments. The European Union's supranational character often results in a question of the placement of national parliaments. Some argue that national parliaments are only "marginally involved in European decision-making."[57] It could be viewed that the powers granted to the Union's institutions has resulted in the erosion of traditional parliamentary power at the national level. National parliaments, however, have not been totally forgotten.

"The Member States are represented in the Council of Ministers and European Council by their governments, themselves accountable to the national parliaments elected by the citizens."[58] Even more obvious is the "early warning system for the national parliaments to provide input in European legislation."[59]

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[55] *The European Commission: The Proceedings of the European Ombudsman*, 68 Law & Contemp. Prob. 161, 162, 163 (2004).

[56] *Id*. at 179.

[57] Hendrik Vos and Jeroen Decock of Ghent University, *Democratic Legitimacy in the EU: the Role of National Parliaments*, available at http://aei.pitt.edu/473/01/parliaments.htm.

[58] Markus G. Puder, *Constitutionalizing Government in the European Union: Europe's New Institutional Quartet Under the Treaty Establishing a Constitution For Europe*, 11 Colum. J. Eur. L. 77, 110 (2004).

[59] Id.

In the Protocol on the Role of National Parliaments in the European Union, the procedures for hearing national parliamentary opinions are set forth. Draft legislative acts are sent to national parliaments who may send a reasoned opinion back to the presidents of the European Commission, Parliament, and Council regarding the draft's compliance with the principle of subsidiarity. Also, the Protocol declares that the national parliaments and the EP shall together determine interparliamentary cooperation within the Union.

The European Union is thus "seeking to widen and deepen its consultations with Member States (including national parliaments**)** and with private sector and public interest groups during the period in which its legislative proposals are taking shape."[60] However, it is important to note that "the Commission reserves almost complete discretion over the quantity and timing of consultations to be had, the range of persons and institutions whose participation is to be engaged, and the intensity of that participation."[61]

There also are institutions such as COSAC (Conference of European Community Affairs Committees) currently in operation. "COSAC was created to solidify cooperation and information exchange between the European affairs committees of Member States, which oversee EU issues as they affect the Member States. COSAC meets biannually and is comprised of 6 representatives from each Member State and 6 representatives from the European Parliament. In the Protocol on the Role of National Parliaments annexed to the Treaty of Amsterdam, COSAC was given a formal right to examine EU legislative proposals and adopt contributions' in the areas of subsidiarity, fundamental rights and

[60] George A. Bermann, *Regulatory Cooperation Between The European Commission and U.S. Administrative Agencies*, 9 Admin. L.J. Am. U. 933, 946 (1996).

freedom, security and justice."[62] Most parties agree that there must be a role reserved for member states and that it would be better to involve national parliaments rather than trying to completely integrate them.[63]

The United Kingdom's House of Lords Select Committee on the European Union/Community and the Danish Parliament's European Committee often are persistent voices heard by the E.U. but often ignored as well.[64] For example, "The House of Lords Select Committee on the European Communities considered the Bathing Water Directive to be inappropriate for British coastal waters. . . . However, bureaucratic pressures and the structure of decision-making pushed forward legislation."[65]

Denmark and Sweden have parliamentary information centers that answer questions and inquiries from their citizens.[66]

According to the United Kingdom's website at http://www.parliament.uk/parliamentary_committees/parliamentary_committees26.cfm, the EU Select Committee is to "To consider European Union documents and other matters relating to the EU". "The purpose of the Danish EU Decision Making Process is to reach agreement on the Danish EU policy internally in Denmark as well as during the negotiations in Brussels. . . . The EU Committee deals in particular with EU questions that have horizontal, fundamental or sensitive aspects. The Committee also deals with questions that cannot be solved in the special committees. The EU Committee meets

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[61] Id.

[62] Ivar H ansen, National Parliaments in the European Institutional Framework, Report from Conference of Speakers of the National Parliaments of the EU, at 13-14 (June 2002).

[63] Stephen C. Sieberson, The Proposed European Union Constitution – Will it Eliminate the EU's Democratic Deficit?, 10 Colum. J. Eur. L. 173, 237 (2004).

[64] *See* Damian Chalmers, *INHABITANTS IN THE FIELD OF EUROPEAN COMMUNITY ENVIRONMENTAL LAW*, 5 Colum. J. Eur. L. 39, 45 (1999):

[65] Id.

when needed on Tuesdays in the Ministry of Foreign Affairs. The Ministry of Foreign Affairs holds the chairmanship and secretariat."[67]

There is an ongoing debate on what the role national and regional governments should be playing in the EU.[68]

(8). Additional players and Oversight Mechanisms

(a). Independent Administrative Agencies. As we have seen above, the Council delegates power to the Commission but does not do so by giving the Commission a "blank check". To have some control over the details of the delegated norms over and above that created by the enabling legislation itself, comitology was created—*i.e.*, management and regulatory committees institutionalized as a means for allowing national and usually highly technocratic interests to have a real input into these norms. Administrative agencies also fit within this institutional structure.

There have been three waves of agency creation.[69] The first two administrative agencies were created in 1975 when the agency model was first used. These agencies were the European Centre for the Development of Vocational Training and the European Foundation for the Improvement of Living and Working Conditions. Fifteen years later in 1990, a second wave began with the creation of the European Environmental agency and nine other agencies, including the European Agency for the Evaluation of Medicinal

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[66] Denmark: http://www.eu-oplysningen.dk/euo_en/Sweden: http://www.eu-upplysningen.se/templates/EUU/standardTemplate____3131.aspx

[67] Dealing with EU Matters in Denmark, Ministry of Foreign Affairs in Denmark, available at http://www.um.dk/en/menu/EU/DealingWithEUMattersInDenmark?wbc_purpose=Bas.

[68] *See* Roht-Arriaza, *The Committee on the Regions and the Role of Regional Governments in the European Union*, 20 Hastings Int'l & Comp. L. Rev. 413 (1997) (discussing why regional governments should be involved).

[69] This section draws almost exclusively on Paul Craig's forthcoming book, Administrative Law in the EU, chapter 5 (draft).

Products and the European Monitoring Centre for Racism and Xenophobia. In 200, a third wave began with the creation of the European Food Safety Authority, the Maritime Safety Authority and the Aviation Authority and several more. There are a total of 19 such agencies created by the Commission and others are now under consideration.

These agencies are not the only ones in existence. Seven other agencies have been created by the Council, such as Europol. It is difficult to categorize these various agencies. Paul Craig has categorized them as follows: there are what he calls *EU decision making agencies,* which have the power to make individualized decisions that are binding on third parties such as the Office of Harmonization in the Internal Market, the Community Plant Variety Office and the European Aviation Safety These agencies deal with decisional power in a areas where a single public interest predominates and the agency is not called upon to "arbitrate on conflicting public interests or conduct complex economic assessments."[70] Such agencies cannot adopt "legislative measures of general application", or be "delegated responsibilities for which the EC Treaty has conferred direct power of decision on the Commission". These are not, in other words, regulatory agencies as we know them to be.

A second category consists of *quasi-regulatory agencies*. These agencies have strong recommendatory power. They make recommendations to the Commission, which has the final power of decision. The Commission is not bound by the recommendations but they carry great weight because they usually deal with highly technical and scientific matters. If the Commission departs from the agency's recommendations, it will have to

[70] Communication from the Commission, the Operating Framework for the European Regulatory Agencies COM (2002)718 final, p.8.)

provide good reasons for its decision and courts have annulled decisions to depart when the reasons were deemed weak.

A third category of agency is one called *information and coordination agencies;* most agencies gather and coordinate information but for agencies in this category, it is their principal function. They furnish information and analysis to the Commission, Member states, and related actors whether at the public or private level; to assist the Commission where necessary in the formulation of policy and legislation at the EC level; and to coordinate and interact with a network of other players concerned with the subject matter with which the agency deals. Council created agencies tend to be similar to these as well.

Some of these agencies and the way they use their powers clearly have oversight aspects to them. For example, the European Agency for Health and Safety is charged with providing the Community, Member states, and those involved in the field with technical, scientific, and economic information on workplace health and safety. The purpose of the information is to identify risks and good practices. The agency is also to supply both the Community and Member States with such information as they require to implement judicious and effective policies to protect workers' health and safety, and more particularly to provide such information to the Commission when it plans to legislate in these areas.[71] The EU-OSHA also sets up a network comprising the main elements of national information networks. Member states are obliged to inform the agency of the main components of their national health and safety networks.

Another example is the European Maritime Safety agency. The EMSA is the technical body charged with providing the Community and Member States with the

necessary means to act effectively to enhance overall maritime safety and prevent pollution by ships and to assist the commission in updating and developing Community legislation in these areas. Indeed, the role that such agencies play in before the fact legislative development resonates with the kind of oversight at OMB we are familiar with.

Limits on Agency Actions. There is no oversight of agencies similar to what we are accustomed to in the U. S. Burt this is not to say that there are not very definite legal, political, and financial accountability imposed upon these bodies. We have already mentioned the foremost legal limitation on EU administrative agencies, ie, the Meroni decision which effectively precludes the delegation of regulatory power we are accustomed to seeing in U. S. regulatory agencies; nor shall we explore fully the ways in which judicial review comes into play when administrative agencies act. This we leave for other committees. We shall, however, discuss more fully the many political and financial controls that apply to agencies, as these are quite resonant with the oversight criteria set forth earlier in this chapter.

Political controls. (1) Agencies have been created primarily for the expertise they can bring to certain problems. There are various direct and indirect political controls designed to channel the independence that comes from agency expertise. First, the agency's tasks and criteria for success are usually very specific. The greater the specificity, the greater the control exercised over agency choices by the legislature. As a general matter, EU agencies have their tasks and criteria defined with great specificity.

(2). Agencies can also be controlled and held accountable by the way they are composed; that is to say, their structure and membership matters. The general structure of

[71] Craig, forthcoming book, chapter 5, p.18.

EU agencies consists of an administrative governing board or management board, an executive director, and in some agencies an advisory body as well. The administrative, governing or management board has the following responsibilities. It has a role to play in appointing the director; it adopts the agency's annual work program, as proposed by the director; it is responsible for the agency performing the tasks assigned too it; and it adopts the agency's annual report and its financial rules. The composition of these boards is crucial and Member state interests have tended to dominate. For agencies created in the 1990's it was common for agencies to have one or two representatives from each Member state, Between one and three from the Commission, one or two from the EP and sometimes representatives from employer or employee organizations.

The agency director is very important—the Commission provides the list of candidates to the agency and can then chose the director. The extent to which the Commission has input into the agency's work program is also important and this amount of input varies from agency to agency. Council agencies however allow for no such input from the Commission.

Financial accountability. The Council Regulation 1605/2002, on the Financial Regulation Applicable to the General Budget of the European Communities closely structures agency options when it comes to the financing of their activities. The budgetary principles of unity, annuality equilibrium, universality, specification, sound financial management and transparency contained in this Financial regulation apply to EU agencies. The director is the authorizing officer for the agency and is responsible for implementing revenue and expenditure commitments in accordance with the principles of sound financial management. Every item of expenditure has to be committed, validated

authorized and paid. Budgetary commitment must precede legal commitment and the authorizing officer does both. These rules have an impact on agency decision making that goes beyond financial accountability per se. As authorizing officer, the director is acutely aware of agency decision making that involves any expenditure and is mindful of the penalties that can result if errors are made. The financial rules locate responsibility with the director and the director is also in charge of the work program and planning of the day to day agenda of the agency as well.

One commentator has argued that if an agency did not exist, it is likely its issues would be dealt with through a Comitology committee. From an accountability standpoint, however, agency involvement opens up the process more than if it were left only to comitology committees.

(b). Anti-Fraud Office. In order to strengthen the means of fraud prevention, the Commission established within itself, the European Anti-Fraud Office. It undertakes administrative investigations for activities both outside the governmental framework of the EU and within it when fraud is suspected. In the event of fraud harmful to the budget of the EU, the Anti-Fraud office can carry out administrative investigations inside the various institutions of the Community.

The office has various powers including: access to information and the buildings of the Community institutions, the ability to check accounts, and to obtain copies of any document. In addition, the Office can request from any person, information that it judges useful for its investigations, and it can carry out on the spot controls of the economic operators concerned in order to have access to information concerning possible

irregularities.[72] The Office's powers are limited by the privileges and immunities enjoyed by the officers of the Community. It plays the additional role of providing expertise in the crafting of Community anti-fraud legislation and assisting member states in the design and implementation of their anti-fraud activities.

(c). Private Sector Lobbying in Brussels. The staffing and budget of Community policy makers lags considerably behind what is common in the U.S. As a result the lobbying of special interest groups plays an important role in providing information and expertise. As the European Union has grown in power so too has the level of lobbying in Brussels.

The Commission with its power to form Community policy is perhaps the foremost target of lobbyists. The Commission welcomes private lobbying to gain access to expert knowledge and estimates that there are currently 15,000 lobbyists in Brussels (consultants, lawyers, trade associations, corporations, NGOs) and that there are 2,600 special interest groups with a permanent office in Brussels.

While there is no accreditation process for those who wish to lobby the Commission, the Commission does maintain a directory of interest groups which is distributed to the individual Commissioners in an attempt to provide informational resources.

The Commission does not formally regulate the conduct of lobbyists, instead it invites self regulation by interest groups and encourages them to adopt a code of conduct that meets their suggested set of minimum standards. At the behest of the Commission a

[72] AF mission statement http://ec.europa.eu/comm/dgs/olaf/mission/mission/index_en.html

Green paper was prepared that called for heightened scrutiny of lobbying activities and increased transparency, but the self regulating nature of the process was not threatened.[73]

"There are basically two forms of dialogue between the Commission and special interest groups: through advisory committees and expert groups which assist the Commission in the exercise of its own competences; and through contact with interest groups on an unstructured, ad hoc basis. The nature and intensity of these contacts vary."[74] Lobbyists have various "routes of influence."[75] When they go to the EU, they exchange information for influence. The targeted bodies at the EU include the Commission, Parliament, and Council of Ministers. "European associations have the highest degree of access to the European Commission. . . . ." "[76]

In a similar manner, the committees of the European Parliament are directly lobbied by special interest groups while they review proposed legislation.[77] The European Parliament has become increasingly attractive to interest groups as a result of its increased legislative power."[78] "'Interest groups constitute a source of information for the Parliament in the same way that they do for the Commission, enabling it to maintain a certain degree of independence from the other European institutions (Diekmann 1998: 290; Michalowtiz 2002: 46).'"[79]. "Most significant lobbying targets in the EP are the standing committees because most of the Parliament's legislative work takes place in

[73] The Green paper can be found at http://ec.europa.eu/commission_barroso/kallas/doc/com2006_0194_4_en.pdf

[74] See, *An open and structured dialogue between the Commission and special interest groups*, available at http://ec.europa.eu/civil_society/interest_groups/docs/v_en.pdg.

[75] Kristina Charrad, *Lobbying the European Union*, available at http://nez.unimuenster.de/download/Charrad_Literaturbericht_Lobbying_mit_Deckblatt.pdf

[76] Id. at 16.

[77] See, Supra note 75

[78] Supra note 77

[79] Id.

specialized committees."[80] "The suggestion is that individual citizens, voluntary associations, and interest groups, so-called 'civil society,' should have the right to participate directly in the work of the institutions. Of course, these actors have always shaped politics in the European Parliament and the Council through their national representatives. Moreover, interest group lobbyists have been a long-standing feature of Bruxellois topography. The difference . . . is that there is now a call from certain quarters to consider them legitimate partners in European governance."[81] It seems that interest groups have had, do have, and will have even more power and influence in the future.

Conclusions

Differences from the US

Gaps in oversight

Prognosis for future in EU

Regulatory terminology in the EU differs considerably from that in the United States. Most fundamentally, what we call "rules," or "regulations," constitute "secondary legislation" in the EU. The term "oversight" is not in general use in EU administrative or political circles. "Evaluation," "monitoring," "accountability," "traceability," "control" and "supervision" are more common terms used in the EU to describe our concept of "oversight." Thus, the fact that the word "oversight" is not used does not indicate that the concept is foreign. Numerous regulatory processes and institutional practices in the EU assure that there is substantial political, legal, technocratic, and quality control built into the development and approval of secondary rules. However, the EU does not have a

[80] Id. at 17.

regulatory clearing house like the Office of Management and Budget's Office of Information and Regulatory Affairs in the United States. Rather, the Commission is the primary cook and critic for the regulations for which it is responsible.

This report is primarily concerned with the secondary legislation adopted by the Commission pursuant to powers delegated to it by the Council and Parliament. In general, the Commission's delegated powers are cabined by "comitology" procedures specified in the empowering primary legislation. Comitology committees are comprised of representatives of the EU member states, as well as the Commission. For many important regulatory initiatives, the comitology committees have substantial approval authority, as well as drafting responsibilities. In general, the committees are obligated to keep the EP informed, and the EP can theoretically attempt to block regulations adopted by the Commission in the European Court of Justice on the grounds that such regulations are *ultra vires*, that is, that they exceed the legal terms of the delegation to the Commission. The committees also report back to the Council in the event of serious disputes within a committee or between the committee and the Commission with respect to major rules. The EU Member States can also monitor and influence the development, direction and approval of regulations by guiding the actions of their representatives on the comitology committees. The pace and detail of regulatory comitology, however, makes it difficult for the Member States, and especially national parliaments, to stay *au courant* throughout the rulemaking process. Thus, the Commission has many eyes watching over it, but the diffusion of responsibility, relative *informality* of current mechanisms, and the multiplicity of reporting processes actually gives the Commission a

[81] Francesca Bignami, The European Commission: Three Generations of Participation Rights Before the European Commission, 68 Law & Contemp. Prob. 61, 72 (2004).

freer hand in regulation than if there existed fewer and more formal chains of authority. In fact, the Commission controls the flow of regulatory knowledge and information, and sets both the political and technocratic agenda.

The Commission acknowledges that ultimately the adoption of a regulation entails a political judgment. The Commission's political decision is made entirely by the Commission's "College of Commissioners" based on the Commission's policy agenda and its assessment of the legal, technocratic and quality attributes of the regulatory file presented to it for decision. In a sense, however, much "oversight" takes place by the time the regulatory file reaches the College of Commissioners. If the file gets that far, it has survived the bureaucratic and technocratic labyrinth of comitology, and it has not been derailed by the Council, the Parliament, or any of the Member States who could weigh in at various junctures.

There is a prevailing recognition and desire that the quality of rulemaking can be improved substantively and procedurally – but our examination suggests that the applicable protocols for such improvement, and oversight generally, are not yet fully developed or understood within the EU itself.

While the Commission does not have to fear reversal under European analogues to our Administrative Procedure Act, Congressional Review Act, or Unfunded Mandates Reform Act, or even an Executive Order 12866 imposed by any superior executive authority, the Commission has increasingly focused on the quality and accountability of its own regulations. It has recently produced a number of "better governance" documents and guide books, including most recently, its June 15, 2005 "Impact Assessment Guidelines." This document admonishes the Commission staff to analyze regulatory

proposals and their potential impacts very carefully, but not to confuse technocratic expertise with policy judgment. "Oversight" is the province of the Commission as follows:

> The College of Commissioners will take the [Impact Assessment] findings into consideration in its deliberations. The IA will not, however, dictate the contents of its final decision. The adoption of a policy proposal is a political decision that belongs solely to the College, not to officials or technical experts. [p.4]
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> * * *
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> No policy action by the Commission should be taken in isolation. It is necessary to check whether the objectives envisaged are consistent with the other EU policies. In practical terms, this means that you [the Commission staff] should look at any impacts the proposal may have on other policy areas and, if necessary, adjust the proposal to ensure that it does not undermine their objectives. [p. 22]

In the United States, this reconciling role is managed by OMB. While the Commission does not have an Office of Information and Regulatory Affairs, it does have a Secretariat General that funnels "regulatory files" on their way to the College of Commissioners. This elite staff within the Commission is closely attuned to the mandates of the various governance documents, and is sensitive to College's overriding policy agenda. Thus, they are in a position to engage in soft policing of the development of the regulatory file, and we understand that they do in fact exercise this prerogative. Over time, one could imagine the Secretariat General being charged with overseeing regulatory proposals against the criteria of the Commission's governance documents and advancing or remanding the files in accordance with the Secretariat's evaluation. Such a development would not only refine the Commission's oversight processes, but it would also tend to increase the power of the Commission President who would no doubt give the Secretariat General its ultimate marching orders.

Our consultations suggest that the role and true impact of the Secretariat General is subject to different points of view within the EU, and among EU experts, and degrees of familiarity with the Secretariat's functions vary widely. Accordingly, one must be circumspect about jumping too quickly to a judgment that this Secretariat is an OIRA in the making. That would, however, seem like an important possible development to monitor going forward.

The above discussion makes plain that the EU attempts to build considerable political control into the regulatory process above and beyond the work product of what at least one EU document calls the "Brotherhood of Experts."[82] But while the "Commissioners have the final say . . . considerable attentiveness and perseverance are needed to block a draft" produced by the comitology process.[83] In the end, "oversight" in the EU – not unlike the United States – is a Sisyphian struggle.

[82] Report of the Working Group, EVALUATION AND TRANSPARENCY, July 2001, p. 19
[83] *Id.*