ABA Project -- Outline of EU Environmental Rule-making

I. Introduction

A. Scope of This Paper

This paper describes the administrative "rulemaking process" in the European Community ("EC") in the environmental, health and safety area. By the design of this project, and due to the peculiarities of the European Community's complex system of legislation and regulation, the "rulemaking process" is taken to include the administrative process by which the Community (actually, the European Commission) *proposes* environmental, health and safety *legislation* and the way the EC (mostly, but not always, through the European Commission) *adopts* implementing *administrative regulation*. It does not deal, except as necessary in passing, with the EC legislative process itself -- that is, the process by which the EC (normally through the Council and the Parliament) adopts, rather than proposes, legislation, nor with other aspects of the administrative and related judicial processes.[1]

It may seem strange to the American reader that the proposal of legislation is dealt with as a matter of administrative rulemaking, but there are reasons specific to the rather different European context for doing so. Specifically, the European Commission, the European Community institution most closely resembling the US Executive Branch, has as a general matter a monopoly on the initiation of legislation. Thus, it has an important part to play in the initiation and proposal of legislation, and it plays this part as an administrative body and in ways that mirror the administrative rulemaking process in the US in important respects. Further, the actual administrative rulemaking process in the EU pursuant to legislative delegation is much less well-developed than in the US at this stage of the EU's evolution. Thus, although there is an increasing volume of delegated rulemaking in the environmental and other areas by the Commission (and much debate over the propriety of this process), the European Commission's role in proposing legislation has in many ways been more important to date than its role in delegated rulemaking -- just the opposite from the situation with administrative agencies in the US.

B. A Note On Terminology

[1]Such as administrative adjudication, administrative implementation of legislation or rules other than by rulemaking (*e.g.*, by decisions to issue permits, which in any case takes place in large measure at Member State level, not at EU level), administrative or judicial enforcement of either legislation or regulation, or judicial review of administrative action.

A note on the difficulty, and thus the importance, of terminology is useful at the outset. The European Union has a very different constitutional architecture than is the case in the US. This architecture has been in fundamental evolution for the last 20 or so years, through a complicated series of European treaties and treaty amendments. It remains in flux and uncertainty, as indicated by the French and Dutch electoral defeats for the current proposed European Constitution. Because of both the different constitutional structure and its complicated recent evolution, many of the common terms used by US administrative lawyers have different meanings or connotations when used in the European context.

For example, the term "primary legislation" in Europe is commonly used to refer to the governing European treaty provisions (the European equivalent of US Constitutional provisions), not the legislation enacted by the European institutions under those treaties, for which the term "secondary legislation" is commonly used. In the US, Constitutional provisions are not referred to as "legislation." Further, it would be more common to refer to Congressional enactments (*e.g.*, "statutes" or "laws") as "primary legislation" and to delegated administrative rulemaking (*e.g.*, administrative "rules" or "regulations") as "secondary legislation." As noted above, however, "secondary legislation" in Europe is the legislation adopted by the EC legislature pursuant to the powers granted to it in the EC Treaty. In Europe, the adoption of measures *under* legislation enacted by EU institutions is typically referred to as "delegated lawmaking," is carried out through two complex mechanisms (comitology and the standards process), and is not limited to administrative actions by the Commission, since the Council and to some extent the Parliament can also participate.

As a further example, a "regulation" in Europe refers most commonly to a particular *form* of legislation, whether "secondary legislation" because enacted by the Council and Parliament, or "delegated lawmaking" because carried out by one of the Community institutions pursuant to such "secondary legislation." There are other similar terminological or contextual anomalies to which an American administrative lawyer must be alert as he undertakes the study of the European administrative process.

In an effort to simplify the situation for the US lawyer without doing too much violence to the EU context, we refer to EU "primary legislation" as "treaty provisions," to EU "secondary legislation" as EU "legislation," and to EU "delegated lawmaking" as such or as EU "administrative implementing regulation." We then differentiate among sub-species as to form (*e.g.*, Directives or Regulations) and as to the enacting body (*e.g.*, the Council and Parliament on the one hand, or the Commission on the other).

C. EU Environmental Policy

1. The Role And Importance Of EU Environmental Policy In The EU's Evolution

The EU now has a relatively developed system of EU policy and legislation. EU level policy and legislation, however, while it began to develop in the early 1970's as did

US environmental law, has evolved somewhat more slowly than did such policy and legislation in the US.[2] Even so, it has played a key role in the evolution of both the EU's governmental architecture and its development of administrative rulemaking procedures. Indeed, it can be argued that it played a leading and catalytic role in the development of EU administrative law similar to that played by US environmental, health and safety law in the development of US administrative law and judicial review in the US from 1970 to date, in each case for the same reason -- the political importance of the issues dealt with.

EU environmental policy was seized on, early, by the promoters of the EU venture as a vehicle for gaining public support for the EU experiment. A response at the EU level to public concern over the environment was thought to be a good way to popularize and promote the usefulness of EU level regulation. Further, as EU environmental policy and legislation has developed an express basis of authorization in the EC treaties, which it lacked at the outset, and as its methods of enactment and accompanying rights to transparency and accountability have evolved, its development has at least paralleled, over time, and perhaps importantly influenced, the steady evolution of the treaty architecture of the EU itself.[3]

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[2] *See* Prof. Lucas Bergkamp, Turner T. Smith, Jr. EU and US Legal and Administrative Systems: Implications for Precautionary Regulation, in Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt & Peter H. Sand, eds., *The Reality of Precaution: Comparing Risk Regulation in the US and Europe* (forthcoming in 2006)(arguing that US and EU environmental law are on a converging path); *Cf.* Prof. Dr. Ludwig Krämer, EC Environmental Law, Fifth Edition, Sweet & Maxwell (London, 2003), p. 55 ("Krämer")(Krämer, referring to the period 1973 to mid-1998, says with regard to the Commission's five Environmental Action Plans during that period that "[s]ince the majority of Member States did not have a national environmental policy, the measures agreed and adopted at the Community level often influenced environmental policy within the Member States.")

[3] A good example is that the principle of "subsidiarity" was, when first introduced to the EC Treaty in 1987, limited to environmental matters. Krämer, p. 15. It was later broadened to have general applicability. *Id.*, pp. 15-16. Krämer argues that this "principle" has legal force because it "predetermines the activity of the Community," even though it "is not a rule of competence." *Id.*, p. 16. Another example is the provision of Article 173, ¶ 3, of the EC Treaty that environmental policy must take account of "the potential benefits and costs of action or lack of action," which has now been generalized into the impact assessment requirements of the Commission's Better Regulation initiatives, as discussed at length herein. While this provision has not been extended outside the environmental area in the proposed EU Constitution (Treaty establishing a Constitution for Europe, OJ C 310 (16.12.2004))(where it is codified in Article III-233, ¶ 3 of Section 5 (Environment), it may well have an effect in due course

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The elaboration of EU environmental policy at the EU level has been the catalyst for some of the most important developments in EU administrative practice, particularly with regard to the EU's European Governance and Better Regulation Initiatives.[4] For example, EU environmental legislation imposed "impact assessment" requirements as early as 1985, although this requirement applied chiefly to environmental impact, and applied only to case-by-case member state action with regard to certain types of public and private projects, rather than to government legislation or rulemaking, and only to member state actions and not those of EU institutions.[5] The environmental impact assessment process was applied to certain large infrastructure projects, such as highways **[if you have the ELI Deskbook there, please take a quick look at the scope of application of the EIA Directive]** in 2001.[6]

A second example can also be found in the 1985 EIA Directive, which had other provisions requiring forms of public participation, and required written reasons for decision -- both matters that are at the heart of current EU Better Regulation reforms.[7] Later environmental legislation, like the Integrated Pollution Prevention and Control (IPPC) Directive, although directed to case-by-case permitting actions, by member states, and not providing rights as to actions of EU institutions, contained similar requirements for public access to permit information and right to participate,[8] although the proposed requirements for written statements of reasons for decision were eliminated from the final

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on the interpretation of the "proportionality principle," which is codified in the proposed EU Constitution as Article I-II, ¶ 4.

[4] Krämer, for example, attributes the Commission's 2002 adoption of impact assessment procedures for all of its activities to the need to "improve the integration of environmental requirements within its own administration…." Krämer, p. 37.

[5] Council Directive 85/337 on the Assessment of the Effects on Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40, as amended by Council Directive 97/11/EC of 3 March 1997, O.J. (L 73) 5, 14.3.1997 (EIA Directive).

[6] Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment 2001 O.J. (L 197/30).

[7] The "public concerned" was to be given "the opportunity to express an opinion before the development consent is granted," and information generated by the developer, the views of the competent authority, and the opinion of the public concerned "must be taken into consideration in the development consent procedure." *Id.*, Arts. 6 and 8. Once a decision had been made, the governmental authority had to inform the public of that decision and any conditions and "the main reasons and considerations on which the decision is based." *Id.*, Art. 9.

[8] Council Directive 96/61 Concerning Integrated Pollution Prevention and Control, art. 15(1), 1996 O.J. (L 257) 26.

version.[9] By 2003, a directive had given the public the right to participate in the adoption of certain governmental projects, plans and programs.[10]

Some of these types of rights ended up in the EC Treaty, for example, a right to reasons for decisions:

> Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.[11]

Further, the impact assessment process is now being generalized, in the EU's Better Regulation Initiatives, to evaluation of all impacts of significant EU institutional action, not just impacts on the environment. Those initiatives have also picked up other procedural innovations, like minimum standards of public consultation and participation and expansion of the reasons stated for proposed legislation in its accompanying explanatory memoranda, and applied them (on a non-binding basis) to the Commission's own practices across the board, not just in the case of environmental context. Once again, however, the "cutting edge" of progress is found in the environmental area, since the Commission has had to introduce in the environmental area more specific and detailed procedural provisions in many of these areas in order to implement the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention").

A third example is provided by the advance of access to information principles and requirements, which developed in the environmental area first, with a 1990 Directive applicable to the member states and not limited to specific case-by-case contexts.[12] In

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[9] *E.g.*, Commission Proposal for a Council Directive on Integrated Pollution Prevention and Control, COM(93)423 final at 45. Krämer notes various of the procedural rights in this directive, but criticizes it on the grounds that some of them are not sufficiently detailed to allow adequate checking for compliance by member states, and its substantive requirements as to permit conditions are "vaguely formulated and leave large discretion to Member States." Krämer, p. 61-62.

[10] Council/Parliament Directive 2003/35 Providing for Public Participation in Respect of Certain Plans and Programmes Relating to the Environment, 2003 O.J. (L 56/17).

[11] EC Treaty, art. 253.

[12] Council Directive 909/313 on Freedom of Access to Information on the Environment, 1990 O.J. (L 158) 56, repealed and replaced by European Parliament and

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1993 the Council and the Commission adopted a Code of Conduct granting a general right of public access to Council and Commission documents, including those related to environmental matters.[13] The 1999 Treaty of Amsterdam then provided in a new Article 191A (now Article 255, ¶ 1) that, subject to principles and conditions determined by the Council:

> [A]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents…."[14]

Article 255, ¶ 3 provides that each institution named "shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents." In 2001 the EU adopted Regulation (EC) No. 1049/2001 which granted public access generally, not limited to environmental matters, to Commission, Parliament, and the Council documents.[15] The EU has now, however, ratified the Aarhus Convention, the provisions of which are broader in scope and more detailed and far-reaching than those of the existing generally applicable EU Regulation (EC) No. 1049/2001. Once again, developments in the area of environmental regulation are leading the way, and the EU is implementing the Aarhus Convention as to EU-level institutions with a proposed new regulation allowing broader access to information in the environmental area.[16]

Council Directive 2003/4/RC of 28 January 2003 on Public Access To Environmental Information 2003 O.J. (L 41) 26 (FOIA Directive).

[13] Council Declaration 93/730/EC on a Code of Conduct Concerning public Access to Council and Commission Documents, 1993 O.J. (L 340) 41, implemented by Council Decision 93/731/EC of December 20 1993 on Public Access to Council Documents, 1993 O.J. (L 340) 43 and Commission Decision 94/90/ECSC, EC, Euratom of February 8, 1994 on Public Access to Commission Documents, 1994 O.J. (L 46) 58.

[14] The proposed European Constitution broadens the applicability of this language to "the institutions, bodies, offices and agencies of the Union, whatever their medium." Article II-102.

[15] Regulation (EC) No. 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, O.J. (L 145) 43 31.5.2001.

[16] Proposal for a European Parliament and Council Regulation On The Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC Institutions and Bodies (COM(2003) 622 -- C5-0505/2003 -- 2003/0242(COD)).

2. The Evolution Of The Legal Basis For EU Environmental Policy And Regulation

A specific legal basis for environmental regulation was not included in the original EC Treaty. The provisions governing environmental legislation in the EU architecture have evolved with the evolution of that architecture.[17] The EU has two main treaties -- The Treaty on European Union, concluded in 1993 in Maastricht and amended twice since then (the "EU Treaty"), and the original Treaty Establishing The European Community, originally concluded in 1957 and amended many times, including by post-1993 treaties that amended the EU Treaty (the "EC Treaty").[18] While the EC Treaty is the older of the two treaties, and governs most of the legislative, administrative and regulatory issues discussed in this paper, the EU Treaty is now the senior treaty and its Article 8 incorporates the provisions of the EC Treaty.[19]

The Treaty on the European Community did not originally refer to the environment. From the enactment of that Treaty in 1957 until it was amended in 1987, EC environmental legislation was enacted, *ad hoc*, under the authority of EC Treaty provisions dealing with other related subjects. The EC Treaty was amended in 1987 by The Single European Act, however, to provide direct authority for enactment of environmental legislation by a unanimous Council vote.

Subsequently, the 1993 Maastricht Treaty on European Union amended the EC Treaty to allow majority decisions on many issues, including many environmental issues. The EU Treaty, even as currently amended, does not directly mention the environment, although Article 2 does list the achieving of "balanced and sustainable development" as an "objective" for the Union.[20] Title II (Article 8) of the EU Treaty, however, as noted above, incorporates the EC Treaty.

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[17] For an excellent historical discussion of the development of EU environmental law, from which this summary is taken, *see* Krämer, pp. 1-5.

[18] To avoid confusion in citing, Articles in either treaty are normally given an EU or EC suffix where the treaty in question is not clear from context. The EU is also governed by the Treaty Establishing The European Coal and Steel Community, and the Treaty Establishing The European Atomic Energy Community.

[19] Krämer, p. 1

[20] The proposed EU Constitution, so far rejected in the French and Dutch votes, includes among the Union's "objectives" in Article I-3, ¶ 3:

> The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability,…and a high level of protection and improvement of the quality of the environment."

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The 1999 Amsterdam Treaty then introduced to the EC Treaty the co-decision procedure for adopting legislation, which gave the Parliament a greater role in the legislative process, and which applied to environmental issues as well as others, but the unanimity requirement was retained for certain environmental issues (*see* Article 175 ¶ 2(*e.g.*, fiscal and land use measures)).

The EC Treaty states in Article 2 that:

> The Community shall have as its task, by establishing a common market…and by implementing the common policies or activities referred to in Article 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities,…*a high level of protection and improvement of the quality of the environment*….(emphasis added).

Article 3 provides that the "activities" of the Community shall include "(l) a policy in the sphere of the environment." Article 6 provides that:

> "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."

Articles 95 (Internal Market) and 175 (environment) both authorize the enactment of environmental legislation.

3. The Current Legal Bases of EU Environmental Regulation

a. Significance of Legal Basis

There are few broad grants of legislative authority to the EU institutions in the EU or EC Treaties. The pattern is rather to make many specific grants of legislative authority on specific subject matters, which differ in material respects from each other from subject matter to subject matter in the scope of the authority granted and the legislative process mandated.[21] Thus, as Krämer says:

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It also requires the Union to "contribute to…the sustainable development of the Earth." *Id.*, ¶ 4.

[21] [Cite Koen Lenaerts, and Piet Van Nuffel, and Robert Bray, Editor, Constitutional Law of the European Union, Second Edition, Thomson/Sweet & Maxwell (Place; date)("EU

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> The choice of the correct legal basis [for EC legislation] is important because the elaboration of the proposal, the participation of other Community institutions, the intensity of this participation…and the residual rights for Member States are different from one provision to another.

Krämer, p. 5. Specifically, the conditions under which member states may go beyond EC legislation and impose more onerous requirements, differ as between the various legal bases, with the member states having more freedom to do so if EC legislation has been adopted pursuant to Article 175 of the Treaty.

b. Treaty Bases

As noted above, Article 2 of the current EC Treaty states that:

> The Community shall have as its task…to promote throughout the Community…*a high level of protection and improvement of the quality of the environment*….(emphasis added).

Title XIX of the EC Treaty is entitled "Environment," and provides in Article 174:

> 1. Community policy on the environment shall contribute to pursuit of the following objectives:
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> -- preserving, protecting and improving the quality of the environment,
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> -- protecting human health,
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> -- prudent and rational utilization of natural resources,
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> -- promoting measures at international level to deal with regional or worldwide environmental problems.
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> 2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the

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Constitutional Law").] There have been efforts in recent treaty amendments, and in the proposed EU Constitution, to consolidate and rationalize the various bases of authority.

> principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
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> 3. In preparing its policy on the environment, the Community shall take account of:
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> -- available scientific and technical data,
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> -- environmental conditions in the various regions of the Community,
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> -- the potential benefits and costs of action or lack of action,
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> -- the economic and social development of the Community as a whole and the balanced development of its regions.
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> ***[22]

Thus, the EU now has treaty authority to legislate in the environment, health and safety areas, and when it does so its law pre-empts that of the member states,[23] although the Treaty and secondary legislation give the member states some leeway to impose requirements going beyond EU legislation (*e.g.*, through a so-called "safeguard" clause pursuant to which member states, under certain conditions, may temporarily restrict activities permitted by EU legislation).[24]

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[22] These provisions are repeated verbatim in Article III-233, Section 5 (Environment) of the proposed European Constitution.

[23] The pre-emptive effect of EU law is founded on a line of Court of Justice rulings establishing that all national authorities, including regional and local subdivisions of the national governments, and publicly owned companies, regardless of the national constitutional structure, must implement and apply Community law.

[24] *See*, for instance, Arts. 95(5)-(7) and 176, EC Treaty. Similar language on the environmental basis for legislation is included in Article III-234, ¶ 6 of the proposed EU Constitution, but the internal market provisions analogous to Article 95 have been rewritten in the proposed Constitution and are more complex.

Environmental legislation can be enacted under two main EC Treaty provisions -- Articles 95 (Internal Market) and 175 (Environment)[25].

4. EU Policy Objectives, Principles, And Conditions For Action Relevant To EU Environmental Legislation and Rulemaking

The EU Treaty sets forth general "objectives," "principles," and "conditions for action," which should guide the EU institutions in pursuing the EU's policies, a number of which are important to or specific to environmental, and health and safety, legislation.[26] They include the following:

- **Sustainable Development Objective** -- This term is nowhere defined in the EU or the EC Treaties. It is taken from the United Nations Brundtland World Commission on Environment and Development"s 1987 report entitled *Our Common Future*. Sustainable development was there defined as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs."

- **High Level of Protection Objective** -- This term is also undefined, but Krämer suggests that it is not the "highest level one could think of," that it does not allow

[25] Because of the "integration" requirement of Article 6 of the EC Treaty, legislation affecting the environment can also be adopted under a number of other treaty provisions dealing, for example, with agriculture (Art. 37 EC) and transport (Art. 80 EC). Krämer, p. 5.

[26] Some commentators have argued that at least some of these principles are "hard law" (*e.g.*, Douma, (2000)), and provide all the decision criteria necessary to resolve environmental issues, through balancing one principle against the other (Sadeleer, 2003)(examining the legal force of these principles, and offering a novel theory of norm formation by courts in environmental law). Krämer argues, on the other hand, that the EU and EC Treaties' environmental objectives "do not lead to concrete requirements for legislative action," and that the principles are only "general guidelines for Community environmental policy, but not binding rules of law which apply to each individual Community measure." Krämer, pp. 7-8, 13. The proposed EU Constitution provides, in Article II-112 ¶ 5, that the principles set out in its provisions "may be implemented by legislative and executive acts," but that such principles "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their validity."

"the lowest common denominator," that it "cannot be enforced in court," and that in any case, the requirement is only that it be *aimed at*.[27]

- **Subsidiarity Principle** -- The EC Treaty Article 5 "principle" of subsidiarity requires, at least in theory, that legislation must be adopted at the lowest practicable level, restricting EU legislation to those matters that must be resolved at the EU level for various functional reasons.[1] In fact, the pattern of regulation of various types of risks in the vertical dimension in the EU does not differ significantly from that found in US risk regulation, as to product and factory health and safety regulation, at least. There is, however, little EU-level risk regulation in the natural resource and energy production categories, and the new EU Environmental Liability Directive governing soil and groundwater cleanup leaves many crucial details of substance, as well as all implementation and enforcement to member state governments (which are normally left to them).

- **Proportionality Principle** -- Another EC Treaty Article 5 "principle" is the "proportionality" principle, which provides that "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." In theory, this allows the EC to impose on EC citizens only such legislative or administrative obligations, restrictions, and penalties as are strictly necessary for the attainment of the purposes pursued, and then only if the objectives pursued fall within the Treaty's objectives. There must always be a "reasonable relationship" between the measures taken and the objective pursued by the EC -- that is, measures may not exceed what is appropriate and necessary to attain the objective.[28] In applying the proportionality principle, the ECJ has developed two tests -- an "efficacy" test (is the measure reasonably likely to achieve its objective?) and a "necessity" test (is the measure's adverse impact justified in view of the importance of the objective it pursues?). The proportionality principle, however, has no well defined substantive content, imposes no concrete decision criteria on the legislative branch, and is applied sparingly by the courts in judicial review.

- **Integration Principle** -- Article 6 of the EC Treaty requires that environmental considerations be "fully taken into account in the elaboration and consideration of other Community policies," but "does not allow priority to be given to environmental

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[27] Krämer, p. 10-11. Krämer argues, however, that the requirement of Article 95, ¶ 3, that the Commission "*take as a base* a high level of protection" in proposing internal market legislation under Article 95, does impose a theoretical legal requirement on the Commission, but one that has not to date been raised in a legal challenge. *Id.*, pp. 11-12.

[28] Case 11/70 Internationale Handelsgesellschaft v. Einfuhr- under Vorratstelle Getreide [1970] ECR 1125 at 1147, per Lamothe AG.

requirements over other requirements; rather, the different objectives of the EC Treaty rank at the same level and the policy must endeavour to achieve all of them."[29]

- **Precautionary Principle** -- One of the most important "principles" applicable to environmental matters is the "precautionary principle" in Article 174, ¶ 2 of the EC Treaty. That article requires that "Community policy on the environment shall be based on the precautionary principle…," but contains no definition of that principle. As Stone, Wiener, and others have noted, the precautionary principle has been defined in many different and inconsistent ways, some of which are not useful in guiding decision-making and some of which would stymie rational decision-making if adopted (Stone, 2001; Wiener, 2003; Sunstein 2004). The EC Commission has issued a communication[30] which interprets the precautionary principle to require risk management procedures in decision-making. It effectively extends the scope of the precautionary principle to all risk regulation, but does not define it and thus provides little or no useful substantive guidance as to the required level of precaution.[31]

- **Prevention Principle** -- Krämer suggests that this principle, also found in Article 174 EC, ¶ 2, is synonymous with the precautionary principle and likely has no independent legal content.[32] Other authors, such as De Sadeleer, have suggested that the prevention principle applies where risk is certain, while the precautionary principle applies where risk in uncertain. De Sadeleer. Environmental Law Principles. Oxford University [ ].

- **Rectification At Source** -- Krämer argues that it is not clear what this Article 174 EC, ¶ 2 "principle" means, and that in any case it "represents wishful thinking rather than reality," although it may, for example, have some effect, such as allowing (but not requiring) Community provisions dealing with import or export bans on waste.[33] It has also been invoked to support restrictions on chemical substances in products such as electronics, which would potentially cause environmental harm once the products are disposed of and the chemicals leach out to reach soil and groundwater.

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[29] Krämer, p. 19.

[30] Communication from the Commission on the Precautionary Principle. COM (2000) 1, 2 February 2000, http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000_0001en01.pdf.

[31] The proposed EU Constitution also requires that EU policy on the environment "shall be based on the precautionary principle," as well as on the principles that "preventive action should be taken, that environmental damage should as a priority be rectified at the source and that the polluter should pay." Article III-233, Paragraph 2.

[32] Krämer, p. 23.

[33] Krämer, p. 25.

- **Polluter Pays Principle** -- As Krämer recognizes[34], this provision of Article 174 EC, ¶ 2, is at base an economic principle, recognizing the need for legislation to "internalize" the "external costs" of actions affecting the environment, although it is too narrowly drawn since such "external costs" to the environment can be caused by many acts other than "pollution." It conveys no power not already possessed by the Community institutions.[35]

- **Available Scientific And Technical Data** -- This condition to EC legislative action, found in Article 174 EC, ¶ 3, is a weak "sound science" type of requirement. It requires that "available scientific and technical data" must be taken into account, but does not by its terms require studies, nor that a sound scientific base for action exist. It has had an impact in its contributions in thinking to the Commission's Better Regulatory initiatives, discussed below.

- **Regional Conditions** -- This Article 174 EC, ¶ 3 condition simply recognizes the fact of variation in relevant "environmental conditions" in Europe's regions, and requires that this variation be taken into account.

- **Potential Benefits and Costs** -- This Article 174 EC, ¶ 3 condition has had a major impact on environmental policy, as well as on EC policy more generally. It constitutes another area of legal development in which environmental law is leading events in other areas of law. Its impact is discussed below in the context of the Commission's Better Regulation impact assessment process in developing legislative proposals.

- **Economic and Social Development** -- Krämer reports that this Article 174 EC, ¶ 3 condition "is meant to reflect the less-developed Member States' concern that environmental protection provisions should not be imposed at the expense of economic growth," and that the Council and Parliament are required to consider "to what extent regional differences should lead to specific wording in the final texts adopted at Community level."[36]

D. EU Institutions

1. Commission

The EU Commission, effectively the EU Executive, consists of a team of 22 senior political appointees chosen by member states and approved by the Parliament, led

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[34] Krämer, p. 25.

[35] Krämer, p. 25.

[36] Krämer, p. 28-29.

by a President. It is charged with representing and upholding the interests of the EU as a whole, and heads a bureaucracy of about 24,000 officials.

The Commission has an important role in the EU legislative process. First, as a general matter, only the Commission can initiate legislation. Further, the Council cannot directly amend the Commission's proposal except by a unanimous vote. The Commission also can withdraw its proposal at any point until the legislation is finally enacted. Thus, the Commission, not the Council or the Parliament, largely governs the initial timing and choice of subject matter to be dealt with, as well as the initial form, structure, content, and legal basis of proposals for legislation.[37] As a result, the Commission is frequently said to be the "driving force" of the EU. It is this role of the Commission that is of most importance in this paper, and which most approximates the US procedures for notice and comment rulemaking. Second, the Commission has a consultative role during various stages of the EU legislative processes, and can shape the final content of legislation by withholding its consent to changes in the legislation in various ways and at various stages. Third, the Commission also has an important role in the passage of delegated legislation, that is, of administrative implementing regulation, also an important role in the context of this paper. Finally, the Commission has the tasks of managing and implementing EU policies (important here, since the Commission drafts the general and sectoral Environmental Actions Plans discussed below) and the budget, and of enforcing European law in the Court of Justice.

2. Council

The EU legislature is made up of the Council of Ministers and the European Parliament, with the Council of Ministers the senior legislative and policy-making body.[38] The Council is composed of ministers from each of the member states, and is thus not directly elected. Its members represent their member states -- indeed, member state *governments* -- as such. It has no fixed membership; its composition and thus membership varies with the policy area being acted on. The members of the Council for

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[37] One by-product is that EU legislation is drafted initially by Commission bureaucrats, not by legislative staff. This results in more intellectually coherent and sometimes more rational legislation than is found in the US. At least partially because these bureaucrats are normally not lawyers, however, EU environmental legislation has in the past frequently been so general and loosely drafted as to impede rigorous implementation and enforcement, a tendency that member states acting in the Council have had no incentive to discourage, since it has left them with more discretion over the actual applied stringency of environmental legislation during implementation.

[38] The Parliament's power on any particular legislative issue depends on the applicable legislative procedure. For example, under the so-called "co-decision" procedure of Article 251 EC, the Parliament has the power to block (and thus indirectly affect) the adoption of legislation.

any given piece of legislation consist of the ministers from each member state responsible in their own member state government for the policy area involved. Thus, when acting on environmental issues, the Council consists of the Environment Ministers from the member states, each of whom can commit his government and is accountable to that government.

Votes are distributed among countries largely by population (adjusted in favor of less populous countries). Voting on most issues, including most environmental, health and safety issues, is by "qualified majority" which requires (1) a majority (on some issues, two-thirds majority) of member states, (2) a minimum of 72.3% of the possible votes, and (3) affirmative votes representing at least 62% of the EU's total population

Each member state has a permanent team in Brussels, its "representation" to the EU, to participate on its behalf in the work of the Council. This representation is headed by a "permanent representative," a senior official who sits on the Permanent Representative Committee ("COREPER") that prepares the work of the Council, assisted by a number of working groups made up of officials from the national administrations (as opposed to the EU "representations") of the member states.

3. Parliament

The European Parliament is directly elected by EU citizens from the member states, and is the only EU institution that is composed of directly elected officials. It traditionally had only advisory power over legislation, but recently has taken on a much more active and powerful role in the evolution of the EU's complex legislative procedures. It now shares with the Council the power to legislate on matters covered by the co-decision procedure, the procedure chiefly applicable to environmental, health and safety legislation, and has effective veto power over such legislation. The chief committee involved in environmental issues is the Environment, Public Health and Consumer Policy Committee, although the Committee on Legal Affairs and the Internal Market and others also may play important roles depending on the nature of the subject matter.. The Parliament also has the power to approve or reject the nomination of Commissioners, and has the right to discharge the Commission as a whole.

4. Court of Justice

EU institutions have a right of judicial review of EU actions in the European Court of Justice.[39] Such actions are sparingly brought (except for Commission

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[39] This institutional right to judicial review is a major element of the checks and balances in the EU system, performing in some ways the same balance of power function as separation of powers in the US. In addition to such traditional, formal legal remedies as it contains, EU law also provides for certain informal "remedies," such as filing a complaint with a national government or the Commission, or with the European

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enforcement actions against member states over implementation of EU legislation). When the EU institutions do bring actions (other than Commission enforcement actions), the institutions are normally intent on vindicating their own institutional interests, which revolve around institutional jurisdiction and authority, rather than challenging the validity under the EU or EC Treaties of substantive provisions of EU legislation, or the legal or policy conformity of EU administrative actions with implementing legislation.

Private parties, as a general rule, do not have standing to challenge binding EC legislation (regulations or directives, as opposed to "decisions," which can be appealed by those to whom they are addressed), even where such legislation violates the Treaty, fundamental rights, or general principles of EU law. Subject to a limited exception,[40] private rights of action against generally binding rules cannot be asserted under EU rules of standing, unless an individual is both "directly" and "individually" affected.[41] This

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ombudsman. Private parties damaged by failure of member states properly to implement EU directives can also sue member states for damages under the *Francovich* case. *Francovich* v. *Italy*, Cases C-6, 9-90, [1991] ECR I-5357. This amounts, in effect, to an indirect form of judicial review of member state (but no EU institutional) implementation of EU law, and can be used by a party who has suffered damages to test and deter various forms of member state failure to implement EU law properly. Its direct purpose, however, is to ensure reparation for such damages. The *Francovich* doctrine does not provide for injunctive relief against the government, either alone or in addition to damages.

[40] Where a regulation is said to be, in fact, a disguised decision, an action is available.

[41] The language of Art. 230 of the EU Treaty says "of direct and individual concern." A person is not individually concerned if he is affected only as a member of a general class (Hartley, 2003:360-61). To be individually concerned, a person must be affected "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." *Plaumann* v. *Commission*, Case 25/62, [1963] ECR 95 at 107. There is a substantial body of European Court of Justice ("ECJ") jurisprudence since the *Plaumann* case on the meaning of "individual concern." *Cf*., the discussion of the EU implementation of the Aarhus Convention, *infra*. The new EU Constitution would seem to expand standing for private parties by creating a right of action with respect to "a regulatory act which is of direct concern to him or her and does not entail implementing measures." Article III-365, ¶ 4. The term "regulatory act," however is defined to exclude legislative acts. Article I-33 (1). Further, this explicit grant of standing in respect of "regulatory acts" might have the effect of persuading the courts to use a stricter definition of "individual concern" in the case of regulations that constitute disguised decisions. Finally, Article III-364, ¶ 4

(continued . . .)

lack of adequate private action rights against generally binding legislation and regulation is a severe defect in the architecture of the EU's institutional system that is not generally recognized in Europe as such.

The Commission's recent Better Regulation regulatory reform initiatives, discussed below, tend to deal with the front end of the lawmaking and rulemaking process generally, and public participation particularly, championing such concepts as impact assessment, access, transparency, and stakeholder involvement. They are generally not legally binding even in these areas insofar as they apply to EU institutions (except as proposed in the environmental area to implement the Aarhus Convention). They also tend not to deal with issues like standing to invoke, and accountability through, judicial review of EU government rulemaking at the behest of affected individuals (as opposed to the already existing judicial review possibilities for EU institutions under the EU and EC Treaties). There are, however, legislative proposals implementing, in the environmental area, the Aarhus Convention, which provide for judicial review of member state actions for conformity with EU law and citizen enforcement actions against regulated entities. The continuing weakness of the judicial review (and thus accountability) mechanisms of EU administrative law will weaken effective implementation of the other reform measures that the Commission's Better Regulation efforts do provide for.

5. The Interplay Between The Institutions

EU government is said not to be based on a separation of powers (Majone, **[cite]**). While this may be true in some senses, that does not mean that there are no checks and balances. In the EU, the checks and balances are chiefly institutional. They are built into the complex interplay between the EU institutions of the legislative and executive branches (and between them and the member states) in the legislative process, and in the ability of the various EU institutions (including the member states) to obtain judicial review of the actions of the others in the European Court of Justice.

The structural predominance of the member state governments in the EU legislative and policy process has led to that process traditionally resembling a treaty negotiation between sovereign states more than the dynamics of legislation in national

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might also undermine any effort to construe Articles I-29 ¶ 1 and II-107 as proclaiming an EU constitutional law right to a judicial review cause of action and standing going beyond "individual" concern. With regard to such a claim as to the effect of Article I-29 ¶ 1, in any case it must be noted that any such right would apply only against Member States and that the Article's reference to "*remedies* ... sufficient to ensure effective legal protection" (emphasis added) may be interpreted to exclude standing rights, on the ground that they do not constitute "remedies."

level parliaments. EC policy is set chiefly on the basis of the results of negotiated political deals that involve trade offs of national interests across a wide range of issues.[42]

Given the apparent influence of member states in EU legislation, given that they are acting in their institutional capacity in the Council, and given their only indirect accountability to their national publics when doing so, their power has traditionally led in many cases to environmental legislation that appears to regulate, but is subtly drawn so that it does not, or is hard to implement and enforce, or *de facto* leaves most of the key substantive and procedural issues involved in implementation to the Member States, who have been loath to turn over actual control (as opposed to the appearance of control) of environmental policy to EU institutions.[43]

The treaty-like process in the Council has also had important implications for the nature of EU legislation over time. It has had impacts on both the stringency of EU environmental legislation, and on the extent to which EU legislation imposes relatively general standards through directives or regulations, as opposed to including also specific, detailed implementing requirements normally left for implementing rules or other administrative actions in the US system. Both of these issues have gotten swept up in the struggle over the vertical distribution of power in the EU, with varying results over time in terms of both the degree of stringency (*e.g.*, ineffective and less precautionary legislation early on, with real control over degree of precaution retained at member state level, but lately more and better legislation, with a recent trend to more stringency due partly to the impact of the Nordic countries).

Further, there has thus been a general tendency for the Commission to push for more, and more stringent, legislation than some member states felt comfortable with, and for the EU to enact more stringent legislation as the Parliament has increased in power and operated in cooperation with the Commission. This tendency has recently become more pronounced as the EU has expanded. The Nordic member state governments, reflecting the sentiment of their populations, have joined the German government, which has traditionally been more green than other member states, to push greener legislation within the Council. It remains to be seen, however, what impact the addition of Central and Eastern European countries to the EU will make in the balance of power on environmental regulation in the Council, although it seems likely to have a tendency to diminish the degree of stringency due to the lower standard of living of the accession countries and thus their desire for economic development, and to their current less advanced status of environmental protection.

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[42] *Cf.*, Radaelli, 2003: 12-13.

[43] *C.f.*, Krämer, p. 52.

E. EU Lawmaking Instruments

EU law is made up of four main sources -- EU and EC treaty provisions (called "primary legislation" in Europe), legislation enacted by the Council and Parliament (called "secondary legislation" in Europe), administrative implementing regulation (called "delegated lawmaking" in Europe), and judicial case law - which are commonly referred to as the *acquis communautaire*.

Article 249 of the EC Treaty provides that "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." Generally, the EC Treaty does not provide whether to proceed by way of a regulation, directive or decision and only rarely prescribes the necessity of legislating by way of regulation.

Thus, legislation, as we are using the term, is based on specific authority granted by subject matter in the EU or EC Treaties, and may take the form of:

(1) Directives, which bind Member States with respect to the legislative objectives to be achieved within a certain time period, while, at least in theory, giving national authorities the freedom to choose how to translate such objectives into national law (*e.g.*, choice of form and means to use),

(2) Regulations, which are directly applicable and binding on the regulated community in all Member States without the need for any national implementing legislation although Member States often do adopt some form of implementing measure,

(3) Decisions, which are binding on those (e.g. Member States, enterprises or individuals) to whom they are addressed, and normally do not require national implementing legislation, and

(4) Recommendations and opinions, which are not binding.

Because we are dealing in this paper with administrative "rulemaking" in the US sense of the enactment of generally applicable prospective rules, and not with administrative adjudication, we will hereafter discuss mostly directives, regulations, recommendations and opinions, not "decisions," although Commission "decisions" may be thought to play a role in the standards process of delegated lawmaking. We do, however, discuss below several other non-statutory forms of administrative actions taken in the environmental area that resemble legislation in some regards or are important to or integral in the development of Commission proposals for legislation or its promulgation

of administrative implementing regulation -- communications, action programs, and resolutions.[44]

In the environmental area, the EC acts chiefly through directives. Krämer says of EC environmental directives:

> Directives[footnote omitted] are the most frequently used instrument in Community environmental policy.…[D]etailed directives are frequent for products….In contrast to that, environmental directives tend to be of a general nature. In particular the debate on subsidiarity and deregulation and the general loss of integration capacity of the Community has led to environmental directives which limit themselves to outline general rules, framework provisions and basic requirements. Provisions on measuring methods and frequency, emission limit values, quantitative restrictions and other similar provisions are only laid down in exceptional cases.

Krämer, p. 52.

Regulations are used in environmental regulation much less often. Krämer notes:

> [R]egulations are exceptional. They are normally adopted when uniform provisions are sought….A first group is composed of regulations which set up a specific administrative structure….[*e.g.*, "uniform procedures or structures….the procedures for attributing an eco-label…and the eco-audit scheme]. A second group is formed by regulations which transpose obligations of international environmental conventions into Community law. They mainly serve to organize international trade, concerning products, waste, fauna and flora species. Examples are the Regulation on ozone-depleting substances,(footnote omitted) the shipment of waste (footnote omitted) and the trade in endangered

[44] We do not deal with environmental agreements, since these involve only agreements by the regulated community to achieve environmental objectives. In Krämer's view, "[s]ince the Community may only act within the limits of powers conferred upon it (Art.5)[and since Krämer notes that environmental agreements "are not mentioned in Article 249 EC"], it is doubtful whether they are at all capable of regulating substantive parts of Community environmental policy." Krämer, p. 57.

> species….[A]nd the import and export of chemicals.(footnote omitted)….
>
> ….Regulations do not exist in the water, air and noise sector and there are only a few in the area of nature protection, waste and chemicals. However, these last two sectors show a slowly increasing need for uniform provisions.

Id., p. 50-51. The proposed new EC chemical legislation, known as REACH, would also be a regulation.

As to recommendations in the environmental area, Krämer tells us that:

> Commission or Council recommendations have no binding force. They play a limited role in Community environmental policy.[45]

Id., p. 54. After listing some of the Council and Commission recommendations over the years, Krämer goes on to say that "[n]one of these recommendations had, as far as can be seen, any significant influence on Community or national environmental policy or law." *Id.*

The Commission has used "communications" with some regularity. While they could be classed as "opinions," Krämer takes the position that communications are "not expressly provided for in the EC Treaty." He notes that they are not legally binding, but that :

> They are sent from the Commission to the other institutions, in particular the Council or the Parliament, and expose the Commission's position on a particular problem, indicate orientations and discuss options, which the Commission considers possible. Since the beginning of the 1990's, the number of communications on environmental matters has increased.
>
> Communications appear under different headings, as strategies, green or white papers, reports or communications. Legally, there is no difference. Communications may be accompanied by a draft for a Council resolution, a directive, or a regulation.

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[45] Krämer, p. 54.

Krämer, p. 55.

Guidance notes are now used by the Commission to explain how Member States or the regulated community should interpret and apply certain pieces of EU legislation. They are not legally binding (except perhaps on the Commission itself, until changed), and are probably best classified as a form of ”communication” or “opinion.” In the environmental area, the so-called “Brefs” that spell out by industry category the “best available techniques” for environmental controls are good example of guidance notes. Member states tend to resist Commission “guidance,” they believe encroaches upon their freedom to implement.

Community environmental action plans have been used from the early 1970’s, which were legally communications. They “set out for a period of four-five years the objectives, principles and priorities of Community action which the Commission envisaged” during this period when environmental legislation had no express legal basis in the EC Treaty, were found by the European Court not to “contain legally binding or enforceable provisions,” and were followed by political resolutions by the Parliament and the Council:

> Between 1973 and mid-1988, five environmental action programs were agreed at Community level. Their main effect was political. They achieved a large consensus among Member States on objectives and priorities of Community environmental policy, and since the majority of Member States did not have a national environmental policy, the measures agreed and adopted at Community level often influenced environmental policy within Member States. Since the end of 1993, environmental action plans have had to be adopted by way of a joint decision by the European Parliament and the Council (Art. 175(3)).
>
> ….Action programmes under Article 175(3) must at least outline priority objectives for Community action, provide for measures to achieve these objectives and contain a time period within which the measures are taken. The right for initiative for such a programme rests with the Commission, and no other institution can oblige it to submit a programme.(footnote omitted)

Krämer, p. 55. Sectoral action programs can be used, and have been by the Commission under the current Sixth Environmental Action Plan (which proposes development of “thematic strategies,” the functional equivalent of sectoral action programs, covering soil protection, the urban environment, the marine environment, use of pesticides, the use of

natural resources, the recycling of waste, and air pollution).[46] While Jans correctly observes that action plans cannot legally bind Member States,[47] Krämer argues that they are legally binding on the Commission by force of Article 175 ¶ 3 EC insofar as the Commission is obliged to make proposals for specific measures once it has outlined priority objectives, and that this obligation can be enforced by the other Community Institutions under Article 232 EC.[48] There is no case law on point, however.

Resolutions are political statements by the Council or the Parliament which have no basis in the EU or EC Treaties.[49] They are frequently in reaction to a Commission communication, are not legally binding, and are adopted by consensus in the Council and by majority vote in the Parliament.[50]

F. The EU Legislative Process

In most areas, only the Commission has the authority (and in some cases, the obligation) to propose legislation, while the Parliament and the Council have the authority to amend and adopt such legislation (although the Council cannot directly amend a Commission proposal[51]). As a general matter, the extent to which the Council and the Parliament may exercise their right of amendment and adoption depends principally on the type of legislation involved and the subject matter of the legislation. In other words, various types of subject matters have different authorizing sections in the EU and EC Treaties.

Thus, the subject matter of the legislation determines the proper authorizing section (the legal base) in the treaty. Each separate authorizing treaty section then generally specifies the legislative procedure applicable to the subject matter in question, and thus the relative powers of the Council and Parliament (e.g., most environmental decisions are subject to co-decision, while an agricultural measure is normally subject to the consultation procedure). For the types of legislation of most interest in this paper, binding legislative instruments of general validity (*i.e.*, regulations and directives), there are at present essentially two types of legislative procedure -- the consultation procedure and the co-decision procedure. Of those, the most important is the co-decision

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[46] Krämer, p. 36.

[47] Jan H Jans, European Environmental Law (Second Revised Edition) p.49. **[Complete cite]** ("Jans"); *accord*, Krämer, p. 56.

[48] Krämer, p. 55-56.

[4949] *Id.*, p. 57.

[50] *Id.*

[51] Article 250 EC.

procedure, which applies where ESH legislation is based on Article 95 or Article 175, the two most directly relevant bases of authority for environmental legislation.

The co-decision procedure is used for the bulk of environmental legislation. Such legislation stems primarily from three EC Treaty provisions -- Articles 175 (2) governing environmental measures as such, Article 175 ¶ 3 governing environmental action programs, and Article 95 governing internal market measures.[52] All three provisions specify that the legislative procedure of Article 251 EC, the co-decision procedure, is to be used. Suffice it to say that this complex procedure, which takes place *after* the Commission proposal for legislation that we focus on has been delivered to the Council and the Parliament and which generally allows the Council to act by "qualified majority" voting, allows the Parliament to interact directly with the Council in the development of the ultimate legislation and gives it a veto over the terms of that legislation.

Other environmental issues, governed by Article 175 (or possibly Article 94 for, e.g., some forms of environmental taxes), call for unanimous voting in the Council and must be subjected to the consultation procedure, where the Parliament must be consulted but has no direct right to participate in the development of the legislation with the Council and has no veto power. Environmental matters that:

- are primarily of a fiscal nature,
- affect town and country planning
- affect quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,
- affect land use, with the exception of waste management,
- significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply

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[52] By force of the "integration" requirements of Article 6 EC, environmental or environmentally related measures may also be adopted under other EC Treaty provisions dealing, for example, with agriculture (Article 37 EC) and transport (Article 80 EC), each with its special requirements. Because this paper does not deal with the legislative process itself except in passing, those will not be discussed. Nor will we discuss (1) aspects of Articles 175 ¶ 2 or 95 that deal, in different ways in each provision, with the extent to which Member States may undertake more stringent measures, or (2) the more uniform requirements of those provisions with regard to whether and how various other EC bodies must be consulted, since these aspects are not directly material to the process by which the Commission develops proposals for legislation or promulgates implementing administrative regulation.

fall under the consultation procedure of Article 175 ¶ 2. Internal market measures that have environmental implications, but that constitute fiscal provisions, provisions relating to free movement of persons, and those relating to the rights and interests of employed persons are subjected to unanimous voting in the Council and the consultation process by Articles 95 ¶ 2 and 94 EC.

G. EU Delegated Lawmaking

One must look to specific authorization in the EU and EC Treaties to determine which institution has, as a matter of law, implementing powers under EU legislation, and on what terms. This is so because EU institutions have only the powers conferred, and because the executive and legislative powers are not conferred exclusively on any one institution. Even so, it is the Commission, as a practical matter, that has the bulk of the implementation authority. It carries out this authority in two main ways -- through the comitology process and through the standards process.

Article 202 EC provides that the Council shall:

> confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.

In short, the Council, while it can and does on some occasions exercise implementing power, is to give the principle executive role to the Commission, subject to "principles" and "rules" that the Council lays down.

Implementing power, as the term is used in the EU, encompasses both the power to regulate (secondary to, and subject to, EC legislation) and to apply rules to specific cases by individual decisions.[53] Implementing power, when exercised by either the Council or the Commission, can be exercised by use of either directives or regulations, which can generate confusion where careful distinction is not made between the use of these two instruments as legislation and as delegated legislation or implementing administrative regulations (as we are using these terms in this paper). The use of implementing powers has been broadly construed by the European Court. The

[53] EU Constitutional Law, ¶ 14-052.

Commission may in some circumstances be authorized to compel Member States to take temporary measures if otherwise the aims of harmonization of national legislation would be jeopardized, and to impose penalties on Member States in its implementing provisions, for example, where "designed to secure the proper financial management of Community funds."[54]

In exercising its power to impose "principles" and "rules" for the exercise of delegated power by the Commission, the Council and Parliament have required a decisional process in which the Commission must collaborate with various committees they have required to be set up under EU legislation. The Technical Advisory Committee for Waste, for instance, was set up by the Waste Framework Directive. It is this process that has been named the "Comitology" process. It is governed by a generic Council Decision, the current one being the Comitology Decision of June 28, 1999.[55]

The Council, through various pieces of subject-specific legislation, has provided for the setting up of a large number of committees, with various names and for various purposes, which are made up of representatives of the Member States, but which are each chaired by a representative of the Commission. The types of committees, and the procedures each type is to follow, are set out in the Comitology Decision. Typically, the Council and Parliament, when legislating, set out in the legislation the nature and extent of the implementing power being delegated to the Commission, reference the Comitology Decision, and select the relevant committee (and by doing so, select also the procedures to be followed). See, for example in the environmental area, the Waste Framework Directive and the WEEE and RoHs Directives.

Comitology processes are pervasively used to further elaborate, to set standards under, or to update ("adaptation to scientific and technical progress") over time environmental legislation. Thus they deal with crucially important issues and details of elaboration and implementation. The specifics of the Comitology process and its employment in the environmental area are set out in the more detailed discussion of delegated lawmaking below.

The second way the Commission handles administrative implementing regulation involves the use of the standards process -- what is called the "New Approach" to

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[54] *Id.*

[55] Council Decision 1999/468/EC of 28 June 1999 Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, 1999 O.J. (L184/23). This Comitology Decision was driven by the Parliament's desire to participate in implementation of acts adopted by co-decision. EU Constitutional Law, ¶ 14-054.

technical harmonization and the "Global Approach" to conformity assessment.[56] The Council has used this process in some 25 directives since 1987, chiefly in areas relating to product regulation where detailed, uniform technical regulatory specifications are needed to ensure freedom of movement of goods in the internal market. The approach is for the legislature to set mandatory general "minimum essential requirements," to require that all products in a sector be in conformity with those requirements (and generally to show that conformity by qualifying for and displaying a "CE" mark) in order to be legally placed on the EU market. The legislator allows the Commission to delegate to national or Europe-wide private standards organizations the elaboration (pursuant to a Commission mandate of more detailed technical specifications to implement the essential requirements (such specifications are normally called "harmonized European standards"), and techniques for showing or judging compliance with those requirements (*e.g.*, certification and testing procedures, called "conformity assessment procedures"). These specifications and procedures are then reviewed by the Commission, and if accepted, are published in the Official Journal. Once published, compliance with these standards creates a presumption of compliance with the pertinent directive's essential requirements, which implies that the authorities will have the burden of proving that a product, despite compliance with the standards, does not meet the essential requirements. If a company chooses not to comply with the standards, which it is free to do, it must demonstrate that its products meet the essential requirements.

The standards process is not widely used in EU environmental, health and safety regulation. It has been used in the area of packaging and packaging waste, and to a limited extent in respect of marking under the Waste Electronics Directive. Its details are discussed under the heading of The Standards Process below.

II. EU Legislation

A. Proposals For Legislation

1. A Commission Monopoly

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[56] In light of the "voluntary" nature of the standards, both as adopted at EU and at Member State level, it might be argued that the standards process is one of soft law only, and thus is not properly termed or considered a process of "delegated legislation." The discussion of standards below in the paper indicates the peculiar nature of their legally binding effect, however, despite their being "voluntary," so we analyze them as a form of delegated legislation. What the process is called, however, may not make much difference for purposes of the analysis. It is not clear that the applicability of the various Commission provisions dealing with access to documents and public participation that are considered in the analysis would differ if the standards were called soft law and not "legislation," delegated or otherwise.

The Treaty grants the Commission the authority to initiate the legislative process in the area of environmental law, i.e., all proposals for binding measures require the formal approval of the College of Commissioners in order to enter the legislative process as provided for by the EC Treaty (Treaty).[57]

However, the European Parliament (EP) and the Council have the "right to request" the Commission to submit a legislative proposal under certain conditions. For instance, Article 192 of the Treaty states that the EP may "request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty." The Treaty contains a similar provision in favour of the Council at Article 208, which states that the "Council may request the Commission (…) to submit to it any appropriate proposals." Consequently, the Interinstitutional Agreement on better law-making states that the "Commission will take account" of such requests for the submission of legislative proposals.[58]

In addition to their Treaty-based authority to request legislative proposals from the Commission, the EP and the Council can influence the legislative initiatives of the Commission by adopting resolutions, in order to draw Commission's attention to the necessity of legislating or not legislating on a given issue.

The monopoly of the right to initiate legislation gives Commission a broad level of discretion regarding the form, objective, content and the timing of any of its proposals. It also has the authority to decide what kind of preparation work should be done before the actual submission of the proposal to the other institutions.

The rationale behind entrusting the Commission with such a monopoly is to prevent the submission of legislative proposals inspired by nationalistic interests that would lead to the backsliding of Community legislation.

2. The Commission's Preparatory Work

a. Introduction

While the EC Treaty grants the Commission a monopoly, on the whole, for initiating the legislative procedure, it is silent as to the internal process the Commission has to follow until a legislative proposal is sent to the Council and the European Parliament. This has given the Commission the freedom to develop its own set of practices, but has resulted also in its freedom to make those practices generally legally non-binding, conferring no judicially enforceable rights on participants in that process.

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[57] All legal bases for environmental legislative activity refer to Article 251. The only exception to this, Article 175(2), also provides for an initiation proposal from the Commission.

[58] Interinstitutional Agreement on better law-making [2003] O.J. C321/1.

On the whole, however, the Commission has made good use of its freedom in the preparation of proposals for legislation: it has, in recent years, shown itself to be open and transparent regarding its preparatory activities and has led the way at the EU level with its Better Regulation initiatives. For instance, in the environmental area the Commission has set out its priorities in its Environmental Action Plans, has consulted constituencies through its Green Papers and has provided clear blueprints of some of its legislative plans in its White Papers.

The Commission has also produced in 2001 a report on improving and simplifying the regulatory process[59], and a White Paper on European Governance.[60] In June 2002, the Commission issued a "Better Lawmaking" package of communications, describes in more detail below.[61] These measures, however, constituted policy actions or guidelines, none of which were legally binding on the Commission or granted judicially enforceable rights to anyone, much less individuals in the public. In short, the Commission has taken steps to open up its lawmaking processes, at least where it is preparing proposals for legislation for submission to the Council and Parliament although decidedly not as to its participation in the delegated lawmaking comitology process. Even so, it has been quite careful to keep the process within its own unilateral control, not adopting measures that could be legally enforced against it, and under which it could be held judicially accountable, except in certain limited areas. As discussed below, environmental regulation is one of those areas.

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[59] Commission of the EC. Interim Report to the Stockholm European Council: Improving and Simplifying the Regulatory Environment. COM (2001) 130 final. Brussels, 07.03.2001, p. 5.

[60] Commission of the EC. White Paper on European Governance. COM (2001) 428 final. Brussels, 25.7.2001.

[61] The "Better Lawmaking" package includes four documents: a communication on European governance, an action plan on simplifying and improving the regulatory environment, a communication on impact assessment, and a document on consultation and dialogue. Commission of the EC. Communication on European Governance: Better Lawmaking. COM (2002) 275 final. Brussels, 5.6.2002. Commission of the EC. Action Plan "Simplifying and Improving the Regulatory Environment." COM (2002) 278 final. Brussels, 5.6.2002. Commission of the EC. Communication on Impact Assessment. COM (2002) 276 final. Brussels, 5.6.2002. Commission of the EC. Communication: Towards a Reinforced Culture of Consultation and Dialogue - Proposal for General Principles and Minimum Standards for Consultation of Interested Parties by the Commission. COM (2002) 277 final. Brussels, 5.6.2002. It must be noted, however, that the provisions in these documents are not intended to be binding. *See also* Communication from the Commission. Updating and simplifying the Community acquis. Brussels, 11.2.2003, COM(2003) 71 final. *See supra* in Section III. A. 3. the discussion of the most recent EU "better regulation" initiatives.

The Commission has used directives to impose access to information, and in the environmental area, certain impact assessment and public participation requirements on Member States. It has now issued two more directives in the environmental area imposing on Member States the requirements of the Aarhus Convention with regard to access to information and public participation. A third directive implementing the access to justice provisions of the Aarhus Convention as to breach of EC environmental law at the Member State level is in the legislative process.

The Commission has been considerably slower and more modest in its ambitions to impose legally binding requirements in these various regards on itself. Having relied on non-binding policies dating from 1993/94, the Commission was faced in 1997 with an amendment to the EC Treaty, which took effect in 1999, that required access to documents held by EC institutions.

The Commission was also faced with the new Aarhus Convention, which it and other European countries had signed, which took effect in 2001, and which requires in the environmental area, extensive rights of access to documents, some rights to public participation, and modest rights to access to justice.

As a result, the Council adopted Regulation 1049/2001 on access to documents held by EC institutions, which did enact legally binding requirements applicable to EC institutions to make documents available on request of the general public, and which provided judicial relief.

There being no treaty obligation to allow public participation in Commission processes, however, the Council has adopted no legislation requiring such participation. The Commission has operated under two Communications from 2002 on public participation, under a 2002 Communication and Guidelines on impact assessment, and under a Communication on use of experts. Recently, on 15 June 2005, it has published updated, more extensive Impact Assessment Guidelines, but these again are not legally binding and confer no rights, leaving matters firmly in the control of the Commission bureaucrats.

In the area of environmental regulation specifically, the EU has ratified the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which provides for public participation in procedures such as decision making on specific activities, the preparation of plans, policies and programs, and the preparation of executive regulations and generally applicable legally binding normative instruments.[62] The EC is in the process of adopting legislation to implement the Aarhus Convention. In 2003, the EU adopted two directives

[62] Articles 6, 7, and 8, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 23-25 June 1998.

to implement Aarhus with respect to member state governments, dealing with public access to environmental information in member states and with regard to public participation in member states.[63]

On 24 October 2003, the Commission proposed a "package" of three legislative proposals to complete implementation of Aarhus by dealing with access to information and public participation at the level of the EU institutions, and with judicial review at both the EU and member state levels, all of which remain in the legislative process.[64] The proposed Regulation that would apply to the EC institutions the Aarhus provisions on access to documents, on public participation, and on access to justice is of great importance in the area of environmental regulation, since it would impose legally binding requirements in these regards on EC institutions, at least in so far as environmental matters or actions are involved. This proposed Regulation is discussed in more detail below.

Both the Aarhus Convention and its EU implementing measures, however, apply only to legislation in the environmental field. Further, even in the area of environmental regulation, neither the Aarhus Convention itself, nor the proposed EU implementation of it, provides strong judicial review rights for affected individuals, especially with regard to rulemaking, and with regard to the illegality of government action in general, as opposed to with regard to access to information or "citizen enforcement" of environmental law.[65]

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[63] Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information repealing Council Directive 90/313/EEC (OJ L 41 of 14.02.2003, p. 26), and Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plan and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156 of 25.06.2003, p.17).

[64] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (COM (2003) 624 final, 24.10.2003); Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access of Justice in Environmental Matters to EC institution and bodies (COM (2003) 622 final, 24.10.2003); Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters (COM(2003) 625 final, 24.10.2003).

[65] In addition to requiring opportunities for national-level review in "a court of law" or "other independent and impartial body established by law"(but not necessarily a

(continued . . .)

In short, while the Commission has showed leadership, and its reforms are useful, the EU institutions have been cautious, both in the Commission's generally applicable Better Regulation initiatives and in the Parliament's and Council's implementation in the environmental area of the more onerous Aarhus Convention provisions to the activities of EU institutions, about exposing themselves to legally binding requirements enforceable by the citizenry. Other than Regulation 1049/2001 dealing with access to documents from EC institutions, none of the Commission's general administrative process reform measures at the EU level provide for actual legal rights, much less accountability as to the exercise of those rights through broad public rights to judicial review. In some cases where the EU does grant standing rights to initiate judicial review of government decisions (*e.g.*, in the implementation of Aarhus and in the proposed EU Constitution), it has tended to limit challenge to "acts and omissions" (which may well not be intended to include adoption of regulations or directives, whether by the Council and Parliament or by the Commission), and to lack of enforcement of existing law (as opposed to challenge to the validity of substantive law). The EU has also tended to legislate a right to challenge only in an asymmetrical manner, by granting expressly such privileges to environmental groups, not to regulated industry or individuals in the public generally.

b. Initiation

(1) Influence From Member States

The impetus for EU environmental legislation frequently comes from the Member States. There can be many roads to initiation. First, for example, some "green" Member States may want, for competitive reasons, to spread the burdens of compliance with stringent environmental provisions to other Member States by having the matter regulated at EU level. Second, as another example, the Commission sometimes, particularly in the case of environmental regulation that affects products in commerce, like chemicals and cars, will take the initiative to regulate uniformly at the EU level to preempt conflicting regulation stemming from one or more Member States. The original development of "take-back" requirements in the EC's packaging waste legislation might be an illustration of the operation of both of these two reasons simultaneously, with Germany's then-Environmental Minister trying to spread the idea to other countries and the Commission moving to prevent harm to the internal market from proliferating non-

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court) of its access to information and public participation obligations as those have been transmuted into national law, the Convention requires that national law allow judicial *or administrative* challenge to "acts and omissions by private persons and public authorities *which contravene provisions of its national law relating to the environment*" (thus, only to violations of substantive environmental law, not as to the validity of such law) by entities that "meet the criteria, if any, laid down in…national law," (thus requiring no change in national standing law). Art. 9 (1)-(3).

uniform requirements. Another example would be the regulation of the chemical constituents of electrical and electronic products in the RoHS Directive.

(2) Influence From EU Institutions

The political agenda of the Council or the Parliament can also influence the Commission to initiate environmental legislation, particularly if return "consideration" is needed in some inter-institutional bargaining process. The Parliament, in particular, has a Treaty basis in Article 192 EC for requesting that the Commission submit a proposal for legislation "on any matters on which it considers that a Community act is required for the purpose of implementing [the EC] Treaty," although such a "request" is not legally binding. The Commission may also be thought to have at least a "political, if not legal, obligation" to submit legislation in areas in which it has committed itself to do so in an Environmental Action Program, now that such Programs are adopted as decisions by the Council and Parliament pursuant to the requirements of Article 175 ¶ 3.

(3) Influence From Other Sources

(a) Other National Legal Systems

The Commission studies the environmental legal systems of other countries carefully, particularly that of the United States. It sometimes gets ideas both as to what it would like to do and what it would like to avoid through this process. An example is the EC environmental liability directive; in preparing that directive, the Commission had a series of studies done on the US regimes for natural resource damage and oil pollution damage.

(b) International Law Obligations

There has been a veritable explosion of international treaty making in the environmental area over the last few decades, and most of those treaties must be implemented at the national level. In the case of the EU, this implementation sometimes takes place at the EU level -- the EU legislation implementing the Aarhus Convention being a good recent example. Likewise, the Montreal Protocol on CFCs was implemented by means of a Regulation, and so was the Basel Convention on the international shipment of hazardous waste.

(c) Interested Third Parties

The political agendas of both the environmental non-governmental community and the business community can serve as the initiating spark for Commission interest in proposing legislation. The proposed REACH Regulation was, at least in some respects, influenced by the ENGO community's demands for more chemical information and substitution of dangerous substances.

(d) Specific Incidents

In the environmental area, both in the EU and in the US, some specific disaster or set of disasters is frequently the initiating event in proposals for legislation. One of the earliest pieces of EU environmental legislation, the 1978 Titanium Directive, dealing with waste from the titanium dioxide industry, can trace its initiation to concern over waste discharges into the Mediterranean Sea from a Montedison factory at Scarlino, Italy, which caused concern in Corsica and thus difficulty with the French government.[66] Likewise, the 1976 industrial accident involving dioxin releases at Seveaso, Italy, was a key factor in the proposal of the original version of the "Seveaso" Directive, a directive that dealt with accident prevention and emergency planning at major industrial sites.[67] The later major industrial accidents in Bhopal, India in 1984, and the pollution of the Rhine in Basel, Switzerland in 1986 drove two amendments to the Seveaso Directive in 1987 and 1988.[68] More recently, two mining accidents in Aznalcollar, Spain in 1988 and in Baia Mare, Romania in 2000 led the Commission to amend the Sevaso Directive in 1996 to extend its coverage to storage and processing activities in the mining industry, and accelerated the Commission's proposal for a directive on environmental liability.[69]

c. The Commission's Internal Deliberative Process -- An Overview

The development of a legislative proposal is normally assigned to or undertaken by the Directorate General responsible for the subject matter. **[Can the Commission reviewers give us help on the politics of the choice of lead DG?]** The Commission, through that DG, begins consulting with Member State Experts (who may come from national environmental or other administrations, but can also come from the private sector) with the first draft of a directive or regulation.[70] Such a draft is "frequently accompanied by background documents which explain the approach chosen, indicate the options and raise other matters that may be of interest." Krämer, who has many years of practical experience at DG Environment, reports that "[p]ractice varies as to whether at this stage of he drafting a consensus is sought with other departments inside the Commission before a draft is sent to a wider audience."[71] These discussions will normally be multi-lateral discussions with experts from all the Member States (designated, upon invitation from the Commission to the various Member State Permanent Representations, by those Representations) and officials from other interested Commission departments, in Brussels on invitation by the Commission, which chairs

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[66] Krämer, p. 161.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*, p. 68.

[71] *Id.*

them.[72] The length of this process varies widely, depending on the political sensitivity of the issues being dealt with.[73] Bilateral discussions with "important" Member States, which would take place in Member State capitals, would be unusual and limited in number.[74]

While the governmental consultation process goes on, there are simultaneous meetings with business organizations and environmental non-governmental organizations. Krämer reports that:

> No systematic consultation is organized, although the Commission services prefer consultation with European organizations over national bodies or even individual companies. The sheer number of professional organizations guarantees them a greater chance of consultation, compared to environmental organizations which are under-represented at Community level and lack resources, know-how and expertise in successful lobbying.

Krämer p. 69. Although this may have been so in the past, over the last decades, the sophistication, know-how, and resources of ENGOs have grown substantially.

For major legislation, the Commission has now organized its internal deliberations around a critically important impact assessment process, which is discussed in detail below. We also discuss below, EU-level administrative provisions for, and sometimes rights to, access to documents and participation during the Commission's deliberative process, some of which are applicable to all legislation, but the most important of which result from implementation at the EU level and apply only in the area of environmental legislation.

Once the impact assessment and consultation processes are concluded, the responsible Directorate General sends a draft text, along with an explanatory memorandum (in a standardized format governed by internal Commission rules) to all interested Directorates General and to the Legal Services with a request for approval.[75] There is then an attempt to reach a compromise text that satisfies all the DG's involved

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[72] *Id.*

[73] Krämer reports that on technical matters with little political content, sometimes only two meetings suffice, but that on politically sensitive proposals like that on environmental impact assessment and on liquid beverage containers the number of drafts of the proposal can exceed twenty. *Id.* p. 69.

[74] *Id.*, p. 68.

[75] *Id.*, p. 69.

(who have their own agendas and are responding to lobbying), and the revised text then goes to the College of the Commissioners, where attempts are made at *cabinet* level to reach a political compromise on outstanding matters if necessary.[76] Where this is successful, the Commissioners approve through a written procedure; where this is unsuccessful or "where the text is of political significance," the Commissioners discuss the matter orally and can adopt a text as the Commission proposal by majority vote.[77]

An official Commission proposal for a regulation or a directive is then published in the Official Journal of the European Communities, Part C, and the explanatory memorandum, which is not an integral part of the proposal, is made available to the public in the form of an official COM-document.[78] Krämer reports that:

> The text of the proposed Act is drafted in all 11 languages, while the explanatory memorandum is usually produced only in English, French and German.

Krämer, p. 70.

The Commission's proposal is then transmitted to the Council, which passes it on to the European Parliament, the Economic and Social Committee and the Committee of the Regions (the latter two of which normally must render opinions), and the formal legislative process commences.

d. The Impact Assessment Process

Over the years, each Directorate-General (DG) had its own way of carrying out its preparatory work for legislative proposals, leading to a sense of inconsistency at the overall Commission level. For instance, some DGs heavily used impact assessment while others were not using the tool at all. Also, the way in which the impact assessment was carried out varied across the different DGs.

In 2002, within the framework of the Better Regulation Action Plan and of the European Strategy for Sustainable Development, the Commission decided to bring more consistency in the preparatory work by issuing three sets of non-binding guidelines that would apply equally to all Commission services:

- Guidelines regarding the impact assessment process,
- Guidelines defining the minimum level of consultation, and

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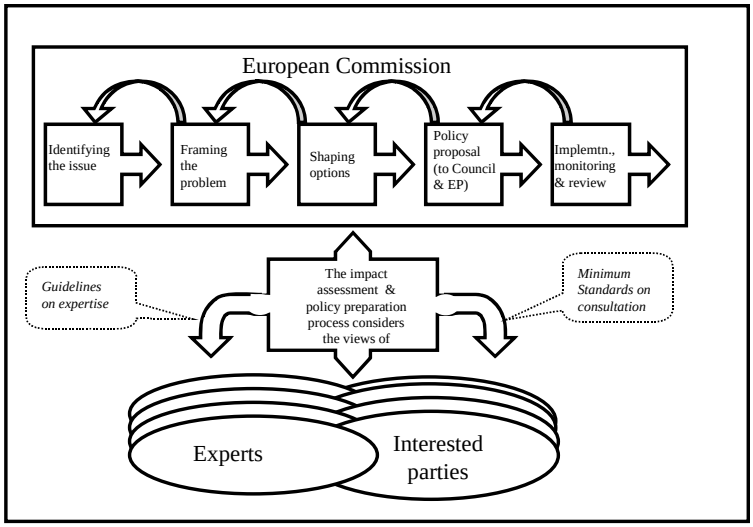
[76] *Id.*

[77] *Id.*

[78] *Id.* pp. 69-70.

- Guidelines relating to the use of expert advice.[79]

On 15 June 2005, the Commission released a revised version of the 2002 Impact Assessment Guidelines.[80] The main features of this 2005 document – which is now the cornerstone of Commission's preparatory work – are presented below. The other two 2002 guidelines, which in fact complete the Communication on Impact Assessment, will be presented in their relation with it. The following diagram gives a good picture of the relationships between the various instruments and their place in the legislative process.



The impact assessment process is the same for both directives and regulations, as well as for the EU Environment Action Programmes. Indeed, the legal bases do not make any distinction between these two types of measures.[81]

It may be helpful to summarize the 2002 and 2005 Impact Assessment Guidelines before examining the 2005 Guidelines in detail. The EU Treaty imposes, in Article 174(3), a requirement that costs and benefits be "taken into account" in making environmental policy decisions, but does not expressly call for the conduct of cost-

[79] Respectively: COM(2002)276, COM(2002)704, COM(2002)713.

[80] SEC(2005)791.

[81] Articles 251 and 175(2) of the Treaty.

benefit analysis prior to the adoption of environmental measures. Since 1996, this provision has been implemented in non-binding "Regulatory Policy Guidelines" issued by the President of the European Commission. **[Can the Commission reviewers help us on this point -- do these exist and is it possible to obtain a copy?]**

In June 2002, the Commission issued a communication on regulatory impact assessment (RIA) for "major initiatives."[82] That communication, which is not legally binding on the Commission, provided for an integrated assessment of all economic, social and environmental impacts of "major initiatives," replacing a number of sector specific impact analyses that preceded it.[83] It defines impact assessment as "the process of systematic analysis of the likely impacts of intervention by public authorities."[84] The Commission goes out of its way to note that impact assessment is "an aid to decision-making, not a substitute for political judgment," stressing that while impact analysis provides "an important input by informing decision-makers of the consequences of policy choices," "political judgment involves complex considerations that are go [*sic*] far beyond the anticipated impacts of a proposal."[85] It notes that impact assessment overlaps to some degree with the *ex ante* budgetary evaluation required by the Financial Regulation of all proposals involving budgetary expenditures, but that the two can be melded into a single evaluation where both apply.[86]

On 15 June 2005, the Commission issued new Impact Assessment Guidelines, reinterpreting and elaborating on this communication.[87] These new Guidelines, which again are not legally binding, provide much useful new analysis and detail as to the *process* that Commission bureaucrats should use in developing the impact assessment ("IA"), and provides that the IA will accompany the legislative proposal through the decision-making process. They do not, however, prescribe the process, much less the criteria that the Commissioner's or the other EU institutions will use *in actually making a decision*.

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[82] Commission of the EC. Communication on Impact Assessment. COM (2002) 276 final. Brussels, 5.6.2002, p. 5.

[83] *Id.*, p. 3, Para. 1.3.

[84] I*d.*, p. 3, Para. 1.2.

[85] *Id.*

[86] *Id.*, pp. 3-4, Para. 1.3.

[87] SEC(2005)791 ("2005 Impact Assessment Guidelines"). These new guidelines replace the Commission's 2002 "Impact Assessment In The Commission -- Guidelines" and its "A Handbook for Impact Assessment in the Commission -- How to do an Impact Assessment." *Id.*, note on cover.

Interestingly, Impact Assessments are required only for the development by the Commission of proposals for legislation.[88] They do not apply to the subsequent legislative process[89], nor to the administrative regulatory process, the Commission's actions as to the latter being expressly "normally exempted."[90] Of course, more of the important precautionary decisions are made at the legislative stage in the EU than in the US, where the real regulatory action normally takes place at the administrative level. The Impact Assessment Guidelines also apply only to a class of the most significant legislative proposals, the make-up of which is not defined objectively, since the Commission controls unilaterally the projects it places in the designated categories.

They contain no binding decision criteria, referring instead to 3 "generic evaluation criteria that apply to all proposals of the Commission[91]", criteria set by the EU treaties (*e.g.*, the subsidiarity and proportionality principles), and 5 alternative sets of criteria that can be used by the Commission bureaucrats to compare impacts.[92]

Once again, as in its 2002 Communication, the Commission takes pains to subordinate impact assessment in the actual decisional process, noting that it is not the same thing as the "policy proposal or...the explanatory memorandum which precedes the proposal."[93] It says that "The College of Commissioners will take the IA 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."[94]

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[88] As noted below, it is only the Commission in the EU that can originate legislation.

[89] Although the Commission is actively trying to persuade both the other EU institutions and the member states to adopt IA and other aspects of its "better regulation" program. *E.g.*, Communication From The Commission To The Council, And The European Parliament, COM(32005) 97 final (16.3.2005).

[90] *Id.*,p. 15 ("Each institution is responsible for carrying out impact assessments in their respective areas of responsibility -- the Commission carries them out for its proposals, and the Council/EP assess the impact of their substantive amendments." "In light of new or previously unavailable information, the Commission may decide to update the original impact assessment. However, *the decision whether to do so is for the Commission alone to make.*")(emphasis added); p. 6, Section II, 1. and note 7.

[91] *Id.*, p. 43 (effectiveness, efficiency, and consistency).

[92] *Id.*, Annexes, p. 42-44 (see list, *supra*, n. __).

[93] *Id.*, p. 4.

[94] *Id;* see also p.39 ("the final decision on whether, and how, to proceed is a political one.").

While the Guidelines are not legally binding and do not seem to establish an EU equivalent to the US OIRA, they do provide for administrative policing of their provisions, even indicating institutional and structural methods for doing so. There is mention of use of Intra-Service Steering Groups to ensure broad participation by other affected parts of the bureaucracy (establishment of such a group is "compulsory for all items of a cross-cutting nature," and "valid reasons must be provided" if a Directorate General does not plan to establish such a group), and of centralized supervision of the process by the Secretariat General (which will "consider the quality of the IA report as part of the formal Inter-Service Consultation procedure" and apparently may issue "a suspended or unfavorable opinion" if the IA report "does not reach a satisfactory level of quality").[95] Further, the Commission notes that "it is also possible that one or more of the Groups of Commissioners will examine the draft proposal and the impact assessment prior to the College's deliberation," and, quoting an earlier document, that one such group is the "Competitive Group of Commissioners," whose mandate allows it, "at the request of the President, [to] consider the impact of significant draft Commission proposals outside the Competiveness Council's remit, and in particular, to ensure that the impact assessments accompanying such proposals adequately take account of competitiveness."[96]

There is also a requirement that "stakeholder" consultation during the Impact Assessment process be undertaken "according to the Commission's general principles and minimum standards for consultation,"[97] as well as instruction on collection and use of expertise.[98]

The scope of action covered by impact assessment includes all legislative and other policy proposals that the Commission includes in its Annual Policy Strategy or Work Program, "provided that they have a potential economic, social and/or environmental impact and/or require some regulatory measure for their implementation."[99] These actions include "[a]ll regulatory proposals, White Papers,

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[95] *Id.*, pp. 7, 9, 14-15.

[96] *Id.*, p. 15, quoting SEC(2004)1617/4, p.14.

[97] *Id.*, p. 11, citing COM(2002)704, although the Commission's June 5 2002 Communication "Towards A Reinforced Culture of Consultation And Dialogue -- Proposal for General Principles and Minimum Standards for Consultation of Interested Parties by the Commission" is COM(2002)277.

[98] *Id.*, p. 12, citing Commission Guidance on use of experts and expertise (COM(2002)713).

[99] Thus, as noted above, the Commission retains control over which proposals are subject to IA. This creates opportunities for strategic maneuvering; an independent, quantitative definition of "major initiatives," similar to that used in the US under Executive Order 12866, would reduce this problem significantly.

expenditure programmes and negotiating guidelines for international agreements (with an economic, social or environmental impact)."[100] The Commission may also decide, "on a case-by-case basis, …to carry out an impact assessment of a proposal which does not appear on the WP."[101] Green Papers and proposals for consultation with "Social Partners" are exempted, as are "periodic Commission decisions and reports, proposals following international obligations and Commission measures deriving from its powers of controlling the correct implementation of EC law and executive decisions."[102]

The 2002 Communication called for two stages in the IA process. All major initiatives were subject to a preliminary assessment, which served as a "filter."[103] Certain policy initiatives were then chosen by the Commission for an "extended impact assessment." This structure seems to have given way in the 2005 Impact Assessment Guidance to a requirement for an Impact Assessment Report in all cases covered by the Communication, but with such a report subject to "proportionate analysis," under which [t]he impact assessment's depth and scope will be determined by the likely impacts of the proposed action…."[104]

Under the 2005 Impact Assessment Guidelines, the Impact Assessment process has 6 basic steps:

- What is the problem?
- What are the objectives?
- What are the policy options?
- What are the likely economic, social and environmental impacts?
- How do the options compare?
- How could future monitoring and evaluation be organized?[105]

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[100] 2005 Impact Assessment Guidelines, p. 6.

[101] *Id.*

[102] *Id.*, p. 6. The last category includes "implementing decisions, statutory decisions, technical updates, including adaptations to technical progress, competition decisions or acts which scope [*sic*] is limited to the internal sphere of the Commission." *Id.*, n. 7.

[103] *Id.*, p. 6.

[104] *Id.*, p. 8.

[105] *Id.*, pp. 2-3 (Table of Contents)

The Impact Assessment Report can be no more than 30 pages (excluding annexes) and must follow a set format.[106]

Neither the 2002 Communication nor the 2005 Impact Assessment Guidelines call expressly for either risk assessments or cost/benefit analyses, and the 2002 Communication specifically notes that:

> A number of analytical methods can be used to assess impacts. They differ in concept and coverage (e.g., cost-benefit analysis, compliance cost analysis, multi-criteria analysis and risk assessment). The choice of method and the level of detail will vary with the nature of the problem and judgments about feasibility.
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> *** …When assessing impacts, strict cost-benefit analysis may not always supply the most relevant information; for example, the degree of irreversibility should also be considered. The precautionary principle should be applied when appropriate. The impact on established policy objectives where available, should be assessed.[107]

The 2002 Communication, however, does not supply any single, or binding, decision criteria.

Neither does the 2005 Impact Assessment Guidance, noting as it does that Impact Assessment is a decision *tool*, but that it will not govern the "political" decision of the Commission, much less that of the Parliament or the Council. The new Guidance does, however, go much further than prior guidance both in "screening" to arrive at a shortlist of options (using the criteria of "effectiveness, efficiency, and consistency) and in structuring the consideration and ranking of options. It requires that for all options considered (which must include the "no action" option), the Impact Assessment Report must "consider all the relevant **positive** and **negative** impacts alongside each other, regardless of whether they are expressed in qualitative, quantitative or monetary terms."[108] While the Commission presents this approach as a "simple multi-criteria analysis," and carefully distinguishes it from the alternative approaches of "cost-benefit analysis, which compares positive and negative impacts expressed in the same units, normally in monetary terms, and cost-effectiveness analysis, which compares the costs of achieving a given objective," in fact the approach suggested by the Commission is compatible with what is commonly considered cost-benefit analysis in the U.S., where

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[106] *Id.*, p. 14.

[107] *Id.*, p. 15-16.

[108] *Id.*, p. 39 (emphasis in original).

the term "formal" or "quantified" cost-benefit analysis is normally properly reserved for the fully quantified type of assessment.[109]

In short, if implemented rigorously and consistently, the 2005 Impact Assessment Communication and the IA process it requires potentially represent a significant move by the Commission towards more rigorously institutionalizing impact assessment (and thus, perhaps in due course, towards a broad and flexible cost-benefit analysis, properly understood, as opposed to insistence on fully quantified cost-benefit analysis). It is true that it deals only with executive branch review of EU risk legislative proposals (which in the EU contain much more detailed precautionary regulation than legislation alone does in the US),[110] and that the process will not likely cover delegated legislation (administrative regulation, of course, is where much of the real regulatory action in the US takes place). It is also true that it remains non-binding, highly discretionary, and not subject to judicial (rather than political) accountability at the behest of generally affected private parties because they lack standing for judicial review of rulemaking.[111] Nonetheless, it is a significant new development.[112] **[The following sections describe**

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[109] On the other hand, when the Commission defines "multi-criteria analysis" in its Annex at *id.*, p. 42-43, it does not require that a "net benefits" hurdle or a "maximizing net benefits" test be used for multi-criteria analysis.

[110] Further, the 2005 Impact Assessment Guidance is full of much practical wisdom on this process, like the suggestions (1) that problem definition is the key first step, (2) that understanding why the problem is a problem is crucial, (3) that one must distinguish between the problem, the objective (indeed, three levels of objectives -- the general overall goals of a policy, expressed in terms of its outcome or ultimate impact; the specific objectives, expressed in terms of the direct and short term effects of the policy; and the operational objectives, normally expressed in terms of outputs, that is, goods or services that the policy should produce), and the proposed policy, and then fine-tune the various aspects of the proposed policy in consideration of alternatives, and (4) that how you express the problem (*e.g.*, as a "lack of something") can bias the whole subsequent analysis. Perhaps the greatest blind spot, however, is illustrated by asking "why the problem is a problem," without specific focus on why, if the policy is such a good idea, rational people operating in a market system have not already implemented the policy, and then letting that analysis of cognitive or market failure guide the further analysis of what needs to be, and can be, done. *See*, Smith, 1994.

[111] The 2005 Impact Assessment Guidance does, however, seem to announce a much more rigorous internal policing of the quality of Impact Assessment Reports by the Secretariat General of the Commission, and perhaps by those Commissioners sitting on the Competitiveness Group.

[112] The 2005 Impact Assessment Guidance are relatively new, however. It is chiefly their precursors that have influenced the EU's risk regulation in the past. These

(continued . . .)

the IA process as set out in the 2005 Guidelines, in more detail, chiefly using the actual language of those Guidelines. In the next draft of this paper, we will revise these sections, add quotation marks as needed, and footnote them to the Guidelines.]

(1) What Is Impact Assessment?

Impact assessment (IA) is defined as:

> a set of logical steps which structure the preparation of policy proposals. It involves building on and developing the practices that already accompany the process of policy development by deepening the analysis and formalizing the results in an autonomous report. Responsibility for developing the impact assessment lies with the service in charge of developing the proposal.[113]

IA is thus a tool intended to be helpful in designing policies. It could be considered as a "file" that contains all the evidence and other documents supporting the legislative proposal. It does not replace in any way the proposal itself or the explanatory memorandum which preceded and accompanies the proposal. Also, while the College of Commissioners will take the IA findings into consideration in its deliberations, the adoption of a policy proposal is pointedly said to be a political decision that belongs solely to the College.[114]

The aims of the IA are the following:

> It ensures early coordination within the Commission. It demonstrates the Commission's openness to input from a wide range of external stakeholders, and shows its commitment to transparency. Further, by providing a careful and comprehensive analysis of likely social, economic and environmental impacts, both direct and indirect, it also contributes to meeting the specific

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precursors were of lesser scope and much less rigor. For a general assessment of the EU RIA process, see Hahn and Litan, 2004: 13-19, who conclude that "centralized regulatory oversight in the EU is in its infancy," that "institutional mechanisms are not yet in place to assure a high level of quality," that the "overall quality" of assessment and oversight in Europe as a whole is "generally poor," and that "Europe has made some progress in improving regulatory analysis and oversight, but can do much more."

[113] **[Cite]**, p. 4.

[114] **[Cite]**

> commitments of the Lisbon and Sustainable Development Strategies. Also, it improves the quality of policy proposals, by keeping EU intervention as simple as possible. Finally, it will help explain why an action is necessary and that the proposed response is an appropriate choice or, conversely, demonstrates why no action at EU level should be taken.[115]

(2) Proposals Requiring An IA

A formal IA is required for all regulatory proposals which are included in the Commission's Annual Policy Strategy (APS) or Work Programme (WP).[116]

(3) Planning The IA -- Planning Stages, The Strategic Planning And Programming Cycle, & Roadmaps

The Commission's legislative activity is pursued within a general programming framework that includes various types of instruments intended to give notice about the legislation to be adopted in the future. These include the following.

(a) White Papers

White Papers are documents containing proposals for Community action in a specific area. They sometimes follow a Green Paper published to launch a consultation process at European level. While Green Papers set out a range of ideas presented for public discussion and debate, White Papers contain an official set of proposals in specific policy areas and are used as vehicles for their development.

(b) Annual Policy Strategy

The Annual Policy Strategy (APS) is a general policy document that sets out the priorities of the Commission for the following year. It is generally adopted in February of the preceding year and takes the form of a non-binding communication from the Commission to the European Parliament and the Council. Although a Commission document, it takes account of feedback received from the Parliament and the Council, and can therefore be considered to be the result of an inter-institutional dialogue.

(c) Annual Legislative And Work Programme

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[115] **[Cite]** Idem.

[116] COM(2005)97.

The purpose of this document, which is sometimes just called a "Work Programme" and is adopted in November of the year preceding the year during which it should be carried out and then published, is to lay out how and where the Commission will act in order to pursue the priorities and the key initiatives that were announced in the APS.

(d) Annual Management Plan

In order to implement the Commission's Work Programme, each Commission department sets up its own work schedule called the Annual Management Plan (AMP). The purpose of the annual management plan is twofold:

- It translates the priority initiatives and the strategic objectives of the Commission into concrete operations, and
- It provides an instrument enabling the management to plan, follow up and report on all the activities and resources of each DG.

(e) The Strategic Planning And Programming Cycle

The following diagram gives an overview of the Strategic Planning and Programming (SPP) Cycle.

(f) Roadmaps

At the point when the APS and WP are adopted, each service must establish 'Roadmaps' for the initiatives they have suggested for inclusion in the APS and the WP. For WP items which follow from an APS initiative, it is necessary to update and resubmit the Roadmap prepared at the time of the APS.

The Roadmap must provide, among other things, an estimate of the time required for completing the IA, as well as a brief statement on (1) the likely impacts of each policy option and (2) who is likely to be affected. It must also indicate which impacts warrant further analysis, and outline the consultation plan. The Roadmap must also indicate whether an Inter-Service Steering Group will be established.[117] When a Directorate-General (DG) does not plan to convene such a group, it must provide valid reasons.

Roadmaps, even in a preliminary form, should ideally be circulated to other DGs early enough in advance of the adoption of the APS and the WP that the latter have time to verify the contents of the Roadmaps, plan their contribution to the forthcoming impact assessment and integrate the work done in other areas in their policy objectives.

The Roadmaps are published in parallel with the WP, so external stakeholders can anticipate the timing of the policy preparatory work and be ready to provide input.

In some cases (for instance when a quantitative model must be developed), it may be necessary to launch an ad hoc study in advance of the adoption of the APS or the WP. The Guidelines say that it is good practice to invite other interested services to be involved at this stage.

(4) Link between IA and Ex-Ante Evaluation

The Financial Regulation and its Implementing Rules require the Commission to carry out an 'ex-ante evaluation' for all programmes and activities entailing significant spending.[118]

As long as an IA for a proposal having budgetary implications properly addresses the most important items of the Financial Regulation's Implementing Rules, it will be accepted as an ex-ante evaluation under them. Since these items are similar to the IA requirements in many ways, the Guidelines argue that no 'extra' work is likely to be necessary. Particular attention must be paid, however. to the cost-effectiveness of the various options reviewed.

(5) Proportionate Analysis

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[117] See the discussion below of such a group.

[118] **[Cite]**

The IA's depth and scope will be determined by the likely impacts of the proposed action (the principle of "proportionate analysis"). The more significant the action is likely to be, the greater the effort of qualification and monetisation that will generally be expected. Besides, depending on the political and legal nature of the proposal under preparation, its sector-specific particularities and the point in the policy-making process at which the IA is undertaken, some aspects of the analysis will often have to be developed more than others:

"New" regulatory proposals – When the action under consideration concerns (1) an area that was previously left to Member States or (2) an entirely new area, the IA will usually have to be particularly well developed. Special care will be needed to determine whether EU intervention is justified (the principle of "subsidiarity") and that the policy options do not go beyond what is necessary to achieve the objectives (principle of "proportionality" – not to be mistaken for the methodological principle of "proportionate analysis").

Revisions of existing legislation – By definition, in these cases, the problem at issue and the objectives pursued by the EC have been already defined. Therefore, work at those levels can often be limited to considering whether the problem has changed since the original legislation or whether the original objectives are still valid. Available evaluations of the existing legislation may already provide enough data for a proportionate analysis.

Broad policy-defining documents – For action programs setting out "strategic orientations" (which is Euro-English for the very broad lines of a contemplated proposal) or proposed framework directives (meant to be followed by daughter directives), the analysis will generally be rather broad in its problem description and objectives. The different types of actions envisaged to reach these objectives should, however, be sufficiently detailed for stakeholders to prepare for subsequent consultation on specific actions. Assessment of impacts will be necessarily be preliminary, and will not provide detailed quantitative data.

(6) Inter-Service Steering Groups

An Inter-Service Steering Group is compulsory for all items of a cross-cutting nature. Inter-Service Steering Groups provide specialised inputs and bring a wider perspective to the process. Involving other DGs from the early stages is said also to make it easier to reach agreement during Inter-Service Consultation. The Roadmap asks DGs to provide valid justification in those instances when no Inter-Service Steering Group is envisaged. The Guidelines provide that the Strategic Planning and Programming Unit (SPP Unit) of the Secretariat General should always be invited to participate in such a steering group. If no steering group is set up, the SPP Unit is to be kept informed of the state of play on a bilateral basis.

(7) Contracting Out The IA Process

Parts of the IA may be contracted out. In such cases, the terms of reference must make clear that contractors will have to follow the analytical steps as the Commission would have followed had it performed the IA itself.

(8) Presenting The Findings -- The IA Report

At the end of the IA process, a summary report must be drawn up by the responsible service: this is the IA report. The IA report needs to be completed even when the preparation of a draft proposal is abandoned as a result of the IA process. There is no formal inter-service consultation in such circumstances and the report is sent to the responsible IA unit within the responsible DG and to the Secretariat-General SPP Unit.

The IA report must contain a clear 'waiver' on its cover and an introduction indicating that the report commits only the Commission's services involved in its preparation and that the text is prepared as a basis for comment and does not prejudge the final form of any decision to be taken by the Commission.

(9) The Structure Of The Report

The report should normally be no more than 30 pages (excluding annexes) and must use the following format:

- Executive summary
- Section 1: Procedural issues and consultation of interested parties
- Section 2: Problem definition
- Section 3: Objectives
- Section 4: Policy options
- Section 5: Analysis of impacts
- Section 6: Comparing the options
- Section 7: Monitoring and evaluation

Any supporting documents, such as expert reports or summaries of stakeholders' views, should be annexed to the IA report. Where the limit on the number of pages for the IA report precludes going into detail on an important point set out in an accompanying document, a cross-reference must be inserted to that document. There is no limit to the size of the annexes.

The report can be drafted in English, French or German. As a Commission Staff Working Document, the IA report will normally not be translated.

(10) Inter-Service Consultation & Presentation To The College

If 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.

Because the Secretariat General considers the quality of the IA report as part of the formal Inter-Service Consultation (ISC) procedure, its SPP Unit 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 unfavourable 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 also possible that one or more of the Groups of Commissioners will examine the draft proposal and the impact assessment prior to the College's deliberation.[119]

(11) Using The Findings -- The IA Report In The Legislative Process

The proposal and the final IA report, which has the status of a Commission Staff Working Document, are transmitted to the other Institutions. The other Institutions are invited to use the final IA report in their discussions on the proposal itself. The Guidelines stress, however, that the other Institutions should consider the report alongside the proposal, and not separately.

Commission services are to use the IA in the legislative process. The Guidelines say that Evidence presented in the IA report will help those services argue the merits of the Commission's proposal in the Council and/or European Parliament.

Services are also to ensure that the impact assessment is mentioned in any press release or media statement made about the proposal, in order to underline that the Commission's major policy proposals are based on careful consideration of their potential impacts.

Each Institution is responsible for carrying out impact assessment in its respective areas of responsibility – the Commission carries them out for its proposals, and the Council/EP are to assess the impact of their substantive amendments.

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[119] SEC(2004)1617/4, p.14.

In the light of new or previously unavailable information, the Commission may decide to update the original impact assessment. However, the Guidelines note that decision on whether to do so is for the Commission alone to make.

(12) Publication of the final report

The completed IA report is published on the Europa impact assessment website along with the legislative proposal by the Secretariat General. The Guidelines say that only in very rare circumstances, such as when international negotiations are involved, will a decision to restrict or delay the publication be considered.

e. Access to information

Dating from the Amsterdam Treaty in 1997, the EC Treaty was amended, effective in 1999, to provide for rights of access to documents held by the three main EC institutions:

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
>
> General principles and limits on grounds of public and private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of entry into force of the Treaty of Amsterdam.
>
> Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

EC Treaty, Art. 255. The proposed European Constitution carries these provisions forward, but broadens their applicability to EU "institutions, bodies, offices, and agencies" generally.[120]

At Community level, access to information is currently governed by Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents.[121] This

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[120] Proposed EU Constitution, Arts. I-50, ¶ 3, II-102,

[121] O.J. L 145 pp. 43-48.

regulation, which applies across all sectors, including the environmental area, has the purpose of ensuring "the widest possible access to documents"[122] held by the EP, the Council and the Commission, including those authored by Member States. Citizens and residents of the EU have a right, enforceable by judicial review, to request documents (broadly defined) from these EC institutions.[123]

With particular regard to the Commission's process for preparing legislation, moreover, Recital 6 to the Regulation provides that:

> *Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers*, while at the same time preserving the effectiveness of the institutions' decision-making process. *Such documents should be made directly accessible to the greatest possible extent.* (Emphasis added).

Article 12 provides for access to documents electronically or through a register:

> 1. The institutions shall as far as possible make documentsdirectly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.
>
> 2. In particular, *legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding* in or for the Member States, *should*, subject to Articles 4 and 9, *be made directly accessible*.
>
> 3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.
>
> 4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

Id., Art. 12 (emphasis added)

Article 2, ¶ 4 also provides, in the same vein, that:

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[122] *Id.*, Art. 1 (a).

[123] *Id.*, Arts. 2, ¶ 1, 3 (a), and 8, ¶ ¶ 1, 3.

> In particular, *documents drawn up or received in the course of a legislative procedure* shall be made directly accessible in accordance with Article 12. (Emphasis added).

Article 11, ¶ 1 further requires that "References to documents in the Register shall be recorded *without delay*."[124]

Notwithstanding these provisions, and notwithstanding the Commission's extensive voluntary but non-binding guidelines on impact assessment and participation in its process of preparing legislative proposals, there are two key exceptions listed in Regulation 1049/2001 that can be used by the Commission to deny any right of access to documents produced during the process of preparing draft legislation for transmission to the Council and the Parliament:

> Access to a document, drawn up by an institution *for internal use* or *received by an institution, which relates to a matter where the decision has not been taken* by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
>
> Access to a document containing *opinions for internal use as part of deliberations and preliminary consultations within the institution concerned* shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Id., Art. 4, ¶ 3 (emphasis added). These very provisions have been used from the outset by the Commission in the comitology process to deny access, across the board, to proposed delegated legislation until *after* the relevant comitology committee has acted -- that is, until after it is of any use to the public to have access.

A Commission proposal for a Regulation to implement the Aarhus Convention is being debated within the Council and the EP.[125] As of September 5, the proposal has not

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[124](Emphasis added). Note that this only requires "references" to documents, not the actual documents themselves, access to which in the register depends on Article 12. Where the Commission avails itself of the opportunity to provide only a "reference," it will normally furnish only the name and number of the document and perhaps a summary. The document must then be subject to an individual request under Article 6 of Regulation 1049/2001.

yet been adopted. That proposal notes the "basic concept" in the Aarhus Convention that "whenever public authority is exercised, there should be rights for individuals and their organizations."[126] It then goes on immediately, however, and in the very same paragraph, to say:

> In line with the Aarhus Convention, Community bodies and institutions are to be excluded when and to the extent that they act in a judicial or legislative capacity."[127]

It carries this exclusion through by excepting from the definition of "Community institutions and bodies" all performance of "public functions" "when and to the extent which [such institutions or bodies act] in a judicial or legislative capacity."[128]

In determining the reach of this provision as to the action of the Commission, it should be noted that the Commission apparently does not classify its activities preparing proposed legislation, prior to the transmittal of legislation to the Council and Parliament, as "legislative." The Commission addresses expressly the status of its actions in preparation of legislation, and provides expressly in commentary on its proposed Regulation that these actions are not excluded by the "legislative capacity" exclusion, but only addresses this issue in the context of public participation in decision-making (Article 7 of Aarhus, discussed below):

> Article 2(1)(c) of the proposal clarifies that the definition of "Community Institutions and bodies" does not include those "when and to the extent to which they act in a judicial or legislative capacity". Applied to the decision-making on plans and programmes relating to the environment, which are prepared by the Commission and subsequently endorsed or adopted by a legislative act, *this means that the public participation requirements cover the stage preceding the legislative proposal by the Commission*.

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[125] Proposal for a regulation on application of the Århus Convention to the EU institutions and bodies will apply the three pillars of the Århus Convention - access to information, public participation in decision-making and access to justice in environmental matters - to the European Community institutions and bodies, COM(2003)622.

[126] *Id.*, Recital (7).

[127] *Id.*.

[128] *Id.*, Art. 2, ¶ 1 (c).

> Once a proposal is made, participation is ensured through the parliamentary process."[129]

There is no parallel statement as to the issue of access to documents at that stage, but the interpretation of the exclusion in the one context would seem to require a similar reading in the other context. In short, it would seem to indicate that the proposed Regulation's "legislative" exclusion does not apply to Commission actions in preparation of proposed legislation.[130]

It should be noted, further, that with regard to access to documents, the proposed Regulation is drafted so that its main operative provision on access to documents has the effect, simply, of extending the provisions of Regulation 1049/2001 to Community bodies and institutions *other than the three main institutions to which that Regulation is already addressed*, which the proposed Regulation must do since the larger group of institutions must be covered under the requirements of the Aarhus Convention.[131] Arguably, therefore, it is the limitations of Regulation 1049/2001 that apply to those duties already imposed on the Commission under that Regulation (*e.g.*, the exceptions of Article 4, ¶ 3 noted above), not the broad "legislative" exemption in the proposed Regulation.[132] The latter would, however, apply to the requirements in all operative terms of the proposed Regulation newly applicable to the Commission, such as Article 4, which goes beyond Regulation 1049/2001 by requiring the collection and dissemination of "environmental information." The term "environmental information" is broadly defined to include many documents that would normally be produced during the process of preparing legislative proposals:

> iii) [M]easures (including administrative measures), policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;

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[129] proposed Regulation, p. 14 (emphasis added).

[130] Its potential effects on Commission actions in the comitology process is discussed below, in the discussion of delegated legislation and the comitology process.

[131] *Id.*, Art. 3.

[132] Indeed, the proposed Regulation is explicit in saying that the exceptions in Regulation 1049/2001 apply, *mutatis mutandas*¸ to requests for environmental information under the proposed Regulation. *Id.*, Recital (15). The Parliament has attempted to change this provision to make applicable the list of exceptions imposed by the Commission on Member States in Directive 2003/4 implementing Aarhus as to public participation with regard to the Member States, but with no success to date.

> iv) [R]eports on the implementation of environmental legislation;
>
> v) [C]ost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii)….

Id., Art. 2, ¶ 1 (e).

f. Public Participation (Consultation)

There is no EC Treaty right of public participation or consultation, much less of specific notice and written comment, with rights that comments be considered and responded to in writing as in the US under the APA for rulemaking involving legally binding rules. This is true both as to the Commission's preparation of legislative proposals, and for both forms of delegated lawmaking. Nor are any such rights expressly provided for in the proposed European Constitution.[133] There is also no across the board EC legislative requirement applicable to the Member States in this regard, although there are in the area of environmental regulation several directives that require public participation in certain cases in the environmental impact assessment process and the environmental permitting process.[134] Further, there is now a Directive implementing Aarhus with regard to public participation at the Member State level that extends these

[133] There is a great deal of elevated general language, however. Article I-47, entitled "The Principle of Participatory Democracy," provides in ¶ 1 that EU institutions "shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action." Paragraph 2 provides that "[t]he institutions shall maintain an open and transparent and regular dialogue with representative associations and civil society." Paragraph 3 requires that "[t]he Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent." Article I-50, ¶ 1, provides for "transparency," and requires among other things that '[i]n order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible." It also provides, in ¶ 2, that the European Parliament is to meet in public, and that the Council is to do likewise "when considering and voting on a draft legislative act." Finally, Article II-101 establishes "Rights to Good Administration," including in ¶ 2 (a) the "right of every person to be heard, before any individual measure which would affect him or her adversely is taken."

[134] Directive 85/337; Directive 96/61.

public participation requirements to "certain plans and programmes relating to the environment."[135]

The Commission itself has been functioning under two non-legally binding Communications from 2002 dealing with proposed "Consultation,"[136] and one from 2002 dealing with use of experts,[137] none of which grant any judicially enforceable rights to citizens or others. These are discussed below.

This situation will change, in theory, with the adoption of the proposed Regulation implementing Aarhus with regard to EC institutions. The Commission has said, however, that it will apply only the bare, legally-required minimum of Aarhus rights;

> The point of departure for the present proposal for a Regulation was that it should be limited to the legally binding requirements of the Aarhus Convention, i.e. Articles 6 and 7, where the latter concerns public participation in the preparation of plans and programmes relating to the environment.[138]

Article 8 of the proposed Regulation is, indeed, both sparse in its coverage and narrowly drafted. It requires only that "Community institutions and bodies…make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment." It covers no other form of action by EU institutions and bodies, limiting legally required public participation only to this narrow set of actions.

The EC definition of "plans and programmes relating to the environment" leaves out the term "policy" (Aarhus includes the term "policy" in the title of Article 7, but omits it in the language of Article 7, ¶ 1), an omission that the Parliament has so far unsuccessfully attempted to reverse.[139] Further, the definition of "plans and programs relating to the environment" is tightly drawn, being limited to only those that meet all three of the following tests: "subject to preparation and/or adoption by a Community institution or body, "required by legislative, regulatory or administrative provisions," *and* "which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, as laid down in [the Sixth Environment

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[135] Directive 2003/35.

[136] COM (2002) 277 final; COM (2002) 704 final.

[137] COM (2002) 713 final.

[138] proposed Regulation, p. 13.

[139] *Id.*, Art. 2, ¶ 1 (f).

Action Programme] or in any subsequent general environmental action programme."[140] The definition is also not to include "financial or budget plans and programmes, or internal work -programmes of a Community institution or body," a limitation that the Parliament has also to date unsuccessfully tried to eliminate.[141]

Even in this regard, while this provision might be enforceable by any environmental NGO that ends up gaining standing for administrative and judicial review under Article 9-13[142], any relief obtained might well be limited to an order requiring only that such "provisions" be made. In addition, Article 8 does not even say expressly that the "provisions" must themselves be legally binding on the EC institution, much less that they create any judicially enforceable rights to test their substantive compliance with the Aarhus Convention's requirements or to test their application or non-application during the Commission's process of preparing legislative proposals (or Commission actions during either delegated legislation process).

Further, the specifics required under Article 8 (a)-(d) to be incorporated into the "provisions" are extremely vague and general, providing great room for exercise of administrative discretion and leaving a court little ability to hold the EC institutions accountable.[143] And all of these deficiencies are on top of the various other exclusions and exceptions, and limitations of definition, noted above with regard to the proposed Regulation in the context of access to documents. In short, the proposed Regulation is at best a cautious acquiescence to a need for accountable public participation at the EC level of government.

Indeed, it can be argued that the proposed Regulation is an inadequate implementation of the Aarhus Convention as to public participation. That Convention

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[140] *Id.*

[141] *Id.*

[142] Depending, of course, on whether the essentially procedural proposed Regulation is itself classified as an element of "environmental law," since administrative and legal challenges are limited to challenges as to "breach of environmental law" and "compliance with environmental law." proposed Regulation, Arts. 9, ¶ 1, 11, ¶ 1.

[143] For example, "reasonable timeframes" allowing "sufficient time" for public participation "at an early stage"; "due account" to be taken of "the outcome of public participation," rather than a right to comment in writing with written justification for the decision taken in light of the written comments; and a right in the EC institution to "identify the public which may participate," rather than giving any citizen a clear right to participate. *Id.* Note that there is apparently litigation pending in the ECU that might cast serious doubt on the legality of legislation that provides no discernable standard for decision-making. *See* Food Safety draft, pp. 41-49 (Opinion of Advocate General Geelhoed in litigation dealing with Directive 2002/46 on Food Supplements).

provides in Article 6 for fairly strong and detailed requirements for public participation in individual decisions-- "adjudications" in the context of US administrative law. The Commission omits any implementation of that provision of the Convention at the EU level on the grounds that no individual decisions are at present made at the EU level under environmental law -- only at the Member State level to which Directive 2003/35 applies. The Commission concedes that certain decisions are made on genetically modified organisms at the EC level, but claims that its legislation already provides for the necessary public participation and that in any case the Convention required that Article 7 of the Convention be applied only "to the extent feasible and appropriate," which condition the Commission implies is met by the existing EC legislation.[144] Yet, under the Commission's proposed REACH Regulation, there would be several types of key issues decided by the Commission, including for instance with regard to applications for authorization of a restricted dangerous substance.

The title of Article 7 also speaks of "policies" as well as of "plans and programmes," although its body only speaks of public participation "concerning plans and programmes relating to the environment." We have already noted that the Commission has left the word "policies" out of its implementation, and tied the matters covered tightly to the objectives of its environmental action programmes. The provisions of the Convention's Article 7 are, on the other hand, much less concrete than those of its Article 6 dealing with permit decisions, and the Commission has been careful to repeat Article 7's language virtually word for word (absent the word "policy") in its proposed Regulation. Further, while Article 7 of Aarhus refers to several specific subparagraphs of its more detailed Article 6 which are to be applicable, the Commission has also borrowed the language of these provisions virtually word for word in its subparagraphs of Article 8 of the proposed Regulation. It has chosen, however, because not required to do so by Aarhus, not to provide, in the context of plans and programs for public notice, such key Aarhus Article 6 rights as rights to written comments, notice of any decision, and access to a decision's text "along with the reasons and considerations on which the decision is based."

Finally, the Commission has omitted entirely any implementation of Article 8 of the Convention, which is entitled "Public Participation During The Preparation Of Executive Regulations and/Or Generally Applicable Legally Binding Normative Instruments." It makes no reference to this omission, other than its starting statement that it is limiting its implementation of Aarhus to the Convention's "legally binding requirements…i.e. Articles 6 and 7," pointedly omitting to even mention Article 8. Its sweeping exclusion, implementing this choice, for acts in a "legislative capacity," has already been noted above.

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[144] Aarhus Convention, Art. 7. ¶ 11; proposed Regulation, p. 14.

Article 8 does not say that it applies to legislation on even the adoption of rules. Both the text of Article 8, and UN commentary on it, however, confirm that the function of preparation of legislation and rules is within its scope.[145] Its title is "Public Participation During the *Preparation* of Executive Regulations And/Or Generally Applicable Legally Binding Normative Instruments" (emphasis added). Further, its first sentence imposes an obligation on parties to "strive to promote effective participation" in such preparation, a comparatively soft obligation to use "best efforts," but an obligation none the less. This lends force to the Commission's own concession that the requirements of Article 7 apply to its own preparation of legislation (but subject to the limited scope of the definition of "plans and programmes relating to the environment," leaving out both "policy" and any matters not tied to the objectives listed in the Sixth Environmental Action Programme). And it leaves open the question of the Commission's position on Aarhus Article 7's applicability to Commission actions preparatory to and during both branches of the delegated legislation process discussed below.

Given all of that, it is hard to see how the Commission justifies its failure to implement Article 8 of the Aarhus Convention generally, rather than only, and then cautiously and narrowly, through the limited "backdoor" of the "plans and programs" scope of Article 7 of Aarhus. Where it has found itself able to do the latter, how can it then claim it has made its "best effort" to do the former?

We turn now to a discussion of the guidance on public participation under which the Commission is now functioning.

(1) Consultation With Member States

Once the planning process described above is complete? the Commission then generally proceeds to an informal consultation with experts of the Member States. Such meetings generally take place in Brussels at the invitation of the Commission.[146]

[The following sections also need revision, proper quotation, and citation.]

(2) Consultation With Interested Parties During The IA

(a) Why Consult?

The Guidelines say that gathering opinions and information from interested parties is an essential part of the policy-development process, enhancing its transparency

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[145] **[Cite ECE/UN Implementation Guide, p. 119-20.]**

[146] The bigger Member States are sometimes also consulted individually, on a bilateral basis.

and ensuring that proposed policy is practically workable and legitimate from the point of view of stakeholders.[147] Furthermore, the Commission is required by the Protocol on the Application of Subsidiarity and Proportionality to carry out wide consultations before proposing legislation.[148]

(b) The Consultation Plan

The Guidelines say that the consultation plan should ideally cover the whole policy-making process and determine the objective of the consultation(s), relevant target groups, appropriate consultation tool(s), consultation time(s) and consultation document(s). However, a balance has to be struck between the scope and length of the consultation and the obligation for the Commission to work in an efficient manner. Consultation must remain proportionate to the likely impact of the proposal.

(c) The Objective Of The Consultation

In order to be successful, it is necessary to clearly identify the objective of a consultation: finding new ideas (brainstorming); collecting factual data; validating a hypothesis; etc. Another important objective may be to clarify the possible impacts of a measure on public opinion. This will helpful in deciding who needs to be consulted, when and how.

(d) Consult On What

Depending on the objective pursued and the issue at stake, consultation can be carried out on different elements of the IA (nature of the problem, objectives and policy options, impacts, comparison of policy options). It may also concern the whole draft proposal.

(e) Whom To Consult

Consultations may be open to the general public, restricted to a specific category of stakeholders (any member in the selected category can participate) or limited to a set of designated individuals / organisations (only those listed by their name can participate). All target groups and sectors which will be significantly affected by or involved in policy implementation should be included, including those outside the EU. Input from the Inter-Service Steering Group or, failing that, contacts with colleagues in other DGs will provide guidance on who to consult.

(f) How To Consult

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[147] COM(2002)704.

[148] **[Cite]**

The choice of consultation tools will largely depend on who needs to be consulted, on what, and on the available time and resources. The relevant tools include consultative committees, expert groups, open hearings, ad hoc meetings, consultations via Internet, questionnaires, focus groups, seminars/workshops, etc.[149]

(g) When To Consult

Appropriate timing must be fixed on a case-by-case basis, but consultation should start as early as possible in order to maximise its impact on policy development. Also, consultation should be seen as a recurring need in the policy development process rather than a "one-off" event. Depending on the issue at stake and the consultation objectives, it may therefore be useful to arrange for a series of consultations as the proposal develops.

(h) The Green Paper -- a special instrument of consultation

Green Papers are discussion papers published by the Commission on a specific policy area. Primarily, they are documents addressed to interested parties – organisations and individuals – who are invited to participate in a process of consultation and debate. In some cases they provide an impetus for subsequent legislation.

(3) The Requirements Of The 2002 Minimum Standards For Consultation Guidelines

(a) Minimum standards for consultation

Wide consultation is one of the Commission's duties according to the Treaties, and helps to ensure that proposals put to the legislature are sound. This is fully in line with the European Union's legal framework, which states that "the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents."[150]

Stakeholder consultation in the impact assessment process must be carried out according to the Commission's general principles and minimum standards for consultation, without prejudice to more advanced practices applied by Commission

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[149] The Commission maintains an Intranet site on 'Stakeholder consultation' which contains more details on this.

[150] Protocol (N° 7) on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty.

departments or any more specific rules to be developed for certain policy areas. Neither the general principles nor the minimum standards are legally binding.[151]

"The Commission's minimum standards on public consultation (…) apply in consultations of the public at large, and also when the Commission seeks the views of civil society groups and other interested parties because of the constituencies they represent, rather than because of the expertise they possess." [152]

(b) General principles

Participation: the Commission should consult as widely as possible on major policy initiatives, in particular, in the context of legislative proposals;

- **Openness and accountability**: both the Commission and the interested parties should adopt a transparent attitude during the consultation process;
- **Effectiveness**: consultation should start as early as possible so that input may be received at a stage where it can still have an impact on the formulation of the policy, while at the same time respecting the principle of proportionality;
- **Coherence**: consistency should be ensured, notably through appropriate coordination and reporting in the context of the Commission's "better law-making" activities.

(c) Minimum standards

- **Clear content of the consultation process**: all communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses;
- **Consultation target groups**: when defining the target group(s) in a consultation process, the Commission is to ensure that relevant parties have an opportunity to express their opinions;
- **Publication**: the Commission is to ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences - open public consultations must at least be publicised on the Commission's single access point for consultation, 'Your Voice in Europe';

[151] COM(2002)704.

[152] COM(2002)704.

- **Time limits for participation**: the Commission is to provide sufficient time for planning and responses to invitations and written contributions, striving to allow at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings;

- **Acknowledgement of receipt**: the Commission is to provide – collective or individual – acknowledgment of responses;

- **Providing feedback**: A report must be drawn up on the consultation process, its main results, and how the opinions expressed have been taken into account in the impact assessment report and in the explanatory memorandum accompanying the Commission proposal.

(4) The Requirements Of The 2002 Guidelines On Collection And Use Of Expertise

The Commission has defined core principles and guidelines for collecting and using expertise.[153] The core principles and guidelines apply whenever Commission departments collect and use advice of experts coming from outside the responsible Commission department. Thus it is also applicable when the advice comes from another DG or a European agency such as the European Environmental Agency. These guidelines are of particular importance in the area of environmental regulation, since so much of that regulation involves both scientific and technical issues.

[Expert groups and, in particular, scientific committees set up by the Commission and EU Agencies are a prime source of sound scientific advice. In addition, since 2005, a web application called the SINAPSE e-Network (Scientific INformAtion for Policy Support in Europe) offers Commission services communication and information tools for ad hoc collection of expertise, such as a library of scientific advice and opinions or a consultation module which allows services to conduct informal scientific consultations, complementing formal advisory processes.]

The principles and guidelines are not legally binding. Nor do they apply to the formal stages of decision-making as prescribed in the Treaty and in other Community legislation.

(a) Core principles

The Commission is to always:

- Seek advice of an appropriate high quality (in terms of professional excellence, independence/integrity and pluralism);

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[153] COM(2002)713.

- Be open and transparent in seeking and acting on advice from experts; and

- Ensure that its methods for collecting and using expert advice are effective and proportionate.

(b) Guidelines

The following guidelines implement the principles set out above.

- Planning ahead

The Commission is to maintain an adequate level of in-house expertise. This enables it to act as an 'intelligent customer' when organizing and acting on external expertise. If departments lack the necessary expertise, they are to seek to have access to it in other departments.

Policy issues that require expert advice are to be identified as early as possible.

- Preparing for the collection of expertise

The manner in which experts are involved (in-house, consultancy, expert group, conference, etc.) is to be determined by the urgency, complexity and sensitivity of the policy issue.[154]

Other departments liable to be interested in the policy issue are to be invited to contribute.

Departments are to first assess the extent to which their needs can be met by any existing mechanisms conforming to the core principles. This may include permanent scientific committees, and in-house expertise, such as that available in the Joint Research Centre (JRC). Suitable mechanisms may also be found in the Member States, partner countries or international organisations.

The scope and objective of the experts' involvement, and the questions they will address, are to be set out clearly. Departments may consult interested parties on the framing of the questions and underlying assumptions, particularly on sensitive issues.[155] These assumptions may need to be revisited as the policy process runs its course.

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154 Without prejudice to cases where the consultation of specific scientific committees is required under existing legislation.

155 However, this may not be appropriate for study contracts if the interested parties may later tender for the work.

A scoping exercise is to determine the profile of expertise required. The nature of the issue in question is to determine the optimum mix. Nevertheless, departments are to aim to ensure that the different disciplines and/or sectors concerned are duly reflected in the advice provided. This may involve, for example, those with practical knowledge gained from day-to-day involvement in an activity.

- Identifying and selecting experts

Departments are to cast their nets as widely as possible in seeking appropriate expertise. As far as possible, fresh ideas and insight are to be sought by including individuals outside the department's habitual circle of contacts. Departments are also to strive to ensure that groups are composed of at least 40% of each sex.[156]

Both mainstream and divergent views are to be considered. The Guidelines note, however, that it is important to distinguish proponents of theories that have been comprehensively discredited from those whose ideas appear to be supported by plausible evidence.

- Managing the involvement of experts

When using expertise, departments are to maintain a record of the process including the terms of reference and the main contributions of different experts or groups of experts.

The Commission is in consultation with the experts themselves, to determine whether the assembled expertise covers the topics to be addressed and whether sufficient pertinent background information and data are available and to ensure that there is a clear understanding of the tasks assigned.

Experts are to declare immediately any direct or indirect interest in the issue at stake, as well as any relevant change in their circumstances after the work commences. The Commission is to decide whether any conflict of interest would jeopardise the quality of the advice.

- Ensuring openness

The main documents associated with the use of expertise on a policy issue, and in particular the advice itself, is to be made available to the public as quickly as possible, providing no exception to the right of access applies.[157] Departments are to aim to

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156 In line with Commission decision of 19 June 2000 (OJ L 154/34, 27.6.2000) relating to gender balance within committees and expert groups established by it.

157 Regulation (EC) No 1049/2001 of May 2001 regarding public access to European Parliament, Council and Commission documents.

provide translations of documents – at least in summary form - insofar as this is practically possible, and in particular on sensitive issues. Possible delays or practical constraints in providing translations are to not preclude documents being made available in their source language.

Departments are to consider allowing the public to observe certain expert meetings, particularly on sensitive policy issues.

Departments are to insist that experts clearly highlight the evidence (e.g. sources, references) upon which they base their advice, as well as any persisting uncertainty and divergent views.

Departments are to consider how to promote an informed and structured debate between policy-makers, experts and interested parties (e.g. workshops, consensus conferences), particularly on sensitive issues.

As a general rule, any proposal submitted by departments for Commission decision is to be accompanied by a description of the expert advice considered, and how the proposal takes this into account. This includes cases where advice has not been followed. As far as possible, the same information is to be made public when the Commission's proposal is formally adopted.

g. Requirement for Rationale of Decision

Article 253 EC requires that all *regulations, directives, and decisions* adopted by the Parliament and Council jointly, by the Council alone, or by the Commission, "shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained by this Treaty."[158] This treaty requirement is normally thought to be satisfied by the recitation of "whereas" clauses at the beginning of EC legislation.[159] Such recitals, however, only set out seriatim a set of relevant facts or factors, but never deals with trade-offs or the real reasoning of the decision, and would not likely satisfy US courts as an adequate reasoned explanation of the decision.[160] The proposed European Constitution carries this Treaty provision forward in Article II-101, ¶ 2 (c) which includes in the "Right to Good Administration" "the obligation of the administration to give reasons for its decisions."[161]

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[158] **[Cite disposition in proposed EU Constitution]**

[159] **[Cite relevant EC authority]**

[160] **[Cite relevant US statutory and case law]**

[161] Note, however, that this is in the context of provisions relating to an "individual measure" that would "adversely" affect an individual.

III. EU Delegated Legislation

A. Delegation Doctrine In The EU

The EU theory of legislative delegation differs significantly from that in the US. In the EU, case law prohibits, in theory, the delegation of legislative power by the EU Council.[162] The result is that in order to provide for delegation of power to promulgate secondary interpretative or implementing legislation, for example, the EU legal scholar characterizes the situation as one of delegation of "implementation," not the delegation of legislative power or authority.

B. The Delegated Powers Of The Commission

Provision for delegated powers to *implement* EU legislation adopted by the Parliament and the Council, or the Council alone, is found in Article 202 of the EC Treaty. According to the third indent of Article 202, the Council "shall" "confer on the Commission, in the acts which the Council adopts, powers *for the implementation* of the rules which the Council lays down."(Emphasis added) The Council "may impose certain requirements in respect of these powers." The Council "may also reserve the right, in specific cases, to exercise directly implementing powers itself." Finally, "[t]he procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament."

The process of adopting implementing measures takes place in the EU in two main ways -- through the so-called comitology process under Article 202 and through the so-called standards process (dealt with below). Each is used with regard to environmental legislation, although the use of the comitology process by far predominates.

C. Delegated Powers In The Proposed European Constitution

The proposed European Constitution would have provided, in Article I-36, express authority for the delegation of power to the Commission to adopt "delegated European regulations" to "supplement or amend certain non-essential elements of the law or framework law [both new terms introduced by the proposed Constitution]." Article I-35, entitled "*Non-legislative* Acts"(emphasis added), expressly dodged the prohibition on delegation of *legislative* power by implicitly classifying delegated regulations as " non-legislative," granting the Council and the Commission the power, in cases under Article I-36, to adopt "European regulations and decisions." Article I-36 then addressed issues of scope and conditions for delegation by providing:

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[162] **[Cite]**

> The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the European laws and framework laws. The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of delegation of power.
>
> European laws and framework laws shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
>
> (a) the European Parliament or the Council may decide to revoke the delegation;
>
> (b) the delegated European regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the European law or framework law.
>
> For purposes of (a) or (b), the European Parliament shall act by a majority of its component members, and the Council shall act by a qualified majority.

Article I-37, which requires that Member States "adopt all measures of national law necessary to implement legally binding Union acts," then goes on to allow delegation to the Commission of "implementing powers" to enact "European implementing regulations or European implementing decisions" where "uniform conditions for implementing legally binding Union acts are needed."[163] Article I-37, ¶ 3 requires that "European laws shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers."

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D. Comitology

1. An Overview Of The Comitology Process

The Council, in delegating implementation powers to the Commission under Article 202 EC, and in implementing that Article's requirement that it "impose certain requirements in respect of the exercise of [Article 202's delegated implementation] powers," typically requires, in the legislation that is to be implemented, that the Commission collaborate with committees made up of Member State representatives, normally national bureaucrats from the relevant ministry. These committees, which are

[163] Art. I-37, ¶ ¶ 1,2, and 4.

chaired by non-voting Commission bureaucrats, participate in a complicated and relatively secretive legislative process involving themselves, the Commission, and the Council and the Parliament. The term "comitology" refers to the process which requires use of these committees.

In short, the comitology committees have a real influence on the shape of implementing legislation and as a result play a key role in the decision-making process.[164] They must not be confused, however, with other "committees," frequently with similar names, that are consulted by the Commission during the drafting phase of legislation headed for the Council and Parliament.[165]

The types of Article 202 "implementing" measures, the enactment of which may be delegated to the Commission, has been characterized by one source as follows:

- "Legislation of an abstract and/or general type, such as the adoption of directives intended to harmonize technical or economic developments, the preparation or the revision of appendices in order to make the original more effective, etc."

- "Executive activities on a concrete and individual level, such as imposing marketing restrictions on certain products in certain areas and on all measures in connection with the administration/management of a common market organization"

- "Advisory work, such as the evaluation of any aspects of the common foodstuffs laws, which might affect public

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[164] Daniel Gueguen, Caroline Rosberg, Comitology And Other EU Committees and Expert Groups: The Hidden Power of the EU: Finally A Clear Explanation, Europe Information Service (European Public Affairs Series)(February 2004), 53 ("The Hidden Power")("Many of the executive legal acts adopted by the Commission are "routine" measures, but decisions of enormous political importance are also made in these Committees, for example the embargo against British beef in connection with the BSE crisis in 1996").

[165] As noted *supra*, advisory committees, scientific committees and expert groups assist the Commission before it proposes legislation to the Council and the Parliament, by providing the Commission with non-binding opinions or advice on future legislative proposals, and as a result are influential even before the Commission considers drafting a proposal (*e.g.* they may issue studies laying the basis for a future Commission proposal). These are not, however, the same committees involved in the Comitology process, notwithstanding much confusion and apparent overlap in names.

> health or the assistance, provided by experts from the Commission, with all questions relating to technical harmonization and standards."[166]

In implementing Article 202's requirement that "procedures" used in the exercise of its delegated implementing powers "be consonant with principles and rules to be laid down in advance by the Council….", the Council has adopted a generic decision, called the Comitology Decision, spelling out the types of procedures to be used, when they are to be used, the powers of the committees using each type, and the procedures that must be used with regard to legislation passing through each type of procedure and committee.[167] Two of the four types of committees dealt with there, the regulatory and advisory committees, are involved directly in the regulatory process. Another type, the management committees, are normally used for management of markets and Community programs, an area where the Commission's authority is strongest.[168] The opinions of the regulatory and the management committees can, in certain regards, be binding on the Commission with regard to its implementing proposals. Even the advisory committees, however, which can issue only non-binding opinions, can still have considerable influence over the position that the Commission takes.[169]

The upshot is that comitology committees can, at least on paper, exercise real legislative powers independent of the Commission over implementing legislation.[170] In effect, the Member States, acting in Council, have forced the Commission to exercise "delegated" implementing powers only under careful supervision by "representatives" of Member State governments acting through their relevant Ministries.

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[166] The Hidden Power, p. 50.

[167] This process was originally provided for in the First Comitology Decision in 1987. Council Decision 87/373/EEC (1987) O.J. L197/33. That decision has now been replaced by the Second Comitology Decision of 1999, which we refer to as, simply, the Comitology Decision. Council Decision 1999/468/EC (1999) O.J. L814/23.

[168] The fourth type, the safeguards committee, is not used in environmental regulation.

[169] The Hidden Power, p. __.

[170] **[Discussion of whether the Commission controls the committees, or vice versa, and the debate on this subject. This depends on the issue, the sophistication of the national experts, and, importantly, on the extent of agreement between the national representatives. Do our Commission reviewers want to weigh in on this point?]** One commentator argues that the Commission succeeds in dominating the process notwithstanding the existence of the committees. *C.f.*, The Hidden Power (*compare* p. 61 *with* p. 65).

2. The Comitology Process

a. The Comitology Decision

The comitology committees are regulated by procedures set forth in The Comitology Decision. The Comitology Decision provides procedures for the exercise of implementing powers granted to the Commission in specific pieces of legislation.

The Comitology Decision, sets out certain provisions applicable to the three main types of comitology committees -- the regulatory, management, and advisory committees:

- Each comitology committee is to be composed of representatives of Member States, and is chaired by a non-voting representative of the Commission. (Arts. 3, 4, and 5, ¶ ¶ 1 respectively).

- The legislative process for implementing measures can only be initiated by the representative of the Commission submitting to the committee a draft of the measures to be taken, along with a time limit for taking action. (Arts. 3, 4, and 5, ¶ ¶ 2 respectively).

- The committees then deliver their opinion on that draft within the time-limit. (*Id.*).

- Each committee is to adopt its own rules of procedure, which must be based on "standard rules of procedure which shall be published in the Official Journal." (Art. 7, ¶ 1)

- "The principles and conditions on public access to documents applicable to the Commission shall apply to the committees." (Art. 7, ¶ 2).

- The Commission must inform the Parliament "on a regular basis" of the "committee proceedings," with certain specifics spelled out in this regard, and of any transmission of measures to the Council pursuant to the various procedures. (Art. 7, ¶ 3).

- The "*references* of all documents" sent to the European Parliament under the provisions of Art. 7, ¶ 3, "shall be made public in a register" that the Commission is to set up. (Art. 7, ¶ 5).

- A list of all of the committees used in comitology must be published in the Official Journal, specifying in the case of each committee the legislation under which it was set up and functions. (Art. 7, ¶ 4).

Further, the voting arrangements for the management and regulatory committees are the same. In both cases, the opinions are delivered by qualified majority, or by unanimity, depending on whether the issue being dealt with would require such voting in the Council.[171] In the case of advisory committees, decisions are normally taken by consensus, but Article 3, ¶ 2 of the Comitology Decision allows decisions to be made "if necessary by taking a vote," without spelling out what type of voting is to apply.

(1) Regulatory Committees

EU legislation normally requires that the Commission collaborate with a relevant regulatory committee when the Commission implements the legislation in question through a Commission regulation, directive or decision. **[We could use help here from the Commission reviewers on which types of instruments are used, when.]** The Comitology Decision specifies that the regulatory procedure is to be used for two basic types of cases:

- "[M]easures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants," and
- "[W]here a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures."

Art. 2(b).

A regulatory committee shares in legislative powers when the Commission elaborates such implementing measures as Commission directives or regulations. Its opinion is binding on the Commission, in the sense that in the event of a negative opinion, or no opinion (which is given the same effect as a negative opinion, contrary to the rule with a management committee), the Commission cannot adopt the measure as it can if there is a positive opinion, but "shall, without delay, submit to the Council a proposal relating to the measures to be taken and shall inform the European Parliament." The Council may then, within the period specified by the underlying legislation being implemented or not more than three months, take one of the following actions: (1) adopt the Commission proposal by qualified majority, **(2) unanimously amend the proposal, (3) reject the proposal by a qualified majority, then initiating the "safety" net**

[171] Comitology Decision, Arts. 4 and 5, ¶ ¶ 2 respectively.

procedure[172] which provides that the Commission may (a) opt for a new proposal thus starting over with the legislative process, (b) opt for a modified proposal to be submitted to the Council again, or (c) opt for the same proposal, subject to obtaining a change in opinion of the regulatory committee, and (4) fail to adopt a position and in which case the Commission takes its proposal back and makes a decision on the initial text proposed to the Council (referred to as the "safety net" procedure). [We need the assistance of the Commission reviewers on these points. Is this how it works? Where, textually, is this provided for?]

The Commission's Report on committee work in 2003 lists 26 regulatory committees working with DG Environment. The list of DG Environment committees of all types, which includes the statistics for their 2003 work, is attached as Appendix A to this report. **[That is, will be attached to later drafts.]** While it is difficult to gauge the real function of each committee from its name, it is noteworthy that many names state that the committee is "for application of" or "for implementation of" particular pieces of legislation; many state that they are "for the adaptation to technical progress" or "for the adaptation to scientific and technical progress" of specific legislation or subjects (in most cases also specifying that they are for "application" or "implementation" of the same legislation); some state that they are for "the approximation of the laws of the Member States" in certain areas; and some are simply labeled "Committee on" a given subject matter area. *See* Appendix A. Only one committee, the Committee for the adaptation to technical progress and application of the Community award scheme for an eco-label, rendered a negative opinion in 2003 (related to furniture), and in that case the measure was not referred to the Council, although the statistics report that one proposal before that committee in 2003 was so referred.[173]

(2) Management Committees

The management procedure is applied by management committees to the adoption of "management measures such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications."[174]

Because a management committee is not involved in the rulemaking process, but rather is normally involved in management of markets and community programs, it will normally be dealing with a proposed Commission decision, not a proposed Commission directive or regulation. **[Commission reviewers -- are we correct here?]**The opinion

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[172] This procedure, which is rarely used, is not favored by the Commission as it may put it in a position where it cannot implement the Council Decision.

[173] EC Commission, Report From The Commission On The Working of Committees During 2003,2005 O.J. (C 65) E/01 (*compare* p. 23 *with* p. 25).

[174] Comitology Decision, Art. 2(a).

of a management committee is not binding on the Commission. The committee may issue a positive opinion, or no opinion (which will have the effect of having issued a positive opinion). It may also issue a negative opinion. In any case, once a management committee issues an opinion, the Commission "shall" adopt a measure (which can apparently include a measure that has been changed to accommodate the committee's opinion), which "shall" take effect immediately. In the case, however, that the measure adopted by the Commission is "not in accordance with the opinion of the committee," the measure adopted by the Commission must be communicated to the Council "forthwith." The Commission "may," but need not, defer application of its measure for a period of time laid down in the legislation being implemented, but not to exceed three months, during which time the Council may by a qualified majority "take a different decision." If the Council does not amend the Commission measure within the allowed time, it enters into force.[175]

DG Environment worked with 6 management committees, as of the Commission's latest Annual Report on the working of committees for 2003. One of these committees has a scope that might implicate regulatory rather than just management issues -- the Committee for the adaptation to technical and scientific progress of the directive on the quality of water intended for human consumption.

(3) Advisory Committees

The Comitology Decision establishes the advisory procedure as a residual category -- to be used, in addition to the other two procedures, "in any case in which it is considered [by the Council or the Council and the Parliament, in adopting the legislation to be implemented] to be the most appropriate." Advisory committees can only issue non-binding opinions, but the Comitology Decision requires that an advisory opinion be recorded in the committee's minutes, and gives each Member State the opportunity to have its position recorded there as well.[176] Further, it requires that the Commission "shall take the utmost account of the opinion," and that it "shall inform the committee of the manner in which the opinion has been taken into account."[177] In short, according to one source, an advisory committee opinion can exert a "real influence" over the Commission.[178] Generally, this procedure is used when the matters under discussion are not very sensitive politically.

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[175] In practice, management committees do not often deliver negative opinions, since the Commission negotiates with them to avoid this result. The Hidden Power, p. __.

[176] The Comitology Decision, Art. 3, ¶ 3.

[177] *Id.*, Art. 3, ¶ 4.

[178] The Hidden Power, p. ____.

The Commission's Report on committee activities in 2003 lists only four advisory committees working with DG Environment. One of these appears to be a double entry -- the Advisory Committee For Implementation of the Directive on the Limitation of Emissions of Volatile Organic Compounds Due To the Use of Organic Solvents in Certain Activities and Installations.[179]

(4) Safeguard Committees

Safeguard committees are rarely used by the EU. The provision covering the safeguard procedure in the Comitology Decision does not even contain the normal provisions for the organization of a committee that it does in the case of the other three types of committees. Safeguard committees have been used mainly in connection with the taking of defensive measures in international trade cases in order to protect the interests of the EU or those of Member States. For example, a safeguard committee was used in the US-EU steel crisis which resulted when the US introduced safeguard measures against imports of certain steel products, which could have had a negative effect on the EU market.[180] In this case, the Commission informed and consulted the safeguard committee on which safeguard measures it should take against the US. The safeguard committee had to approve the Commission regulation to establish provisional safeguard measures prior to the implementation of such regulation. As of its Report on The Work of Committees in 2003, the Commission reports no safeguard committees in the areas for which DG Environment has responsibility.

b. The Updating of Underlying Legislation

Once the Comitology Decision was revised in 1999, the Commission began case-by-case revision of existing legislation to "align" it to the Comitology Decision. In 2003, the Council and Parliament enacted four regulations that aligned more than 300 pieces of underlying legislation to the Comitology Decision -- one regulation for the pieces of legislation for which each of the main types of legislative procedure were applicable. The main legislative procedure in the field of environmental legislation currently is the co-decision procedure, for which Regulation EC No. 1882/2003 was adopted.[181]

c. The Requirement for Standard Rules of Procedure

Article 7, ¶ 1 of the Comitology Decision requires the adoption by each committee of rules of procedure "on the basis of standard rules of procedure" to be published in the Official Journal by the Commission.[182] The Commission published such

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[179] Annual Report on 2003, *compare* p. 21 *with* p. 24.

[180] The Hidden Power, p. 53.

[181] O. J. (L 284) 1, 31 October 2003.

[182] O.J. (C 38) 6 February 2001.

rules on 31 January 2001, and intends to adopt an updated version to bring them into compliance with its new rules on access to documents.[183] Nonetheless, the Commission reports that as of 2003 only 94 out of a total of 263 committees had adopted rules of procedure based on the standard rules.

d. The Parliament's Powers

The Parliament has worked hard over the years to insert itself into the process of enactment of delegated legislation, on grounds of the need for "democratic" control and because it wishes to be co-equal with the Council. Under Article 7 ¶ 3 of the Comitology Decision, it has the right to be informed of the work of the committees and to be sent certain documents ("agendas for committee meetings, draft measures submitted to the committees…and the results of voting [the Commission interprets this as requiring only *overall* results of voting] and *summary* records of the meetings and lists of the authorities and organizations to which the persons designated by the Member States to represent them belong").[184] Under the same provision, they are entitled to be "kept informed whenever the Commission transmits to the Council measures or proposals for measures to be taken."

In 2000, the Commission agreed with the Parliament that it would electronically transmit to the Parliament the documents it was required to furnish.[185] This agreement specifies that except in emergencies, the Parliament will act to adopt any resolution charging excess of authority under Article 8 of the Comitology Decision within one month of receipt of a "definitive" draft implementing measure.[186] This agreement was followed in 2001 by a further administrative agreement designed to ensure a uniform approach by Commission departments to the Commission obligations to the Parliament, including minimum standards with regard to the types of documents to be provided to the Parliament and their structure.[187] There was also another agreement with the Parliament in 2003 on Procedures for Implementing Council Decision 1999/486/EC.

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[183] *See* Report on Committee Work During 2003, p. 2.

[184] The Commission sometimes also provides minutes of committee meetings when requested by the Parliament, and other accompanying documents like working papers, non-papers or information material authored by the Commission, Member States, or third parties.

[185] Agreement on Procedures for Implementing Council Decision 1999/486/EC, O. J. (L 256) 19, October 10 2000.

[186] Drafts are to be sent before the committee meeting, and again if substantially amended there.

[187] Administrative Agreement between the Secretariats-General of the European Parliament and the Commission, dated 14 December 2001, Note SEC (2002) 179.

In December 2002, the Commission proposed to amend Decision 1999/468/EC, a proposal that is still before the Council.[188] That proposal, amended as of 22 April 2004 to reflect the views of the Parliament[189], would have the effect, among other things, of putting the Parliament on the same footing as the Council in supervising the Commission's exercise of implementing powers.

Under Article 8 of the Comitology Decision, the Parliament has the power to pass a resolution concluding that any "draft implementing measures…which have been submitted to a committee" "would exceed the implementing powers provided for in the basic instument" being implemented, although it must also include in its resolution "the grounds on which [the resolution] is based." The Commission then has three alternatives, but must act within the time limits then running for the procedure in question: (1) submit a new draft measure to the committee, (2) ignore the Parliament and continue with the procedure, and (3) submit a normal legislative proposal to the European Parliament and the Council (presumably to cure the excess of authority by supplying new authority to do what the Commission wants to do). Whatever the Commission decides to do, it must inform the Parliament and state its reasons for its choice.

The Parliament has invoked this power in the environmental area in the Spring of 2005. On April 12, 2005, it demanded an investigation into the question whether the Commission had exceeded its authority by introducing proposed "relaxations" to Directive 2002/95/EC on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment," the "RoHS Directive without providing Parliament the documents it was due.[190] A representative of the Environment Committee alleged that this was "not an isolated case" and that the Parliament got "almost no" documents.[191] He also said that this failure "would not necessarily raise the risk of annulment [of any rules] because the EU agreement on procedures is essentially political rather than legislative."[192] The Environment Committee apparently also contests the substantive legality of the Commission proposals to except from the Directive's effect some types of cases through the comitology process under the provisions of the Directive that provide for this.

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[188] Commission 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(2000) 719 Final, adopted 11 December 2002.

[189] COM(2004) 324 final, dated 22 April 2004.

[190] International Environment Reporter, Vol 28, No. 8, p. 250 (April 20 2005).

[191] *Id.*

[192] *Id.*

e. The Requirement for a Register

Article 7, ¶ 5 of the Comitology Decision requires the publication by the Commission of the "references" of all documents sent to the European Parliament. The conditions and restrictions on access to comitology documents on the Register is dealt with in Commission Decision 2001/937.[193] The Commission makes available references to all documents sent to the Parliament, not just the ones falling into the category of those legally required to be sent. Recently the Commission has also taken steps to make those references available to the public on the Register simultaneously with transmission of the documents to the Parliament. Documents referred to have traditionally had to be individually requested under Regulation 1049/2001. The Commission is also moving, however, to make the documents themselves available in a public repository, as long as they *prima facie* are not subject to an exclusion. Due, however, to the exceptions in Article 4, ¶ 3 of Regulation 1049/2001, which provides an exception from disclosure where documents may "seriously undermine the institution's decision-making process," all draft implementing measures and supporting documents in the comitology process are to be put in the public repository only *after* the committee has delivered its formal opinion on the draft measure or subject. In short, they will be available to the public only after the key decisions have been made.

f. Access To Information

The Comitology Decision, as noted above, provides that the "principles and conditions" on public access to documents apply to the comitology process. It also provides for various forms of public access to documents, names of committees, an annual report on the working of the committees, and access for the Parliament to committee documents. Further, one of the purposes of the 1999 Comitology Decision was to improve information to the public concerning committee procedures. Specifically, the Comitology Decision provides that (1) the principles and conditions on public access to documents applicable to the Commission are applicable to the comitology decisions, (2) the Commission was to publish in the *Official Journal of the European Communities* a list of all committees which assist the Commission in the exercise of implementing powers (Article 7),[194] (3) an annual report on the working of committees is to be published, and (4) the references to all documents related to committees which have been transmitted to the European Parliament must be made public in a register set up by the Commission.

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[193] 2001/937/EC. ECSC, Euratom: Commission Decision of 5 December 2001 Amending Its Rules of Procedure; O. J. L 345, 29/12/2001, p. 94. **[Get this and review it.]**

[194] Such list must, with respect to each committee, set forth the basic instrument(s) under which the committee is established.

In unilateral Statement No. 5 with regard to the enactment of the Comitology Decision the Commission announced its intention "to make documents communicated to the European Parliament available to the public, except those deemed to be confidential."[195] The Commission confirmed this commitment in the discussions on the 2002 Agreement with the European Parliament referred to above, and committed itself to put the public, as far as possible, on an equal footing with the Parliament in regard to comitology documents transmitted to the Parliament. **[Question to our Commission reviewers -- is documentation of this publicly available?]**

Nonetheless, the comitology process remains, to a large degree, a "black box." None of the documents providing rights to access to documents discussed above in the context of the Commission's procedure for preparing proposals for legislation appear to apply to comitology by their terms, although Article 7, § 2 of the Comitology Decision may make them applicable generally, subject to their exceptions. But the Commission takes the position that the exceptions of Article 4, ¶ 3 of Regulation 1049/2001 relating to undermining the decision-making process, set out above, allow the Commission to shield from the public view all comitology documents until too late -- after the comitology committees have acted.

This situation is not likely to improve, even in environmental matters, with adoption of the proposed Regulation implementing the Aarhus Convertion in the EC institutions. As discussed earlier, the "access to documents" provisions of that proposed Regulation apply only to the larger circle of EU institutions that the Convention requires to be covered -- the Commission remains subject to Regulation 1049/2001 and its exceptions in Article 4, ¶ 3. Further, even if the proposed Regulation did somehow change the status quo as to the Commission, its Recital 15 provides expressly that the exceptions of Article 4 (1), (2) and (3) of Regulation 1049/2001 will apply, *mutatis mutandis*, to requests for environmental information under the proposed Regulation, a provision that the Parliament has not to date succeeded in changing. Finally, while the Commission has conceded that its administrative process of preparing proposed legislation does not fall within the "legislative capacity" exclusion of the proposed Regulation for purposes of public participation, it has not made this concession as to access to documents, and in any case it has made no similar concession as to its functions during the comitology process.

Notwithstanding the lack of rights to documents during comitology, good lobbyists can frequently obtain what they need, either from Commission officials or from Member State representatives. The problem is simply that the public has no right of

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[195] This Statement is not published in the Official Journal. **[Question to our Commission reviewers -- is this Statement publicly available, on the web or otherwise?]**

access, that NGO's may or may not, depending on how well they lobby, and any business that cannot afford a good lobbyist has no effective right of access.

g. Public Participation (Consultation)

The Commission's extensive guidance with regard to its own decision process when preparing proposed legislation, and its consultation practices in doing so, are by their terms uniformly made not applicable during the comitology process. Nor, again, is this likely to change with the adoption of the proposed Regulation applying the Aarhus Convention to environmental matters. Even so, however, the process is somewhat more open than it may appear, at least to a good lobbyist. It is just that there are no rights, much less rights backed up by broad judicial review, and thus no effective public accountability.

The June 2002 Communication on Impact Assessment appears to exclude the comitology process without coming out and saying so directly. It includes only proposals submitted for inclusion in the Annual Policy Strategy or the Work Program, and then only for "[r]egulatory proposals, such as directives and regulations…."[196] It then goes on to say, however, that the following are excluded:

> [P]roposals like Green Papers where the policy formulation is still in process, periodic Commission decisions and reports, proposals following international obligations and executive decisions for example, *implementing decisions, statutory decisions and technical updates, including adaptations to technical progress.* Commission measures *deriving from its powers of controlling the correct implementation* of Community Law are equally exempted. (Emphasis added).

The Commission, of course, is said to be exercising "implementation" powers in the comitology process, since EU delegation doctrine precludes delegation of "legislative" powers, no matter that what the comitology process produces is delegated legislation of general applicability in many cases. It must also be noted that the bulk of the comitology measures in the environmental field are termed adaptations to either scientific or technical progress, or both.

Both of the 2002 Consultation Communications appear to exclude comitology implicitly from their provisions through use of similar language. The June 2002 Communication, for example, provides that:

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[196] *Id.*, p. 5.

> For the purpose of this document 'consultations' means those processes through which the Commission wishes to trigger input from outside interested parties to its policy-shaping prior to a decision by the College of Commissioners. Consequently, the following fields are excluded from the scope of the general principles and minimum standards:
>
> -- Specific consultation frameworks foreseen in the Treaties (*e.g.*, the roles of the institutionalised advisory bodies; the social dialogue according to articles 137 to 139 TEC) or provided for in other Community legislation
>
> -- Consultation requirements under international agreements
>
> -- *The participation of Member States' representatives through the so-called comitology procedure[footnote: According to Council Decision 1999/468/EC]*.[197]

As a further indication, page 9 of the Communication notes that:

> The proposal is that the Commission will be guided in the conduct of its open and/or focused consultations on major policy initiatives [footnote] by [this document.]
>
> [The footnote provides "Major policy initiatives are, in particular, those that will require an extended impact assessment."]

As noted earlier, the 2002 Communication on Impact Assessment Guidance, which is apparently still in effect (but with the updated June 2005 Guidelines), appears to rule out the application of impact assessment to the comitology process.

The June 2005 Impact Assessment Guidelines have similar provisions. In the discussion of which proposals require an impact assessment, the Commission notes that:

> The following are also normally exempted: periodic Commission decisions and reports, proposals following international obligations and Commission measures deriving from its powers of controlling the correct

[197] *Id.*, p. 10.

> implementation of EC law and executive decisions. Footnote 7.[198]

Footnote 7 says:

> The latter category includes *implementing decisions*, *statutory decisions*, technical updates, including *adaptations to technical progress*, competition decisions or acts which scope is limited to the internal sphere of the Commission. COM (2002)276.[199]

While none of the above provisions say clearly and expressly that all aspects of comitology measures, including the Commission's activities (as opposed to just those, perhaps, of the Member state representatives on the committees), are excluded from all of their provisions, the Commission's past practices and apparent inclinations would seem to make this by far the most likely outcome.[200]

Further, it does not appear that the proposed Regulation applying the Aarhus Convention to the EU institutions will require public participation in the comitology process, for the reasons set out above with regard to rights to access to documents. Notwithstanding its sweeping "legislative capacity" exclusion, the Commission expressly clarified that public participation rights would apply to its work preparing legislative proposals. It could have, but did not, say the same as to its work in the comitology process. Further, it expressly took the position that the provisions of Article 8 of Aarhus, which seem to be tailor made to cover its role in both the preparation of legislation and the comitology processes, are not legally binding and are not being implemented by its proposed Regulation.

E. The Standards Process

1. The Nature Of The Standards Process

The standardization process in EC law is called the "New Approach." In this process, the Council passes product-specific legislation establishing "essential

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[198] June 2005 Impact Assessment Guidelines, p. 6.

[199] *Id.*

[200] It should be noted that the Commission's Report on the Working of Committees for 2003 makes no comment on the applicability of any of the Better Government initiatives of the Commission, nor of Aarhus implementation, although it does, in a section titled "Wider Developments," deal with the proposed changes to the process of delegated legislation in the proposed European Constitution. *Id.*, Section 1.5, p. 3.

requirements" for certain areas of regulation, with regard to products to be placed on the market in Europe. For example, in the area of environmental legislation, European Parliament and Council Directive 94/62 of 20 December 1994 establishes, in Annex II, "essential requirements" for the composition and the reusable and recoverable, including recyclable, nature of packaging."[201] It also provides in the same legislation, in Article 9, that Member States are to require that within a certain time (3 years in the Packaging Directive) no packaging may be placed on the European market unless it complies with all essential requirements in the directive. But they are also to allow free movement and marketing in their countries of all products that do meet such essential requirements, even if this showing of compliance has been made in some other EU Member State (although the legislation does not actually say the last).[202]

In order to implement this scheme, the legislation normally directs the Commission to "promote" the development of technical standards, called "European Standards," relating to various aspects of the products in question.[203] These standards are intended to be more detailed technical specifications, developed at the invitation of the Commission by private European standards organizations like CEN and then published by the Commission as harmonized European standards in the Official Journal, which will ensure meeting the more general requirements of the essential requirements, but the legislation again does not actually say this.

What it does provide, however, is that in enforcing the requirement that all products placed on the European market after a certain date must meet the directive's essential requirements, Member States "shall…presume compliance" with those requirements if the product in question "complies" with either (1) national standards adopting ("transposing," in European parlance) the European standards (these national standards are then presumed to be the same around Europe, and are considered "harmonized") or (2) where no European harmonized standards exist, national standards developed by each Member State, and which that Member State "deems" to meet the essential requirements. Note, however, that there is apparently no actual requirement in the text of the Packaging Directive that requires Member States to transpose European Standards into harmonized national standards.

If any Member State "considers" that the standards of either type "do not entirely meet the essential requirements," they or the Commission:

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[201] 1994 O. J. (L365/10).

[202] *See, e.g.*, Packaging Directive, Article 18 ("Member States shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive.")

[203] *E.g.*, Article 10 of the Packaging Directive.

> shall bring the matter before the Committee set up by Directive 83/189/EEC giving the reasons therefor. This Commission shall deliver an opinion without delay.

Packaging Directive, ¶ 4. Directive 83/189 has now been superceded by Directive 98/34/EC, which requires Member States to inform the Commission of standards draft technical regulations adopted at the national level, and which provides in Article 5 for a Standing Committee consisting of representatives appointed by the Member States, and chaired by a representative of the Commission. This committee is distinct from the comitology committee provided for in Article 21 of the Packaging Directive. Article 9, ¶ 4 of the Packaging Directive goes on to say that:

> In light of the Committee's opinion, the Commission shall inform Member States whether or not it is necessary to withdraw those standards….

[Paragraph to be supplied on the operation of this process with regard to disapproval of CEN packaging standards.]

It is important to note, with regard to the standards process, that there is no generic legislation empowering the Commission to act, as there is in the comitology process. The New Approach was announced in a Council Resolution of 7 May 1985, and has been the subject of several Council Resolutions since then, but the Commission's authority to act, other than under Article 202 of the EC Treaty, is found in each separate piece of product-related legislation setting essential requirements.

Further, the Commission itself apparently enacts no secondary legislation as such (*e.g.*, anything entitled a regulation or directive) -- it (1) invites one of the European standards organizations to develop standards by issuing a "mandate" to that organization, (2) approves the standards then developed and publishes them in the Official Journal, unless, presumably, it "considers" that they do not "entirely meet the essential requirements," in which case it (3) decides whether or not the standards must be withdrawn after obtaining the opinion of the Directive 83/189/EC Committee.

Finally, the Commission takes the position that the European Standards published in the Official Journal are not legally binding. Once they are transposed into national law, the issue would then become whether they were legally binding as a matter of Member State law, not EU law. Even then, they are not legally binding on the regulated community, since compliance with them is not mandatory -- they are simply one method that the regulated community can use, if it chooses, to demonstrate compliance with the relevant essential requirements. It might be said, however, that they become legally binding on other Member States, who must accept demonstrations of compliance with essential requirements that rely on those national standards.

For purposes of this analysis, the question becomes whether any of the Commission's actions in standardization constitute "rulemaking" as this project is using

the term, and what is the status of the Commission actions in standardization, however, characterized, under the various regulations and Commission Communications discussed earlier that deal with access to documents, public participation, impact assessment, and statements of reasons for actions. We examine only the actions of the Commission, since the European Standards organizations are private organizations and the actions of the Member States are beyond the scope of this paper, which deals only with the rulemaking process at the EU level.

As for the first question, none of the Commission's actions appear to constitute adoption of the standard forms of legislation like a directive or a regulation. The issuance of the mandate, for example, seems essentially managerial.

The approval and publication of European Standards in the Official Journal, however, bears some resemblance to adoption a determination of general applicability and future effect. Further, these standards would be legally binding on the Member States if there were any requirement that the latter must transpose them into national standards.[204] Note, however, that there is apparently no such requirement on the face of, *e.g.*, the Packaging Waste Directive. Further, as noted above, even when transposed under national law, the national standards are not legally binding requirements on the regulated community, because compliance with them is voluntary even if compliance with the essential requirements is not. It is at least the case, however, that once transposed into national standards, these standards bind other Member States, in the sense that those Member States must "presumptively" accept products that have made compliance demonstrations under them. On balance, their publication as European Standards might be characterized as a "disguised" directive for that reason, or at least as a decision embodying a form of administrative notice with legal consequences, reflecting the Commission's determination of their compliance with essential requirements.

2. Access To Information

Turning to the question of access to information, and particularly documents, during the standards process, the Commission does in fact provide some access to the process, as Professor Strauss' draft indicates at p. 35, n. 141. The question remains, however, of the applicability of Regulation 1049/2001 to these Commission actions in implementation of the standardization process. Article 2, ¶ 3 says that:

> This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it or in its possession, in all areas of activity in the European Union.

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[204] Where they are protested, of course, such a duty would arise only if the Commission did not decide that they should be withdrawn after receiving the opinion of the Directive 83/189/EC Committee.

Article 12, ¶ 2 of that regulation further requires, "subject to Articles 4 [Exceptions] and 9 [Sensitive Documents]," "direct access, in electronic form or through a register," to:

> In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are binding in *or for* the Member States. (Emphasis added)

It would thus seem that the real issue is whether documents involved in the standard ship process, which are drawn up or received by or in the possession of the Commission, are covered, unless they are properly withheld under the exceptions of Article 4 of the sort discussed earlier in this paper in other contexts. Given the position taken by the Commission on the application of the exceptions in Article 4, ¶ 3 of the Regulation in the comitology process, it is not clear that the Commission would conclude that the public has rights to documents during the standards process under the Regulation, whatever its voluntarily applied policy in this regard.

As for the special applicability in the area of environmental regulation of the proposed Regulation for implementing the Aarhus Convention, the issue would seem to be whether the Commission in the standards process is acting in a "legislative capacity," again for the reasons discussed earlier in this paper (and subject to the same considerations). Since, however, all that the proposed Regulation does in the context of access to documents is carry over the provisions of Regulation 1049/2001 as to applicability to the Commission, the proposed Regulation may not change the result already required by the terms of (or allowed by the exceptions to) Regulation 1049/2001.

3. Public Participation

As to public participation in the standards process, there are a number of ways that effective lobbyists can gain access to it. As for *rights* to participation, however, we have noted earlier that there are none at present. The 2002 Comunications on Consultation are not legally binding, and are in any case limited in their application to "major policy initiatives"[205] -- that is, those that "will require an extended impact assessment."[206] It is unlikely that they will apply by their terms to Commission actions in the Standards process.

As for the special applicability in the area of environmental regulation of the proposed Regulation implementing the Aarhus Convention, it is unlikely that the Commission would classify its actions implementing the standards process as acts "in the

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[205] *E.g.*, 5 June 2002 Guidelines at 9.

[206] *E.g.*, *id.*, n. 11.

preparation of plans and programmes," although an argument could be made that at least some of the Commission's implementing decisions and acts during standardization fall within the ambit of those terms (or of the Aarhus reference to "policies" that the Commission has not implemented), however those terms are used by the EU institutions under EC law. It is also not at all clear that the Commission's actions in the standards process would qualify as "decisions" under the narrowly drawn terms of Article 6 of the Convention, which is focused on decisions on permitting specific activities. In any case, the Commission takes the position that it makes no decisions in the sense covered by Aarhus Article 6, since it claims that all such decisions are delegated to the Member States under EU legislation or that they involve GMO's and are not subject to mandatory Aarhus requirements.

Finally, a good argument could be made that the Commission's acts during standardization fall within Aarhus Article 8 as incident to the "preparation of …generally applicable legally binding normative instruments," to the extent that the published European Standards must be transposed by the Member States, or at least because compliance with national harmonized standards set based on them must, as a matter of law, be accorded "presumptive" status in other Member States. Nonetheless, as noted earlier, the Commission has wholly failed to implement this Article of the Convention, on the grounds that it is free to refuse to do so under the terms of the Convention.

4. Impact Assessment

The Commission's June 2005 Impact Assessment Guidelines apparently do not apply to Commission actions during the Standards process for the reasons discussed above with respect to comitology -- such Commission actions would likely be said to be excluded as "periodic Commission decisions and reports…and Commission measures deriving from its powers of controlling the correct implementation of EC law and executive decisions."[207]

5. Explanation Of Decision Rationale

Article 253 of the EC Treaty would appear to apply to Commission decisions to issue a mandate and to approve the resulting standards as European Standards and publish them in the Official Journal, as well as its decision whether or not to withdraw standards after obtaining the opinion of the Directive 83/189/EC Committee. Article 253 covers *decisions* of the Commission, and would therefore seem to require statement of the reasons on which each such decision was taken, unless the language referring to "proposals or opinions…required to be obtained by this Treaty" is read as limiting its application to decisions taken by the Commission during the normal legislative process.

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[207] June 2005 IA Guidelines, p. 6 Note 7 says specifically that "implementing decisions, statutory decisions, [and] technical updates" are included in the excluded categories.