TABLE OF CONTENTS

ABA Project -- Outline of EU Environmental Rule-making

Executive Summary

The summary of EU administrative law in the environmental sector deals primarily with (1) EU regulation of the environmental impacts of (a) industrial and commercial manufacturing plants (including the environmental impacts of industrial accidents), (b) the products those plants make, (c) major public and private infrastructure projects, and with (2) EU regulation of various aspects of nature protection.[1] EU environmental sector regulation of plants encompasses regulation of air and water pollution; waste (*e.g.*, waste, hazardous waste, waste shipment, waste oil, and PCB's), including waste releases to the environment from industrial accidents and other sources; and regulation of impacts on special environments such as wetlands, groundwater, and natural areas. EU environmental sector product regulation focuses on eco-labeling and life cycle regulation of the harmful environmental impacts of chemicals and products containing chemicals, packaging, batteries, electrical and electronic equipment, products containing genetically modified organisms, and automobiles. EU environmental regulation also covers such subjects as environmental impact of major public or private development and other projects, eco-management and auditing, and legal liability for environmental damage.

While EC level environmental legislation is now extensive, and has generally led the development of environmental regulation in Europe[2], its implementation and enforcement is typically left up to the Member States. This has proved to be the Achilles heel of the regulatory system.[3]

Plant regulation typically requires implementation by plant specific permits issued at the Member State level. Product regulation, on the other hand, has frequently required implementation by listing of products or product types through EU-level comitology, much as in the field of food safety. With the passage of the new REACH regulation affecting chemicals and products containing chemicals (almost all products), and the creation of a new European Chemicals Agency, much more of this form of product regulation will now be done at the EC level than in the past.[4]

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[1] See Prof. Dr. Ludwig Krämer, EC Environmental Law, Sixth Edition, Sweet & Maxwell (London, 2007)(hereinafter Krämer) for a comprehensive overview and critique of EU environmental law by a former Commission official, and acute observer, who participated extensively in its development.

[2] Id. at 448-52.

[3] Id. at 418-41, 459-62, 471-73.

[4] Regulation (EC) No 1907/2006 of the European parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93

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The chief regulatory institution at the EU level is DG Environment, located in Brussels and employing about 550 staff. It consists of the Office of the Director-General and seven Directorates covering such matters as Communication, Legal Affairs & Civil Protection; Climate Change & Air; and Water, Chemicals & Cohesion.

The European Environmental Agency, a relatively new agency with about 150 employees and an annual budget of about 31 million Euros, is located in Copenhagen, Denmark. It became operational in 1994, and is a non-regulatory entity that provides environmental information to the Commission, other EU institutions, national governments, and the public. The European Chemicals Agency, just in the initial stages of being created as a result of the recent passage of the REACH regulation, will be located in Helsinki, Finland, and will play an important role in the implementation of the regulatory provisions of REACH.

The EU'S treaty authority to legislate in the environment, health and safety areas arises principally under Articles 95 TEC (Internal Market) and 175 TEC (environment).[5] When it does so its law pre-empts that of the Member States,[6] although the Treaty and secondary legislation give the Member States various types of leeway to impose requirements going beyond EU legislation (*e.g.*, under Article 176 TEC, and through a so-called "safeguard" clause pursuant to which Member States, under certain conditions, may temporarily restrict activities permitted by EU legislation).[7]

The sources of authority for EU environmental law govern the legislative procedure used. The co-decision procedure is used for the bulk of environmental legislation. Such legislation stems primarily from three EC Treaty provisions – Article 175(1) TEC governing environmental measures as such, Article 175(3) TEC governing environmental action programs, and Article 95(1) TEC governing internal market measures. Articles 95(1) and 175(1) and (3) each specify that the legislative procedure of Article 251 TEC, the co-decision procedure, is to be used, which requires qualified majority voting in the Council. By force of the "integration" requirements of Article 6 TEC, environmental or environmentally related measures may also be adopted under other EC Treaty provisions dealing, for example, with agriculture (Article 37 TEC) and transport (Article 80 TEC), each with its special requirements.[8]

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and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC and 2000/21/EC (O.J. L396/1, 30.12.2006) (hereinafter referred to as REACH).

[5] Treaty Establishing the European Community [TEC]

[6] Krämer at 56-59.

[7] See, e.g., TEC, Arts 30, 95(4)-(10) and 174(2).

[8] Because this paper does not deal with the legislative process itself except in passing, those will not be discussed. Nor will we discuss whether and how various

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Environmental matters that:

a. are primarily of a fiscal nature,

b. affect town and country planning

c. affect quantitative management of water resources or affect, directly or indirectly, the availability of those resources,

d. affect land use, with the exception of waste management, or

e. significantly affect a Member State's choice between different energy sources and the general structure of its energy supply,

fall within the consultation procedure under Article 175(2) TEC, which requires unanimous consent in the Council. 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 also subjected to the consultation process and unanimous voting in the Council by Articles 95(2) and 94 TEC.

In the environmental area, the EC acts chiefly through directives, using regulations much less often. Recently, however, more use has been made of regulations – e.g., with regard to the proposed new EC chemicals legislation entitled "REACH," which deals with products, requires a Community wide regulatory system and creates the new Community-level European Chemicals Agency to assist in implementation.

The Commission makes broad use in the environmental area of "communications," which are not expressly provided for in the EC Treaty and which are not legally binding. These typically express the Commission's views on a problem, and can take the form of strategies, green or white papers, reports or simply communications, and may be accompanied by draft of a proposed directive, regulation, or resolution. There is no legal difference between strategies, papers, reports and communications.[9]

Non-binding guidance notes are also used by the Commission to explain how Member States or the regulated community are to interpret or apply certain pieces of EU environmental legislation – for example documents called BREF's spell out by industry category the "best available techniques" for manufacturing plant or other environmental controls.

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other EC bodies (e.g., The Economic and Social Committee and the Committee of the Regions) must be consulted during the legislative process, since these aspects are not directly material to the process by which the Commission develops proposals for legislation or promulgates implementing administrative regulation, the two key topics dealt with here.

[9] Krämer at 60.

The Commission has used Community Environmental Action Programs for many years. These set out for a period of four-five years the objectives, principles and priorities of Community action. Sectoral action programs can be used, and have been by the Commission under the current Sixth Environmental Action Plan. Since 1993, Article 175(3) TEC has required that these programs be adopted by a joint decision of the European Parliament and the Council, so it can be argued that they are binding on the Commission.[10]

The Commission uses normal processes of legislation to develop environmental legislation for proposal to the Council and Parliament. In the environmental sector, these processes have of late been marked by extensive use of consultation procedures, impact assessment, and other new forms of "better lawmaking." The environmental sector has been a bell-weather in the early development of these techniques in the EU.

DG-ENV uses comitology processes extensively, as for example in the implementation of the Waste Framework Directive and the WEEE and RoHs Directives,[11] and will do so under the REACH Regulation. Comitology processes are used to further elaborate, to set standards under, or to update environmental legislation over time ("adaptation to scientific and technical progress"). Thus they deal with crucially important issues and details of elaboration and implementation. Comitology in the environmental area, in particular in the implementation of the RoHS Directive, has been the focus of clashes between the Commission and the Parliament with regard to Parliamentary power over, and rights to participate in, the comitology process, resulting in new expanded rights for the Parliament being agreed to in 2006.

The "New Approach" to technical harmonization and the "Global Approach" to conformity assessment are also used, but sparingly, in the environmental sector, the chief examples being in the area of packaging and packaging waste[12], and to a limited

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[10] Krämer at 61.

[11] Waste Framework Directive 2006/12, 2006 O.J. (L 114) 9; Waste Electrical and Electronic Equipment Directive 2002/56, 2002 O.J. (L 37) 24 (hereinafter referred to as the WEEE Directive), *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_037/l_03720030213en00240038.pdf; Directive 2002/95/EC on the restriction of the use of certain hazardous substances in electrical and electronic equipment, 2003 O.J. (L 37) 19, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_037/l_03720030213en00190023.pdf (hereinafter referred to as the RoHS Directive). The WEEE Directive requires that manufactures of certain electrical and electronic products take-back these products when they become waste and ensure that they are reused or recycled. The RoHs Directive prohibits or restricts the use of certain toxic substances in the manufacture of such equipment or its components.

[12] European Parliament and Council Directive 94/62/EC on Packaging and Packaging Waste, 1994 O.J. (L 365) 10, as subsequently amended in 2004 O.J. (L47) 26.

extent in respect of product marking under the Waste Electronics Directive. Ecolabeling, on the other hand, is not based on the New Approach; the Eco-label Regulation employs comitology to develop ecolabel criteria.[13] The use of the New Approach in the packaging waste area has been marked by controversy.

EU environmental legislation has anticipated many elements now common throughout EU administrative law. As early as 1985, it imposed "impact assessment" requirements (chiefly dealing with *environmental* impact) on case-by-case Member State action with regard to certain types of specific public and private projects.[14] The same Directive had provisions requiring public access to information, public participation, and by 1997, mandatory written reasons for decision.[15] Access to information principles and requirements developed in the environmental area as early as 1990, in an environmental directive applicable to the Member States with regard to access to information on the environment.[16] By 1996, the Integrated Pollution Prevention and Control (IPPC) Directive, contained requirements for public access to permit information and right to participate with regard to Member States taking case-by-case permitting actions, although it did not provide rights against EU institutions themselves.[17]

The environmental sector is still on the "cutting edge" of progress on better governance and administrative law rights in the EU. Implementation of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention")[18] has required the Commission to introduce into the environmental sector more specific and detailed procedural provisions with regard to participation, right of access, and limited forms of judicial review rights then it has made available generally -- and to do so as to themselves and EU institutions as well as to Member States.

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[13] Regulation 1980/2000 on a Revised Community Eco-label Award Scheme, 2000 O.J. (L 237) 1.

[14] 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).[Include citation to relevant paragraphs on IA]

[15] Id., Articles 6(2) and (3), 8, 9.

[16] 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 Council Directive 2003/4/RC of 28 January 2003 on Public Access To Environmental Information 2003 O.J. (L 41) 26 (FOIA Directive). [Cite to relevant paragraphs][Compare the chapter of this report on information access.]

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

[18] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

The Commission has adopted a "package" of three legislative proposals -- two directives and one regulation -- to complete implementation of Aarhus. The two directives, adopted in 2003, dealt with access to information and public participation at the Member State level. [19] The regulation, adopted in 2006, dealt with access to information, public participation, and judicial review at the EU level.[20]

The Commission's implementation of the Aarhus Convention has been carefully narrow, however, and possibly so narrow as to constitute a violation of the Convention.[21] Further, the Commission has chosen not to grant the same rights outside the environmental area. For example, the Aarhus Convention has access to information provisions, applicable to the environmental area, that are broader in scope and more detailed and far-reaching than those of the existing, generally applicable EU Regulation (EC) No. 1049/2001.[22]

To summarize the current state of affairs with regard to preparation of legislation and delegated legislation at the EU level in the environmental sector, impact assessment of environmental sector rulemaking through the Commission's preparation of legislative proposals takes place through the Commission's general "better legislation" procedures, which have been laid out in several communications. These impact assessment procedures do not create "rights" to their application, however, and are not applicable to the delegated legislation processes of comitology and standards setting.

As for access to information, rights (enforceable by judicial review) are created by Article 255 TEC and by a 2001 Regulation, with regard to preparation of legislation both in the environmental sector and more generally. Access to information rights are expressly extended to the comitology process by the Comitology Decision, of 28 June 1999, and may apply in certain regards to the standard setting process of delegated legislation by force of Article 255 TEC and the 2001 regulation. The basic access to information coverage is expanded, in the

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[19] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (2003 O.J. (L 41) 26); Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (2003 O.J. (L 156) 17).

[20] European Parliament and Council Regulation 1367/2006, 2006 O.J. (L 264) 13 (hereinafter Regulation 1367/2006).

[21] See Krämer at 149-62, 441.

[22] 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)) at 2 (Explanatory Memorandum).

environmental sector, by a Regulation implementing the Aarhus Convention.[23] Even so, all of these rights of access to information are subject to "exceptions" that can be applied by the Commission to preclude access to key documents during preparation of legislation, and particularly during the comitology and standards processes, until too late to be of real use.

There are no general rights to public participation in the administrative process either in the environmental sector or more generally, although in practice considerable public participation is allowed in the preparation of legislation by the Commission, particularly in the environmental sector, but not in the delegated legislation process. Further, the regulation implementing the Aarhus Convention provides narrow rights to public participation in the formulation of "plans and programmes" "relating to the environment," but not as to matters of policy formulation, nor to preparation of legislation or rulemaking generally or to the delegated legislation processes.

A requirement for a rationale of decision is imposed by Article 253 TEC, applicable to all "regulations, directives, and decisions," apparently whether adopted in the normal or the delegated legislative process, and not just those in the environmental sector. As to regulations and directives, however, this requirement is generally thought to be satisfied by the recitations in the "whereas" clauses at the beginnings of such legislation. The regulation implementing the Aarhus Convention imposes a rationale requirement in the environmental sector that may in time be construed as going beyond that of Article 253, but only in the narrow context of environmental "plans and programmes," not in the more general environmental legislation or rulemaking context and not in the comitology process.

I. Introduction

This paper describes the administrative "rulemaking process" in the European Community ("EC") in the environmental, health and safety area. First, it deals with the *administrative process* by which the European Commission *proposes* environmental, health and safety *legislation* for adoption by the Council and the Parliament, but does not deal with the *legislative adoption process* itself as carried out by those two institutions. Second, it deals with the way the Commission *adopts* implementing *administrative regulation*.

The EU now has a relatively developed system of environmental 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.[24] Even so, it has played a key role in the

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[23] Regulation 1367/2006.

[24] 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)(arguing that US and EU environmental law are on a converging path); Cf., Krämer at 447-55 (Krämer traces the development of European environmental law, notes the retarding

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evolution of both the EU's governmental architecture and its development of administrative rulemaking procedures. Indeed, it can be argued that it has, on certain issues, 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.

II. EU Environmental Law And Policy

A. The Development of EU Environmental Law And Policy

Although not originally a main focus of the EU's governmental architecture[25], 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, 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.[26]

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influence of Member State control on its precision, clarity and stringency, and notes the desire of administrative officials at both the EU and Member State level to monopolize control of the exercise of administrative power and discretion. He also discusses the impact of both Member State influence and administrative official attitude (1) on the inadequacy of EU environmental law implementation (and on its frequent lack of proper implementation) (2) on its lack of enforcement, and (3) on the lack of standing rights for individual citizens necessary to hold governments responsible before courts with regard to both.)

[25] A specific legal basis for environmental regulation was not included in the original EC Treaty of 1957.

[26] A good example is that the principle of "subsidiarity" was, when first introduced to the EC Treaty in 1987, limited to environmental matters. Krämer at 17. It was later broadened to have general applicability. Id. at 17-20. 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., at 16. Another example is Article 174(3) of the EC Treaty, which provides 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 Lawmaking administrative initiatives, the application of which is not limited to environmental policy, as discussed below. The proposed EU Constitution (Treaty establishing a Constitution for Europe, OJ C 310 (16.12.2004)), to date rejected in the French and Dutch votes, did not extend the requirement for consideration of costs and benefits outside the environmental area (codifying it in

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B. EU Law-Making Authority In The Environmental Area

While there was no specific legal basis for environmental regulation in the original EC Treaty, provisions governing environmental legislation were subsequently introduced and have evolved with the evolution of those treaties. The EU has two main treaties. The original Treaty Establishing The European Community (the "EC Treaty") was concluded in 1957 and has been amended many times, including by post-1993 treaties that also amended the EU Treaty. The Treaty on European Union (the "EU Treaty") was concluded in 1993 in Maastricht and has been amended twice (? at least five times: Amsterdam, Nice and the 3 enlargements in 1995, 2004 and 2007) since then. 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.

The EC Treaty 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 and under the provisions of then-Article 235, a catch-all provision (now article 308). The EC Treaty was amended in 1987 by The Single European Act, however, to provide direct authority for enactment of environmental legislation.

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 and from subject matter to subject matter in the scope of the authority granted, the legislative process mandated, and the power of the Member States to enact more stringent legislation in the relevant area. There have been efforts in recent treaty amendments, and in the proposed EU Constitution, to consolidate and rationalize the various bases of authority.[27]

Article III-233(3) of Section 5 (Environment)), but this requirement for cost/benefit consideration might well have ended up, had the proposed Constitution been adopted, by having an effect on the interpretation of the more generally applicable "proportionality principle," which would have been codified in the proposed EU Constitution as Article I-II(4).

[27] The 1993 Maastricht Treaty on European Union amended the EC Treaty to allow majority decisions on many issues, including many environmental issues. [cite] The 1999 Amsterdam Treaty extended the co-decision procedure and its majority voting provisions for adopting legislation, to environmental issues, but the unanimity requirement was retained for certain environmental issues (see Article 175(2)(e.g., fiscal and land use measures)). [cite] 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. [cite] Title II (Article 8) of the EU Treaty, however, incorporates the EC Treaty. The proposed EU Constitution included among the Union's "objectives" in Article I-3(3):

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The EC Treaty currently 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 TEC 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."

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:
>
> -- preserving, protecting and improving the quality of the environment,
>
> -- protecting human health,
>
> -- prudent and rational utilization of natural resources,
>
> -- promoting measures at international level to deal with regional or worldwide environmental problems.
>
> 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 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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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." It also required the Union to "contribute to…the sustainable development of the Earth." Id., Article I-3(4).

> 3. In preparing its policy on the environment, the Community shall take account of:
>
> -- available scientific and technical data,
>
> -- environmental conditions in the various regions of the Community,
>
> -- the potential benefits and costs of action or lack of action,
>
> -- the economic and social development of the Community as a whole and the balanced development of its regions.
>
> ***[28]

Finally, as discussed in more detail below, environmental legislation can now be enacted under two main EC Treaty provisions -- Articles 95 (Internal Market) and 175 (Environment).[29]

Thus, the EU now has treaty authority to legislate in the environment, health and safety areas. When it does so, its law pre-empts that of the member states,[30] although the EC Treaty and secondary legislation give the member states some general leeway to impose requirements going beyond EU legislation (*e.g.*, through special authority to adopt more stringent protective measures in the environmental area[31] and so-called "safeguard" clauses pursuant to which member states, under certain conditions, may temporarily restrict activities permitted by EU legislation).[32]

C. The EU Legislative Process For Environmental Legislation

While we focus here on administrative action by the Commission, both in proposing environmental legislation and in adopting delegated environmental

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

[29] It can also still be adopted under the catch-all provisions of Article 308 TEC.

[30] 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. See Krämer at 418-24.

[31] Article 176 TEC. Similar language on the environmental basis for legislation was included in Article III-234(6) of the proposed EU Constitution.

[32] See Articles. 95(4), (5)-(7) TEC.. The internal market provisions analogous to Article 95 were rewritten in the proposed Constitution, but were more complex.

legislation, it is useful to pause briefly to note how the EU legislative process, which we do not deal directly with, operates with regard to environmental legislation. 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 can only amend a Commission proposal upon a unanimous vote[33]). 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.

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 (those governed by Articles 95(1) and 175(1) and (3) TEC are subject to majority voting under co-decision, while some environmental matters (those governed by Article 175(2) TEC, as noted below) are subject unanimous voting under the consultation procedure). Further, Member States may, under Article 176 TEC, enact more stringent legislation with regard to matters governed under Articles 175(1) and (3) TEC, while as to matters governed by Articles 95(1) and 175(2) TEC they must are significantly constrained as to enactment of more stringent measures by the "safeguard" procedures of Articles 30, 95 (4)-(10) and 175(2) TEC.

For the types of legislation of most interest in the environmental area, 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 procedure, which applies where EHS legislation is based on Articles 95(1) or 175(1) or 175(3) TEC, noted above, the three most directly relevant bases of authority for environmental legislation. While the discussion here is of the administrative process involved in proposing legislation, and not the legislative process itself, it may be well to spell out the basics of that process.

The co-decision procedure is used for the bulk of environmental legislation. Environmental legislation stems primarily from three EC Treaty provisions -- Article 175(1) TEC governing certain environmental measures generally as referred to in Article 174 TEC with regard to Community policy on the environment, Article 175(3) TEC governing environmental action programs, and Article 95(1) TEC governing internal market measures.[34] All three provisions specify that the legislative procedure

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[33] Article 250 TEC.

[34] By force of the "integration" requirements of Article 6 TEC, environmental or environmentally related measures may also be adopted under other EC Treaty provisions dealing, for example, with agriculture (Article 37 TEC) and transport (Article 80 TEC), 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 how various other EC bodies like the Economic and Social

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of Article 251 TEC, 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 here 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(2) TEC, 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

fall under the consultation procedure of Article 175(2) TEC.

D. The EU Actors

1. The Commission

The chief regulatory institution at the EU level is DG Environment, located in Brussels and employing about 600 staff. It consists of the Office of the Director-General and seven Directorates covering such matters as Communication, Legal Affairs & Civil Protection; Climate Change & Air; and Water, Chemicals & Cohesion.

DG Environment's two chief areas of operation are the initiation of new legislation, policies, strategies or other measures (perceived by it as the most important task, according to Krämer[35]) and the management and monitoring of

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Committee and the Committee of the Regions) must be consulted during the legislative process, since these aspects are not directly material to the process by which the Commission develops proposals for legislation or promulgates implementing administrative regulation.

[35] Krämer at 42.

existing legislation (which Krämer believes "clearly ranks lower")[36]. In the latter area, perhaps the most important responsibility of DG Environment is to monitor Member State implementation of EU environmental legislation, although it has no inspection bodies for doing so.[37] The DG does this both by receiving Member State reports (not a very effective system, according to Krämer[38]) and by receiving citizen complaints (an important source of information as to Member State compliance, but recently downgraded somewhat, according to Krämer, by the recent practice of screening complaints rather than registering all of them[39]). The DG also brings court enforcement actions when necessary, although the courts have ruled that, in effect, its discretion not to do so is not subject to review.[40]

In the management category, important responsibilities include the elaboration of implementation measures, such as dealing with forms and formulae, establishing lists or registers, collecting data, taking individual decisions on national derogating measures or other technical measures to ensure smooth application of legislation, issuing guidance or interpretation documents, conveying the Commission's understanding of specific legislative provisions, and informing the public about its policy following judgments of the Court of Justice.[41] DG Environment also administers Community environmental funds and participates in international discussions.[42]

2. The European Environment Agency

The European Environmental Agency, a relatively new agency with about 150 employees and an annual budget of about 31 million Euros, is located in Copenhagen, Denmark. It became operational in 1994, and is a non-regulatory entity that provides environmental information to the Commission, other EU institutions, national governments, and the public.

The Agency's mandate is to help the Community and Member States make informed decisions about environmental issues, and to coordinate the development and integration of compatible environmental data across the EU through the European Environmental Information and Observation Network (Eionet). The Agency regards itself as an independent source of environmental information that analyzes and assesses that information and builds bridges between science and policy through networks involving the EU governments and UN and other international

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[36] Id.

[37] Id. at 427 (The Commission does have such inspectors in the "areas of competition, veterinary, customs, regional and fisheries policy.")

[38] Id. at 42, 425-28.

[39] Id. at 429-32.

[40] Krämer argues the contrary. Id. at 431.

[41] Id. at 43.

[42] Id. at 43-44.

organizations. It deals with the state of the environment and trends, pressures on the environment and the driving forces behind them, policies and their effectiveness, and outlooks and scenarios. It provides a number of reports, briefings, and publications. It also disseminates best practice in environmental protection and technologies and information on the results of environmental research. Its membership extends beyond the EU to include EU candidate countries (Bulgaria, Romania, and Turkey), European Economic Area countries (Iceland, Norway and Lichtenstein) and Switzerland.

3. The European Chemicals Agency

The European Chemicals Agency, just in the initial stages of being created as a result of the recent passage of the REACH regulation, will be located in Helsinki, Finland, is intended to have 110 staff by the end of 2007 and 400 by 2010, and will play a central role in the technical, scientific and administrative aspects of REACH as well as in the coordination of the different bodies involved in its implementation. It will be headed by an Executive Secretary, backed up by a Secretariat. Until the appointment of the Executive Secretary, DG Enterprise and Industry will act on its behalf.

The Agency will manage the registration process, will play a key role in ensuring consistency in the evaluation of chemical substances by Member States, will provide criteria for Member States' selection of substances for evaluation. Its Committees on Risk Assessment and on Socio-economic Analysis will provide opinions and recommendations in the authorization and restriction procedures, and it has duties with regard to confidentiality. Its decisions will be subject to appeal to its Board of Appeal, and subsequently to the Court of Justice, but only by persons meeting the EU's stringent standing rules, which will effectively limit such challenges to regulated entities. Only its role in the setting of restrictions involves rulemaking as such.

E. EU Law-Making Instruments Used In The Environmental Area

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 over the last 15 years 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. 58.[43]

"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.*, the European Environmental Agency; the European Chemicals Agency; other "uniform procedures or structures" such as" 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 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. 56. The new EC chemical legislation[44], known as REACH, has been promulgated as a regulation.

"Decisions" are numerous in the environmental area, and some are both important and may have general applicability, such as that implementing the Kyoto Treaty (Decision 93/389, June 24 1993, replaced by Decision 280/2004, February 2 2004). Decisions "are binding in [their] entirety to [those] to whom they are

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[43] There are, of course, some environmental directives that are more specific -- e.g., dealing with drinking water.

[44] Regulation (EC) No 1907/2006 of the European parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC and 2000/21/EC (O.J. L396/1, 30.12.2006)

addressed,"[45] and are frequently taken through case-by-case rather than rulemaking processes. Decisions will be central to the many of the REACH processes. Decisions will not be further discussed, however, since this report deals with the rulemaking, not the adjudication, process.

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.[46]

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.

Krämer at 60 (emphasis added).

Guidance documents or guidelines (sometimes referred to as 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, they have been used for application of Article 6.3 of the Habitats

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[45] Article 249 TEC.

[46] Krämer, p. 59. Recommendation 2001/331/EC on minimum criteria for environmental inspections by Member States, however, does include reporting obligations.

Directive (92/43/EC) and with regard to sustainable hunting (Directive 79/409/EC). They are also used for the so-called "Brefs" that spell out by industry category the "best available techniques" for environmental controls. Member states sometimes tend to resist Commission "guidance" that they believe encroaches upon their freedom to implement, but in the environment area they often ask for such documents to facilitate implementation.

"Community environmental action plans" have been used from the early 1970's, and were originally "communications."[47] During the early period when environmental legislation had no express legal basis in the EC Treaty, according to Krämer, they "set out for a period of four to five years the objectives, principles and priorities of Community action which the Commission envisaged," 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 essentially 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.[48]

Krämer notes, however, that environmental action plans how have their own governing legislative provision:

> 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)) which is, of course, binding. 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)[49]

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[47] Krämer at 60.

[48] Id. at 60-61.

[49] Id. at 61.

Jans correctly observes that action plans cannot generally legally bind Member States,[50] Krämer argues that they are legally binding on the Commission, in one regard, 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.[51] There is no case law on point, however.

Sectoral action programs can be used, and such sectoral action plans have been used 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).[52] Krämer opines that thematic strategies:

> do not constitute a specific legal form of instrument. Indeed, they may take the form of a communication, a proposal for a directive or a proposal for a (sectoral) programme, or a combination of such measures.[53]

"Resolutions" are political statements by the Council or the Parliament which have no basis in the EU or EC Treaties.[54] 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.[55]

F. EU Delegated Lawmaking In The Environmental Area

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 TEC provides that the Council shall:

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[50] Jan H Jans, European Environmental Law, Second Revised Edition, European Law Publishing (Groningen 2000), p.49 ("Jans"); accord, Krämer at 61.

[51] Id. at 61.

[52] Id. at 40.

[53] Id. at 62.

[54] Id. at 62.

[55] Id.

> 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. (Emphasis added)

In short, the Council, while it can and does on some occasions itself 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 the power both to regulate (secondary to, and subject to, EC legislation) and to apply rules to specific cases by individual decisions.[56] Implementing by regulation, when done by either the Council or the Commission, can be accomplished by use of either directives or regulations. This can generate confusion. One cannot always determine, solely on the basis of the actor, whether the action is legislative or implementing, since the Council has the power to implement by regulation, and in some situations the Commission has the power to amend legislation. Generally, Council directives and regulations are legislative, and Commission directives and regulations are implementing, but this may not always be the case. Thus, careful distinction must be made in the case of each directive or regulation as to whether it was adopted by the Council or the Commission, and as to whether it is secondary legislation (in the terminology of the ABA Rulemaking Report) on the one hand or delegated legislation (that is, tertiary legislation in the terminology of the ABA Rulemaking Report, or implementing administrative regulation in the US terminology) on the other hand.

The use of implementing powers has been broadly construed by the European Court. The 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."[57]

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[56] Koen Lenaerts and Piet Van Nuffel, CONSTITUTIONAL LAW OF THE EUROPEAN UNION ¶ 14-052 (Robert Bray ed., 2d ed. 2005) (hereinafter "Lenaerts and Van Nuffel").

[57] Id.

1. The Comitology Process

The Council and Parliament, in execution of the power to impose "principles" and "rules" for the exercise of delegated power by the Commission, have required that the Commission use a decisional process in which it must collaborate with various committees required to be set up by the relevant EU legislation. The Technical Advisory Committee for Waste, for instance, was set up by the Waste Framework Directive. This decisional process, named the "Comitology" process, is governed by a generic Council Decision, the current version being the Comitology Decision of July 17, 2006 amending the Decision of June 28, 1999.[58]

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 type of committee (and by doing so, select also the procedures to be followed). See, for example in the environmental area, the Waste Framework Directive, the WEEE and RoHs Directives, and the REACH Regulation.

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

2. The Standards Process

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

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[58] Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC of 28 June 1999 Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, O.J. L 200/11, 22.7.2006. A consolidated version has been produced for documentary purposes) and published in OJ C255, 2 1.10.2006, P. 4 (see http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/c_255/c_25520061021en00040008.pdf). The original Comitology Decision was driven by the Parliament's desire to participate in implementation of acts adopted by co-decision. Lenaerts and Van Nuffel, ¶ 14-054.

assessment.[59] The Council has used this process in some 25 directives (in all sectors) 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," and 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 technical specifications are normally called "harmonized European standards"), and of 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. The use of the New Approach in the packaging waste area has been marked by controversy.

G. The Role And Importance EU Environmental Legislation In The Evolution Of EU Administrative Law

Before turning to the examination of the details, in the environmental sector, of the EU legislative and delegated legislation processes, it may be useful to gain an overview of the role and importance of EU environmental legislation in the EU's evolving administrative law processes.[60] The elaboration of EU environmental policy

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[59] 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 (e.g., 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.

[60] An excellent systematic and detailed summary of these matters is found in Krämer at 147-62, 169-76.

at the EU level has been a catalyst for some of the most important developments in EU administrative practice (*e.g.*, impact assessment, access to information, public participation, and written reasons for decision), particularly with regard to the EU's European Governance and Better Lawmaking Initiatives.[61] It is noteworthy, however, that these requirements, in addition to having been imposed in the environmental sector in many cases before being applied to other sectors, have been imposed chiefly on case-by-case actions and then on plans and programs, but not on legislative or rulemaking actions, and first on Member State action and only lately on the Commission's own EU level actions. Furthermore, even when applied at the EU level, the Commission has generally been careful to create procedures that do not result in rights that others could enforce against Community institutions, particularly where applicable to proposals for legislation, and in any case to exempt the creation of delegated legislation through comitology.

1. The Early Developments

For example, as early as 1985 in the Environmental Impact Assessment (EIA) Directive, EU environmental legislation required that Member States consider impact assessment for certain types of governmental projects and private actions, although this impact assessment requirement applied only to *environmental* impact assessment, applied only to case-by-case member state action (*e.g.*, approval or licensing with regard to certain types of public and private projects), rather than to government legislation or rulemaking, and applied only to member state actions and not those of EU institutions.[62] Impact assessment is at the heart of the Commission's current governance and better lawmaking initiatives.

The 1991 Espoo Convention on Environmental Impact in a Transboundary Context, to which the EU adhered in 1993[63], provided the backdrop for a 2001 extension of the environmental impact assessment requirement to Member States' plans and programs[64], but the EU has not to date extended the requirement to formulation of Member State policies or legislation[65].

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[61] Krämer, for example, attributes the Commission's 2002 adoption of impact assessment procedures (not limited to environmental impact) for all of its own activities to the need to "improve the integration of environmental requirements within its own administration…." Krämer at 41.

[62] 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).

[63] **[Citation]**

[64] Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment 2001 O.J. (L 197/30). See Krämer at 173-75. Note that the Gotenborg European Council conclusions of 15/16 June 2001 required a "sustainability impact assessment" of the economic, social and environmental impacts

(continued . . .)

A second example is that environmental legislation early on required access to information, public participation, and reasons for decision during governmental decision-making. The 1985 EIA Directive, in addition to environmental impact assessment requirements, also had provisions requiring public access to information and ability to express an opinion (that had to be taken into consideration) during the Member State EIA administrative process -- again, all matters that are at the heart of current EU Better Lawmaking reforms applicable in all areas of EU governance.[66]

A 1990 Directive imposed general access to environmental information requirements on Member States.[67] In 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.[68]

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of major proposals. The Commission's current Impact Assessment policy is thus a product of both regulatory and sustainability impact assessment.

[65] A 2003 Protocal to the Espoo Convention, which both the EU and the Member States have signed but which has yet to take effect **[Kristen – please check]**, does require a strategic environmental impact assessment of "plans and programs" that are required by legislative, regulatory, or administrative provisions and that are subject to preparation or adoption by an authority. Krämer at 173. If applied at the EU level, it could cover such things as the various thematic strategies to be developed under the Sixth Environmental Action Program. Id.

[66] 1985 O. J. (L 175) 40, Articles 6 (2) and (3), 8. 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., Articles. 6(2) and (3) and 8. Once a decision had been made, the decision and any conditions to it were required to be disclosed to the public. Id. Article 9. So were "reasons and considerations on which the decision is based," but only where a Member States' "legislation so provides." Id. The qualification on the "reasons and considerations" disclosure requirement was dropped in the 1997 amendments to the 1985 EIA Directive. 1997 O. J. (L 73) 5, Article 11, replacing Article 9 of the original. This requirement for providing "reasons" goes well beyond the traditional use of "whereas" clauses in EU legislation to satisfy the requirements of Article 253 of the EC Treaty.

[67] Council Directive 90/313/EEC on Freedom of Access to Information on the Environment, 1990 O.J. (L 158) 56, repealed and replaced by European Parliament and Council Directive 2003/4/EC of 28 January 2003 on Public Access To Environmental Information 2003 O.J. (L 41) 26 (FOIA Directive).

[68] 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.

The 1996 Integrated Pollution Prevention and Control (IPPC) Directive, although directed to case-by-case permitting actions by member states, and not providing rights as to the actions of EU institutions, contained general, but relatively weak, requirements for public access to permit information as well as rights to participate and rights to the results of the decision (at least a copy of the permit when issued).[69] The 2001 extension of the EIA requirement to Member States' plans and programs, however, did include more mature forms of the rights accorded the public in the 1985 EIA Directive (as amended in 1997).[70]

The 1997 Treaty of Amsterdam then provided in a new Article 191A (now Article 255(1) TEC)(which became effective in 1999) 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…."[71]

Article 255(3) TEC 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 Council documents.[72]

2. The EU Better Lawmaking Initiatives

Recently, the Commission's administrative reform efforts have become more comprehensive and more coordinated, through its Better Lawmaking Initiatives,

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[69] Council Directive 96/61/EC Concerning Integrated Pollution Prevention and Control, 1996 O.J. (L 257) 26, Article 15 (1). Proposed requirements for written statements of reasons for decision were eliminated from the final version of the Directive. 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 aspects of this directive, but criticizes it on the grounds that some of them are not sufficiently detailed to allow adequate checking for Member State compliance, and that its substantive requirements as to permit conditions are "vaguely formulated and leave large discretion to Member States." Krämer at 67-68.

[70] Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment 2001 O.J. (L 197/30), Articles 3(7), 6, 8, and 9.

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

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

which apply, importantly, to itself, not to the Member States. As set out in more detail in the ABA Rulemaking Report, these generalize the applicability of the impact assessment process in administrative processes, requiring 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 statement of the reasons for proposed legislation in 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. Even so, the Commission has carefully excluded many sensitive areas from the coverage of these initiatives, including perhaps most importantly the enactment of delegated legislation through the comitology process.[73]

The Commission's significant governance and administrative reform actions have included a 2001 report on improving and simplifying the regulatory process[74], and a White Paper on European Governance.[75] In June 2002, the Commission issued a "Better Lawmaking" package of communications, described in more detail below.[76] In 2005 it updated the Impact Assessment portion of those "Better Lawmaking" guidelines. All of these measures, however, constituted only policy actions or guidelines. None of them were legally binding on the Commission or granted judicially enforceable rights to anyone, much less individuals in the public.

With regard to access to its own documents, the Commission initially relied on non-binding policies dating from 1993/94. Faced with the 1997 amendment to the EC

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[73] See discussion in ABA Rulemaking Report at Section III. C. 1.

[74] 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.

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

[76] 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 ABA Rulemaking Report, Section III for a discussion of the most recent EU "better lawmaking" initiatives.

Treaty (now Article 255(1) TEC, referred to above) that required access to documents held by EC institutions, however, and faced also with the new requirements of the Aarhus Convention in the environmental area, the Council, as noted above, adopted Regulation 1049/2001 on access to documents held by EC institutions, which enacted legally binding requirements applicable to EC institutions to make documents available on request of the general public, and which did provide judicial relief for failures of compliance.

With regard to public participation in Commission processes, there is no treaty obligation to allow such participation. The Council has adopted no legislation requiring such participation. The Commission has operated under two Communications from 2002 on public participation, one of which was part of the "Better Lawmaking" package. There are also provisions relating to public participation in the 2002 Better Lawmaking package's Communication on impact assessment (and, at the time, of the 2002 Guidelines on impact assessment) and the package's 2002 Communication on use of experts. Finally, such provisions appear also in the more recent and extensive June 2005 Impact Assessment Guidelines. All of these provisions, however, are not legally binding and confer no rights, leaving matters firmly in the control of the Commission officials.

3. The EU's Further Steps In The Environment Sector Under The Aarhus Convention

The "cutting edge" of progress on these matters remains in the environmental area, since in order to implement the requirements of the Aarhus Convention[77], which the EU has ratified, the Commission has had to introduce in the environmental area more specific and detailed procedural provisions in many of these areas than it has been willing to introduce across the board. The provisions of the Aarhus Convention are broader in scope and more detailed and far-reaching than those of the then existing, generally applicable EU law. The EU has therefore had to implement the Aarhus Convention as to both Member States and as to EU-level institutions (and also other bodies, offices or agencies established by, or on the basis of the EC Treaty). with a new Regulation allowing broader access to information, public participation and access to justice in the environmental area.[78]

The Aarhus Convention, applicable to the environmental area, requires extensive rights of access to documents, some rights of public participation, and modest rights of access to justice in the governance processes of signatories. It is, in effect, a first step towards a law of administrative process applicable under international law, but limited for the time being to the environmental context.

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[77] See n. 23 above.

[78] Regulation (EC) No 1367/2006 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 to Justice in Environmental Matters to Community institutions and bodies, entered into force on 28 September 2006, O.J. L264/13, 25.9.2006.

The Aarhus Convention provides, importantly, for public participation not only in procedures such as decision making on specific activities and the preparation of plans, policies and programs, but also for public participation in the preparation of executive regulations and generally applicable legally binding normative instruments.[79]

The Commission proposed in 2003 a "package" of three legislative proposals to complete implementation of Aarhus by dealing with access to information and public participation at the Member State level, and with access to information, public participation, and judicial review at the EU level. The relevant Directives concerning the first and the second 'pillars' of the 'Aarhus package' (access to information and public participation) at the Member State level were adopted in the same year.[80] They both contain also provisions on access to justice. The Regulation that dealt with all three "pillars" as applied to the EC institutions themselves was adopted only in 2006.[81]

This Regulation interprets and implements the Aarhus Convention as narrowly as possible. It is, however, still of importance in the area of EU environmental regulation, since it imposes legally binding requirements with regard to access to information, public participation, and access to justice not only on EC institutions, but also on bodies, offices or agencies established by, or on the basis of, the EC Treaty, in so far as environmental matters or actions are involved. All these entities will have to adapt their internal procedures and practice to the provisions of this Regulation by June 28, 2007.

The Regulation gives rights to individuals, as to matters in the environmental sector, concerning the first two of the "three pillars." Under EU law, the public already had certain "rights" to access to information (not limited to the environmental sector) at the EU level, but had no such "rights" at the EU level with regard to public participation (even in the environmental sector). As to public participation rights at the EU level, however, the Regulation applies only to participation in ""plans and programmes relating to the environment" (implementing Aarhus, Article 7 (covering "plans, programmes, and policies"). It does not implement Aarhus Article 6 (covering "decisions on specific activities") or Aarhus Article 8 (covering "preparation of executive regulations and /or generally applicable legally binding

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[79] 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.

[80] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, O.J. L41/26) ; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (2003 O.J. L156/17).

[81] **[Cite]**

normative instruments"). Article 6 is ignored, *inter alia*, on the grounds that "Decisions to authorize the listed activities are not taken at the Community level, but by Member States, at local, regional, or national level."[82] Article 8 is ignored on the grounds that it is not legally binding.[83]

The Regulation also enables certain qualified environmental NGOs to request an internal review of administrative acts. "Administrative acts," however, are defined to be "any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects."[84] They thus exclude all forms of legislation or rulemaking. If a request with regard to an administrative act, so defined, is made and denied, a covered environmental NGO can institute proceedings before the Court of Justice. [85] In short, such an NGO, but not an individual member of the public, is given much the same rights to review of an adjudicatory decision by Community institutions or bodies as a regulated person (to whom the decision is addressed or who is directly and individually concerned by the decision).

No one -- regulated party, NGO, or the public -- is however given any rights of administrative or judicial review of the legality on constitutional or statutory grounds of legislative, or "delegated legislation" (*i.e.*, comitology), actions, which is the foundation of accountability under law, before an independent judiciary, for legislative and rulemaking matters. [86] Judicial review of the denial of "rights" provided in the Regulation with regard to access to documents or public participation, however, may be possible.

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[82] Proposal for a Regulation of the European Parliament and of the Council (COM(2003) 622 (Oct. 24, 2003) at 13.

[83] Id.

[84] Id., Article 1 (g).

[85] The Convention itself, in Article 9, requires, in addition to opportunities for national-level review in "a court of law" or "other independent and impartial body established by law"(but not necessarily a court) of its access to information and public participation obligations as those have been transmuted into national law, 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, apparently 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). Id., Article 9(1)-(3).

[86] Nor, in any clear or comprehensive way, does Article 9 of the Convention. Krämer's critique of the access to justice provisions of the Regulation are found at 151-54, 160-62.

4. The End Result

In short, many of the key aspects of the Commission's recent "Better Lawmaking" initiatives were initially implemented in the environmental sector (and imposed on the Member States before being implemented at the EU level). The Commission has now taken steps through its Better Lawmaking initiatives to open up its own lawmaking processes in all sectors where it is preparing proposals for legislation for submission to the Council and Parliament, but not as to its participation in the delegated lawmaking comitology process. Even where its Better Lawmaking initiatives apply, however, it has generally kept 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. Environmental regulation is one of those areas, but even there, in its implementation of the Aarhus Convention as to EU level institutions and bodies, "rights" have been limited to access to environmental information, to public participation in "plans and programs relating to the environment," and to access to justice for qualified environmental NGO's with regard only to "administrative acts."

III. EU Environmental Legislation

A. Proposals For Legislation

1. 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 through the series of Better Lawmaking initiatives discussed above. In these, the Commission has shown itself to be open and transparent regarding its own preparatory activities for legislation. In the environmental area specifically, 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 lack of statutory requirements, however, has resulted also in the Commission's freedom to refrain, generally, from making those laudable practices legally binding on itself, and to refrain from conferring judicially enforceable rights on participants in that process.

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-uniform requirements. Other examples might be the regulation of the chemical constituents of electrical and electronic products in the RoHS Directive and of chemicals in the REACH Regulation.

(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 the Commission needs some form of return "consideration" in some other inter-institutional bargaining process. Both the Council and the Parliament may pass resolutions requesting action by the Commission, and the Council during debate on Commission proposals ask for new legislation or amendment to existing legislation.[87] 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).[88]

(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. Through this process, it sometimes gets ideas both as to what it would like to do and what it would like to avoid doing. 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. A second example is the REACH Regulation, which self-consciously goes beyond both prior EU chemicals legislation and the US Toxic Substances Control Act (TSCA).

(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, once ratified, 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

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[87] Krämer at 41.

[88] See Krämer at 60-62.

Convention being a good recent example. Likewise, the Montreal Protocol on CFCs was implemented by means of an EU Regulation, as 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 environmental legislation. The 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.[89] Likewise, the 1976 industrial accident involving dioxin releases at Seveso, Italy, was a key factor in the proposal of the original version of the "Seveso" Directive, a directive that dealt with accident prevention and emergency planning at major industrial sites.[90] The later major industrial accidents in Bhopal, India in 1984, and the Sandoz pollution of the Rhine in Basel, Switzerland in 1986, drove two amendments to the Seveso Directive in 1987 and 1988.[91] More recently, two mining accidents in Aznalcollar, Spain in 1988 and in Baia Mare, Romania in 2000 led the Commission to amend the Seveso Directive in 2003 to extend its coverage to storage and processing activities in the mining industry.[92]. The 1986 Sandoz incident also accelerated the Commission's proposal for a directive on environmental liability.[93]

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 -- in this case normally DG Environment.[94] The Commission, through that DG, will consult with

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[89] Krämer at 181.

[90] Id. at 185-86.

[91] Id.

[92] Id. at 187.

[93] Id.

[94] The legal basis to be used may also be a useful indicator. The "integration" principle must be borne in mind, however, particularly in the environmental area. Both sectoral policies and internal market legislation for which DG's other than DG Environment may be in charge may involve a strong environmental component -- e.g.,

(continued . . .)

Member State Experts (who may come from national environmental or other administrations, but can also come from the private sector) and other stakeholders, with the first draft of a directive or regulation,[95] and may have done so previously. 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."[96] Krämer, who has many years of high level practical experience at DG Environment, reports that "[p]ractice varies as to whether at this stage of the drafting a consensus is sought with other departments inside the Commission before a draft is sent to a wider audience."[97] 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, through those Representations) and officials from other interested Commission departments, in Brussels on invitation by the Commission, which chairs them.[98] The length of this process varies widely, depending on the political sensitivity of the issues being dealt with.[99] Bilateral discussions with Member States, which would take place in Member State capitals, would be unusual and limited in number.[100]

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

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sustainable fish stock management measures which are developed by DG Fisheries and Maritime Policy. Transport legislation regulating the environmental aspects of shipping and air travel would be another example. There can, of course, be "grey" areas and exceptions. As for the former, regulation of chemical substances has traditionally been done by DG Environment, while regulation of "preparations" (mixtures of chemical substances) has been done by DG Enterprise and Industries. As for the latter, legislation dealing with "green" energy related matters like renewable energy, while based on an environmental legal basis (e.g., Article 175, EC Treaty), is usually developed by the DG in charge of energy policy, there being no specific legal basis in the EC Treaty relating to energy.

[95] Id. at 74-75.

[96] Id. at 75.

[97] Id.

[98] Id.

[99] 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.

[100] Id.

> 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. Internet consultation became, since several years, more and more frequent.

Krämer at 75. Although ENGO's may have lacked sophistication, know-how, and resources for lobbying in the past, their capability has now grown substantially.

For major legislation, the Commission has now organized its internal deliberations around a critically important impact assessment process, discussed with regard to the environmental sector 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 demanding of which 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.[101] There is then an attempt to reach a compromise text that satisfies all the DG's involved (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.[102] 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.[103]

An official Commission proposal for a regulation or a directive is then published in the Official Journal of the European Communities, Part C (recently, the Commission puts the text on the internet and only refers to it in a note in the Official Journal), 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.[104] Krämer reports that:

> The text of the proposed Act is drafted in all [now 23] languages, while the explanatory memorandum is usually produced only in English, French and German.

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[101] Id. at 76.

[102] Id.

[103] Id.

[104] Id.

Krämer at 76.

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 (which this report does not deal with) 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.

As set out in Section II. B. above, the EC Treaty contains provisions, such as Article 6, that arguably require that environmental impacts be considered by the EC. Article 6 states that "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities." Further, as noted above in Section II. G., the Commission has over the years adopted Directives that required Member States (rather than itself) to prepare environmental impact assessments for certain governmental and private projects (1985, amended in 1997) and certain plans and programs(2001). It adopted internal rules as early as 1993 to promote integration of environmental requirements into its own decision-making in other sectors, but these were difficult for the small staff of the environmental directorate to enforce on the other parts of the Commission.[105]

Again as noted in Section II. G. above, and as spelled out in more detail in Section III. C. (Impact Assessment) of the ABA Rulemaking report (Creating Regulations, Directives and Soft Law in the European Union, Peter Strauss, Turner T. Smith Jr., Lucas Bergkamp, **[date],** these early environmental impact assessment measures were generalized, as to actions at the EU level, through the Commission's 2003 Better Lawmaking Initiatives and their 2005 revisions. These communications and guidelines, applicable to all sectors of EU action, not just the environmental sector, broadened the application of the impact assessment process by requiring consideration of economic and social, as well as environmental, impacts, and applied to the Commission's preparation of legislation for consideration by the Council and Parliament, but not to the creation of delegated legislation in the comitology process. Because they apply to all sectors and are not specific to the environmental sector, they are not discussed in detail here, but are covered in Section III. C. of the ABA Rulemaking Report noted above.

[105] Krämer at 40-41.

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.

Article 255 TEC. The proposed European Constitution carried these provisions forward, but broadened their applicability to EU "institutions, bodies, offices, and agencies" generally.[106]

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, implementing Article 255 of the EC Treaty.[107] This regulation, which applies across all sectors, including the environmental area, has the purpose of ensuring "the widest possible access to documents"[108] 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.[109]

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

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[106] Proposed EU Constitution, Articles I-50(3), II-102,

[107] O.J. L 145 pp. 43-48. A 1990 Directive required access to information by Member States. Council Directive 90/313/EEC of 7 June 1990, on the freedom of access to information on the environment.

[108] Id., Article. 1(a).

[109] Id., Articles. 2(1), 3(a), and 8(1), (3).

> *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 documents directly 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.

Article 12 (emphasis added)

Article 2(4) TEC also provides, in the same vein, that:

> 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*."[110]

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.

Article 4(3) (emphasis added). These provisions have also 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.

As already noted, Regulation 1049/2001 applies to EU action in all sectors. There is special later legislation that is applicable to the environmental sector and to some extent more broadly. The EU's legislation to implement the Aarhus Convention at the EU level, Regulation 1367/2006, was adopted on 6 September 2006 and is to become applicable on June 28, 2007.[111] This regulation is applicable chiefly to EU

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[110] (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.

[111] **[Cite Regulation 1367/2006 – establish a short form reference "Regulation 1367/2006"].** There is also a new Directive applying access to information requirements to Member States, adopted pursuant to implementation of the Aarhus Convention. Directive 2003/4/EC of the European Parliament and of the

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action in the environmental sector but can apply to EU level action outside it, since its coverage extends to access to "environmental information" and "plans and programmes relating to the environment" generally. With regard to access to information, the Commission takes the position that Regulation 1049/2001 already complies "to a great extent" with the Aarhus Convention's access to information provisions.[112] There are, however, six areas with regard to access to information in which the provisions of Regulation 1367/2006 must be noted.[113]

First, while its general provisions exclude its application to actions taken in a legislative capacity, this provision does not apply to its access to environmental information provisions. Specifically, the Regulation notes the "basic concept" in the Aarhus Convention that "whenever public authority is exercised, there should be rights for individuals and their organizations."[114] It then goes on immediately, however, and in the 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."[115]

Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[112] Regulation 1367/2006 at Recital (12).

[113] Krämer at 151-54 discusses in more detail the impact of Regulation 1367/2006 with regard to access to information, and notes other aspects than discussed here, such as its extension of a right of access to information to all persons, not just citizens and residents of the EU, as Regulation 1049/2001 was limited. Krämer also notes, despite the broad applicability of Regulation 1367/2006 to all documents containing "environmental information," the legal uncertainty with regard to release by Community institutions of "documents of which the Member States or other persons are authors" which is created by the "de facto right to veto the access to their documents" given to Member States in Article 4(5) of Regulation 1049/2001. Id. at 152.

[114] Regulation 1367/2006 at Recital (7).

[115] Id..

It carries this exclusion through in Article 2(1)(c) by excepting from the definition of "Community institutions and bodies" all actions by such institutions or bodies taken "in a judicial or legislative capacity."[116] However, an exemption from the exemption is made for access to environmental information in legislative but not judicial actions. Article 2(1)(c) second sentence provides that Title II of the Regulation dealing with these matters "shall apply to Community institutions or bodies acting in a legislative capacity".

Second, the Regulation's access to information provisions have the effect, chiefly, of simply extending the provisions of Regulation 1049/2001 to Community bodies and institutions *other than the three main institutions to which Regulation 1049/2001 is already addressed*[117], which is necessary since the larger group of institutions must be covered under the requirements of the Aarhus Convention.

Third, the primary exceptions of Regulation 1049/2001, including the two key exceptions used to deny access to information during the process of preparing legislation and enacting delegated legislation noted above, apply to "any more specific provisions in this Regulation concerning requests for environmental information." [118]

Fourth, judicial review with regard to application by the Commission and other Community institutions of the primary exceptions of Regulation 1049/2001, including the two just noted, is made more difficult. Article 6(1) of Regulation 1367/2006 states that with regard to the primary exceptions in Regulation 1049/2001: "the grounds for refusal as regards access to environmental information *shall* be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment."

Fifth, some of the requirements in Regulation 1367/2006 go beyond those of Regulation 1049/2001, and thus apply to all Community institutions for the first time. Article 4, for example, 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:

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[116] Id. at Article 2, ¶ 1(c) first sentence.

[117] Id. at Article 3.

[118] Id. at Recital (15). Two lesser exceptions, in Article 4(2) first and third indents of Regulation 1049/2001 (dealing with commercial interests, and inspections and audits) are made subject to a test of "overriding public interest in disclosure" where "the information requested relates to emissions into the environment." Regulation 1367/2006 at Article 6(1). Krämer notes that the Commission applies the Regulation 1049/2001's exception for "inspections, investigations and audits" to refuse to release letters of notice and reasoned opinions under Article 255 TEC, an issue that may now fall under this new test. Krämer at 152.

> 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;
>
> 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. at Article 2(1)(d).

Sixth, the Council, in adopting Regulation 1367/2006, refused to accept an amendment by the European Parliament that would have granted access to information with regard to information on "sustainable development," on the grounds that sustainable development is "outside the Aarhus Convention" and "not in line with Article 174 of the EC Treaty with regard to the objectives of environmental policy."[119]

Krämer sums up the Commission practice, at least with regard to the exception to access dealing with "inspections, investigations and audits" by noting that:

> [A] considerable number of applications are still being rejected, mainly because the decision-making process is not yet finished, there is a commercial interest invoked or the correspondence – in particular internal e-mails – is considered not to be "information on the environment."[120]

With regard to the impact of the Aarhus Convention and new Regulation 1367/2006, he concludes:

> To what extent the amendments brought to Reg. 1049/2001 by Reg. 1367/2006 will align Community practice to the letter and the spirit of the Aarhus Convention remains to be seen. Until now, the practice by the Commission, the numerous agencies, but also, for example, of the European Investment Bank, was

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[119] Krämer at 153, quoting Council, Common position 31/2005 [2005] O.J. C264E/18 (p. 25, III.2.). Krämer views the proposition with regard to Article 174 as "neither historically correct nor compatible with Arts. 2 and 6 EC…." Id.

[120] Krämer at 153.

marked by the effort to give out as little information as possible.[121]

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 were any such rights expressly provided for in the proposed European Constitution.[122] There is also no across the board EC legislative requirement applicable to the Member States in this regard, although there have been for some time, in the area of environmental regulation, several directives that require public participation in certain cases in the environmental impact assessment process, the environmental permitting process, and more recently with regard to certain plans and programs relating to the environment.[123] Further, there is now a Directive implementing Aarhus with regard to public participation at the Member State level that adapts these public participation requirements to the requirements of the Aarhus Convention.[124]

At the EU level, the Commission itself has been functioning under two non-legally binding Communications from 2002 dealing with "Consultation,"[125] and one

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[121] Krämer at 153-54.

[122] 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."

[123] Directive 85/337/EEC; Directive 96/61/EC; Directive 2001/42 (which became effective in 2004). See Krämer at 154-56.

[124] Directive 2003/35/EC.

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

from 2002 dealing with use of experts,[126] all of which apply to all sectors, but none of which grant any judicially enforceable rights to citizens or others. These are not further discussed since they are not specific to the environmental sector and are covered in the ABA Rulemaking Report at Section III. D[127].

This situation will change, with respect to the environment sector, on June 28, 2007. Regulation 1367/2006, which implements the Aarhus Convention at the EU level, becomes applicable on that date, and goes beyond the current generally applicable Communications referred to above by creating "rights" where the communications do not do so.[128]

The Commission said, however, when proposing Regulation 1367/2006, that it would 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

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[126] COM (2002) 713 final.

[127] See also Krämer at 156-59. It can be argued that the proposed Regulation is an inadequate implementation of the Aarhus Convention as to public participation with regard to adjudicatory decisions. That Convention 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/EC applies. Explanatory Memorandum by the Commission to its 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), p. 14. **[Check the page cite]** The Commission concedes that there are certain decisions that are made at the EC level (on genetically modified organisms), but claims that its legislation already provides for the necessary public participation on GMO's and that in any case under Article 6(11) of the Convention, its public participation provisions are to be applied only to GMO's only "to the extent feasible and appropriate," which condition the Commission implies is met by the existing EC legislation. Id. at 14. Yet, under the Commission's REACH Regulation, several types of key issues are to be decided at the EU level by the Commission on an individual rather than a rulemaking basis, including for instance with regard to applications for authorization of a dangerous substance.

[128] **[Cite, or use short form already set up]** Judicial review of Community institution acts with regard to the exercise of these "rights" may be available under normal Community law (depending mostly on how the restrictive rules of standing are applied to them). Internal review and subsequent judicial review may also be available to qualifying ENGO's under Articles 10 through 12 of Regulation 1367/2001 itself if such acts are found to fall within the definition of an "administrative act" found in Article 2 (g) of that Regulation.

> 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.[129]

This effectively limits the public participation rights created by Regulation 1367/2006 to the scope of Article 7 of Aarhus, which itself is limited to rights with regard to the preparation of "plans, programmes and policies relating to the environment."[130] It omits entirely any direct implementation of Article 8 of Aarhus, which deals with "Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments," on the grounds that Article 8 imposes no legally binding duties.[131] And it omits application to "policies" from its implementation of Aarhus's Article 7, except on a hortatory basis, again on the grounds that Article 7 has no legally binding provisions with regard to "policies."

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.

Article 8 does not say expressly that it applies to legislation or even to 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.[132] Its title, of course, is "Public Participation During the *Preparation* of Executive Regulations And/Or Generally Applicable Legally Binding Normative Instruments" (emphasis added). Further, Article 8(b) specifically refers to publishing or making available "[d]raft rules," which applies directly to the creation of delegated legislation. Article 8 also arguably creates legally binding obligations -- 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. In addition, Article 8(a) through (c) sets out steps that "should be taken," and Article 8's last sentence mandates that "[t]he result of the public participation *shall* be taken into account as far as possible," (Emphasis added) In short, Article 8 seems clearly to apply to the Commission's process of preparing legislation and to the process of creating delegated legislation, the two subjects dealt with in this paper, and to create legally binding obligations for signatories with regard to each.

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[129] **[Full cite needed]** proposed Regulation, p. 13.

[130] Aarhus Convention, Article 7 (Title).

[131] Id. (Title)

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

The Commission has implemented Article 8 to a limited extent in its implementation in Regulation 1367/2006 of Aarhus's Article 7 with regard to "plans and programmes." As noted earlier, despite recognizing that under Aarhus, the "basic concept" is that "whenever public authority is exercised, there should be rights for individuals and their organizations,"[133] Regulation 1367/2006 expressly excludes legislative and judicial activity from its scope in both its recitals and in its definitions, with no exception to the exception with regard to public participation as there is for access to environmental information. [134]

This does not mean, however, that the Commission's actions in preparation of legislation focused on in this paper are not covered by Regulation 1367/2006. The Commission apparently does not classify its activities in preparing proposed legislation, prior to the transmittal of legislation to the Council and Parliament, as "legislative" actions subject to the exclusion. The Commission expressly addressed this issue in commentary on its proposed Regulation, where it said that these actions are not excluded by the "legislative capacity" exclusion for purposes of public participation:

> Article 2(1)(c) first sentence of the Regulation clarifies that the definition of "Community Institutions and bodies" does not include those "when acting 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*. Once a proposal is made, participation is ensured through the parliamentary process.[135]

Further, Article 9(1) of the final regulation provides that:

> In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions for decision, it shall provide for public participation at that preparatory stage.

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[133] Regulation 1367/2006 at Recital (7), Article 2(1)(c) first sentence.

[134] Id..

[135] Explanatory Memorandum by the Commission to its 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), p. 14 (emphasis added).

Thus, in principle, Article 9 of Regulation 1367/2006 applies to the Commission's actions in preparation of legislation, which is at issue here, but only to the extent of the scope of Article 9, which is narrowly limited to the definition of "plans and programmes relating to the environment," leaving out both "policy" and matters not tied to the objectives listed in the Sixth Environmental Action Programme. In this regard, it is arguably even more limited than Article 7 of the Aarhus Convention which the EU is obligated to implement.[136]

Article 9 of Regulation 1367/2006 is both sparse in its coverage and narrowly drafted. It requires only that:

> Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification and review of plans or programmes relating to the environment when all options are still open.[137]

It covers no other form of action by EU institutions and bodies, limiting legally required public participation only to the narrow category of "plans and programmes," as defined.

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 operative *language* of Article 7(1) which requires application of the public participation provisions of Article 6 of Aarhus. Policies are covered separately in Aarhus Article 7(4), which requires, in softer language, that "[t]o the extent appropriate, each Party shall endavour to provide opportunities for public participation in the preparations of policies relating to the environment."

Further, Article 9's definition of "plans and programmes relating to the environment" is tightly drawn, being limited to only those "plans and programmes" that meet all of three tests – those:

- which are subject to preparation and, as appropriate, adoption by a Community institution or body;
- which are required under 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, such as laid down in the Sixth Community

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[136] See Krämer at 156-59.

[137] Regulation 1367/2006. Article 9(1).

> Environment Action Programme,, or in any subsequent general environmental action programme.[138]

The definition goes on to provide that "[g]eneral environmental programmes shall also be considered as plans and programmes relating to the environment."[139] It is not, however, to include:

> financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection.[140]

Further, the required content of the some of the "provisions" to be made for public participation is vague and general, providing room for exercise of administrative discretion and leaving a court little ability to hold the EC institutions accountable.[141] In short, the proposed Regulation is at best a cautious acquiescence to a need for "rights" to accountable public participation at the EC level of government.

g. Requirement for Rationale of Decision

Article 253 TEC 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."[142] This treaty requirement is normally thought to be satisfied by the recitation of "whereas" clauses at the beginning of EC legislation.[143] Such recitals, however, only set out

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[138] Regulation 1367/2006, Article 2(e). See Krämer's discussion of the limitations of this definition, especially with regard to the applicable scope of the Aarhus Convention, Krämer at 154-55.

[139] Id.

140 Id.

[141] For example, Article 9(2) allows government control of persons who have a right to comment, rather than self-selection. Community institutions and bodies are to "identify the public affected or likely to be affected by, or having any interest in, a plan or programme, taking into account the objectives of this Regulation." Article 9 does not give any citizen a clear right to participate. Further, only "due account" need be taken during the decision-making process of "the outcome of the public participation."

[142] Essentially the same provision was included in Article I-38(2) of the proposed EU Constitution.

[143] **[Cite relevant EC authority]**

seriatim a set of relevant facts or factors, but never deal 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.[144] The proposed European Constitution carried this Treaty provision forward in Article II-101, ¶ 2(c) which included in the "Right to Good Administration" "the obligation of the administration to give reasons for its decisions."[145]

This report has noted in Section II. G. above that some EU environmental legislation has provisions requiring that reasons be stated for decisions at the Member State level, but in the context of adjudicatory decisions, not legislation or rulemaking. This report does not deal with the Commission's general Better Legislation initiatives (see the ABA Rulemaking Report, Sections III C, D, and especially G). It should be noted, however, that as to the environmental sector specifically, Article 9(5) of Regulation 1367/2006 implements almost word for word the "reasons and considerations" requirement of Article 6(9) of the Aarhus Convention, but as noted above applies it narrowly to create rights in this regard only as to decisions on covered "plans and programmes" relating to the environment:

> Community institutions and bodies shall inform the public of that plan or programme, including its text, and of the reasons and considerations upon which the decision is based, including information on public participation.

It remains to be seen whether this provision will be interpreted, in light of the commentary with regard to its intended content in the Aarhus Convention, more broadly than the requirements of Article 253 TEC have been to date.

IV. 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.[146] The result is that in order to provide for delegation of power to promulgate secondary interpretative or implementing legislation ("tertiary" legislation in the terminology of the ABA Rulemaking Report), the EU legal scholar characterizes the situation as one of delegation of "implementation," not the delegation of legislative power or authority.

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[144] See Charles H. Koch, Jr., Administrative Law and Practice, Second Edition, Section 4.45 (West Publishing Company, 1997).

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

[146] **[Cite]**

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 in the environmental sector.

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:

> 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 required that Member States "adopt all measures of national law necessary to implement legally binding Union acts," then went 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."[147] Article I-37(3) required 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."

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 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.[148] 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.[149]

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[147] Art. I-37, ¶ ¶ 1,2, and 4.

[148] 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").

[149] 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

(continued . . .)

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 health or the assistance, provided by experts from the Commission, with all questions relating to technical harmonization and standards."[150]

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.[151] This Decision was amended in important ways by a Council Decision of 17 July 2006.[152] 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, is normally used for management of markets and Community programs, an area where the Commission's

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Commission proposal). These are not, however, the same committees involved in the Comitology process, notwithstanding much confusion and apparent overlap in names.

[150] The Hidden Power, p. 50.

[151] 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 Council Decision 1999/468/EC (1999) O.J. L814/23.

[152] Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission (2006/512/EC). It is this amended Decision that we refer to as, simply, the Comitology Decision.

authority is strongest.[153] 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.

The upshot is that comitology committees can, at least on paper, exercise real legislative powers over implementing legislation, independent of the Commission.[154] 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.

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. (Articles. 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. (Articles. 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." (Article 7(1))

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

[154] One commentator argues that the Commission succeeds in dominating the process notwithstanding the existence of the committees. The Hidden Power (compare p. 61 with p. 65).

- "The principles and conditions on public access to documents applicable to the Commission shall apply to the committees." (Article 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. (Article 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" set up by the Commission. (Article 7(5))(emphasis added).

- 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. (Article 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.[155] 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[156] (normally a decision, for example, in the area of nature, waste, or climate change).

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

[156] Although there are no clear and certain rules, a number of guidelines (and exceptions to them) are used in choosing the form of the action. The first is the content and purpose of the act. A Comitology act amending a basic act will usually be of the same type/format (on the basis of the so-called "form parallelism" principle). A Comitology act implementing legislation, but standing alone and independent of the basic act, may be either a regulation or a directive, since the standard Comitology provisions in a basic act usually do not specify the format/type of the implementing measures. In this case, factors like whether the implementing measures should apply directly to those regulated, or should be addressed primarily to Member States for further implementation may be dispositive. A directive could, for example, be implemented by a Regulation. E.g., Commission Regulation (EC) No 203212003 of 4 November 2003 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 9818EC of the European Parliament and of the Council concerning the placing of biocidal products on the market, and amending Regulation

(continued . . .)

Following the 2006 amendments to the Comitology Decision, there are now two forms of process for the Regulatory Committees -- the traditional "regulatory procedure" and the new "regulatory procedure with scrutiny." The latter involves greater power for the Parliament in the process.

The Comitology Decision specifies that the old "regulatory procedure" (found in Article 5) 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."

Article 2(b) (emphasis added).

The 2006 amendments provide that the new "regulatory procedure with scrutiny" (found in new Article 5a) must be used where the basic legislation was adopted by co-decision and "provides for the adoption of measures of general scope designed to *amend* non-essential elements…by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements." (Emphasis added) The specific procedures applicable under each of these types of comitology regulatory processes and their scope and effect of operation are not specific to the environmental sector, and are described in the ABA Rulemaking Report in Section IV. C.

The Commission's Report on committee work in 2003 lists 26 regulatory committees working with DG Environment. 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

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(EC) No 189612000 (OJ 2003 L 307). Decisions are normally reserved for administrative adjudication. That said, Decisions may be used to adopt provisions which are neither adjudication nor generally applicable rules. See, e.g., Commission Decision 20001729/EC of 10 November 2000 on a standard contract covering the terms of use of the Community Eco-label (OJ L 293, 22.11.2000, p. 20); Commission Decision of 7 September 2001 on guidance for the implementation of Regulation (EC) No 76112001 of the European Parliament and of the Council allowing voluntary participation by organizations in a Community eco-management and audit scheme (EMAS) (OJ L 247, 17.9.2001, p. 24).

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. 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.[157]

(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."[158]

A management committee is normally involved in management of markets and community programs. The opinion 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, in the sense that the Commission is free to go ahead, if it chooses to do so). 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.[159]

Because a management committee is normally involved in management of markets and community programs, it will usually be dealing with a proposed decision, not a proposed directive or regulation. In the agricultural field, however, the use of

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[157] 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). Later statistics are available in The Report From The Commission on the working of committees during 2005 is available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0446en01.pdf. An Annex with further tables is a separate report available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006SC1065:EN:HTML.

[158] Comitology Decision, Article 2(a).

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

management committees is not limited to administrative adjudication, and can extend to implementing rules to be adopted through the management procedure.[160] It does not seem, however, that such extensive powers have ever been delegated to the Commission in the environment field under the management procedure.[161]

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.

b. 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.[162] 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."[163] In short, according to one source, an advisory committee opinion can potentially influence the outcome considerably.[164] Generally, this procedure is used when the matters under discussion are not very sensitive politically.

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

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[160] See, e.g., Article 40 of Council Regulation (EC) No 3 18/2006 of 20 February 2006 on the common organization of the markets in the sugar sector (OJ L 58, 28.2.2006 (listing such rules); For examples of such rules set by regulation, *see* Commission Regulation (EC) No 95 112006 of 30 June 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 31 812006 as regards trade with third countries in the sugar sector (OJ L 178, 1.7.2006, p. 24); Commission Regulation (EC) No 95212006 of 29 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 31812006 as regards the management of the Community market in sugar and the quota system (OJ L 178,-1.7.2006, P. 391).

[161] See Commission of the European Communities v European Parliament, Council of the European Union Case C-122104 E.C.J. (First Chamber) (23 February 2006)(not yet reported).

[162] The Comitology Decision, Article 3(3).

[163] Id., Article. 3(4).

[164] The Hidden Power, p. 29.

Limitation of Emissions of Volatile Organic Compounds Due To the Use of Organic Solvents in Certain Activities and Installations.[165]

(1) 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.[166] 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 reported no safeguard committees in the areas for which DG Environment has responsibility.

c. 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.[167]

d. 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.[168] The Commission published such 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.[169] Nonetheless, the

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

[166] The Hidden Power, p. 53.

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

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

[169] See Report on Committee Work During 2003 at 2.

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.

e. 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. The 2006 amendments to the Comitology Decision, described in the ABA Rulemaking Report in Section IV. C. reflect the latest developments in this trend towards greater Parliamentary power over the comitology process, but are not dealt with here because they are not specific to the environmental area.

Under Article 8 of the Comitology Decision, in a procedure left unchanged by the 2006 amendments, 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 instrument" 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 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.[170] A representative of the Environment Committee alleged that this was "not an isolated case" and that the Parliament got "almost no" documents.[171] 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."[172] The Environment Committee apparently also contested the substantive legality of the Commission proposals to except from the Directive's effect some types of cases under the provisions of the Directive that provide for this.

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

[171] Id.

[172] Id.

f. 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.[173] 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 one of the key exceptions to Regulation 1049/2001 noted above, its Article 4(3) 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. As also noted above, this exception is carried over to Regulation 1367/2001 by the terms of Article 6(1).

g. 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),[174] (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.

In unilateral Statement No. 5 with regard to the enactment of the Comitology Decision the Commission announced its intention "to make documents communicated

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[173] 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.]**

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

to the European Parliament available to the public, except those deemed to be confidential."[175] 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.

Finally, Regulation 1367/2006 defines "Community institution or body" broadly so as to apparently cover comitology committees:

> [A]ny public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. However, the provisions of Title II [dealing with access to environmental information] shall apply to Community institutions or bodies acting in a legislative capacity.[176]

Thus, this Regulation appears to apply to access to environmental information during the comitology process, subject to all the exceptions and limitations noted above with regard to the Commission's actions preparing legislation.

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, Section 2 of the Comitology Decision may make them applicable generally, subject to their exceptions. But in any case 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.

h. 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, does this change with the adoption of Regulation 1367/2006 implementing the Aarhus Convention with respect to environmental matters, except with regard to "plans and programmes" relating to the environment, as defined, and subject to all of the discussion above with regard to the Commission's procedures for preparation of legislation. 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 outside of the area

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[175] This Statement does not appear to have been published in the Official Journal.

[176] Regulation 1367/2001 at Article 2(1)(c). This would seem to cover even members of comitology committees that are representatives of Member States.

of "plans and programmes," much less rights backed up by standing rules that allow 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…."[177] It 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:

> 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 institutionalized advisory bodies; the social dialogue according to articles 137 to 139 TEC) or provided for in other Community legislation

[177] Id., p. 5.

> -- 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]*.[178]

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 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 implementation of EC law and executive decisions. Footnote 7.[179]

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.[180]

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

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[178] Id. at 10.

[179] June 2005 Impact Assessment Guidelines at 6.

[180] Id.

would seem to make this by far the most likely outcome.[181] Rights may be created under Regulation 1367/2006 as to "plans and programmes" relating to the environment, but not beyond the scope of that Regulation.

i. Requirement for Rationale of Decision

There are no obligations for rationale of decision applicable specifically to the comitology process (except in Article 8 of the 1999 Comitology Decision and Article 5 of the October 200 Interinstitutional Agreement on Comitology, dealing with the Parliamentary review process), although Article 253 TEC's requirements with regard to "whereas" clauses is apparently applicable to adoption of directives and regulations by whatever means. Further, the "reasons and considerations" requirement of Article 6(9) of Regulation 1367/2006 might extend to the comitology process to the extent that there were ever "plans or programmes" "relating to the environment" involved.

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 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."[182] 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).[183]

In order to implement this scheme, the legislation normally directs the Commission to "promote" the development of technical standards, called "European

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[181] 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 at 3.

[182] 1994 O. J. (L365/10).

[183] 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.")

Standards," relating to various aspects of the products in question.[184] In theory, anyone who has an interest in, or will be affected by a standard can contribute in its development. Requests for a new standard can come from anyone to the relevant standards body. DG Enterprise and Industry states that depending on the organization, people can either work at the national level or they can represent their views directly at the European level.

These standards are intended to be more detailed technical specifications, developed (normally) 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:

> 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 at ¶ 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….

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

The European Committee for Standardization (CEN) approved five packaging standards after consultation with the committee set up under Directive 98/34. In 2000, Belgium and Denmark both raised formal objections to the harmonised standards arguing that they did not fully meet the essential requirements of the Directive. The Commission then met with the committee created by Directive 98/34 to ascertain whether or not the standards in fact fully met the essential requirements of the Packaging Directive. The Commission found that some of the standards did not fully meet the essential requirements and thus should not be published in the Official Journal. Where the harmonised standard met the requirements with the exception of the third indent to Annex II(1), the standard was required to be published in the Official Journal with a warning stating that it does not cover the requirements of that specific indent. Where the Commission, after consultation with the committee, could not ascertain that the harmonised standard did not fully meet the essential requirements of the Directive, this fact was required to be published in the Official Journal. The Commission Decision also requested CEN to further improve those standards which it found did not fulfill the requirements of the Directive.

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 a "safe harbour," 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 the "harmonized
national standards based on them.

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 impact assessment, access to documents, public participation, 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 of 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.[185] 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. 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."[186]

3. 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. The question remains, however, of the applicability of Article 255 and

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[185] 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.

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

Regulations 1049/2001 and 1367/2006 to these Commission actions in implementation of the standardization process. Both Article 255 and Regulation 1049/2001 apply to documents held by the Commission.[187] Article 2(3) or Regulation 1049/2001 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.

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 standards 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 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.

The applicability of Regulation 1367/2006 implementing the Aarhus Convention to documents containing environmental information held by the Commission would seem to be subject to the same analysis as for such documents when held by the Commission during the preparation of legislation, as discussed above. 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.

The applicability of Regulation 1367/2006 to the European standards organizations themselves, and to documents under their control, is a more difficult question. The question is whether they constitute, notwithstanding their essentially private nature, "Commission institutions or bodies" as defined:

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[187] Regulation 1049/2001 applies to documents held by "institutions," which is defined under Article 1(a) to mean the European Parliament, Council and Commission. Thus, whatever the outcome under Regulation 1367/2006, where the applicability of access to information is broadened to "Community institutions and bodies," it would appear that European standards bodies do not fall within the ambit of either Article 255 or Regulation 1049/2001.

> [A]ny public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. However, the provisions of Title II [dealing with access to environmental information] shall apply to Community institutions or bodies acting in a legislative capacity.[188]

It would seem that they do not. The European standards organizations are in fact independent organizations established at different points in time. CEN, Cenelec, and ETSI, however, are all recognized by the EU as Community standardization bodies through Directive 83/189/EEC and amendments. Directive 98/34/EC is a codification of 83/189/EEC and its amendments. While they may be referred to and relied on in EU legislation, they would not seem to be "established by, or on the basis of, the Treaty," unless the argument is successful that they are established on the basis of the Treaty insofar as they act as Community Standardization bodies pursuant to EU legislation recognizing them as such, even though they may have been "established" for corporate purposes under national legislation.

4. 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 in the area of rulemaking, except with regard to "plans and programmes" relating to the environment under Regulation 1367/2001. The 2002 Comunications on Consultation are not legally binding, and are in any case limited in their application to "major policy initiatives"[189] -- that is, those that "will require an extended impact assessment."[190] It is unlikely that they will apply by their terms to Commission actions in the Standards process.

While Regulation 1367/2001 might in theory apply, it seems unlikely that any aspect of the standards process would qualify as part of a "plan" or "programme." While certain of the Commission's actions in the standards process would qualify as "decisions," it is not at all clear that they would qualify as "decisions" under the narrowly drawn terms of Article 6 of the Aarhus Convention, which is focused on decisions on permitting specific activities. In any case, they would not fall under the provisions of Regulation 1367/2001 since Aarhus Article 6 is not implemented there. The Commission takes the position that all Aarhus Article 6 type 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

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[188] Regulation 1367/2001 at Article 2(1)(c).

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

[190] E.g., id., n. 11.

…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.

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. None of the specific environmental legislation that creates "reasons" requirements would seem to apply to standards decisions, nor does Regulation 1367/2006's "reasons and considerations" requirement to the extent that the standards process does not fall within its "plans and programmes" scope applicable to that requirement.

V. Conclusion

EU legislation in the environmental sector has developed rapidly in the past 20 years. It involves chiefly directives to be implemented by Member States, leading to difficulties in implementation and enforcement. Recently, regulations (like the 2006 REACH Regulation of chemicals and products made from chemicals) have been used to regulate products at the EU level, albeit still with strong Member State (and increasingly Parliamentary) participation through the comitology process.

The rulemaking process in the environmental area, both in preparing legislation for enactment by the Council and Parliament and in the comitology and standards processes, is similar to that employed generally.

Developments in administrative process in the environmental sector have led the development of administrative law at the EU generally, at least in the key areas of impact assessment, access to information, public participation, and (to a very slight extent) access to justice (where virtually no progress has been made, either in the environmental sector or generally). The actual practice of the Commission in the preparation of legislation, both in the environmental sector and more generally, has been opened up in recent years to various forms of "better lawmaking" that involve more general public access to information and public participation. The process of delegated legislation has not been similarly opened up, however, other than to heightened participation by the Parliament with regard to comitology, either in the environmental sector or generally, and remains to a large extent a "black box." Judicial review of rulemaking largely remains available only to the EU institutions and Member States, reflecting the current nature of the EU as a union of Member

States established by international treaty, not a federal government created by EU citizens.

Even where rulemaking practices have changed, the EU level institutions have imposed those changes on Member States first. When extending those changes to their own rulemaking practices at the EU level, they have been very careful to change practice unilaterally, and in most cases without granting "rights" to such new procedures to the public generally. Even where procedural "rights" are granted, and *a fortiori*, where substantive judicial review of EU-level administrative action is at issue, extremely restrictive rules of standing generally preclude any real accountability of the EU level administrative process before the EU Court of Justice at the hands of the regulated community (other than where individual decisions affecting them are at issue), environmental NGO's, or the public, although the 2006 Regulation implementing Aarhus has cracked open the door slightly for environmental NGO's on certain issues. This has the effect of leaving the bulk of the administrative rulemaking process, even where liberalized, firmly in the hands of the administrators, without significant check by or accountability to an independent judiciary, even in the environmental sector, much less more generally.