Regulatory Governance in the EU: Unveiling the Consensual Nature of Comitology

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Abstract

This article revisits the question of the alleged consensual and deliberative nature of comitology proceedings on new conceptual and empirical bases. On the conceptual plane, we argue that it is important to separate the analysis of decision-making from that of outcomes: the fact that committees generally end up ratifying Commission proposals does not mean the latter are never contested. Consensus and deliberation being closely related concepts, we propose to focus on dissent within committees, which we regard as an indicator of a non-deliberative process or an imperfect deliberation. Applying this approach to data from the comitology register, we show the existence of a sizeable rate of contestation in various fields, and offer a first analysis of the factors that may influence dissensus.

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INTRODUCTION

The scholarly literature on comitology has often focused on the nature of the interactions within committees, namely the nature of the decision-making dynamics at work within committees. What are the main features of executive committee governance? Is the decision-making style homogeneous across committees or are there visible differences depending on sectoral specificities or the procedures followed? (Blom-Hansen and Brandsma 2009; Egeberg et al. 2003).

Analysis of these issues has led to different interpretations. Drawing on sociological institutionalism, one part of the literature maintains that informal rules, collective deliberation and thus a consensus-oriented culture largely prevail and characterize the essence of the decision-making process (Christiansen and Larsson 2007; Joerges 2006; Joerges and Neyer 1997; Wessels 1998). Another part of the literature, rooted in a rational institutionalist perspective, on the contrary considers that working methods at the executive stage of the policy process typically reproduce the intergovernmental bargaining dynamics that dominate the ministerial level (Ballman et al. 2002; Egeberg et al. 2003; Pollack 2003a). Some scholars have qualified these views by drawing attention to the changing nature of committees over time (Brandsma 2010; Dehousse 2003) and particularly to the contrast between the original institutional design of the committees, which is largely infused by intergovernmental precepts, and their actual functioning, which seems to leave more room for a logic of deliberation, famously coined ‘deliberative supranationalism’ in a much noted series of articles by Christian Joerges and Juergen Neyer (1997).

However, the now vast literature on the functioning of comitology often fails to distinguish between two key issues that may be related, but nevertheless need to be analyzed separately in order to fully capture the nature of decisional interactions within committees. A first issue relates to the preferences of various institutional actors regarding the delegation of regulatory powers to committees. Largely influenced by American literature on congressional politics, a number of works treat delegation as a dependent variable that can vary according to the need for expertise and credible commitments, the institutional interests of the actors concerned and the uncertainties surrounding the issues addressed. The goal is to understand

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1 This paper has been published by the Journal of European Public Policy (‘How Consensual is Comitology’, JEPP, 21(6): 842-59, June 2014)
the conditions in which principals (here the member states, acting as the Council of Ministers) will delegate powers to their agent (here the Commission), and how much discretion the latter will enjoy. This kind of question has given rise to a number of analyses on the choice of comitology rules that have often confirmed rationalist expectations (see, e.g., Dogan 2000; Franchino 2000a, 2000b and 2004; Pollack, 1997; Pollack 2003a). A second issue relates to the way committees actually operate once they have been set up. Key questions at this level revolve around the role of delegates within committees: do they pursue specific national interests and follow their governments’ instructions, or do they accept that in order ‘to develop converging definitions of problems and philosophies for their solutions’, they must engage in a deliberative process, where what is decisive is the quality of the arguments they exchange (Joerges and Neyer, 1997b: 619)?

Documenting the existence of such a process is difficult since ‘it is difficult to measure the ‘real weight’ of an argument against the interest it furthers or to detect whether the reasons given for a decision reflect its real motivation’ (Joerges and Neyer 1997a: 292). Thus, the deliberative model has been repeatedly challenged using evidence related to the choice of comitology procedures. Some have suggested that the intense conflicts produced in comitology are evidence of the relevance of decision-making rules:

‘…it is unclear why rational actors would expend considerable time and energy to secure specific comitology rules as instruments of control if we posit at the same time that those rules are regularly put aside in favor of supranational deliberations in committees.’ (Pollack 2003a: 153)

Yet the argument is far from decisive. Indeed, it omits one key element, namely the fact that the actors at work at both levels of the decision-making process are not necessarily the same and may be motivated by very different concerns. Diplomats drafting Treaty rules or EU legislation may have little or no experience of comitology and may pay more attention to symbolic issues which would carry less weight in the day-to-day operation of committees. Furthermore, there is no shortage of evidence to suggest that institutions established for one purpose may end up taking a very different direction (Pierson 2000). Thus, the link between rules and the behaviour of delegates is an empirical question that must be addressed using evidence related to the actual functioning of committees.
Our ambition in this article is to shed new light on this question by analyzing committee voting records. There is, indeed, a striking contrast between the intense bickering to which comitology has given rise – first between the Commission and the Council; more recently between the Parliament and the Council (see, e.g., Blom-Hansen 2011a; Bradley 2008; Christiansen and Dobbels 2012) – and the peaceful image conveyed in the Commission’s annual reports. As is known, comitology proceedings generally end with the adoption of Commission proposals: the number of rejections is remarkably low. In 2008, the year covered by this study, the number of proposals that ultimately failed at the end of the procedure amounted to 7 out of a total of 2,185 decisions, i.e. a mere 0.33%. The Council opposed six draft measures proposed by the Commission in the field of environmental policy, while the Parliament objected to one proposal concerning the internal market. In all cases, the Commission withdrew the controversial provisions and resubmitted a modified version to the respective committees. This kind of evidence, often used to describe the ‘consensual nature’ of comitology decision-making, has been regarded as inconclusive by some scholars, since it is compatible with radically different explanations of committees’ activities: the high level of positive decisions made by committees may reflect either the Commission’s dominance over their work, their submission to the preferences of the member states, or the existence of a true deliberative process (Blom-Hansen and Brandsma 2009: 724; Pollack 2003a: 129). Instead of looking at the decisions eventually adopted by committees, we therefore propose to open the black box of committee decision-making and look at how the decisions in question were adopted.

This study looks at the frequency of votes in committees in order to identify the behaviour of member state representatives whenever committees opine on Commission draft implementing measures. To this end, we have elected to scrutinize and compare the voting results of implementing decisions, covering all the policy domains, procedures and committees included in the Comitology Register of the Commission. To our knowledge, this is the first time this source is systematically exploited, and it enables us to cover a broader spectrum than average. As a rule, earlier studies have focused on a specific policy field (foodstuffs policy in the case of Joerges and Neyer, 1997; health and safety in Daemen and Van Schendelen, 1998) or built their analysis on data drawn from surveys conducted with a

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3 It is worth pointing out here that formally, committees merely hand in an opinion, the final decision being taken by the Commission (in most cases) or the Council (in the case the committee objects to the Commission’s draft implementing measure).
number of national officials (153 in Brandsma, 2010, 294 in Brandsma and Blom-Hansen, 2010; 318 in Egeberg et al., 2003). Analyzing the hundreds of decisions reported in the register will enable us to get a more comprehensive picture of the working of committees. Admittedly, as with much quantitative work, the enlargement of the scope of inquiry may result in a rough picture, which needs to be supplemented by more fine-grained analyses. We therefore view this first presentation of our work as an opportunity to discuss the theoretical concerns that inform our research and present some tentative findings.

In a nutshell, our findings reveal that consensus is less frequent than the ‘deliberative’ model would suggest. Although a very large majority of the opinions were adopted unanimously, in over a quarter of the cases observed the Commission proposals met with some opposition within the relevant committee. To make sense of these findings, however, we need to clarify the concepts used in this study since the very notion of consensus has been used in different ways in European studies.

The article is therefore organized as follows. The first section discusses the conceptual link between the concepts of deliberation (a discussion mode) and consensus (a decision-making mode) in order to better assess their respective relevance to our understanding of comitology. Section II presents the data we have used in this study, outlining some of the problems related to data availability, the heterogeneity of information on voting records and missing cases, and presenting a first overview of our data sample. Sections III and IV respectively analyze the frequency of consensus and discuss some of the factors that may determine the level of conflict. The article ends with some concluding remarks on the findings of this study and their theoretical implications.

I. DELIBERATION AND CONSENSUS

Defenders of the ‘deliberative supranationalism’ model stress the quality of discussions that take place in committees. In their analysis of the foodstuffs sector, Joerges and Neyer emphasized the willingness of delegates to revisit their perceptions and preferences in light of arguments made by their peers, in which scientific evidence plays a central role. In this process, contrary to what would happen in a strategic interaction mode, ‘preferences
cannot be simply asserted, but need to be justified by arguments’ (Joerges and Neyer 1997b: 616). In their view, the shift to a deliberative mode is facilitated by the fact that governments do not always have the opportunity to develop clear preferences, and therefore often grant their representatives a wide margin of discretion. The latter can therefore ‘slowly move from representatives of national interests to representatives of a European interadministrative discourse in which mutual learning and understanding of each other’s difficulties […] becomes of central importance’ (Joerges and Neyer, 1997a: 291).

Like much of the literature on deliberative processes, this description says remarkably little about how decisions are eventually made, with the emphasis rather being placed on the interactions among participants. From what we are told, we may gather that although the possibility of a vote is foreseen, it seems to be regarded as suboptimal: the Commission proposals tend to reflect ‘not only …[its] interest but also what it assumes to be in the interest of more than a qualified majority of the other parties involved’; it will call for a vote only ‘if consensus is out of reach and voting is the only way to succeed’ (Joerges and Neyer, 1997b: 617-18). It is therefore hardly surprising that later commentators have interpreted this model as emphasizing ‘the consensual nature of committee decision-making’ (Pollack 2003b: 138).

However, the slippery notion of consensus, which is widely used to describe various aspects of EU decision-making, needs to be refined. Too often, it is used to refer somewhat vaguely to the existence of diffuse support for a measure that is being proposed, be it in the Council (see Tsebelis 2013; Novak 2010 and 2013 for a critique), in the Commission or even in the European Parliament (Hix and Kreppel 2003).

Following the suggestion of Philippe Urfalino (2006), we propose to define ‘decision by apparent consensus’ as a collective decision-taking mode in which discussions end when it becomes clear that a proposal is not opposed. The links with the concept of deliberation ought to be acknowledged. As mentioned, the two concepts focus on different stages of the decision-making process: whereas deliberation refers to the interactions that take place between participants, consensus relates to the way decisions are eventually made. Both concepts are nevertheless logically related: if what matters is that arguments be seriously considered and debated, ‘ideal deliberation aims to arrive at a rationally motivated consensus’ (Cohen 1989: 23). Granted, this is only an aim, as has been noted (Steiner et al. 2006: 25). In practice, deliberation may end with a vote – a possibility that is explicitly contemplated by some deliberation theorists (Habermas 1996). However, empirical studies have also shown
that the two often work hand in hand. Indeed, consensus is often preferred in situations where there is a strong concern for the ‘quality of decisions’, e.g. in expert committees or in constitutional courts, where participants generally attempt to identify the ‘right’ solution to a problem. There is often no clear break between the two phases: if consensus is reached, ‘the decision […] seems to emerge directly out of the discussion’ (Urfalino 2006: 16). There is, in contrast, a clear difference between ‘decisions by apparent consensus’ and voting procedures, be they majoritarian or unanimous, where preferences need to be known and counted. In the former case, the quality of decisions is a central concern, whereas in the latter the emphasis is placed on the representation of individual preferences, often inspired by an ideal of equal participation in the decision-making process (ibid.: 17-19).

Returning to the work of committees, unanimity may be the result of different things: a negotiated compromise, in which the parties, although they do no agree on what is needed, accept some mutual concessions; a convergence of views as a result of argumentation and deliberation, or a more modest ‘working agreement', i.e. a conclusion resting on different grounds but nonetheless regarded by each party as reasonable and acceptable (Eriksen, 2003). In contrast with some consensus theorists (Innes 2004), our concerns are not normative, nor are we trying to analyze how, through what means consensus is fabricated. More simply, we try to assess its importance in comitology proceedings, and identify a number of variables that may weigh on the frequency with which it is reached. Contrary to other comitology scholars, we believe the way discussions in the committee framework are concluded can be regarded as a good indicator of the quality of the interactions that took place beforehand. Not that the existence of a consensus offers a 100% guarantee that a deliberative process occurred: it may originate from inequalities in the respective competence or influence of various members, with weaker members unwilling to challenge, and therefore eventually accepting, a proposal to which they do not really adhere (ibid.: 22-23). Rather, the opposite may be most relevant for our purposes. In committees as in the Council of Ministers, the fact that opposition to a proposal is registered at the time of the vote can be taken as an indication that deliberation, if it occurred at all, failed to reach its objectives, since the participants did not succeed in identifying "the" right response to the question at hand, or were not able to convince their principals of the quality of arguments used by the other side. This has implications for the design of our research: to assess how frequent deliberation may be in committees, it is not consensus, but disensus we should track.
The data we present here\(^5\) consists of all the vote procedures substantiating opinions on the Commission’s draft implementing measures for basic legal acts adopted under codecision, delivered by committees and analysis we present in this article is based on information made public in the Comitology Register of the Commission. The latter is an online repository that was created in 2003 in application of Council Decision 1999/468/EC and gradually modernized in parallel with extension of the supervisory capacity granted to the European Parliament (EP) for the purpose of improving the transparency of committee activity\(^7\) (Blom-Hansen 2011b). The 2006 reform of comitology consolidated the EP’s right of scrutiny on the executive competences of the Commission. One of the corollaries of this change has been an enhanced right to be informed of the committees’ activities.\(^8\) According to the Commission’s Declaration on Transparency of 2006\(^9\) and the inter-institutional agreement between the Commission and the EP of June 2008, the development of the comitology register reflects the Commission’s commitment to regularly inform the EP and the general public on committee proceedings by providing extensive and direct access to the documents produced at different stages of the comitology procedure. The register contains all the documents that have been transmitted to the EP for information and scrutiny since 2003, with the exception of some classified documents.\(^10\) This includes five main types of documents: the agendas of committee meetings, the draft implementing measures adopted on the basis of a basic legal act decided under the Art. 251 procedure (co-decision), the minutes and attendance lists of meetings, the voting results delivered by committees and urgent letters. Since 2009, the register also contains information on the draft implementing measures withdrawn by the Commission before being submitted to a formal vote in a committee.\(^11\)

Compared to the annual reports on the workings of committees that are published by the Commission and often referenced in the literature, the register is more detailed as it traces


\(^{7}\) Council Decision 2006/512/EC

\(^{8}\) Council Decision 2006/512/EC

\(^{9}\) Official Journal of the EU, C171/21, 22 July 2006.

\(^{10}\) Art. 2 of the 2008 inter-institutional agreement. Official Journal of the EU, C143/01, 10 June 2008.

almost the entire lifecycle of an implementing measure. Moreover, it provides information on votes. On the other hand, its coverage is less extensive: whereas the annual report includes information on all committees, whether or not they were active, as well as all legislative procedures, the register only covers the comitology procedures stemming from a legal act adopted under co-decision.\footnote{12}{For instance, even though agricultural policy is one of the main fields of legislative activity it is not covered, because prior to the Lisbon Treaty the European Parliament merely had a consultative role in this area. Furthermore, the sectoral classification of the annual report does not fully coincide with the register’s policy field typology, making comparisons between these two sources difficult.} The register also includes areas that do not appear in the annual report, such as climate change, energy, and communication. As a result, the number of committee opinions listed in the annual report does not always coincide with the data included in the register.

Our research project intends to process all the information available on the measures adopted in the period 2008-2012. In this article, we discuss the evidence on measures adopted in 2008 (N=728), the last year before the Lisbon Treaty, and the first year of operation of the new Comitology register following the 2006 reform. The 'voting sheets' we examined were compiled by 18 European Commission Directorates General (DG). Being in charge of the secretariat of committees, DGs are responsible for collecting data on committees pertaining to their sector of activity. Evidently, the Unit for Better Regulation and Institutional Issues in the General Secretariat of the Commission, which centralizes the information, has not completely succeeded in eliminating variations in data collection and transmission practices. This explains the heterogeneous and incomplete nature of the information included in the online repository. Despite recent harmonization efforts, there still is no single voting sheet model. The volume of missing data can occasionally be high. In 72 cases (9,9% of the total), mainly related to Justice and Home Affairs, the only information available is the final outcome of the procedure; there is no information on how the decision was ultimately made.

The register mentions four different decision-making systems: weighted voting, in which a qualified majority is required, as is the case in the Council; simple majority of states;
‘consensus’; and ‘unanimity in favour’. In the latter two categories (15 voting sheets), there is no indication as regards the number of member states represented. In addition, a significant number of voting documents use a mixed system to express voting results, i.e specifying both the weighted votes of the member states represented during the vote and the number of member states that were not present, or showing results in terms of both the absolute number of votes and the number of member states (Table 1).

### Table 1: Voting systems

<table>
<thead>
<tr>
<th></th>
<th>Nr. of Decisions</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td>Weighted Voting</td>
<td>446</td>
<td>61.30%</td>
</tr>
<tr>
<td>Simple Majority</td>
<td>59</td>
<td>8.10%</td>
</tr>
<tr>
<td>Mixed</td>
<td>136</td>
<td>18.70%</td>
</tr>
<tr>
<td>Unanimous Favourable</td>
<td>4</td>
<td>0.50%</td>
</tr>
<tr>
<td>Consensus</td>
<td>11</td>
<td>1.50%</td>
</tr>
<tr>
<td>Not specified</td>
<td>72</td>
<td>9.90%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>728</strong></td>
<td><strong>100.00%</strong></td>
</tr>
</tbody>
</table>

Despite theses inconsistencies, which appear to stem from the decentralized nature of the data collection process, the rule is simple: the type of majority required to adopt an implementing act depends on the comitology procedure that is used. In line with the Council’s Decision 1999/468/EC establishing the criteria applicable to the choice of comitology procedures, simple majority is the rule in advisory procedures, whereas a qualified majority is required in management, regulatory, and regulatory with scrutiny procedures, as well as safeguard procedures if specified in the basic act. In the latter case, the threshold for a decision is the same as in the Council. In the case of a simple majority, each state is entitled to one vote. Finally, it is important to note that in most cases, the failure to express opposition to a Commission proposal will play into the hands of the latter, since a negative opinion of the

14 In accordance with Article 205(2) and 205(4) of the EC-Treaty, the qualified majority is achieved with 255 votes (out of the total of 345), expressed by a majority of the Member States (at least 14 delegations). A delegation may request that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. The quorum required for the validity of deliberations is the same as for the adoption of an opinion, i.e. 255 votes (out of 345) in the case of a QMV and 14 states for the simple majority system.
committee is generally required to prevent the Commission from adopting an implementing act.\(^{15}\)

Table 2 shows the sectoral distribution of the decisions covered in our data sample.

\(^{15}\) See e.g. Article 5(4) of EU Regulation 182/2011 of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by member states of the Commission’s exercise of implementing powers, Official Journal of the EU, \textit{L51/13}, 28 February 2011.
Table 2: Number of voting result sheets
Breakdown by policy domain/DG

<table>
<thead>
<tr>
<th></th>
<th>Nr. of Decisions</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education and Culture (EAC)</td>
<td>85</td>
<td>11,70%</td>
</tr>
<tr>
<td>Mobility and Transport</td>
<td>64</td>
<td>8,80%</td>
</tr>
<tr>
<td>Enterprise and Industry (ENTR)</td>
<td>29</td>
<td>4,00%</td>
</tr>
<tr>
<td>Environment (ENV)</td>
<td>73</td>
<td>10,00%</td>
</tr>
<tr>
<td>Development and Co-operation EuropeAid</td>
<td>114</td>
<td>15,70%</td>
</tr>
<tr>
<td>Eurostat (ESTAT)</td>
<td>27</td>
<td>3,70%</td>
</tr>
<tr>
<td>Fisheries and Maritime Affairs (MARE)</td>
<td>4</td>
<td>0,50%</td>
</tr>
<tr>
<td>Health and Consumer Protection (SANCO)</td>
<td>115</td>
<td>15,80%</td>
</tr>
<tr>
<td>Humanitarian Aid (ECHO)</td>
<td>47</td>
<td>6,50%</td>
</tr>
<tr>
<td>Informatics (DIGIT)</td>
<td>1</td>
<td>0,10%</td>
</tr>
<tr>
<td>Information Society and Media (INFSO)</td>
<td>33</td>
<td>4,50%</td>
</tr>
<tr>
<td>Internal Market and Services (MARKT)</td>
<td>25</td>
<td>3,40%</td>
</tr>
<tr>
<td>Justice</td>
<td>12</td>
<td>1,60%</td>
</tr>
<tr>
<td>Taxation and Customs Union (TAXUD)</td>
<td>8</td>
<td>1,10%</td>
</tr>
<tr>
<td>Communication</td>
<td>11</td>
<td>1,50%</td>
</tr>
<tr>
<td>Directorate General for Climate Change</td>
<td>6</td>
<td>0,80%</td>
</tr>
<tr>
<td>Directorate General for Energy</td>
<td>9</td>
<td>1,20%</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>65</td>
<td>8,90%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>728</strong></td>
<td><strong>100,00%</strong></td>
</tr>
</tbody>
</table>

As can be seen, four sectors – namely Health and Consumer Protection (15,8%), Development and Co-operation (EuropeAid) (15,7%), Education and Culture (11,7%), and Environment (10%) – account for a majority of the overall number of voting sheets produced in 2008.

The distribution of voting sheets by type of procedure, recorded in table 3, shows that management and regulatory procedures are most frequently used in our sample. Together, they account for slightly more than three fourths of the opinions analyzed in this study, whereas the advisory procedure and the regulatory procedure with scrutiny appear confined to a more marginal role. This, however, does not give an accurate picture of the relative importance of each procedure since, as was indicated above, our data only covers decisions implementing legal acts adopted in co-decision.
Table 3. Number of voting sheets.
Breakdown by type of procedure

<table>
<thead>
<tr>
<th></th>
<th>Nr. of Decisions</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advisory</td>
<td>99</td>
<td>13.60%</td>
</tr>
<tr>
<td>Management</td>
<td>297</td>
<td>40.80%</td>
</tr>
<tr>
<td>Regulatory</td>
<td>253</td>
<td>34.80%</td>
</tr>
<tr>
<td>Regulatory with Scrutiny</td>
<td>75</td>
<td>10.30%</td>
</tr>
<tr>
<td>Not specified</td>
<td>4</td>
<td>0.50%</td>
</tr>
<tr>
<td>Total</td>
<td>728</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

However, this difference need not be overblown since, as mentioned above, the data only covers procedures in fields governed by codecision. On this basis one can therefore not derive any inference as to the relative importance of each procedure.

3. HOW FREQUENT IS DISSENSUS?

The outcome of comitology procedures is known to be generally favourable to the Commission. The only instance of a negative outcome in the period under survey occurred in the traditionally controversial area of health and consumer protection and within the framework of the regulatory procedure (Brandsma and Blom-Hansen, 2010). With 316 negative votes and 29 abstentions, the Standing Committee on the Food Chain and Animal Health strongly opposed the adoption of a draft Commission decision implementing EC regulation nº 853/2004 regarding the use of antimicrobial substances to remove surface contamination from poultry carcasses.18 The matter was referred to the Council, which confirmed the committee’s decision.

In addition, in four cases the committee consulted failed to reach an opinion on the Commission’s proposal. Again, three of these cases concerned health and consumer protection matters, more precisely genetically modified organisms In all three cases, the same Standing Committee on the Food Chain and Animal Health, acting in the framework of the

18 Voting sheet code reference: V000724/01.
regulatory procedure, failed to reach a qualified majority either in favour or against a draft Commission decision based on the EC regulation nº1829/2003 on foodstuffs. The three situations, the cases were matter was referred to the Council, which abstained. It is worth noting that in all four cases, proved equally unable to decide either way; the Commission could therefore adopt the controversial draft measures, as foreseen in the GMO regulation.

As said above, however, such stories are extremely rare. In our data sample, 99% of its draft implementing measures submitted to committees (719 cases out of 728) resulted in a favourable outcome.

The picture changes, however, if we shift to the way decisions are made within each committee. To make sense of this process, we analyzed a sample of 656 voting results. These correspond to a total of 582 proposals adopted through qualified majority voting, 59 through a simple majority vote (number of states), 4 for which the decision was said to be ‘unanimously (ly) favourable’ and 11 adopted ‘by consensus’. We discarded 72 measures for which only the final outcome (favourable, unfavourable or absence of opinion) was reported without any indication as to how the decision was made. The voting sheets show a unanimity rate of 73.5%. By unanimity we mean instances in which Commission proposals were supported by all state representatives attending the committee meeting. It will be recalled that the absence of some delegates does not necessarily prevent unanimity, as it is assumed that states agree with the Commission draft unless they express their dissent in writing. In our sample, of all the proposals that were ‘unanimously’ approved, a substantial 44.8% (209 proposals) did not receive explicit support from all delegations.

This notwithstanding, in a sizeable 26.5% of cases, the draft proposal was challenged in the form of at least one vote cast against it or one abstention. Some decisions were more controversial than others. For example, the Standing Committee on the Food Chain and Animal Health adopted a favourable opinion on a draft Commission Regulation amending Annex VII to Regulation (EC) No 999/2001 on the prevention, control and eradication of

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22 It ought to be stressed that the remaining 1% relates to instances where committees rejected Commission proposals. However, such rejection does not necessarily preclude the eventual adoption of the proposal, as will be seen. This explains the difference with the data on final rejections by either the Council or the Parliament mentioned in the introduction.

24 Voting sheets referring to both decision-making votes have been included in this category as, according to the Commission secretariat general, they actually refer to situations in which weighted voting was required.

25 This figure is based on a sample excluding the 15 missing cases for which voting sheets merely indicates that the proposal was approved through a unanimously favourable decision or by consensus.

certain transmissible spongiform encephalopathies with 256 ‘for’ and 89 votes ‘against’. Likewise, committee C20406, operating within the same Health and Consumer Protection sector, issued a favourable opinion with 160 votes ‘for’, 69 ‘against’ and 106 ‘abstentions’. As these examples show, even when the eventual decision is positive, there may be strong opposition within committees.

It is also interesting to note that our 26.5 % figure is slightly higher than the frequency of votes in the Council, which is generally around 20 % (Deloche-Gaudez 2009; Hayes-Renshaw et al. 2006). This finding is all the more remarkable because our sample is limited to following legislative acts adopted by co-decision; in the period examined the comitology register did not include documents on opinions on agricultural policy, which is the policy area with the largest number of legislative decisions and where voting in the Council is most frequent (Deloche-Gaudez 2009). Moreover, work on the Council of ministers has shown that delegates initially opposed to a proposal may find it convenient to drop their objections once it is clear that the proposal is supported by a majority (Novak 2010: chapter 4). Assuming that the same structural factors are at work in committees, we can posit that the situation is identical at this level. In other words, it is likely that our data underestimates the volume of contested decisions. At the very least, this suggests we should not create an opposition between a would-be consensual committee system and a more conflictual Council, where bargaining and exchanging concessions would be the dominant mode of interaction. In all likelihood, both modes of decision-taking coexist at each level.

4. EXPLAINING DISSENSUS

The aggregate figure given in the previous section hides substantial variations from one policy area to the next. As can be seen in table 4, the level of disputed issues ranges from 0% in the portfolio handled by the Home Affairs office, to 71.4% for the Taxation

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28 Voting sheet code reference: V002054/01. The total number of votes was of 335 only as two member states were not represented.
Directorate-general (TAXUD). Caution is required in interpreting these differences since the number of cases is small in some sectors. Be that as it may, even the upholders of deliberative supranationalism have acknowledged it is one of many decision modes and recognized that it was important to identify the factors that could facilitate the development of a deliberative process. Our goals in this section are more modest, though related: our ambition is to explore some of the reasons that may explain variations in the level of dissensus.
Several hypotheses can be derived from the literature as to potential causes for these variations. A first, rationalist explanation would be that governments are inclined to oppose proposals deemed unfavourable to their national interests. According to a dominant reading, the possibility to do so was supposed to be one of the main rationales for the complex structure of comitology, regulatory committees and safeguard procedures being imposed when sensitive interests are at stake. If this is the case, one would expect more frequent controversy in regulatory or management committees than in advisory committees, since governments have found it necessary to limit the Commission’s executive powers in the first two categories (Dogan 1997; Pollack 2003a). A second hypothesis can be derived from

Table 4. Frequency of dissensus by policy field

<table>
<thead>
<tr>
<th>Policy Field</th>
<th>Nr of Decisions</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education and Culture (EAC)</td>
<td>14</td>
<td>16,70%</td>
</tr>
<tr>
<td>Mobility and Transport</td>
<td>15</td>
<td>24,20%</td>
</tr>
<tr>
<td>Enterprise and Industry (ENTR)</td>
<td>8</td>
<td>33,30%</td>
</tr>
<tr>
<td>Environment (ENV)</td>
<td>22</td>
<td>30,10%</td>
</tr>
<tr>
<td>Development and Co-operation EuropeAid</td>
<td>1</td>
<td>0,90%</td>
</tr>
<tr>
<td>Eurostat (ESTAT)</td>
<td>13</td>
<td>48,10%</td>
</tr>
<tr>
<td>Fisheries and Maritime Affairs (MARE)</td>
<td>1</td>
<td>25,00%</td>
</tr>
<tr>
<td>Health and Consumer Protection (SANCO)</td>
<td>49</td>
<td>42,60%</td>
</tr>
<tr>
<td>Humanitarian Aid (ECHO)</td>
<td>17</td>
<td>36,20%</td>
</tr>
<tr>
<td>Informatics (DIGIT)</td>
<td>0</td>
<td>0,00%</td>
</tr>
<tr>
<td>Information Society and Media (INFSO)</td>
<td>13</td>
<td>41,90%</td>
</tr>
<tr>
<td>Internal Market and Services (MARKT)</td>
<td>7</td>
<td>29,20%</td>
</tr>
<tr>
<td>Justice</td>
<td>1</td>
<td>8,30%</td>
</tr>
<tr>
<td>Taxation and Customs Union (TAXUD)</td>
<td>5</td>
<td>71,40%</td>
</tr>
<tr>
<td>Communication</td>
<td>0</td>
<td>0,00%</td>
</tr>
<tr>
<td>Directorate General for Climate Change</td>
<td>3</td>
<td>50,00%</td>
</tr>
<tr>
<td>Directorate General for Energy</td>
<td>5</td>
<td>55,60%</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>0</td>
<td>0,00%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>174</td>
<td><strong>26,50%</strong></td>
</tr>
</tbody>
</table>

*The figures in this table do only considerate the sample of 656 voting results that we analyze in this section.

** Percentages in this tables are calculated in relation to the total number of Decisions per policy field, not regarding the total number of Decisions (except for the Total).
Theodore Lowi’s work on types of public policies, that famously suggested ‘policies determine politics’ (Lowi 1964 and 1972). Giandomenico Majone has attempted to transpose this idea in the study of European public policy by arguing that in the case of the European Union, the main distinction is between regulatory policies, on the one hand, which respond to market failures, and distributive policies such as public works or research and development, which allocate public resources among alternative users, or redistributive policies, which transfer resources from one group to the another, on the other. The difference between the two categories is important in any political system, but it is especially crucial in the EU, whose financial autonomy is severely limited (Majone 1996: chapter 4). What is interesting to us are the implications of this basic distinction for the politics of each type of policy. Since regulatory policies are dominated by efficiency concerns, they generally rely heavily on the contribution of experts and can be expected to be more consensual, whereas distributive or redistributive policies tend to be fairly conflictual since they often involve zero sum games. Thus, one might expect to find more evidence of dissensus in committees dealing with (re)distributive issues than in those where regulatory issues are more prominent.30 Finally, in a sociological institutionalist perspective, one might regard consensus as the product of a dynamic of socialization: delegates who are used to meet regularly and frequently take decisions together might be more inclined to make efforts to understand each other’s concerns and viewpoints, and therefore more willing to transcend national interest and engage in some form of supranational logic (Egeberg et al. 2003; Quaglia et al. 2008).

Table 5. Dissensus and Types of Procedure

<table>
<thead>
<tr>
<th></th>
<th>Nr of Decisions*</th>
<th>Percentage**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advisory</td>
<td>19</td>
<td>19.60%</td>
</tr>
<tr>
<td>Management</td>
<td>29</td>
<td>12.30%</td>
</tr>
<tr>
<td>Regulatory</td>
<td>99</td>
<td>39.80%</td>
</tr>
<tr>
<td>Regulatory with Scrutiny</td>
<td>27</td>
<td>36.49%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>174</strong></td>
<td><strong>26.50%</strong></td>
</tr>
</tbody>
</table>

*The figures in this table do only considerate the sample of 656 voting results that we analyze in this section.

30 See also Brandsma and Blom-Hansen 2010: 504, for another variant of this hypothesis.
** Percentages in this tables are calculated in relation to the total number of Decisions per
type of procedure, not regarding the total number of Decisions (except fot the Total).

Table 5 provides a breakdown of voting results according to the type of comitology
procedure used by the relevant committee. The data seems to broadly confirm the first
hypothesis. Although instances of dissensus can be found in all categories, dispute appears to
be more frequent in committees where the procedures are more demanding. Instances of
dissent are twice as frequent in regulatory committees than in advisory committees, and three
times more frequent than in management committees. However, we note that dissent is higher
in management than in consultative committees, which is not in line with our predictions.
This notwithstanding, our findings would appear to corroborate the idea that when states have
strong preferences they will insist on procedural safeguards and be less inclined to engage in
deliberative processes.

To test Majone’s idea of a major difference between regulatory and (re)distributive
policies, we have relied on a classification of Commission directorate-generals (DG) proposed
by Hussein Kassim et al. (2013) on the basis of their 2008 and 2009 annual management
plans (AMP). The classification comprises 6 categories: ‘spending’ (management);
‘legislative’ (advancement of new legislation); ‘regulatory’ (upkeep of existing acquis / areas
subject to comitology); ‘enforcement’ (of the acquis); ‘internal support services’ and;
‘external’ (negotiations). It has been slightly adjusted to reflect our theoretical concerns. The
‘legislative’ and ‘regulatory’ categories were merged as they both seem to fit within Majone’s
broad definition of regulation. 31 Each of the committees for which data is available was then
classified in the category corresponding to the DG in charge of coordinating its work. Table 6
shows the frequency of dissensus in each category.

31 The following policy fields were included in the Regulatory class: Mobility and transport, Environment (ENV), Fisheries and maritime affairs (MARE), Health and Consumer protection (SANCO), Internal market and Services (MARKT), Justice, Taxation and Customs Union (TAXUD), Climate Change, Energy, and Home Affairs. The Spending class includes: Education and Culture (EAC), Development and Co-operation EuropeAid and Humanitarian Aid (ECHO). The Regulatory-Spending class includes: Enterprise and Industry (ENTR) and Information Society and Media (INFSO); while the internal services refer to Eurostat, Informatics and Communication.
The results appear to contradict the hypothesis we derived from Majone’s work. Whereas instances of dissensus account for a third of decisions taken by committees active in regulatory policies, the share is significantly lower in areas where the distribution of EU funds is at stake. This is consistent with one of our earlier findings: we have seen above that the most disputed issues in 2008 all related to Health and Food Safety issues, a field where disputes tend to revolve around questions linked to scientific uncertainty.\textsuperscript{32} Thus, if one accepts our argument that dissensus indicates a lower propensity for deliberation, our data suggests that deliberative supranationalism is less likely to develop in regulatory policies.

Finally, the socialization hypothesis would lead us to expect that more frequent meetings and the habit of taking decisions together should be conducive to greater levels of mutual understanding, and therefore to a higher percentage of decisions taken unanimously. However, the data does not allow us to establish a clear relationship between these. The number of decisions taken by each committee does not seem to affect its propensity to decide by consensus. As regards the number of meetings, we relied on data published in the

\textsuperscript{32} See above, section 3.
Commission’s annual report on comitology.\textsuperscript{33} However, the information contained therein does not always match that from the on-line register, on which we relied for our own database: some of the register’s voting sheets were said to be issued by committees that according to the annual report did not meet in 2008. The data seems to suggest there is some correlation between an increased number of meetings and a higher percentage of unanimity: the unanimity rate is of 72\% in committees that met less than five times that year, against 88\% in committees that met between 11 and 15 times. However, there are many examples to suggest the link between the two factors may not be all that strong. Thus committee C13400 on the conservation of natural habitats and of wild animals and plants (DG ENV) held a single meeting in which 8 decisions were taken (7 unanimously and one with disagreement), while the committee C15400 on COCOM-framework directive 2002/21/EC (DG INFSO) met 5 times and took also 5 formal decisions, all with a disagreeing votes. At present, therefore, our data does not offer strong support for the socialization hypothesis.

CONCLUSION

The analytical utility of voting results in capturing the prevailing style of interaction in comitology procedures has often been challenged. Rationalist models highlight the importance of pre-voting negotiations, much like within the Council of ministers (Sullivan and Selck, 2007. Moreover, it is argued, the Commission has the ability to anticipate adverse results and accordingly only subjects implementing measures to vote when there is no risk of rejection (Brandsma 2010; Pollack 2003a).

Yet we have shown that it is important, both conceptually and in practice, to separate the analysis of decision-making from that of outcomes. It is true, as is often emphasized, that in 99\% of the cases the member state representatives in committees deliver a favourable opinion on the draft proposals presented by the Commission. However, in our view this outcome should not be mistaken for an indicator of the consensual nature of decision-making \textit{within} committees. Building on Philippe Urfalino’s work, we have suggested that voting may

be seen as a kind of 'smoking gun' revealing the absence or the limits of deliberative processes. If consensus can be considered as the logical, or even the ideal, decision-making mode in a truly deliberative process, resorting to a formal vote is a sign of imperfect deliberation, or of its complete absence. On this basis, we have shown that conflict was far from rare in comitology procedures: in over a quarter of the opinions delivered by committees in 2008, the Commission proposal was challenged by one or more delegations. For all these cases, either deliberation was not the only interaction process at work or it failed. And in the given period, conflict appeared to be greater within committees than in the Council of Ministers.

Our research has also confirmed that it makes little sense to attempt to squeeze comitology into one single model. Different patterns of decision-making appear to co-exist; the key issue is therefore to identify the factors that may account for the quality of interactions among committee members, and the rationale behind the act of voting itself. Our analysis lends credence to the rationalist view that a bargaining process is more likely to emerge in areas where strong national interests are at stake. It contradicts a widespread expectation to see deliberation and consensus play a more important role in regulatory policies. Despite its being significantly larger than the sample used in earlier studies, however, our dataset only covers a fraction of the decisions adopted in the period under survey, which is why these findings are presented here as tentative conclusions. Further work is required to better understand the factors that may influence the use of each decision-taking mode. In particular, the quantitative part of the project needs to be be supplemented by a qualitative component in which the findings generated in this first part will be refined through interviews with national and Commission officials.

Another important aspect the research will have to address is the impact of the Lisbon Treaty. As is known, the latter has produced yet another reform of implementing legislation that recognizes the competence of principle of the Commission and reduces the scope of comitology to the benefit of so-called delegated acts (Christiansen and Dobbels 2012). However, comitology has not disappeared, nor have the functional reasons that have led to the emergence of a dense web of committees ruled by complex procedures over the past decades; indeed some observers have stressed the many similarities that exist between the new regime and the old comitology system (Brandsma and Blom-Hansen, 2012). It remains to be seen to what extent this new environment has altered the modus operandi of committees. In this
respect, it is interesting to note that the new Comitology Regulation adopted in February 2011 explicitly requires the Commission to seek the widest possible support within committees\textsuperscript{34}. Whether this will translate into more deliberation is an open question.

References


\textsuperscript{34} Article 3(4). See supra note 13.


