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An impressive number of transnational committees populates the EU institutional system. Their statutes and internal regulations are almost all unpublished, their composition and agendas are largely unknown, their meetings inaccessible. Nevertheless, this almost impenetrable «jungle» is actually the life force animating EU decision-making; all implementing measures are defined and approved by the comitology committees; agreement on the substance of most legislative measures is reached at the level of Council working groups; the Commission's power of initiative is exercised by – or, at least, shared with – committees composed of national officials. Is this seemingly technocratic nightmare radically unconstitutional? The answer I put forward in this paper is negative. After a brief discussion of the ECJ's formalistic approach to the comitology issue, I shall argue that: a) the committee system coheres with a functional (or vertical) understanding of the principle of institutional balance anchoring the European composite system; b) in such a multi-level system, the existing mechanisms for ensuring the accountability of administrative bodies cannot be understood by the classic hierarchical «transmission belt model»; c) notwithstanding recent improvements in the transparency and the rationality of certain kinds of committees, there are still parts of this jungle in which law's legitimising potential remains hidden.

1. EU Committees: «Iceberg Theory» and Technocratic Nightmare

Three kinds of transnational committees play an important but obfuscating role in the EU decision-making process. Firstly, *comitology* or executive committees, composed of national officials: they assist the Commission in implementing Community law. Secondly, *Council* legislative committees and working groups, composed of national officials: they prepare the ministers' legislative decisions. Thirdly, *expert* committees, composed of national officials and/or representatives of social and economic interests or independent experts: they carry out various tasks mainly in the initiative phase of lawmaking. The number of transnational administrative committees is impressive: according to recent estimates, there are more than two hundred and fifty comitology committees¹, almost two hundred Council committees² and more than 1000 expert committees³. There are thus approximately 1500 EU committees altogether⁴. Their statutes and internal regulations are almost all unpublished, their composition and agendas are largely unknown and their meetings, inaccessible. Nevertheless, this almost impenetrable jungle is actually the life force animating EU decision-making: implementing measures are defined and approved by the comitology committees in over 99 percent of the cases; agreement on the substance of

¹ *Report from the Commission on the working of committees in 2002*, 8 September 2003, COM/2003/530 final, para. 2.1, tab. 1, documents that there were 257 active comitology committees in 2002.

² There were exactly 159 active Council committees – 247 if sub-committees are included – in February 2004 (Council of the European Union, *List of Council preparatory bodies*, Brussels, 23 February 2004, doc. no. 6124/04).

³ Unofficial but reliable data are collected by the Secretary General of the Commission in the following internal documents: SEC (2002) 868/1, 22 July 2002, and SEC (2002) 868/2, 22 July 2002. According to data cited in T. Larsson, *Pre-cooking in the European Union. The World of Expert Groups*, Stockholm, ESO-report, 2003, p. 152-154 (available at <http://finans.regeringen.se/eso>), there were a total of 851 expert committees in 2000, 482 of which were temporary; taking the various committees' sub-committees into account, the total number rises to 1352.

⁴ See also D. Guéguen e C. Rosberg, *Comitology and other EU committees and experts groups. The hidden power of the EU: finally a clear explanation*, Brussels, Europe Information Service, 2004.

legislative measures is reached in 70-75 percent of the cases at the level of Council working groups (thus, below the COREPER level); the Commission's power of initiative is exercised by – or, at least, shared with – committees composed of national officials (sometimes interest committees and scientific committees are also consulted)⁵.

This simple quantitative overview illustrates the so-called *iceberg theory*, according to which, in EU decision-making, «only a small proportion of all dossiers seem to be dealt with by Commission officials and Council Ministers, while the bulk of these dossiers seems to be determined by committees»⁶. Of course, the idea that unelected bureaucratic bodies make the bulk of EU decisions doesn't fit very well into a classic understanding of «democracy». These committees are moreover largely unaccountable to the European Parliament.

Is this seemingly technocratic nightmare radically unconstitutional? The answer I put forward in this paper is negative. After a brief discussion of the ECJ's formalistic approach to the comitology issue, I shall argue that: a) the committee system coheres with a functional (or vertical) understanding of the principle of institutional balance anchoring the European composite system; b) in such a multi-level system, the existing mechanisms for ensuring the accountability of administrative bodies cannot be understood by the classic hierarchical «transmission belt model»⁷; c) notwithstanding recent improvements in the transparency and

⁵ For an in-depth analysis of the organization, functioning and influence of these three groups of committees, see M. Savino, *I comitati dell'Unione europea. La collegialità amministrativa negli ordinamenti compositi*, Milano, Giuffrè, 2005, chapters 2, 3 and 4.

⁶ M.P.C.M. van Schendelen, *EC Committees: Influence Counts more than Legal Power*, in R.H. Pedler and G.F. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, Maastricht, Eipa, 1996, p. 37. See also, Market Access Europe, *Brussels – the Tip of the Iceberg. The Role of Committees in the EC's Decision-making System*, Brussels, Market Access Europe, 1993.

⁷ For a critical discussion of this model, with regard to national administrations, see S. Stewart, *The Reformation of American Administrative Law*, in *Harvard Law Review*, 1975, vol. 88, p. 1669, Id., *Madison's Nightmare*, in *University of Chicago Legal Forum*, 1990, vol. 57, p. 335, and also S.P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, in *Columbia Law Review*, 1998, vol. 98, p. 1.

the rationality of certain kinds of committees, there are still parts of this jungle in which law's legitimising potential remains hidden.

2. The Inadequacy of the Court of Justice's Formalistic Approach

The Court of Justice has held that the committees do not exercise any decision-making power, and thus do not alter the institutional balance of the European Union. This view was put forward in the *Köster*⁸ decision concerning executive committees, and more obliquely by the *FAO*⁹ decision regarding the Council legislative committees. Criticism of this formalistic approach has been widespread, and often penetrating¹⁰. The voices from the academy, however, do not sing in unison.

According to some scholars, the transnational administration created by the EU committees is illegitimate¹¹ or at least constitutionally «weak»¹². Others similarly question the legitimacy of the EU committees,

⁸ Case 25/70 *Einfuhrstelle v. Köster* [1971] ECR 1161.

⁹ Case C-25/94 *Commission v. Council (FAO)* [1996] ECR I-1469.

¹⁰ See J.H.H. Weiler, *Epilogue: "Comitology" as Revolution – Infranationalism, Constitutionalism and Democracy*, in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford, Hart, 1999, p. 343-346, and, less directly, R. Dehousse, *Misfits: EU Law and the Transformation of European Governance*, Jean Monnet Working Papers, n. 2/02, p. 16: «basic principles (such as the concept of "institutional balance") have been instrumentalized [...] The stubborn insistence on a non-delegation doctrine has often been presented as a defence against a technocratic drift, and an attempt to preserve the "political" character of basic decisions against the evils of technocracy. However, the reality is somewhat more complex. The EU's legislative processes are heavily technocratic. Moreover, despite many protests to the contrary, one has accepted – in fact, if not in law – that basic decisions are made by technocratic bodies of various kinds, the choices of which are duly rubber-stamped by "political" powers that be. EU law is then used as a façade to hide a reality that is deemed to be unacceptable. Law is said to protect normative values. Are these better served by this exercise in camouflage?».

¹¹ J.H.H. Weiler, *Epilogue: "Comitology" as Revolution*, op. cit.; C. Harlow, *Accountability in the European Union*, Oxford, Oxford University Press, 2002, especially p. 32 and 67.

¹² P. Lindseth, «Weak» Constitutionalism? *Reflections on Comitology and Transnational Governance in the European Union*, in *Oxford Journal of Legal Studies*, 2001, vol. 21, n. 1, p. 145; Id., *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the EEC*, in *Columbia Law Review*, 1999, vol. 99, especially p. 626, and, more recently, Id., *Delegation is Dead, Long Live Delegation:*

but acknowledge that similar problems also arise at the state level¹³, and that they could be at least partially addressed by introducing such a procedure as the American «*notice and comment*»¹⁴. Still others maintain that the transnational committees are an example of «*deliberative supranationalism*» and thus affirm their full constitutionality.¹⁵

In the constitutional debate however, there is agreement about the need to go beyond the Court's approach, as it conceals the truly

Managing the Democratic Disconnect in the European Market-Polity, in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, Oxford University Press, 2002, p. 139.

¹³ P. Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, in G. de Burca and P. Craig (eds.), *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, p. 25; less assertively, G.F. Schäfer, *Linking Member State and European Administrations – The Role of Committees and Comitology*, in M. Adenas and A. Türk (eds.), *Delegated Legislation and the Role of Committees in the EC*, The Hague, Kluwer, 2000, p. 5.

¹⁴ F. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, in *Harvard International Law Journal*, 1999, vol. 40, n. 2, p. 451; M. Everson, *The Constitutionalisation of European Administrative Law: Legal Oversight of a Stateless Internal Market*, in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, op. cit., p. 281. In the same vein, but more cautious, is R. Dehousse, *Towards a Regulation of Transnational Governance? Citizen's Right and the Reform of Comitology Procedures*, in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, op. cit., p. 109., especially p. 120, and P. Craig, *Democracy and Rule-making Within the EC: An Empirical and Normative Assessment*, in *European Law Journal*, 1997, vol. 3, p. 123.

¹⁵ C. Joerges and J. Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, in *European Law Journal*, 1997, vol. 3, n. 3, p. 273, and by the same authors, but from a political science perspective, *Transforming Strategic Interactions into Deliberative Problem-Solving: European Comitology in the Foodstuff Sector*, in *Journal of European Public Policy*, 1997, vol. 4, p. 609. Among the many articles in which these scholars have replied to criticism, it is worth mentioning: C. Joerges, «*Deliberative Supranationalism*» – *Two Defences*, in *European Law Journal*, 2002, vol. 8, n. 1, p. 133; J. Neyer, *Discourse and Order in the EU. A Deliberative Approach to Multi-Level Governance*, and C. Joerges, «*Comitology and the European Model?*». *Towards a Rechts-Fertigungs-Recht in the Europeanisation Process*, both in E.O. Eriksen, C. Joerges and J. Neyer (eds.), *European Governance, Deliberation and The Quest For Democratisation*, Oslo, Arena, 2003, p. 235 and p. 501; J. Neyer, *Explaining the unexpected: efficiency and effectiveness in European decision-making*, in *Journal of European Public Policy*, 2004, vol. 11, n. 1, p. 19.

decisional nature of the activity carried out by most European transnational committees.

3. The Principle of Institutional Balance

The European Union is a mixed or composite legal system¹⁶. Its institutional structure rests upon the principle of institutional balance, whereby EU institutions operate in conformity with the distribution of powers provided for by the treaties. The notion of institutional balance has been elaborated by the Court of Justice with reference to Article 7 of the EC Treaty, according to which «each institution shall act within the limits of the powers conferred upon it by this Treaty». This is a controversial notion. Some authors consider it an «empty formula», which EU institutions stretch in different directions corresponding to their respective interests¹⁷. Others refer to institutional balance as a legal principle¹⁸, albeit of limited concrete relevance¹⁹. Others still regard it as

¹⁶ S. Cassese, *La costituzione europea: elogio della precarietà*, and Id., *Che tipo di potere pubblico è l'Unione europea?*, both in Id., *Lo spazio giuridico globale*, Roma, Laterza, 2003, respectively at p. 29 and p. 55; S. Cassese, *L'Unione europea come organizzazione pubblica composita*, in Id., *La crisi dello Stato*, Roma, Laterza, 2002, p. 67. See also G. della Cananea, *L'Unione europea. Un ordinamento composito*, Roma, Laterza, 2003.

¹⁷ R. Bieber, *The Settlement of Institutional Conflicts on the Basis of Article 4 of the EEC Treaty*, in *Common Market Law Review*, 1984, vol. 21, p. 519.

¹⁸ G. Guillermin, *Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de Justice des Communautés européennes*, in *Journal du droit international*, 1992, p. 319; D. Simon, *Le système juridique communautaire*, Paris, Puf, 1997, p. 231; J. Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe*, Bruxelles, Bruylant, 1997, p. 390; J.P. Jacqué, *The Principle of Institutional Balance*, in *Common Market Law Review*, 2004, vol. 41, p. 383.

¹⁹ K. Lenaerts e A. Verhoeven, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, op. cit., p. 44; B. de Witte, *The Role of Institutional Principles in the Judicial Development of the European Union Legal Order*, in F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford, Hart, 2000, p. 91-93; S. Prechal, *Institutional Balance: A Fragile Principle with Uncertain Contents*, in T. Heukels, N. Blokker e M. Brus (eds.), *The European Union after Amsterdam: A legal Analysis*, The Hague, Kluwer, 1998, p. 273.

having normative value²⁰. In any case, a distinction must be made between the legal and political understanding of institutional balance: «*il n'évoque en rien l'idée selon la quelle les auteurs des traités auraient mis en place une répartition équilibrée des pouvoirs entre les différentes institutions, mais plus simplement le fait que l'organisation communautaire est le reflet d'un équilibre des intérêts selon l'importance que les Etats ont assigné à chacun d'entre eux. Dans ce contexte, la tâche de la Cour est de faire respecter cette organisation des pouvoirs afin que ne puisse être remis en cause les arbitrages effectués au moment de la rédaction des traités*»²¹.

In some cases, reference to the notion of institutional balance has enabled the Court of Justice to pronounce innovative doctrines. This is particularly evident in the *Chernobyl* case²², in which – in contrast with previous interpretations expressed, among others, in the *Isoglucose*²³ and *Wybot*²⁴ cases – European judges have invoked this principle to affirm the capacity of the European Parliament to bring an action for annulment - a gap in the EC Treaty²⁵. Thus, by resorting to a dynamic (or functional) interpretation of the notion of institutional balance, the Court has affirmed a principle that complements the express provisions of the treaties²⁶.

²⁰ P. Craig, *Democracy and Rule-making Within the EC*, op. cit., p. 113; Id., *The Nature of the Community: Integration, Democracy and Legitimacy*, op. cit., p. 37-40.

²¹ J.P. Jacqué, *Cours général de droit communautaire, Cours général de droit communautaire*, in A. Clapham (ed.), *Collected Courses of the Academy of European Law*, vol. I, book 1, Dordrecht, Nijhoff, 1991, p. 292.

²² Case C-70/88 *European Parliament v. Council* [1991] ECR I-4529.

²³ Case 138/79, *Roquette Frère v. Council* [1980] ECR 3333, para. 33.

²⁴ Case 149/85, *Wybot v. Faure* [1986] ECR 2391.

²⁵ Case C-70/88 *European Parliament v. Council* [1991] ECR I-4529, para. 26: «The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities».

²⁶ On the Court's functional approach, S. Prechal, *Institutional Balance: A Fragile Principle with Uncertain Contents*, op. cit., p. 277, and J.P. Jacqué, *The Principle of Institutional Balance*, op. cit., p. 386: «In this case, the Court did not use the principle in a static manner, but on the contrary relied on it to supplement the Treaty in a dynamic way».

4. The constitutionality of the EU committees

In the following section, I shall analyse the constitutionality of transnational committees in light of the principle of institutional balance. My goal will be to demonstrate that the committees perform a decisive role in resolving two problems: the efficient allocation of powers among EU institutions and the effective administrative implementation of Community law. The arguments I put forward will have a substantive character, thus presupposing a functional interpretation of the principle of institutional balance²⁷.

4.1. The Horizontal Dimension: the Problem of Delegating Powers

There are nearly seven thousand Commission officials who work to prepare legislative proposals and to implement Community policy²⁸. The Council's decision-making work is carried out by the ministers of the Member States; but they are few and, being mainly engaged in domestic questions, can dedicate only limited time to Europe. Such meagre human resources are hardly sufficient for confronting the heavy workload of the two (out of the three) institutions having the most important role in the adoption and implementation of Community law.

²⁷ For a similar attempt, E. Vos, *The Rise of Committees*, in *European Law Journal*, 1997, vol. 3, n. 3, p. 223; Id., *Institutional Frameworks of Community Health and Safety Regulation. Committees, Agencies and Private Bodies*, Oxford, Hart, 1999, especially pp. 83, 120. See also, Id., *EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation*, in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, op. cit., p. 19; W. Sauter and E. Vos, *Harmonisation under Community Law: The comitology issue*, in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union*, London, Kluwer, 1998, p. 169.

²⁸ According to the data cited by N. Nugent, *The European Commission*, Basingstoke, Palgrave, 2001, p. 169, there were 7068 A-grade bureaucrats in the Commission in 1999.

This problem persists because of the *Meroni* doctrine, which prohibits the delegation of discretionary powers «to bodies other than those which the treaty has established to effect and supervise the exercise of such power each within the limits of its own»²⁹. The problem of guaranteeing an efficient Community decision-making process in the face of these legal and structural limitations has been mostly resolved by the creation of transnational administrative committees.

The first committees to be established were the expert committees and the committees of the ECSC Council, which go back to 1952-1953. From the beginning, the High Authority officials and foreign ministers meeting in the ECSC Special Council sought the help of national administrations. In the EEC legal system, in addition to the expert committees (which are active mainly in the proposal phase) and the Council committees (which act in the legislative phase), the first *comitology committees* (which intervene in the implementing phase) emerged in the 1960s. Since 1962, in the face of a growing workload, the EEC Council of Ministers began to use the Treaties' only express tool of flexibility in allocating the workload between Community institutions: handing executive competences over to the Commission³⁰. The treaty provision enabling this (Article 211, formerly Article 155) was supplemented by establishing committees, made up of national officials with the task of assisting the Commission. The balance that this struck seemed to be satisfactory, and led the Council to make regular use of the delegation option. Ever greater decision-making powers were assigned to the Commission, leading this executive branch to grow, while the legislative branch contracted. In order to confront the growing workload produced by the expansion of Community competences, particularly noticeable since the 1970s, the Council delegated a considerable part of its work to the Commission and to the executive committees assisting it.

Committees played a key role in this re-allocation of powers from the Council to the Commission, mainly for two reasons. The first is that their creation enabled a «re-nationalisation» of Community decision-making, by getting national administrations involved in the decisions delegated by the Council to the Commission. The second reason regards the executive

²⁹ Case 9/56 *Meroni v. High Authority* [1958] ECR 11.

³⁰ Article 211 (formerly Article 155) of the EC Treaty.

and expert committees more specifically: such committees enabled Commission officials (who are, as already mentioned, quite limited in number) to benefit from the collaboration of thousands of national civil servants in confronting their growing workload.

This institutional evolution stands in sharp contrast to a static notion of institutional balance: in substantive violation of the *Meroni* prohibition – never formally pronounced by the Court of Justice – a growing part of the legislative and executive workload assigned to the Council and Commission is carried out by committees of national civil servants. The balance of powers is altered, since substantive decision-making (and thus discretionary) powers are assigned to bodies to which, judging from the letter of the treaties, they do not belong³¹.

A reinterpretation of the principle of institutional balance in functional or dynamic terms would suggest a different conclusion. There is a twofold justification for the delegation of executive and legislative competences: *efficiency*, in so far as it promises a better division of labour among EU institutions and more efficient decision-making processes; *representativeness*, in so far as it enables governments to represent their interests at all steps of the decision-making process, even when, for practical reasons (lack of time and expertise) the ministers would be unable to do so.

As far as they improve the decision-making capacity of the EU governing institutions, committees are therefore implicitly «covered» by Article 7 of the Treaty. By making use of executive and legislative committees, the Council and the Commission are each able to exercise «the powers conferred upon it by this Treaty»³² and to assume the

³¹ Though the executive and legislative committees have gained a foothold in the Treaties, in Articles 202 and (though limited to COREPER) 207 (specific provisions expressly call for the establishment of special or senior Council committees) respectively, these provisions in no way authorize the delegation of decision-making powers to these auxiliary bodies. For this reason, a simple static interpretation of institutional balance – consistent with the leading jurisprudence of the Court of Justice – together with a recognition of the discretionary nature of the committee's powers, would preclude the recognition of their legitimacy.

³² Article 7 of the EC Treaty. This is the provision that the Court of Justice connects with the principle of institutional balance.

consequent responsibility³³. As for the second function performed by committees – representativeness – it is the very foundation of institutional balance. This principle seeks to ensure respect for the balance of the interests considered important by the Treaty’s framers, with respect to the different sectors and decision-making phases. If the Treaty assigns legislative and executive powers to the Council in order to guarantee the representation of national governments’ interests, and if the only way to adequately represent these interests in all sectors (even the most technical) and phases (even the detailed analysis of legal texts) is by setting up committees, then the creation of transnational committees seems to satisfy the need to maintain this balance.

4.2. The Vertical Dimension: the Effectiveness EU Law

A second argument for the compatibility of the EU transnational committees with the principle of institutional balance regards the committees’ (and not only the comitology committees) decisive role in implementing Community law.

a) The Vertical Meaning of Institutional Balance

The idea that the principle of institutional balance has a vertical dimension as well as a horizontal one is controversial. Challenges to this argument appeal to a strict interpretation of Article 7 of the Treaty (which refers only to Community institutions)³⁴, as well as to objections of

³³ Already from the *Köster* decision, the Court revealed its sensitivity to efficiency considerations, when it affirmed that «the management committee machinery [...] enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary» (Case 25/70 *Einfuhrstelle v. Köster* [1971] ECR 1161, para. 9).

³⁴ G. Guillermin, *Le principe de l’équilibre institutionnel dans la jurisprudence de la Cour de Justice des Communautés européennes*, in *Journal du droit international*, 1992, p. 328, restricts the range of the principle’s application to the «institutional triangle» made up of the Council, Parliament and Commission. Analogously, B. de Witte, *The Role of Institutional Principles in the Judicial Development of the European Union Legal Order*, in F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, op. cit., p. 91, considers the principle of institutional balance as a merely horizontal institutional principle.

principle³⁵. But arguments in favour convincingly sustain that «the full complexity of the Community structure may only be understood if the institutional balance of powers is defined widely, not only encompassing the balance between the individual Community institutions, but also including the balance between the Community and the Member States. Such a functional understanding of the notion of the balance of powers thus further explains why it be necessary not only to give the Member States and their national institutions a voice in the legislative process, but also to allow them a degree of influence over the process of the implementation and application of Community law»³⁶.

This position thus does not rest upon merely theoretical foundations. The idea of institutional balance is, first of all, incorporated into the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam. Paragraph 2 of the Protocol declares: «The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the *acquis communautaire* and the institutional balance». It seems intuitive that the connection between the preservation of institutional balance and the application of the principles of subsidiarity and proportionality,

³⁵ See in particular, S. Prechal, *Institutional Balance: A Fragile Principle with Uncertain Contents*, op. cit., p. 284, which makes the following argument: «To consider institutional balance as a means of maintaining the integrity of the Member States' powers seems to me to be rather contradictory with the concept of institutional balance as an inherent safeguard building upon the tradition of constitutional checks and balances. Instead of helping to avoid the concentration of powers, the introduction of the interests and concerns of the Member States into the notion of institutional balance is producing the opposite effect, in particular in strengthening the position of the Council, with as a possible result the further intergovernmentalization of the Community». This objection seems to be based on an incorrect perception of the consequences of the Member States' participation in the Community decision-making process: their involvement takes place mainly through the transgovernmental committees, which do not function according to intergovernmental logic and procedures.

³⁶ E. Vos, *The Rise of Committees*, op. cit., p. 223. See also, M. Everson, *Independent Agencies: Hierarchy beaters?*, in *European Law Journal*, 1995, vol. 2, n. 1, pp. 196-198.

understood in the Protocol as vertical institutional principles³⁷, makes sense only if institutional balance also comprehends the relationships between Community powers and Member States.

Furthermore, a wide concept of institutional balance has been accepted by the Court of Justice. In delimiting its own competence, the Court explicitly affirmed that the institutional balance required by the Treaties establishes conditions, according to which the Member States participate in the work of Community institutions³⁸.

Therefore, it does not seem unreasonable to maintain that the principle of institutional balance has a vertical dimension, comprehending the balance of powers between the Union and its Member States.

b) State Autonomy and the Supremacy of Community Law: the «Dual Loyalty» of the National Administrations

In principle, the implementation of the EU law is part of Member States' competence. Member States' administrative autonomy has been recognised by the Court: «[a]ccording to the general principles on which the institutional system of the Community is based and which govern the relations between the Community and the Member States, it is for the Member States, by virtue of Article 5 [now 10] of the Treaty, to ensure that Community regulations [...] are implemented within their territory. In so far as Community law, including its general principles, does not include common rules to this effect, the national authorities when implementing Community regulations act in accordance with the procedural and substantive rules of their own national law»³⁹. However

³⁷ On the vertical nature of these principles, B. de Witte, *The Role of Institutional Principles in the Judicial Development of the European Union Legal Order*, op. cit., p. 90.

³⁸ Case C-95/97 *Région wallonne v. Commission* [1997] ECR I-1787; Case C-180/97 *Region of Tuscany v. Commission* [1997] ECR I-5245.

³⁹ Joined Cases 205-215/82 *Deutsche Milchkontor GmbH and others v. RFG* [1983] ECR 2633, para. 17. On Member States' institutional and administrative autonomy, see, respectively, L.M. Díez-Picazo, *What does it mean to be a State within the European Union?*, in *Rivista italiana di diritto pubblico*, 2002, p. 655, and H. Oberdoff, *Une Communauté administrative pour l'Europe ou l'administration en réseau*, in *Revue politiques et management public*, 1997, vol. 15, n. 3, p. 8. On the limits imposed by the European Union on national administrative autonomy, S. Cassese, *La signoria comunitaria sul diritto amministrativo*, in Id., *Lo spazio giuridico globale*, op. cit., p. 93.

autonomous in their administrative sphere, Article 10 of the Treaty requires Member States to loyally cooperate with Community institutions to ensure the implementation of Community law. It is precisely in applying this principle of loyal cooperation that the Court of Justice has developed its jurisprudence of the supremacy of Community law⁴⁰.

The coexistence of the rule of national administrative autonomy on the one hand, and the doctrine of Community law supremacy on the other, gives rise to a crucial problem, the so-called dual loyalty of national civil servants: «On one hand, they are integrated in their respective institutional hierarchies. On the other hand, national agencies are responsible for the implementation of EU law and thus function as the substructure of the European institutions. That *dédoublement fonctionnel* may lead to conflicts if state officials receive diverging commands from the two orders»⁴¹. In theory, the conflict is resolved by national officials' duty to apply Community law and to disregard any potentially conflicting norms⁴². Still, «to suggest that the doctrine of priority resolves the conflict is to presuppose what is often yet to ascertain, namely that EU law applies directly and has a defined content. Since authorities do not have the option to refer questions to the ECJ, legality of administrative conduct is at risk of becoming selective»; moreover, «priority does not help where there is nothing on the Union level which can compensate for the loss of the norm set aside for the sake of uniform application of EU law. This is usually the situation in administrative law»⁴³. Every time national bureaucrats apply Community law, they must analyse the compatibility of existing national administrative regulations with

⁴⁰ The connection between Community law supremacy and the principle of loyal cooperation set forth in Article 10 of the Treaty is explained in Case C-213/89 *Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433, para. 19. On this subject, B. de Witte, *The Role of Institutional Principles in the Judicial Development of the European Union Legal Order*, op. cit., p. 88.

⁴¹ S. Kadelbach, *European Administrative Law and the Law of a Europeanized Administration*, in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, op. cit., p. 176.

⁴² Case C-103/88 *Fratelli Costanzo spa v. City of Milan* [1989] ECR 1838, para. 30-31.

⁴³ S. Kadelbach, *European Administrative Law*, op. cit., p. 177 s.

European law⁴⁴. It might happen that an incompatible national rule creates a gap in which there is neither a national nor a Community administrative rule for implementing Community legislation.

In other words, the administrative autonomy of the Member States produces a gap between legislation and administration, which the doctrine of Community law supremacy is not able to fill, and which also risks compromising the very effectiveness of Community law.

c) The «Europeanisation» of Community Law: a General Remedy?

It has been argued that the best solution to this problem would be a «Europeanisation» of national administrative law⁴⁵. This could take place in two ways: «by principles» or «by norms». Europeanisation through principles occurs when national administrative law reflects the principles established in Community law and can therefore be applied on the basis of the criteria of effectiveness and equivalence⁴⁶. Europeanisation through norms happens when there are no alternatives to the application of Community norms, because they leave national authorities no discretion.

Undoubtedly, this solution can be effective in some cases. Europeanisation through principles enables administrations to apply the existing national law when it is substantially equivalent to the Community law and is thus able to guarantee effectiveness. But, while the conditions of effectiveness and equivalence might be met by domestic law, this is

⁴⁴ For a recent example of the problem of dual loyalty, see the Court of Justice's recent decision in the *CFI* case (Case C-198/2001 *Consorzio fiammiferi italiani* [2003] not yet published).

⁴⁵ This is the argument of S. Kadelbach, *European Administrative Law*, op. cit., pp. 178-180.

⁴⁶ Case 39/73, *Rewe-Zentralfinanz c. Director der Landwirtschaftskammer Westfalen-Lippe* [1973] ECR 1039, para. 5; Case 45/76, *Comet BV c. Productschap voor Siergewassen* [1976] ECR 2043; Case C-231/96, *Edis v. Minister of Finance* [1998] ECR I-4951, para. 34: in the absence of a Community implementing law, «it is for the domestic system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)».

certainly not always the case⁴⁷. Europeanisation through norms can likewise only be exceptional, because it has the disadvantage of compromising the administrative autonomy of the States. It is no accident that it has been used in a very limited context⁴⁸.

d) The General Remedy: the «Nationalisation» of Community Law through Transnational Committees

Before Community law «Europeanises» national administrative laws, national administrations «nationalise» Community law: this remedy to the gap between European legislation and national implementation seems to be the general one. Both primary norms (through expert committees and Council committees) and implementing acts (through comitology committees) are carefully elaborated and negotiated by Community institutions in consultation with national administrations.

The need for this «nationalisation» of Community law is clear in the context of executive measures. The participation of the administrations in the downward phase of the decision-making process takes place in so far as States are directly responsible for carrying out the implementing acts set forth by the Commission. As has been remarked, «la Commission ne dispose pas d'une administration opérationnelle, d'une administration de terrain. Il lui faut s'en remettre aux administrations nationales. Mais la Commission n'a pas de prise directe sur celles-ci: les comités constituent l'articulation essentielle, l'intermédiaire obligé entre le niveau de l'exécution normative qui relève des autorités communautaires, et le niveau de l'exécution "administrative" qui continue à relever des administrations nationales. C'est parce qu'ils occupent cette place stratégique, que les comités ne peuvent être considérés comme des

⁴⁷ See, on this issue, A. Tomkins, *Of Institutions and Individuals: The Enforcement of EC Law*, in P. Craig e R. Rawlings (eds.), *Law and Administration in Europe. Essays in Honour of Carol Harlow*, Oxford, Oxford University Press, 2003, p. 281-285.

⁴⁸ As recognized by S. Kadelbach himself (Id., *European Administrative Law*, op. cit., p. 179 s.), the Court deny Member States' procedural autonomy almost exclusively in the area of State aids, for the reason that «where State aid is found to be incompatible with the common market, the role of the national authorities is [...] merely to give effect to the Commission's decision. The authorities do not, therefore, have any discretion as regards revocation of a decision granting aid» (Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland GmbH* [1997] ECR I-1591, para. 34).

"bavures" du système communautaires, des scories qu'il faudrait éliminer à tout prix ou encore des séquelles d'une incorrigible souveraineté étatique, toujours prête à reprendre d'une main ce qu'elle a donné de l'autre»⁴⁹.

Similar needs for cooperation also exist in relation to legislative acts. It often happens that a Community law is directly implemented by national administrations, without there being an executive measure from the Commission specifying implementation details and procedures. In these cases, there is the need to avoid a conflict between Community law and Member States' norms (such as those expressing constitutional principles) and/or implementing procedures. The involvement of national administrations in the initiative and upward phase of the decision-making process enables them to raise these incompatibility concerns and thus to resolve from the outset problems that could become unsolvable later on in the implementation phase and consequently lead to non-compliance. For this reason, the presence of transgovernmental committees in the initiative and legislative phase significantly reduces the risk of non-compliance by building a «counterpunctual law»⁵⁰, a *ius commune* compatible with national *iura particularia*.

The European committees are thus one of the main tools of integration and cohesion in the composite legal system of the European Union. Without them, Community law would not have such a high level

⁴⁹ C. Blumann, *Le pouvoir exécutif de la Commission et le problème de la comitologie*, in *Rivista italiana di diritto pubblico comunitario*, 1993, p. 1059. In the same vein, J.-P. Jacqué, *L'éternel retour: réflexion sur la comitologie*, in *Mélanges en hommage à Jean-Victor Louis*, Vol. I, Bruxelles, Editions de l'Université de Bruxelles, 2003, p. 221: «La comitologie a souvent été considérée comme une question technique. Mais, derrière l'apparente technicité des procédures se dissimule une question constitutionnelle importante, celle de la nature du "fédéralisme" que l'on souhaite construire. Les traités avaient organisé un fédéralisme d'exécution décentralisé. Or les querelles interinstitutionnelles ont masqué l'enjeu du problème. Souhaite-t-on réellement centraliser l'adoption des normes d'exécution? Il ne semble pas que la réponse soit positive».

⁵⁰ The expression is borrowed by M. Poiars Maduro, *Europe and the Constitution: What if this is As Good As It Gets?*, in J.H.H. Weiler e M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge, Cambridge University Press, 2003, p. 98.

of implementation⁵¹, or the national administrations would be forced to give up their organizational and procedural autonomy. If one considers how important it is for a composite legal system to achieve a satisfactory balance between the administrative autonomy of its Member States and the effectiveness of its *ius commune*, one can easily appreciate the essential role of the European transnational committees.

5. The Problem of Accountability

Arguing that the EU committees are compatible with the institutional balance laid down in the Treaties and supporting a functional understanding of this balance does not mean, on the other hand, to deny that such committees raise (more specific) legitimacy issues, especially regarding accountability⁵².

5.1. EU Committees between the International Transgovernmental Relations Model and the State Transmission-Belt Model

The EU is a composite legal order halfway between an international organization and a state legal system. It might be useful for this reason to compare the accountability mechanisms of the EU committees with those of international transgovernmental bodies and national governmental administrations.

The administrative committees of the European Union are subject to the same control mechanisms as are transgovernmental bodies operating in the international context. Each committee official answers to the director of her/his own administration, who in turn answers to the

⁵¹ See T.A. Börzel, *Non-compliance in the European Union: pathology or statistical artefact?*, in *Journal of European Public Policy*, 2001, vol. 8, n. 5, p. 803; J. Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, in *International Organization*, 2002, vol. 56, n. 3, p. 632; M. Zürn and C. Joerges (eds.), *Law and Governance in Postnational Europe: Compliance beyond the Nation-State*, Cambridge, Cambridge University Press, 2005.

⁵² For a recent assessment of this problem, R. Dehousse, *Comitology: Who Watches the Watchmen?*, in *Journal of European Public Policy*, 2003, vol. 10, n. 5, p. 798.

political leaders. There is (the possibility of) a constant exchange of information between committee officials and their home administrations. Most of the delegates come from the capital cities and report back to their directors about how they served their mandate. National civil servants fixed in Brussels are instead subject to a twofold subordination, which implies a twofold control: organizationally, they depend on the Permanent Representative of their Member State and thus answer to the permanent representative (or her/his substitute), who answers in turn to the minister;⁵³ functionally, they depend on the competent national administrative body, which sends them instructions to follow and receives timely reports of the meetings. The national administrations' ordinary accountability mechanisms are thus at work here.

It is argued on the other hand that this mechanism for controlling the transgovernmental phenomenon is slackening. In the early 1970s, the first transnational relations scholars pointed out the existence of a «transbureaucratic politics», conceived as decision-making flows taken out of the hands of national political leaders. They, therefore, emphasized the existence of this peculiar problem of accountability⁵⁴. Actually, the accountability problem raised by transnational phenomenon is real. The work of national officials sent to Brussels is carried out in what are largely opaque committees. The national director's only means of control is usually to review the meeting report prepared by the national official or a co-delegate. The consensual logic behind these committees' actions enables a would-be dissenting bureaucrat to justify his conformist choice, by invoking the need to avoid isolation. This effectively weakens the director's ability to oversee the work of the official sent by the national administration to transnational committees. But similar dynamics protecting civil servants from political control can also be seen at the

⁵³ J. Lewis, *National Interests: COREPER*, in J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union*, Oxford, Oxford University Press, 2002, p. 294.

⁵⁴ K. Kaiser, *Transnational Politics: Toward a Theory of Multinational Politics*, in *International Organization*, 1971, XXV, p. 790; K. Kaiser, *Transnational Relations as a Threat to the Democratic Process*, in R.O. Keohane and J.S. Nye (eds.), *Transnational Relations and World Politics*, Cambridge, 1972, p. 350. On the phenomenon of transgovernmental relations in general, R.O. Keohane e J.S. Nye, *Transgovernmental relations and international organizations*, in *World Politics*, 1974-75, p. 43.

national level⁵⁵. We can thus question whether the problem of bureaucratic accountability assumes a special dimension at the supranational level.

Moreover, in contrast with international transgovernmental bodies, European committees are also subject to genuinely supranational control mechanisms⁵⁶. All EU committees are subject to control by the institution politically responsible for their decisions. The Commission formally enacts the measures adopted by the comitology committees and has complete control over the content of their decisions, since no textual amendment may be proposed without the consent of its delegation. Moreover, the Commission controls the overall finances of the executive and expert committees in different ways (organizationally and financially, these committees depend on the Commission), answering to the European Parliament for their operational costs; on the basis of recent inter-institutional agreements, moreover, it sends the Parliament a wide range of information, inducing the Commission offices to widen and intensify their monitoring of comitology. Similarly, the legislative committees are subject to the control of the Council, which provides them the necessary organizational and financial support. Control of the content of the decisions by the ministers themselves can be seen from time to time, but COREPER, through the Antici and Mertens groups, carries out a timely verification of the consensual decisions adopted by the working groups in relation to the national positions (so-called double check). Finally, there is an overall system of accountability deriving from the co-participation of a plurality of institutional actors in the decision-making process⁵⁷. These

⁵⁵ On the domestic phenomena of bureaucratic politics, see the classic A. Downs, *Inside Bureaucracy*, Boston, Brown, 1967.

⁵⁶ However, one should not forget that the legitimation of «transgovernmental relations» is based on wider assumptions than mere domestic accountability: see, in particular, R.O. Keohane and J.S. Nye, *The club model of multilateral cooperation and problems of democratic legitimacy*, (2001), now in R.O. Keohane, *Power Governance in a Partially Globalized World*, London, Routledge, 2002, p. 219, especially p. 233; A.M. Slaughter, *Governing the Global Economy through Government Networks*, in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford, Oxford University Press, 2000, p. 177.

⁵⁷ See *infra*, § 5.3.

control mechanisms bring the EU committees closer to the government bureaucracies of state legal systems.

In sum, Community transnational administration, though giving rise to phenomena of «transbureaucratic politics» similar to those observed in international transnational relations, can be distinguished by its subjection to control not only by the national governments, but also by genuinely supranational accountability mechanisms. These control mechanisms, however, only partially compensate for the lack of direct political supervision and of *ex ante* criteria and directive principles that the committees must follow in carrying out their substantive decision-making activity. The gap between the transmission-belt model and the reality of European transnational administration is thus evident: the Community institutions assuming political responsibility for the committees' *de facto* decisions – the Commission and the Council – only partially and indirectly guide and control the committees' activities.

5.2. Transparency and Participation: the Real Problems?

It is now necessary to ascertain whether the weakness of the transmission-belt model are counterbalanced by the existence of interest representation mechanisms. Considering that weakness, it is not surprising that the questions of the committees' transparency and participation are hotly debated at the moment.

The situation with respect to transparency has been noticeably improved in recent years. Right of access to committee documents (in particular, to the minutes of the meetings) has been recognized by recent norms and Court decisions, which have clarified that the same rules apply to the committees as to the Council and Commission⁵⁸. Furthermore,

⁵⁸ The general rule is set forth in Regulation 2001/1049/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (in OJ L 145, 31 May 2001, p. 43). The right of access to comitology committee documents is expressly set forth in Article 7 of Council Decision 1999/468/EC. Access to Council committee documents, insofar as they are Council documents, is ensured by general legal norms: see in particular Annex II («Specific Provisions Regarding Public Access to Council Documents») to Council Decision of 22 July 2002 (OJ L 230 of 28 August 2002, p. 21). See Case T-188/97

information regarding the number of committees, their composition and their daily agenda can now be obtained with relative ease. The Commission published an annual report containing quantitative data regarding the system of executive committees⁵⁹. The Secretary General of the Council has a similar duty with respect to its committees, and many documents (for example, the daily agenda) are published on the Council's internet site⁶⁰.

Still, there remain some knots to untangle. A controversial point is whether committee meetings should be open to the public (currently they are not). On the one hand, a committee's exposure to the scrutiny of public opinion risks compromising the efficacy of its decision-making process: subjected to public scrutiny, the delegates could harden their positions, undermining the committee's ability to reach speedy compromises. On the other hand, open meetings would prevent the risk that the committees degenerate into elitist or neo-corporative *fora*⁶¹ – especially the expert committees, where participants do not have official positions to defend and there is less formality and transparency⁶².

The committees' internal rules do not provide for formal notice-and-comment procedures. The consultation of social and economic interest groups is, therefore, occasional. Still, the committee system offers two important channels for introducing those interests into the Community decision-making process. First of all, a committee member is often given a mandate; in helping him to define it, governments and administrations solicit and filter the interests present in the national public spheres. Secondly, many interest committees help the Commission and are

Rothmans International v. Commission [1999] ECR II-2463 and Case C-211/00 *Kuijjer v. Council* [2002] ECR II-485.

⁵⁹ The latest is the *Report from the Commission on the working of committees in 2002*, 8 September 2003, COM (2003) 530 final.

⁶⁰ At the address: www.ue.eu.int. Cfr. Article 10 («Public Register of Council Documents») of Annex II to Council Decision of 22 July 2002 (OJ L 230 of 28 August 2002, p. 21).

⁶¹ Like those foreseen by J.H.H. Weiler, *European democracy and its critics: polity and system*, in Id., *The Constitution of Europe: "Do New Clothes Have a New Emperor?" and Other Essays on European Integration*, Cambridge, Cambridge University Press, 1999, p. 270.

⁶² In this sense, M. Rhinard, *The Democratic Legitimacy of the European Union Committee System*, in *Governance*, 2002, vol 15, n. 2, p. 204.

themselves consulted in the proposal phase. Through bipartite and tripartite interest committees, European and national associations are involved in the formulation of Community policies.

In short, the level of transparency and openness of the overall system of committees has improved in recent years, even if it is not yet satisfactory⁶³. Indeed, devices for guaranteeing the representation of interests are in place, though a clear and formalized model thereof is still missing.

5.3. Accountability: Taking the Composite Nature of the Community Legal System Seriously

The EU committees represent an essential element in the EU's institutional balance. Still, their democratic legitimacy appears rather weak. The transmission-belt model is inadequate: the politically responsible European institutions do not have the necessary time and expertise to set down cogent mandates and to oversee their execution. The interest representation model is not completely realized either: in the transnational administration of the EU, the representation of non-governmental (social and economic) interests is not guaranteed by procedures or formal consultation duties, as the Commission is not obliged to consult interest group committees⁶⁴, nor to follow their recommendations.

However, in a composite system like the EU, the problem of accountability is less serious than in other legal systems. International systems depend on intergovernmental forms of cooperation and legitimation; here transgovernmental relations manifest their democratic limits, by taking the control of the ultra-state decision-making process away from multinational and supranational powers, such as the European Parliament, the Commission and the Court of Justice. The problem of accountability at the EU level also arises in a different way than in

⁶³ For a comprehensive analysis, S. Smismans, *Law, Legitimacy, and European Governance: Functional Participation in Social Regulation*, Oxford, Oxford University Press, 2004.

⁶⁴ With the exception stated in Article 138, para. 2 and 3, of the EC Treaty.

national legal systems. National administration is conceived as an apparatus serving the government, according to the transmission-belt model, or as an independent authority, whose legitimacy rests on such procedures as notice-and-comment.

The question is whether, notwithstanding these differences, the democratic accountability achieved by the EU is comparable with that of the Member States. In order to answer the question, we must proceed from the observation that the European Union has not inspired by the principle of the separation of powers. The EU is rather organized according to the principle of institutional balance whereby a balanced representation of the different institutionalized interests in the decision-making process is ensured⁶⁵. Both principles seek to avoid the dominance of one partial interest over the community. But they have different means for achieving this aim.

When powers are *divided*, the need to establish checks and balances is clear: otherwise the separation of one power from the others would enable the single institution to exercise its power without control. This gives rise to often overlapping accountability mechanisms among the different powers of the State. In the contrasting case of *shared* powers, like in the EU, the system of checks and balances is, so to speak, *in re ipsa*: each institution involved in a particular decision is able to control the activity of the others. This occurs for at least two reasons.

The first is that shared powers give rise to a (substantive) co-decision⁶⁶, which itself is an instrument of accountability. Executive measures require agreement between the Commission and the national administrations represented in the executive committees. Likewise, legislative decisions are the fruit of compromises between the

⁶⁵ See J.P. Jacqué, *Le labyrinthe décisionnel*, in *Pouvoirs*, 1994, vol. 69, p. 23, and Id., *Cours général de droit communautaire*, op. cit., p. 289: «Le principe d'organisation de la Communauté n'a pas été celui de la séparation des pouvoirs, mais bien plutôt, à notre sens, celui de la représentation des intérêts. Chaque institution communautaire est porteuse d'un intérêt spécifique à la défense duquel elle œuvre dans le cadre du processus décisionnel communautaire».

⁶⁶ Formally, one speaks of co-decision only in reference to the legislative procedure set forth by Article 251 of the Treaty. Here I understand the word «co-decision» in a wider meaning, as including all the instances in which two or more (governing or auxiliary) bodies exercise *de iure* or *de facto* decision-making powers.

Commission and the national administrations represented in the legislative committees (or, should the competent committee fail to reach an unanimous agreement, between the Commission and the national governments represented in the Council of Ministers). Moreover, in cases of co-decision, there is also the added deliberation and control of the Parliament.

All of this means that every decision-making step (legislative act and relevant implementing act) is scrutinized by a considerable number of institutional actors: in the upward phase, by the Commission's services which propose the law, by the expert, scientific and interest committees consulted, by the College of commissioners which approves it, by the competent Council committees, by the national administrations represented there, in consultation with their permanent representatives, and, when there is failure to reach an agreement, by COREPER, the Council of Ministers and, in cases of co-decision, by the Parliament, with its commissions and possibly a conciliation committee. In the downward phase: by the Commission's services, which prepare Community measures with the assistance of expert committees (i.e. national civil servants, representatives of socio-economic interests and/or scientists), by the national administrations represented in the executive committee, by the college of Commissioners and, in the case of a negative opinion of the management or regulation committee, by the Council with its working groups, diplomats and ministers.

The second reason for which shared powers offer a heightened guarantee of accountability is that the Community decision-making process is full of super-majorities⁶⁷ and, above all, it is governed by the rule of unanimous consensus. This rule is constantly applied in the Council legislative committees, and also prevails in the deliberative practice of bodies like executive committees, the College of Commissioners and the Council of Ministers. Where disagreement

⁶⁷ This is pointed out by A. Moravcsik, *In Defence of the «Democratic Deficit»: Reassessing Legitimacy in the European Union*, in *Journal of Common Market Studies*, 2002, vol. 40, n. 4, p. 609, who underscores in particular that: «Even “everyday” EU directives must be promulgated under rules that require the concurrent support of between 74 and 100 per cent of the weighted votes of territorial representatives in the Council of Ministers – a level of support higher than required for legislation in any existing national polity or, indeed, to amend nearly any constitution in the world».

prevents this rule from working, these bodies proceed to the vote. The vote is always adopted by a super-majority: it is a qualified majority, for example in the executive committees and in the Council (when it is not actually unanimous)⁶⁸; the European Parliament, in order to reject the common position of the Council, must reach an absolute majority⁶⁹.

Despite all this, it might happen that the national officials working in the transnational committees escape the substantial oversight of the other actors involved in the decision-making process, because, for example, they are the only ones with the expertise necessary to analyse and amend specific legal texts. Still, even in such case, one should acknowledge that this is not very different from what happens in national legal systems⁷⁰.

In sum, the involvement of a plurality of institutions representing diverse interests in the decision-making process, the existence of unanimous agreements and the requirement of particularly heightened majorities all make it unlikely that partial, narrow interests (of a single nation-people, government or administration) will prevail. We can thus conclude that, through the lens of accountability, the system of institutional balance is – in contrast to what many members of the European Parliament and others sustain – the functional equivalent of the principle of the separation of powers: both prevent the tyranny of partial interests over the whole.

6. Legitimacy through Law

⁶⁸ The absolute (unqualified) majority rule, though set forth in general terms by Article 205(1) of the Treaty, has not been concretely applied.

⁶⁹ Articles 251(3) and 252(c) of the Treaty.

⁷⁰ A. Moravcsik, *In Defence of the «Democratic Deficit»: Reassessing Legitimacy in the European Union*, op. cit., p. 613: «*within the multi-level governance system prevailing in Europe, EU officials (or insulated national representatives) enjoy the greatest autonomy in precisely those areas – central banking, constitutional adjudication, criminal and civil prosecution, technical administration and economic diplomacy – in which many advanced industrial democracies, including most Member States of the EU, insulate themselves from direct political contestation. The apparently “undemocratic” nature of the EU as a whole is largely a function of this selection effect*» (italics of the author).

Finally, I turn to what is perhaps the main lacuna in this system: the law. It is often ignored that the law constitutes a very important source of legitimacy for public powers⁷¹. Yet, transnational committees almost completely lack a legal foundation.

First of all, the internal procedures of the Council committees are not formalized, but rather shaped along the lines of the Council's rules of procedure. Even in the case of the executive committees, that do have internal regulations, the most important rules can be apprehended only by looking at actual practice. Finally, with regard to the expert committees, it has been appropriately affirmed that «[t]he only general rule is that there is no general rule»⁷².

Rules have been set forth which aim to rationalize the committee system in certain sectors⁷³. But there is still a lack of general rules and, in particular, of cross-sectoral rules, for coordinating the activities of the various committees operating in the same decision-making phase. In this respect, the Commission and Council secretariats' activities can only fill the gap in part. For example, in the case of Council working groups, *cloisonnement* is the rule: as a consequence of the fragmentation produced by the multiplication of Council formations, if the national delegates reach a compromise in committee on a proposal having cross-sectoral importance, no rule requires that they give the other interested committees an opportunity to analyse the draft decision. The rotating presidency can freely decide to accelerate the procedures for the formal ratification of the Council's decisions, which effectively prevents an examination by other competent committees, without encountering any resistance from explicit procedural norms. More generally, the absence of legal norms precludes the Community Courts from exercising judicial

⁷¹ S. Cassese, *Is there really a "democratic deficit"?*, in *Europeos, Institutional reforms in the European Union*, Rome, Failli, 2002, p. 21.

⁷² G. Ciavarini Azzi, *Comitology and the European Commission*, in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, op. cit., p. 52.

⁷³ One particularly significant attempt at defining and rationalising the decision-making role of the different categories of committees is the so-called Lamfalussy approach. It has been first established in the sector of financial securities (Commission Decisions 2001/527/EC and 2001/528/EC of 6 June 2001), and then extended to banking and insurance (Commission Decisions 2004/5-10/EC of 5 November 2003).

review over the committees' activities, and this takes away a basic mechanism of accountability.

This lacuna results, probably, from the will of Community institutions to avoid subjecting themselves to norms that might limit their discretion, or in the best of cases, that might limit their ability to experiment with more effective practices. It also results from the fact that the Court of Justice has declined to announce a single jurisprudential principle to fill the gap in the formal rules, except for the principles of the right of access to administrative documents⁷⁴ and some very specific procedural principles⁷⁵. European judges have adopted a pernicious stance of self-restraint: «the committees do not have formal powers» – hey observe – from which a faulty logic concludes that «the committees are irrelevant to the institutional balance». The failure to overcome this view, which goes back more than three decades, has led to the exclusion of the committees not only from the constitutional framework, but also from the realm of the legally relevant.

7. Conclusions

Though lacking a formally recognized constitutional status, the EU committees are an essential element of the «material» constitution of Europe.

The committees appear as a constitutive element of institutional equilibrium, at least if this is understood in a functional sense. The efficiency of the Community decision-making process and the effective performance of the tasks assigned by the Treaties to the Council and the Commission depend on this multivalent transnational administration. European committees can also be credited with reconciling the Member States' administrative autonomy with the effectiveness of «nationalised»

⁷⁴ Case T-188/97 *Rothmans International v. Commission* [1999] ECR II-2463.

⁷⁵ For example, Case C-263/95 *Germany v. Commission* [1998] ECR I-441, affirming that the committee's failure to send the draft document to members of a comitology committee in the official language of their Member State within the time-limit and according to the committee's rules of procedure constituted an infringement of essential procedural requirements, with the result that the contested Commission decision was void (para. 32).

Community law, thus reducing the risk of Community law incompatibility with national administrative systems.

The accountability problem exists, but some of the prominent criticisms rest on the faulty assumption that the organizing principle of the European Union is the separation of powers. This is not the case. The European system of power sharing is functionally equivalent to those providing for mechanisms of checks and balances and separation of powers. Furthermore, it gives rise to supranational mechanisms of oversight, in addition to the national ones. The European transnational administration is thus subjected to more intense forms of accountability than are transnational bodies in the international context.

Still, there are two main problems: transparency (though there have been meaningful developments in recent years) and the feeble legal legitimacy of the committees. The second is particularly relevant: the lack of formalized norms and jurisprudential principles makes the committees' decision-making process unintelligible and inconsistent. It is a serious problem, which probably calls for the full recognition of the constitutional significance of the committees of the European Union.

The academic debate is dominated by two opposite perspectives – «deliberative supranationalism» and «infra-nationalism» – neither of which pays much attention to the latter problem. Meanwhile, European committees – which constitute a relatively immature transnational administration that is vital to ensure the efficiency and effectiveness of EU decision making – remain awaiting for the law to strengthen their legitimacy.