The Independence of the European Commission in the Legislative Process of the Communities

Thesis
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Summary

The European Commission was created so that it could work to fulfil the Community Interest. Therefore it was decided to be an independent institution. But because the European Union affects its Member States very deeply, not least in budgetary ways, the Member States seem to want to influence the Commission as much as possible. Therefore the independence of the Commission is at stake.

The Treaties try to deal with the problem by setting some protective mechanisms on the Commission. But is it enough? It seems that the Commission gets influenced too much in its everyday work. This influencing starts already at the nomination of the Commissioners, continues all the while when the Commission is deciding if new Community legislation is needed and while it drafts new legislation. The substance of the drafts are often influenced very much by the other institutions, Member States and interest groups.

What this means is that the Commission can't fulfil its task at seeking the best of the Communities. In many different ways the decisions of the Commission may further the good of one or some interested parties instead of the Community Interest.

Subject words: European Union, Commission, Independence

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Tiivistelmä

Euroopan komissio luotiin jotta se voisi ajaa yhteisöjen intressiä. Sen vuoksi siitä päätettiin tehdä itsenäinen. Mutta koska Euroopan Unionin vaikutus jäsenmaissaan on hyvin vahvaa, myös talouden kannalta, haluavat jäsenmaat vaikuttaa komissioon mahdollisimman paljon. Tämän vuoksi komission itsenäisyys vaarantuu.

Perustamissopimukset koettavat hoitaa ongelman luomalla komissiolle joitakin suojamekanismeja. Mutta ovatko ne riittäviä? Vaikuttaa siltä, että komissioon pystytään vaikuttamaan liikaa sen jokapäiväisessä työssä. Tämä vaikuttaminen alkaa jo komission nimittämisvaiheessa ja jatkuu koko ajan komission pohtiessa uuden lainsäädännön tarvetta ja komission valmistellessa uutta lainsäädäntöä. Komission lakiehdotelman sisältöön vaikuttavat usein paljonkin muut instituutiot, jäsenvaltiot sekä intressiryhmät.

Tämä johtaa siihen, että komissio ei täysin pysty toteuttamaan yhteisöjen intressiä. Monin eri tavoin komission päätöksiin voivat vaikuttaa yksittäisten tai useampien jäsenmaiden edut, vaikka tarkoitus olisi ajaa yhteisöjen etua.

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1. An independent Commission for the European Communities?

1.1 The Subject and Area of This Thesis

The subject of this thesis is the independence of the European Commission. This question is interesting because of the democracy deficit of the Communities. Many have seen the Commission as the main reason for the deficit as its Commissioners are not chosen by the people and its decision making is often seen as not being transparent. Therefore these same people would like to see the Commission controlled more by the Parliament as the Parliament is the only truly democratically chosen institution in the Communities.

But the Commission is meant to be independent by the Treaties. This is because the Member States that have created the Communities have come to the conclusion that an independent actor is better suited to improve the Communities. This it does firstly by making legislative drafts and secondly by watching over the implementation of these drafts. This independent actor is also better suited to have a clear overall picture of the situation in the Communities. Last but not least the independent Commission has to protect the Community interest.

This is why it is interesting to study whether the Commission truly is independent in its decision making or not.

To me the most natural way of constructing this thesis was to follow the legislative process through. Therefore this thesis first concentrates on what happens before the Commission starts drafting a proposal. This includes the nomination of the Commission. After this the thesis continues to study how the Commission decides whether to legislate or not and how the Commission does prepare the draft. Then the thesis briefly discusses what happens after the draft is forwarded to the other institu-

tions. After the proposal has been accepted the thesis continues to discuss briefly how the Commission watches over the implementation. This seems natural as in this way it is possible to seek chronologically the different influences the Commission may come under. All along the way this thesis tries to seek out the ways in which the Commission may be influenced by outside actors.

In some important areas the possible changes that may come to be according to the Constitution are discussed. This is because even though the Constitution wasn't approved of there still is a possibility for it to come into force. If this will happen it will in some ways change the position of the Commission. Therefore the main changes concerning the Commission are discussed briefly throughout this thesis.

The other institutions discussed in this thesis include the European Parliament and the Council of Ministers. This is because these together with the Commission form the triangle that is responsible for new legislation in the Communities.

Because this thesis concentrates on the institutions and the Member States contracts with third countries will not be discussed here. This includes anything related with the enlargement. Also because of the limited space allowed to this thesis the budgetary parts that have some meaning for the Commission are not included in this work. The same goes for the Commission's right to watch over the competition policy sphere. Although these are very important parts of the Commission's powers these would be too vast areas to briefly be looked on here. This decision is made because this thesis concentrates on the legislative process. It would seem that although these matters that are left outside are very important they do not directly influence the Commission's decision making in drafting new legislation.[1]

This thesis tries not to solve any of the well known problems of the Union. The democracy flaw for example is only discussed because it may have some meaning for the Commission as the Commission tries to improve the democratic situation

[1] The budget naturally affects the Commission's possibilities to get new staff etc. but it seems to go too far away from making legislation to be included in this thesis.

in the Union. As the focus is on the Commission it is not interesting concerning this thesis whether something is good or bad for the Communities as long as the Commission is not involved.

Also what is included in the legislative drafts as such is not important concerning this thesis. Instead the possible ways in which somebody may influence the substance of the drafts are seen as significant because there should not be that kind of influence.

Only a brief look will be made to the Commission's powers concerning the implementation of Community legislation. This area is important because even if the Commission is independent its independence would not have any real meaning if the Member States would not follow the legislation which the Commission has drafted. But on the other hand this area is so vast that only the most important and basic things are covered in this thesis.

In the last chapter some thoughts will be given about the question why the Commission is needed. This question is crucial as many actors seek to limit the powers of the Commission.

The hypothesis is that the Commission should be independent but that it really is not, at least at the moment. The Treaties state that the Commission really should be independent from any outside influences including other institutions, the Member States, the people of the Member States and any other actors[1]. The whole Commission should be independent meaning that the individual Commissioners and all of the Commission's staff should not strive for the best of anybody else than the Communities. Is this so?

[1] Article 213 EC.

1.2 The Nature of the Independence and the Community Interest

The Commission should be independent in proportion to the other institutions and actors. But on the other hand the Commission is not independent in proportion to the Treaties. The Commission has to follow what is stated in the Treaties. Therefore the Commission has to make every decision it makes in accordance with the Community Interest.

This in turn makes the situation more complex than it first would seem. This is because the Community Interest includes many ingredients and they change according to the situation at hand. Therefore the Commission must in most cases take the interests of the Member States into account. But also the interests of different interest groups. Then again in some cases the well being of the environment is the deciding factor and sometimes monetary reasons.

The Community interest means the good of the Communities. This includes everything inside the Communities. The wellbeing of the European Union as a whole. But more accurately it includes the wellbeing of the individual actors as well as that of the public. Human rights link with the wellbeing of the individual. Some of these matters will not be discussed more deeply because it seems that it suffices to say that the Commission has to take these interests into account. This is so for example for the human rights. The Commission has to make sure that its proposals honour these rights as they are actually a part of the Communities legislation.

The Community Interest and the nature of the Communities make the Commission's work difficult. The Commission firstly has to take into account the good of the Member States and the interest groups. On the other hand because the Communities are a multinational entity the Commission has many different areas to legislate and many different languages and cultures with which it has to work. These latter matters will not be discussed broadly here. Suffice it to say that the Commis-

sion has problems as it tries to find ways in which to make legislation that will function well in every culture involved in the Communities.

2. Before the Drafting of a Proposal

This chapter concentrates on what happens before the work starts on a legislative draft. This includes the appointment of the Commission, finding out how it is estimated if new Community legislation is needed and where the ideas for new legislation come from.

2.1 The Appointment of the Commission

In Article 213 of the Treaty establishing the European Community it is stated that each Commissioner shall be independent[1]. Therefore it is important to discuss the appointment of the Commissioners first. This is because the way in which the Commissioners are nominated may very well affect their commitments. On the other hand the composition of the Commission is crucial in regard of its fluent functioning. How much does the nomination process affect the views of the Commissioners? Is the Commission's independence at stake? Here this thesis will first outline the appointment procedure concerning the Member States and the Council of Ministers and thereafter the Parliaments part will be discussed. The chapter is so divided as the Member States and the Parliament seem to be the two main actors involved in the process.

Article 213 EC further states that the governments of the Member States shall have no power over the Commissioners. No Commissioner must further the interests of one's home country but instead they must concentrate on the best of the Commu-

[1] It must be noted that not only the Commissioners shall be independent but also the College that is made up of them. Also the whole Commission should be independent in accordance to any outside influence. On the other hand the statement that the Commissioners should not further the best of their home countries must be interpreted broadly. This means that the Commission shall work for the good of every Member State. This means that the Commission as a whole shall not be allowed to further the good of some individual Member State. Therefore the Commission should be there for the big and also for the small countries alike.

nities and forget their nationality. This is, as Professor Trevor Hartley notes in his book, not very likely to happen. Hartley goes as far as pointing out that nobody really believes this non-nationality even to be possible.[1]

This view is backed up by the fact that the Member States fight so furiously to get the Commissioner of their choosing into the Commission. This behaviour of the Member States makes it difficult to believe that the Commissioners don't try to further the good of their own home countries.[2]

2.1.1 The Appointment Procedure

Before the Treaty of Nice came in to force, the Member States had very much to say about the composition of the Commission. This was because every Member State had the right to appoint the Commissioners of their choosing but if even one Member State didn't want some others candidate to be appointed, it had a right to veto.

The Treaty of Nice made a few changes to the old procedure. Now the Member States do not appoint the new Commissioners directly. According to Article 214 of the consolidated Treaty establishing the European Community the Council appoints the new Commissioners by a qualified majority. It would seem that the Member States thus have less influence in appointing the Commissioners.

What the change really means though, is that the name of the body making the appointment changed from "Member States" to "Council". And because in Article 214 EC it is stated that the Council will meet in the composition of the Heads of State or Government, it actually are the same people making the decision.

A more significant change that came along with the Treaty of Nice was the qualified majority needed for the appointment of the Commission. This too is regulated in Article 214 EC. The change, as Hartley states, means that a single Member

[1] Hartley 2003, 12.
[2] Hartley 2003, 12.

State can't hinder the appointment of a Commissioner if the others want to appoint a person. Instead a bigger coalition of Member States is needed[1].

The new situation mostly means that there are coalitions made up of Member States with the same political view. These coalitions try to get as many Commissioners of their choosing into the College. The difference to the old system is that the political situation in Europe has more meaning, as a bigger coalition is needed to hinder a candidate's appointment.

An additional thing that increases the influence the Member States have on the composition of the Commission is that the Council must make the appointments based on the candidate-list given by the Member States. So even if the members of the Council weren't the same that name the candidate(s) of a Member State, the Council couldn't choose any other person to appoint.

Summing up, the Member States are still very much involved in appointing the Commissioners.

2.1.2 The Commission's Composition

What then are the criteria according to which the appointments are made? How does a Member State choose who it will make available for appointment? Is it for the good of the Commission or for somebody else's? And what does this mean concerning the composition of the Commission?

Since the body which chooses the Member State's candidate for appointment is usually the government or a part of the government, it would be difficult to think that the body would choose a person with different views than those of the body. This may imply that the choosing is highly influenced by political factors.

[1] Hartley 2003, 13.

Because of this the Commission can be fractured in its political base. Naturally this is because the Member States have different leading parties.

Even if this is so, the Commission is often composed mostly of people with nearly same political views. Most of the Commissioners have been pro-European.

Still, the whole nomination process might make it difficult for the Commission to be effective as the Commissioners are not chosen because of their quality or because of the Commission's need for just that kind of person but because the Member States want to further their positions in the Communities.

The political aspect concerning the appointment of a new Commission was seen clearly in the difficult appointment of former Luxemburg Prime Minister Jacques Santer as the President of the Commission. Different Member States wanted different kinds of President. Some wanted a President who would be adventurous and bold in making new policies but on the other hand others wanted a calmer President who wouldn't make many reforms.[1]

This shows how important it is for the Member States to have a word in the appointment of the Commission. There wasn't really any discussion about what is good for the Union, only how much different things would affect the Member States. In the after-Nice system the President is also chosen by the Council but as noted above this hasn't changed the situation very much.

On the other hand if a Commissioner is very idealistic and wants to concentrate to work primarily for the best of the Communities, there are some important protection mechanisms defending the Commissioners. The legal basis for these mechanisms comes from Article 213 EC. The independence of Commissioners is protected by giving them immunity before national courts for the actions they take as a Commissioner. This means that Commissioners can't be prosecuted in their country of origin because of the decisions they make as Commissioners.

The Commissioners are also not taxed by their country of origin for the salary they get for working in the Commission. Instead they are taxed by the Communities.

[1] Nugent 2001, 63.

But the independence of the Commissioner's is not the only problem. Because the Member States are very keen to have a say in the Commission the cabinets of the Commissioners were often build up of nationals of the same country as the Commissioner. This did surely make the team work more efficient and easy inside the cabinet but then again the interest of the given Member State was very strongly represented in the work of the Commissioner and through the Commissioner the work of the whole Commission.[1]

Former Commission President Prodi sought to change the situation by trying to make the cabinets more multinational[2]. In some respects he succeeded but this still is a threat to the Commission's independence.

2.1.3 The Role the President of the Commission Has in the Nomination

Some sort of restraint on the Member States' power comes from Article 214 EC which states that the President of the Commission must be cooperated with when choosing the nominees for appointment. In fact the President has a right to veto the national nominees. In this way the President may have some effect on the nominees but this power is made somewhat lame as the President is chosen by the Member States themselves. This may indicate that the President thinks in the same way as most of the Member States anyway.

Also, as has happened, the Member States don't always even give the President a chance to have any influence.[3] Still, this right gives the President the possibility to build a Commission according to what kind of people the President would like to see in the Commission. And if the President doesn't offend too many Member States he may actually get what he wants.

[1] Kassim 2003, 145. This is backed up by Stevens and Stevens 2001, 231 where it is stated that while the Commissioners may make the decision who to appoint in the cabinet it is not entirely free as the national governments have such a crucial interest in the matter.
[2] Kassim 2003, 145.
[3] Nugent 2001, 82-83.

2.1.4 Parliament's Role in Choosing the President

When choosing the President of the Commission the Parliament should be consulted. The nominee for the President of the Commission must also be approved of by the Parliament. In the Santer case the Parliament wasn't actually consulted with but it still got to vote on the approval of the President. The vote was taken and Santer was appointed but only narrowly which shows that the Parliaments right to vote is not to be taken too lightly.

To further the meaning of this statement the Parliament declined to approve Santer as the president of the College that would follow Santer's first College[1].

2.1.5 The Parliament's Role in Nominating the Commission

The Member States are not the only actors that can influence the composition of the College. The Member States choose the nominees for Commissioners in the form of the Council of Ministers but they don't have absolute power. Although the Member States can say who is chosen as the nominee, the European Parliament still has to approve the nominees, including the President of the Commission. This may sound like a very effective power but as always this isn't absolute power and there are limits to the powers of the Parliament.

The Parliament can not choose which Commissioners to agree to.[2] It has to handle the College as a whole: Either it kicks the whole College or it approves the whole College. To fulfil this right the Parliament may question every Commissioner it wants. Although this may seem like a power that won't be much used it actually

[1] Nugent 2003, 112. See also Nugent 2001, 55.
[2] The Parliament would indeed like to have the power to accept or kick individual Commissioners. This is actually the only power the Parliament doesn't yet have over the Commission. If the situation would someday change the Commission's independence would at last be almost completely over.

is, even more so after the last Delors College. Also the approval of the Parliament is not something that can be taken as given.

2.1.6 Examples of Relations Between the President of the Commission and the Parliament

To emphasize the Parliament's powers two examples are worth mentioning. After Jacques Delors Jacques Santer was nominated as the next President for the Commission. After Santer had chosen the appropriate portfolios for his new Commissioners to be, the Parliament, after hearing all the Commissioner nominees, stated that it would like to see that some portfolios would be differently dealt. Santer declined this, after which the Parliament announced that it might not support the Commission.

Santer took the threat seriously and made some changes. The most important of these changes concerning the heading of this thesis was that Santer promised to the Parliament that the Commission would take the opinions of the Parliament more seriously. He also stated supporting the view that the Parliament should have more powers, and concerning this he would want the code of conduct which regulated the relations between the Commission, the Council and the Parliament to be reviewed. Furthermore Santer promised that he would be in favour of furthering integration. This was important because most of the members of the Parliament shared this view.[1]

A situation of the same kind came up as the Romano Prodi College was nominated. The Parliament wanted to be consulted more often in the legislative process and also before a draft was submitted to the Council. Prodi agreed to this. After the Parliament wanted to know what Prodi would do if the Parliament passed a vote of no confidence on an individual Commissioner, Prodi responded that he

[1] Nugent 2001, 85.

would dismiss the Commissioner.[1] It must be emphasized that this was not something written in the Treaties. Prodi wanted a pledge from every Commissioner that they would resign if that was what Prodi wanted.

2.1.7 The Procedure According to the Constitution

The Parliament gets new powers concerning the appointment of the Commission. This means that the President of the Commission will be nominated by the Parliament after the European Council has named the candidate. Following this every Member State gets to choose three nominees for the Commissioners. The President of the Commission chooses one of every Member States nominees. After the President has chosen his or hers Commissioners the Parliament again gets to vote on approval on the whole Commission.[2]

2.1.8 Conclusions

The EU exists because of the Member States. It follows that the Commission must keep good relations with the Member States or else the Member States could make the life of the Commission very difficult[3]. This would be so even if the Commission would be completely independent from the Member Sates. The Member States could still influence the Commission through the other institutions.

According to the Treaties the Commission is meant to be independent. The measures taken by the EU to make this possible are still not quite powerful enough. The reality is maybe best described as Hartley does as he writes that if Commissioners would not heed to national interests there would be no need for national govern-

[1] Nugent 2001, 86.
[2] de Zwaan 2004, 62-63.
[3] The ways in which the Member States could revenge the Commission's decisions would include limiting the powers of the Commission, by choosing new Commissioners or by rejecting Commission's drafts in the Council.

ments to nominate the candidates for appointment[1]. This indicates that the Member States do have an interest in who is nominated. Actually this is quite natural and understandable as the Commission makes important decisions that affect every single Member State.

Of course the Member States are not straight away acting against the Treaties or else the Commission would start proceedings against them. It still is important to notice the influence the Member States have on the Commission's composition. The influence is evident. And because of this the independence of the Commission is put in jeopardy.

This influence of the Member States grows even stronger because of the fact that the post of a Commissioner is highly sought after. This means that the people working in the Commission may feel that they owe something to the body that nominated them. This may very well affect the way decisions are made inside the Commission. There is also an additional reason for every member of the Commission to make decisions that support their national interest: if they don't they may not be re-selected for the post.

Concerning the reason why the Commission is independent the Parliament's part in the appointment procedure causes difficulties. As Jaap de Zwaan has stated the Parliament's right to directly elect the President and the Commissioners is problematic as the Parliament has a national mandate[2]. Therefore the Commission's work as an independent actor that strives for the good of the Communities is put at risk.

On the other hand de Zwaan's reasoning is not without its flaws. He seems to forget that the Parliament, although elected by nationals of the Member States, is not directly acting as a representative of any Member State. The Parliament is made up of different political parties that include members of every Member State. Therefore

[1] Hartley 2003, 13.
[2] de Zwaan 2004, 63. Actually de Zwaan is talking about the changes brought about by the possible Constitution but this reasoning can be used when considering the situation at the moment as the Parliament has almost the same powers now.

it seems more likely that the Parliament works on the political aims of the parties, not individual Member States. Therefore the Parliament seems not to be on a very clear "national mandate".

Nevertheless the Commission's independence is already at stake and even more so if the Parliament gets yet more powers concerning appointing the Commissioners. de Zwaan has correctly stated that this "does not necessarily serve the general interest of the European Union"[1].

2.2 The Commission as the Initiator of New Legislation

The Commission is the natural centre in terms of new legislation. This is because the Commission is the one and only institution that can make legislative proposals under the first pillar[2]. Naturally this attracts much attention towards the Commission. In the Treaties it says that the Council may request proposals from the Commission. In the same way the Parliament is allowed to make such requests. These are some of the main ways in which new legislation gets started.

On the other hand the Commission itself makes all the decisions concerning what legislation it shall prepare. It doesn't need any request from other institutions to make legislative proposals.

Following this, all the main institutions can at least in theory be the source of new legislation.

Here will shortly be described the Council's and the Parliament's official part in requesting new legislation. After this will be discussed about how the Commission chooses whether or not it will start preparing a draft. Already at this stage it can be seen that the Commission may become under the influence of other actors. Therefore it is important to find out if the Commission really is the one and only actor that

[1] de Zwaan 2004, 63.
[2] Nugent 2001, 236. Even though this power is only reserved for matters dealt with under the first pillar it is very important as most of the Community legislation is made under the first pillar.

can initiate the legislative process. On the other hand it must be studied how the Commission is regulated in this area.

2.2.1 The Council and the Parliament can Request Legislation

As already stated the Council is now the actor which appoints the Commissioners. In addition to this new right the Council can also request a legislative draft from the Commission. This is regulated in Article 208 EC. The Parliament's right to request drafts comes from Article 192 EC.

Although both of these institutions have the right to request legislative drafts, the power is in some important ways limited. The Commission can itself decide whether to act or not and in what timeframe.[1]

But the real powers are not as evident as would seem after reading the Treaties. The Council has sometimes given so specific instructions to the Commission and with such a political weight that the Commission has had no other choice but to obey the request.[2] The problem from the Commission's point of view is that the Council must approve of the legislative propositions the Commission makes[3]. This means that if the Commission doesn't make such initiatives as the Council would like, the Council can block other activities of the Commission too.

The same goes for the Parliament. If the Commission doesn't make the Parliament happy the Parliament can make the Commission's life difficult.

In addition to requesting legislation the Parliament can also influence the Commission's annual legislative program. The Parliament can't dictate what goes in

[1] Nugent 2001, 236.
[2] Nugent 2003, 151.
[3] This point is made even more important by the European Court of Justice's case 325/85 where the Court stated that the proposals of the Commission can not have legal effects in a case where there is political inaction from the Council. This is important because if the Commission's proposals would be binding acts the Commission would have much more power as its unilateral proposals would have the same effect as proposals that are accepted by the Council and/or the Parliament. See Gormley 2004, 40.

the program but it discusses the substance of the program with Commission representatives.

2.2.2 How the Commission Decides if New Legislation is Needed

As all three institutions with which this thesis is concerned with can make requests for new legislation many ideas emanate from them. But this is not only a good thing as the Communities have produced much too much legislation and the legislation has become difficult to understand and the whole law has become cumbersome. The Commission is in a key position concerning this problem. It has the right to choose what legislation is needed and what is not.

The basic principle of new legislation according to the Treaty on European Union (TEU) Article 2, is the use of subsidiarity. This means that the Commission has to ponder what the correct course of action should be. Is there a need for Community intervention? Or should the Commission leave the matter for the Member States to decide? The subsidiarity principle is important as the Member States were not too happy with the numerous legislative acts emanating from the Communities.

Antonio Estella argues that although provision 4 of the Protocol on subsidiarity actually should mean the contrary the Commission uses many of these subsidiarity analyses for its own purposes. This means that it uses the information it gets strategically to uphold the Community intervention. Estella goes as far as to claim that what ever the case the Commission will try to justify intervention by the Communities.[1]

But at the same time it also must be kept in mind that the same provision backed up with the European Court of Justice obliges the Commission to make its reasons for making new legislation known. This at least in some ways limits the

[1] Estella 2002, 127-130.

Commission's keenness to prepare legislation that clearly doesn't belong to the Communities competence.[1]

What then does the subsidiarity principle[2] mean? The answer to the question who should regulate can be found after asking who is best equipped to deal with the case. If the Member States can very well handle the case, then the Communities should not intervene. But on the other hand if the Commission finds out that the Communities would handle the case better then it will start preparing a draft.[3]

There are even tests that can be used to find out if Community intervention is needed. These are: the Communities shall only intervene if there are "trans national aspects which cannot be satisfactorily regulated by national measures (necessity test I)" or if "national measure alone or lack of Community action would conflict with the requirements of the EC Treaty or would otherwise significantly damage Member States' interests (necessity test II)" or if "action at Community level would provide clear benefits compared to national measures (added value test)".[4]

The Commission has also created other guidelines concerning the creation of new legislation. A proposal shall only be prepared after an effective analysis of how the matter should be dealt with. The analysis shows whether or not EU-level intervention is needed.[5]

It is also stated that although the Commission has to respect the Community law, meaning that it has to start drafting if it sees the need for it, the Commission must also take into account if there are "well established national arrangements".

[1] Estella 2002, 131.
[2] Here the difficulties regarding the term "subsidiarity" nor the difficulties it creates as a purely legal term will not be discussed. For more on this topic see Estella 2002, 1-3.
[3] Although the subsidiarity principle may in many cases restrict the Commission by not allowing it to make new legislation the principle is not as simple as it seems. As Estella has argued in many cases it seems that the Member States would be better placed to regulate some area. But in deciding whether the Communities should intervene market distortion must be taken into account. In these cases although the Member States can very well regulate some area on its own territory these regulations would be very different from other Member States regulations. Therefore the European Market would not be same for every actor. In such cases the Communities have to intervene although Estella asks whether this is reason enough to do so. See Estella 2002, 110-111.
[4] COM(2003) 770 final, 16.
[5] COM(2001) 428 final, 20.

This can in some cases mean for example that the Commission uses many experts and seeks advice from many different actors in sensitive matters before making the decision whether to intervene or not.[1]

In line with this principle the Commission sees its relations with the Member States' governments. The Commission promotes more dialogue with regional and local governments. This would be accomplished by working with national and European associations more closely.[2] The Commission seeks to improve its dialogue with the Member States by taking into account the local conditions as early as possible already at the policy shaping stage.[3]

One aspect of deciding what to legislate and when is the person who makes the decision. Although the officials of the Commission do not have a monopoly in this area they still affect it very much.[4] The problems concerning the staff of the Commission will be discussed later in this thesis.

Be it as it may, the Commission's interest to make better legislation can be seen in its statement that the preparatory phase is often insufficient. The Commission seeks to deal with this problem by using more and better forms of consultation. In terms of this chapter the consultations should answer the question whether or not new legislation is needed.[5] The Commission's aim can be clearly seen in the following statement: "The main principles of a regulatory strategy: legislative action only where necessary […]"[6].

[1] COM(2003) 770 final, 23.
[2] COM(2001) 428 final, 4.
[3] COM(2001) 428 final, 13.
[4] Stevens and Stevens 2001, 139.
[5] COM(2001) 130 final, 3.
[6] COM(2001) 130 final, 5.

2.2.3 The Commission's Ambivalent Position in Choosing Whether to Legislate or Not

Of course it is important to think about if legislation is needed and on which level. That is for the good of the Communities because naturally it is better for any actor if its legislation is easy to understand and flexible. The Member States will also be happier if more things are left for them to decide and regulate. Therefore rethinking the need for legislation is in line with the Community Interest which the Commission has to protect.

One major problem Tom Burns sees concerning the Community legislation is how detailed it is. In his opinion it is too detailed and prescriptive.[1] Apparently the Commission has acknowledged this problem too. Therefore the Commission has made a plan of making the new legislation more simple and effective.

This shows how confidently the Commission seeks to uphold the Community Interest. According to Burns if the legislation is detailed it better invites the Commission to monitor the correct implementation[2]. Therefore if this statement is taken for true it implicates that if the legislation is made simpler and less detailed the Commission's power will grow weaker. This is why it is interesting to note that the Commission seems to promote the best of the Communities but not necessarily the best of the Commission.

Another thing concerning this theme is that because it is the Commission's job to protect the Community Interest the happiness of the Member States and the development of the legislative process would seem to be a good thing concerning the Commission. Its job gets done if the Communities thrive. But on the other hand it must be kept in mind that when ever the Commission decides to let the Member

[1] Burns 1998, 442. Then again it seems interesting that the Member States are worried about implementation as they say the directives are often vague and unclear. See Bekkers, de moor-van vught and Voermans 1998, 475. It would seem that the legislation of the Communities is either too detailed or too vague depending on the case.
[2] Burns 1998, 442.

States regulate something for themselves it at the same time gives away part of its power. This is because it can't anymore itself regulate this area.

Throughout this thesis it must be tried to keep in mind this ambivalent situation the Commission is in. It can't strive for more powers if it is not for the good of the Communities. If the Commission gets new powers it necessarily isn't a good thing as far as the Communities are concerned.

2.2.4 The Legal Basis of the New Legislation

After the Commission has decided that new legislation by the Communities is required it can't just prepare the regulations needed. Instead it has to choose the legal basis for the new provisions first. In other words the Commission has to choose the right Articles from the Treaties on which it can base its legislation. This is most important because if the Commission has chosen the wrong Articles its decisions can be challenged before the European Court of Justice.[1]

The legal basis does not only protect the Commission from challenges but the Articles also define the legislative procedure to be used. This in turn is important because the powers of the institutions differ according to the procedure chosen.[2]

Article 7 EC provides that the institutions shall use the powers granted to them in the Treaties. Therefore the Treaties not only give powers to the institutions but they also give the limits in which the institutions have to work. The institutions are bound by the Treaties and are not allowed to overstep their Treaty-based limits.[3]

[1] Nugent 2001, 247.
[2] Nugent 2001, 247.
[3] Actually this is the only thing that separates the European Union from a federation. The Communities are made up of the institutions. If the institutions could by themselves make amendments to the Articles regulating their powers, they would become truly independent and self providing. In this case the Union would become a federation. At this time the Member States still have the final saying on any amendments made to the Treaties and thus are masters of the Treaties and therefore are still masters of the Union.

2.2.5 The Commission's Role as the Initiator According to the Constitution

The Commission will gain powers from the Constitution. One of the most significant is the fact that the Commission would be the sole initiator of legislation in the whole European Union. At the moment the situation is so only in matters falling under the first pillar.[1]

On the other hand the subsidiarity and proportionality principles would become stronger. The Commission should include in every proposal it makes a review on how these principles are followed. The proposal including this review is then send to all national Parliaments. This is made so because if the Commission would overstep the Community's right to legislate some area the national Parliaments may react on it.[2]

If one third of the Parliaments would react in this manner the Commission would be obliged to review its proposal. This is a very important new power the national Parliaments would get. On the other hand the Commission would need to think its proposals even better through before sending them forward.

2.2.6 Conclusions

Does the right of the other institutions to request legislation from the Commission threaten the Commission's independence? According to Nugent many see the way the Council uses the right given to it by Article 208 EC strictly speaking against the meaning of the Article.[3] But is this really so? At first in the view of the Commission this would seem so because of the independence granted to the Commission in Arti-

[1] de Zwaan 2004, 59.
[2] Lenaerts 2004, 15.
[3] Nugent 2003, 151.

cle 213 EC. Clearly if the Council can make the Commission to do something, the Commission won't be independent.

But here another factor must be taken into account. This factor is the Community Interest. The Commission is independent therefore that it can further the Community Interest. But what if the Commission will not act on a request coming from the Council, a request that would further the Community interest? In such a case it would seem to be a good thing that the Council can force the Commission to do something.

But the most worrying part is that the Council not only can make the Commission act on something but it can actually dictate what the substance of the draft will be.[1] This clearly must be against the spirit of the Treaties. If it would be meant to be that the Council can command the Commission to make specific legislation it most definitely would be written in the Treaties.

On the other hand the Council is the representative of the Member States. Its decisions are compromises that please the majority of the States. If this is so, is it really a bad thing that the Council gets to dictate? The answer lies in the Commission's expertise. The Commission with its information sources is best placed to prepare the drafts. It may be that when the Council forces the Commission to make a specific kind of draft, the Council hasn't seen all the sides of the matter. The Commission has better resources to do this. Therefore it seems that the way in which the Council acts can endanger the true-coming of the Community Interest. The Council is there to represent the Member States, not the Community Interest.

The same again goes for the Parliament. Although the Parliament may find some shortcoming in the legislation of the Communities the Commission still is better placed to decide whether or not to legislate. Therefore it seems that it is positive that the other institutions can request but if they can really force the Commission to make something the meaning of the Treaties is not honoured. Because of this the Commission's independence is not protected in an appropriate way.

[1] Nugent 2003, 151.

What about the subsidiarity? It would seem that the Commission after all has been quite strict in following the subsidiarity principle or at least hasn't very openly acted against it. This statement is supported by the fact that the European Court of Justice has never annulled a legislative act of the Communities on grounds of neglecting the subsidiarity principle.[1]

But then again it must be remembered that the Court according to Estella doesn't currently very actively implement the subsidiarity principle.[2] This gives in some cases more power to the Commission. This is because the subsidiarity principle could be used, in a case where qualified majority voting has been used in the Council, by the Member States that were left in the minority to annul the legislation before the Court. But because the Court has not automatically supported the view of these "minority states", the Commission can usually rest assured that if its proposal gets through the Council the proposal will not be annulled at least on the subsidiarity reason.[3]

Therefore Estella even argues that the subsidiarity principle has failed.[4] But is it really so? It would seem that even though it isn't as strong a principle as it could have been, it still sets some limits to the Commission and the other institutions too. At least they have to reason why they regulate some area. This would seem to limit some of the most outrageous cases out.

The subsidiarity principle strictly from the Commission's point of view will limit the Commission's powers. But as Estella has argued it isn't such a strong principle and therefore doesn't affect the Commission very much although the Commission seems to seek to use it more frequently and correctly.

[1] Estella 2002, 139.
[2] Estella 2002, 139. Here it won't be ventured further to prove this statement because it is more a question of the Court's powers than the powers of the Commission. Suffice it to say that Estella argues that this is because the Court fears for its own legitimacy and on the other hand the Court has its own agenda which is integration based.
[3] Estella 2002, 159.
[4] Estella 2002, 176.

3. The Drafting of a Proposal

What happens after the Commission has decided that new legislation is needed? This chapter concentrates on how the Commission makes a draft and how the Council, Parliament, Member States and interest groups may affect the substance of a draft. This is maybe the most important aspect of making new legislation as the substance of the legislation is formed at this stage. The Commission should be independent but how much can the other actors affect it? What are the ways in which the other actors try to steer the Commission?

3.1 The Way a Draft Moves Through the Commission

When the need for new legislation comes up, the Commission starts working on a draft. Here it will be described how the draft proposal is prepared inside the Commission before it is forwarded to the other institutions.

3.1.1 The Directorate General Prepares a Draft

First must briefly be described what the official way is in which a legislative draft proposal is made. After this can it be analyzed how much there is room for the other actors to intervene.

The procedure is quite simple in theory. Depending on the subject of the new legislation the making of the draft is given to a Directorate General (Hereafter referred to as DG) to which competency area the draft belongs. If the draft's area will overlap more than one DG's area, it will be decided which DG is the leading one. This is most easily done by choosing the one DG to which area the draft mostly belongs to.

After the DG is chosen an official in the DG is chosen to take care of the dossier. This means that one officer has the duty to watch over the draft and has to see to it that it moves forward in the Commission. The keeper of the dossier is most often a middle class A-grade official. He is called the chef de dossier.

If the draft belongs to the competency areas of more than one DG, the lead DG has to consult with the other DGs to which competency the draft belongs to. How often this is done depends on a few factors. First, how important is the legislation in preparation and second, how much does the draft overlap. If the matter isn't very important and does not overlap too much with other competency areas, the lead DG will probably not consult with other DGs very much. Also the timing of the consultation differs. Sometimes consultation is used throughout the drafting process but sometimes it takes place only at the end.

The cabinets of Commissioners try also to influence the draft. Often the heads of DGs forbid their personnel to interact with the cabinets[1]. Therefore the cabinets have to stay alert and find things out for themselves. Otherwise they may hear of a proposal at such a late time that they actually can't influence it at all.[2] Because of this the Commissioners don't have very easy access to the DG preparing the draft[3].

In the case that the opinions of DGs differ widely, there could be problems. The DGs try to solve these problems primarily with the consultation process but consensus is sought also in latter parts of the preparation process. After the draft is considered to be ready by the DG making the draft, the legal services are consulted to see if the draft is prepared in a way that fulfils all the necessary criteria.

The way in which drafts and other papers officially move through the Commission is vertical. This means that if some DG official wants to hear the thoughts of an official in a different DG the official has to send the inquiry to the head of the

[1] Stevens and Stevens 2001, 226. There is tension between the cabinets and the DGs as the cabinets try to push forward the kind of policy its Commissioner approves of but the DG may have other plans. See for example Stevens and Stevens 2001, 236.
[2] Stevens and Stevens 2001, 179-180.
[3] Stevens and Stevens 2001, 226.

DG who in turn will deliver it to the head of the other DG who again in turn will deliver it to the other official. In this way the head of the DG can monitor what is going on. Probably the head of the DG can also react if the paper is not in line with the policy that the DG leads.

Because the official that prepares a paper may be very isolated the complete text may be the official's own. Therefore if the head of the DG is not paying enough attention and signs the paper the text of an official may go very far.[1] In this way the opinions of some official may go a long way.

3.1.2 After the DG is Ready

Until this stage the draft is in most cases been only in the DG, and the lead commissioner of the DG hasn't had very much part in drafting the proposal. But now before the draft can advance to the college it must first be approved off by the commissioner in charge of the (lead-) DG. After the Commissioner has approved the draft it is sent to the secretariat general which checks if the formal procedures are met.

When the draft is returned from the secretariat general, it is sent to the organ that prepares the meetings of the College. This is the meeting of chefs de cabinet. The function of these meetings is as follows: If there is no conflict over the matter and the draft seems to be quite simple, the draft is called an A-point, and will be approved by the College without discussion. If the meeting of the chefs de cabinet finds that there still are some conflicting opinions between DGs, it tries to solve the differences before the College meets. If there is no success in this, the draft is anyway forwarded to the College meeting, which can make a number of decisions.

The College can return the draft to the DGs for them to make changes to the draft. It can also agree on outstanding issues, or disagree on outstanding issues and

[1] Stevens and Stevens 2001, 180.

either take a vote or don't take a vote. The latter is possible mainly because some powerful Commissioner is too close to the case[1].

No matter what the decision of the College is the purpose is to get new legislation done. Ultimately the College tries to reach a solution so the draft can be put forward. After this stage the draft goes to the Council.

3.1.3 The Independence of the Staff of the Commission

Although the Commissioners must be independent they are not the only ones. The whole staff of the Commission is included in the independence obligation. Because the Commissioners do not participate in most of the work done inside the Commission it is important here to discuss about the staff's independence. On the other hand here will be discussed some aspects of how the Commission works inside. Do the national interests get represented in the Commission or is it completely independent in its internal working?

The independence of the staff is protected by a few regulations. The staff may not accept any kinds of gifts, payments or honours from outside sources. On the other hand the regulations "forbid the keeping or acquisition of interests in bodies which are subject to authority of the EU institutions, or which to business with it".[2]

The staff of the Commission is not without its flaws. In 1994 and 1995 two officials of the Commission were arrested as they allegedly had accepted some sorts of bribes from certain tourism related companies to whom funds were allocated from the Communities.[3]

The Commission has two kinds of staff: temporary and permanent. First the temporary staff will be discussed. The Commission uses temporary staff more than any other institution in the Communities. Mostly the temporary staff can be found in

[1] Nugent 2001, 251.
[2] Stevens and Stevens 2001, 62.
[3] Stevens and Stevens 2001, 67.

the Commission's own research programs. The Commission uses temporary staff on such occasions because it wants to promote easy creation and movement of new work groups.[1]

The Commission uses detached national experts as temporary staff. This program should work both ways. In other words the Commission should send its staff to Member States and the Member States should send their representatives to work in the Commission. But in reality this mostly happens in the latter way. Although the number of these experts is not overtly great the real interesting thing is that the experts occupy the higher ranks of the Commission staff.[2]

This is interesting concerning the topic of this thesis because in this way the Member States and other interests get to influence the Commission's work literally from the inside. This is a problem for the Commission but on the other hand for the Member States too as some Member States may be overrepresented in the Commission while some may not be presented at all.[3]

Then again the reason why this program is used is because through it the Commission gains the expertise of the national experts but on the other hand they also take knowledge of the workings of the Commission with them back to their home country. This is important because the Member States do not necessarily completely understand the functioning of the Commission.[4]

The person of the chef is interesting. If the chef is very ambitious it would seem that it would be in the chef's interest to get as many drafts for he's own DG as possible. In this way the chef would have the most power. This will also lead to a situation where the DGs fight over the drafts. If all the DGs which really should

[1] Stevens and Stevens 2001, 19-20.
[2] Stevens and Stevens 2001, 20. Stevens and Stevens further note that the detached national experts account for 15% of all the A grade staff and 30% of A4 and A5 grade staff.
[3] Stevens and Stevens 2001, 22.
[4] Stevens and Stevens 2001, 21.

have a part in making the draft are not included in the preparation the legislation will not be sufficiently prepared as the DG working on the draft may try to pull home.[1]

On the other hand the chef may very well consult with many outside bodies informally.[2] This is because if well consulted the chef may get the draft easier accepted. This is a good thing for the chef but not necessarily for the Communities. This is because the informal consultations are made to outside bodies and these in turn influence the draft possibly very strongly. This may go as far as to result in a claim that everybody leaks in the Commission[3].

The staff of the Commission is often appointed because the appointed has some kind of relations with the Commission or in their national representation.[4] This means that from the very beginning the staff has links to many sources that can influence the decisions of the staff.

Along the years the officials of the Commission have created personal relations with different interest groups too.[5] Therefore the officials may very well be affected by the interest group's wants. On the other hand this naturally works both ways and the Commission gets in this way to know what happens in the interest groups.

These influences and personal wishes of the staff can make considerable difference when it comes to preparing a draft. If there are enthusiastic people behind a draft it will go forwards easier. In this way the political stance of the staff may very much affect the decisions the Commission makes.[6] Of course this is natural but on the other hand it may not necessarily be a good thing if the staff tries to further some cause that they bring from their home countries. This is because the cause is not necessarily for the best of the Communities.

[1] The DGs fight over other things too. These things include money and personnel See for example Stevens and Stevens 2001, 201.
[2] Stevens and Stevens 2001, 178.
[3] Stevens and Stevens 2001, 178.
[4] Stevens and Stevens 2001, 80.
[5] Mazey and Richardson 2003, 220.
[6] Stevens and Stevens 2001, 141.

The problem concerning the independence of the Commission in accordance with the cabinets is that the Commissioners rely heavily on their cabinets. The Commissioner makes the decisions based on the cabinet's preparation. The cabinet also helps keep the Commissioner up to date.[1] This is problematic because as noted earlier the cabinet is not chosen by the Commissioner alone.

As a concluding remark it may be stated that "If the Commission were less 'chaotic' it would be harder to influence, whether for member state governments or for outside groups".[2]

3.2 The Influence Interest Groups May Have in Defining the Substance of a Legislative Draft

This chapter concentrates on what are the ways in which the interest groups can influence the Commission. The interest groups are mentioned here because they mostly are involved with the Commission at the preparation stage. They are the ones with which the Commission negotiates what should be the substance of the draft.

3.2.1 The Commission's Understaffing

The Commission is understaffed. It has much less staff than many national bodies working in the same field. Because the Commission has to deal with dozens of different policy areas it should have expertise in a very broad area. Since the Member States are not very fond of the idea of making the Commission a big bureaucracy the Commission has to make use of the resources available.[3]

[1] Stevens and Stevens 2001, 234.
[2] Stevens and Stevens 2001, 181.
[3] van Schendelen & Scully 2003, 27. The reason for this is probably that the Member States don't want to pay the expenses a bureaucracy of this size would create.

Already the influence of the Member States over the Commission has been studied. But it must be noted that the Member States try to influence the Commission also by other means, not just by choosing the Commissioners. By this is meant that the Member States also have interests after the Commission is appointed and they want the Commission to make decisions that are good for the Member State concerned.

In addition to the Member States there are also other actors that want to be heard when decisions are made. There are many more of these interest groups than there are Member States in the Communities. The decisions of the Commission affect the lives and business of many million people and every one of them has an interest in some of the matters the Commission decides. In short, the Member States and the nationals and actors of the Member States have an interest.

This interest combined with the fact that the Commission is understaffed has lead to a solution concerning the understaffing which will be studied here. In this chapter the attention will be turned to the influence the different interest groups have on the work of the Commission. This includes different committees and also corridor lobbying.

3.2.2 The Solution to the Problem

The solution the Commission has come up with concerning understaffing and lack of knowledge is the use of in-sourced experts.[1] Mostly the in-sourced experts are civilians who represent different interest groups or representatives of national governments or even representatives of smaller units, like regional governance.

[1] In-sourced expert means an expert who is not part of the Commission. See also COM(2002) 704 final, in which it is stated that the Commission is obliged by the Treaties to consult. Therefore it is not only the Commission's solution for a problem but also an obligation. Protocol N°7 on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty says that "The Commission should […] consult widely before proposing legislation and, wherever appropriate, publish consultation documents". It must be noted that by lack of knowledge is not meant that the Commission is incompetent but instead that the Commission just can't have knowledge of all the areas needed with the number of staff it has.

The Commission has correctly realized that the representatives of the interests are experts of their own area and have much more detailed information on how different decisions would affect their sectors. So if the Commission is working on a legislative draft that concerns, for example, cars, the people who best know the effects this decision has on the car industry are the car manufacturers themselves. They have information the Commission's officials might never get their hands on or at least it would be time consuming and expensive.

The question that is most interesting concerning this way of thinking is how much the representatives of the car industry could be trusted. In other words, how much would they try by giving false information to get the Commission to make a decision that would be easy on the industry? Also the wishes of the interest groups may very well be completely against the wishes of the Member States or the Community Interest.

The Commission has seen this problem and has acted on it. The solution is a committee. This means that the Commission doesn't just invite the representatives of the car industry but also other interest groups. The best situation is if the Commission can get some representatives who have an opposite view on the decision being made[1]. In other words the Commission invites different interest groups to discuss the decision in a committee. In this way the Commission gets a much more accurate picture of the situation.

The committees can be divided in different groups according to the stage of the legislative process at which they are involved. I will concentrate on advisory committees and will not touch the Comitology issue here but instead in a latter chapter.

[1] If, for example the car industry is present, a good way in which the Commission will get accurate information on the matter is by inviting representatives of car sellers and some environment groups too. On the other hand like Burns states there can arise problems if only the big companies are included in the consultations. There could for example be a situation where a big company has already established a market and promotes some kind of specifications. It would reason that it would be good for the environment for example. But if this specification would come into force it would actually restrict the small businesses of coming to the market Burns 1998, 442-443. Therefore it is important to get as many actors to take part in the consultations as possible.

The stage at which the committees are mostly used is the preparation of legislation. This separates these committees from the Comitology committees that are mostly concerned with implementation.[1]

The advisory committees the Commission consults during this stage are further divided into two different groups: the expert committees and the consultative committees.

Expert committees' participants are nominated by the Member States but the representatives are not seen as official governmental spokespersons. This means that the dealings with the committee are conveniently informal.[2]

Consultative committees on the other hand "are composed of representatives of sectional interests and are organised and funded by the Commission without reference to the national governments"[3].

3.2.3 How a Committee is Created

The committee is build by the decision of the chef de dossier (the chef) of the DG that prepares the draft. It must be noted that concerning the advisory committees the chef is not obliged to form a committee. In other words the creation of a committee is not compulsory like it is in the Comitology procedure.

The chef invites the representatives by his own accord. It must here be emphasized that a committee doesn't only consist of civilians but also of representatives of the national governments.

Although the chef gets to choose whether a committee is formed he or she is not the only one who has a say on who gets into the committee. As noted earlier the experts committees are created based on the nominations made by the Member

[1] Naturally this doesn't mean that the advisory committees could not discuss matters that concern the implementation of the legislative act they are working on.
[2] Nugent 2001, 244.
[3] Nugent 2001, 245

States. Therefore the Member States get just the kind of representatives into the committee as they want.

On the other hand the consultative committees are created more according to the Commission's wishes.

Seen from the point of view of this thesis this committee procedure awakens some questions. They evolve around the question what is the chef de dossier's involvement and influence in making the draft.

As Rinus van Schendelen notes, the Interest Groups lobby even before the committee is established by trying to affect the chef de dossier to choose the right persons into the committee.[1] Again here rises the question about the independence of the staff of the Commission. Does the chef try to make a decision that would support the chef's country of origin? Of course there is also the possibility that the chef will work for the good of the Commission, and more importantly for the good of the Communities.

The chef may make considerable difference in the making of the draft as the chef can choose which interest groups are represented in the Committee. This means that it is possible for the chef to choose experts who represent views that support the Commission's draft. The chef can get important support from the experts in forwarding the draft[2]. This gives more power to the Commission. But on the other hand the chef may get experts that will advice to make the proposal to support some individual country or a group of countries. This in turn would be against the Community Interest.

[1] van Schendelen & Scully 2003, 29.
[2] van Schendelen & Scully 2003, 29.

3.2.5 The Influence of the Committees

Van Schendelen has an interesting claim to make concerning the committees. If it is difficult for the interest groups to reach consensus they will negotiate, and thereafter produce a preference. In such a case where secondary or delegated legislation is being prepared the chef de dossier may use this preference as the draft text, and will only act as a rubber stamp.[1] The result will no doubt be satisfactory for the interest groups but how is the Community Interest taken into account in situations like this?

The effect this has on the Commission's powers is not quite clear. Naturally the Commission has the power not to forward a draft that it doesn't feel good about. But then again, how can the Commission know if a draft coming from the Committee is good or bad, if it doesn't have the required expertise in the first place? This actually leads to the conclusion that the understaffing of the Commission is a restriction of its powers. If the Member States would give the staff needed for the Commission, they wouldn't anymore be consulted in the committee[2]. The Commission would be a bit more independent if this were so but it still should take the opinions of the Member States into account because of the powers of the Member States to make the Commission's life difficult.

But what kind of effect may the composition of the committee have? Or in other words is there a difference between the consultative and expert committees? It would seem that as the Member States get to nominate the staff of the expert committees the committee is more in the hands of the Member States. At least this means that the committee represents very strictly or clearly the opinions of the Member States that have nominated them. Therefore the expert committee represents more the best of the Member States.

[1] van Schendelen & Scully 2003, 29.
[2] Or more correctly the Commission would not need to use the Committees as much as before. At the moment the Member States naturally try to influence different interest groups. If the Commission would not consult as many interest groups as it does at the moment the Member States would not be as involved in the making of new legislation as they are now.

On the other hand again the consultative committees include staff that is nominated by the Commission. This means that the Commission might get more accurate information concerning the situation at hand than it will from the expert committee.

3.2.6 Interest Groups and Lobbying

In addition to working in the formal or informal committees the representatives of different groups of course do something outside the committees. It is a well known fact that the corridors of the Community institutions are filled with people who try to influence the decision makers and try to further their own causes. They are called lobbyists. Some of them are there only to lobby but others, as stated above are included in the committees. Because of the growing number of the Committees the importance of a single committee is diminishing. To counter this, many representatives included in the committees are doing the "regular" lobbying also.

This lobbying together with the personal relations between the staff of the Commission and the interest groups makes for an efficient way for the interest groups to get their views known in the Commission. And it must be remembered that the interest groups and lobbyists include members of the Parliament and representatives of the Member States too.

Here it can be stated that the people lobbying are often representatives of some of the interests that must be taken into account if the Community Interest is to be taken seriously. Therefore the Commission in many cases rightly listens to the lobbyists. On the other hand, though, the lobbyists may get too much influence in the Commission. This is why the personnel of the Commission should be very careful while dealing with these outside actors.

3.2.7 An Improving Procedure

The consultation procedure is used first to decide whether new legislation is needed and then to create the substance of the legislative draft. The Commission has noticed that the consultation procedure is very effective but that the procedure is not without its problems and flaws. The Commission has openly admitted that one main problem there is with the consultation procedure is that only one side of the story is heard. This is because all the actors that will be influenced by a decision are not asked to participate in the committees.[1]

Therefore the Commission has stated that it will develop the consultation procedure. This development has been named participation. Participation means that the Commission will include more actors in the consultations and also use the consultation procedure more[2]. The aim is to get as many actors from as many fields and stages as possible to participate in the making of legislation.[3]

To get as many participants in the procedure is alone not enough though. In addition the Commission should make sure that the participants could participate as early on as possible in the legislative process, as in the beginning it is the easiest time to make amendments to the upcoming draft. The consulted parties should have their say on the aims and methods in which the legislation should be implemented.[4]

The Commission has stated that it will make strict instructions on publishing who will be consulted, what advice has been given, what this has lead to and what

[1] COM(2001) 428 final, 17.
[2] But as stated in COM(2005) 98 final, 3, the growing number of consultations is not only a positive thing. It has resulted in a "consultation fatigue" of some stake-holders and "having to apportion limited advertising and analytical resources among too many consultations have become real risks in some sectors". One thing that would help in this matter too would be to give more resources to the Commission.
[3] COM(2002) 227 final, 10. The Commission aims to get at least „those affected by the policy, those who will be involved in the implementation of the policy and the bodies that have stated objectives giving them a direct interest in the policy" involved in the consultation procedure. COM(2002) 227 final, 14. See also COM(2001) 130 final, 7: „more involvement on the part of civil society".
[4] COM(2002) 227 final, 12.

were the alternate views gained.[1] These instructions are like a "code of conduct that sets minimum standards"[2].

Here it must be remembered that democracy and transparency are not the only aims of this new code of conduct. One of the most important aims is to make the consultation procedure as effective as possible.[3] Of course the good of the Community must be taken into account here too. It is the Commission's job to take care of this because the Commission is the guardian of the Community Interest.

If the Commission sees it appropriate it will even encourage the actors to give their opinions.[4] Seen from the point of view of the Commission this is not necessarily only a good thing. It is true that the Commission gets more accurate information but the fact remains that the Commission won't itself know the things any better. This will lead to a situation in which the Commission may continue to act as a rubber stamp. On the other hand the Commission gets more power in the way that its proposals are seen as better prepared than before. The Commission gets even more power behind its proposals as all, not just some, important actors in the given field are consulted.[5]

Even if using more participants in decision making may take power away from the Commission, the rules on how the consultation happens and the publication of what is gained from it can only be seen as strengthening the Commission's position.[6] By making its decision making more open in this way it will gain the trust of

[1] COM(2001) 428 final, 5. See also COM(2001) 428 final, 17, where the Commission states that it seeks „not to stifle discussion, but to make it more effective and accountable both for those consulted and those receiving the advice". Also in COM(2002) 704 final, 3, the Commission states that there exist no coherent rules on consultation. Therefore the future aim is to „ensure that all relevant parties are properly consulted" by making new rules that must be followed.
[2] COM(2001) 428 final, 17.
[3] COM(2003) 770 final, 37.
[4] COM(2002) 227 final, 15.
[5] Then again, it is interesting to notice that the Commission uses an e-network from which it can get informal scientific consultation from scientist and the like (COM(2003) 770 final, 38). Naturally the more knowledge the Commission has the more power it has. But how should this work in accordance with the need for more transparency and openness? Of course it is possible that the Commission reports how, why and from whom it has gained the knowledge. But why then would this form of knowledge-getting be called informal?
[6] See COM(2002) 704 final, 5, where it is stated that the idea of consultation is to give the interested parties a voice but no vote.

the other institutions and of the other actors. And again the Commission's decisions will be seen as better prepared.

The same goes for the Commission's plans to make better impact assessments. Earlier the Commission only took into account the economic impact. According to the communication "Better Lawmaking 2003" the Commission plans to take into account also the environment and the social impact.[1] Again this limits the Commission's freedom to make proposals because the Commission must take into account more matters but on the other hand good preparation has a positive effect on the proposals.

Here the Commission runs into problems as it can't make exhaustive studies even if it would like to. This is because it doesn't have enough resources. If the Commission would try to use the impact assessments exhaustively, it would also be very time consuming. This in turn would stifle the legislative process. It would be unacceptable in a situation where the Commission and the Communities should act quickly on some urgent matter.[2]

Therefore the Commission is keen to use proportionate analysis. Still this wouldn't mean that the Commission won't take all matters into account. If it gets to know that some important matter was overlooked in the preparatory phase, the Commission will withdraw its proposal.[3]

3.2.8 Conclusions

The question raised by the heading of this chapter is how much these committees and interest groups affect the decision making of the Commission. If the draft is very politicized or complicated, the College will discuss it in its meeting. This will naturally affect the contents of the draft. After all the College is a very experienced

[1] COM(2003) 770 final, 6.
[2] COM(2005) 98 final, 6.
[3] COM(2005) 98 final, 6.

and able organ, which was in the beginning created to discuss this kind of things. The difficulty is, as noted, the growing multitude of areas of expertise. The Commissioners are very dependent on their cabinets and DGs. This has always been so but nowadays it's even more so and what is more important, the DGs are dependent on the expert committees.

The answer to the question concerning the committee's influence in the case of secondary or delegated legislation seems to be quite simple. As mentioned before, the chef de dossier may only act as a rubber stamp. This would indicate that the committees have great influence. This seems to be furthered by the fact that the College only meets to discuss matters that are complicated and politicized. Of course this doesn't mean that completely outrageous drafts would get through the Commission as somebody would probably notice something is wrong along the way.

As the situation is as it is the Commission can't completely fulfil the obligations given to it in Article 211 EC, more accurately it can't make legislation that would entirely be for the best of the Communities. Of course this problem is partially dealt with by the fact that the committee has the most influence when dealing with drafts that are not very complicated in the European Union-point of view. But especially in the cases of low-politicized legislation the committee may have a very strong influence on the Commission.[1]

The importance of the committees has increased because of the enlargement of the EU[2]. Naturally the enlargement has brought new areas of expertise into the legislation process. This has also meant that the number of different committees grows. Because of this the Commission is the whole time getting more depended on the committees' help.

The advantages the committee procedure has are two-fold. First, it gives the Commission badly needed information and expertise. While the Commission starts

[1] van Schendelen & Scully 2003, 30. See also Obradovic 1998, 355, where she states that "private interest groups take many of the decisions discharged by the EU institutions". Yet there is no accountability for them.
[2] The Commission does get one Commissioner for every Member State but this may not be enough to fill the new areas of expertise needed.

preparing a draft, it necessarily doesn't know every aspect of the area concerned or else it wouldn't use the committee. Therefore the first advantage the Commission gets from using a committee is that the Commission gets to know the difficulties concerning the draft in preparation.

In addition the Commission gets another important advantage from using advisory committees. If the committee includes representatives from very important sectors, the Commission can use this to its advantage when negotiating with the Council and the Parliament. This is because the Commission can say that it has the support of these important actors, as they have agreed on the draft.[1]

But on the other hand the committee procedure gives a way for interest groups and the Member States to get inside the Commission. The Member States already have all the saying in the Council. In this way the Member States hold great power in making new legislation for the Communities as they are the Council who at the end decides whether or not the proposal from the Commission should be accepted. In any case the Member States naturally try to influence the Commission not only through the committees as such but also by influencing other actors that are present in the committee[2].

As Nugent puts it, the influence the Member States may have depends on the Commission's decision whether the Member States are invited to take part in the committee or not. If not, then the Member states may know nearly nothing of the draft in preparation. But if the answer is yes, then the Member States know actually much, if not even everything about the draft.[3]

Nonetheless we have to keep in mind that, according to some sources, as many as 80 percent of the proposals coming from the Commission include the com-

[1] Nugent 2003, 287.
[2] Nugent 2003, 443.
[3] Nugent 2003, 342. Then again the Member States work together with some interest groups and in many ways influence them for example by feeding ideas through them. This means that the Member States will probably gain information through the Interest Groups anyway.

plete text that was written by the chef de dossier[1]. Or, as we have learned, by the interest groups working in the committee.

3.3 How the Opinions of the Parliament and the Council may Influence the Substance of a Draft

It must be remembered that the Commission doesn't work alone. It doesn't have the right to alone finish all the proposals it prepares. In this chapter the text will concentrate on the two most important institutions that also have a say on the legislation in preparation. These are the European Parliament and the Council of Ministers.

This chapter studies the influence these actors may have on the substance of a draft. First it tries to find out if the Parliament has powers over the Commission at this stage and then moves on to deal with the Council.

3.3.1 The Parliament's Right to Dismiss the College

According to the Treaties the European Parliament has some powers that may affect the way the Commission makes its decisions. Earlier the Parliament wasn't that powerful but it has gradually gained more and more weight as the Communities have evolved.

One of the most important powers the Parliament has is the right to dismiss the College. Yet again there is the same restriction as with the right not to approve of the Commission: The Parliament can not dismiss individual Commissioners but only the whole College[2]. This means that probably this power won't be used very

[1] van Schendelen & Scully 2003, 11.
[2] Although here must be remembered the agreement that Prodi made with the Parliament which stated that if the Parliament will pass a vote of no confidence the President will force the Commissioner to resign.

easily. The dismissal of the College also needs a 2/3 majority of the votes given by the Parliament.

Even if formally the Parliament can only dismiss the College with the 2/3 majority this actually doesn't tell the whole truth. It seems that it is enough if the votes given will form a nominal majority. This would show that the Parliament doesn't trust the Commission. In such a case the College would probably resign after getting such a signal of distrust from the Parliament. The Santer College resigned after the Parliament threatened to pass a motion of censure.[1] This backs up the statement that a 2/3 majority is not needed in the Parliament.

The resignation of the Santer College is the only time the Parliaments right of dismissal has resulted in the resignation of a College. Actually there haven't even been that many votes. This is because the Parliament usually thinks of the Commission as an ally as the Commission mostly has the same views as the Parliament and even if there are differences they mostly are on details.[2]

3.3.2 Other Ways in Which the Parliament may Influence the Commission

The Parliament seeks to influence the Commission as early as possible as it knows that the draft is easiest to shape before the Council acts on it. In this way it is important for the Parliament that it has these ways in which to deal with the Commission.

Before a draft is made the Commission usually asks about the Parliament's opinions concerning the draft. And again, because of the Commission's need to keep the Parliament happy, not least because the co-decision procedure which will be more accurately discussed later, the Parliament may get to influence the draft before even the preparation is started. In matters that are not very important the Commis-

[1] Nugent 2003, 113.
[2] Nugent 2001, 87.

sion may ask for the Parliaments opinion but if the matter is important the Commission is obliged to ask.

Another way in which the Parliament seeks to influence the Commission is informal. The members of the Parliament use their personal relations with the Commissioners to get their thoughts known in the Commission. This means that there is also lobbying from the part of the Parliament. This is probably the most natural and usual way of communication in the EU but as Nugent states its impossible to really know how much it happens because the meetings are informal and don't produce official papers[1].

In addition to normal corridor lobbying there are also many informal meetings between representatives of the Commission and the Parliament. These differ from normal lobbying in that these meetings are called together either by the Commission or the Parliament and are as such somewhat more formal than lobbying. These meetings are very important as they let the Commission know how the Parliament thinks about different matters. In this way the Commission gets to know how the Parliament will react to the draft. Also the Commission gets to know if the Parliament would like Commission to make a specific kind of proposal. Naturally this works both ways.

3.3.3 The Influence the Council of Ministers May Exercise on the Commission

In addition to the European Parliament and the Member States an important actor in the European Union is the Council of Ministers. It is one of the three main institutions involved in making new legislation. But in addition to this it actually is the main way in which the Member States are represented in the Union. Some of the powers the Member States had are by the Treaty of Nice reallocated to the Council.

[1] Nugent 2003, 201.

Even though the Council represents the Member States it in some ways is subordinate to the Commission. The most important power the Commission has over the Council is that the Council can not initiate legislation under the first pillar without a draft from the Commission. In this way the saying that the Commission is the initiator of the Community legislation is correct.[1] This means that without an initiative from the Commission there would be no new legislation under the first pillar[2].

The Council would like to see the Commission as its ally and would not readily take powers away from it. This is because if some actor in the Communities at the moment would get new powers it would be the Parliament as the Parliament is the only truly democratic actor. But as Laurence W. Gormley points out the Council doesn't respect the Commission anymore. The reason for this is that the Council thinks that the Commission is under the rule of the Parliament.[3] This is probably because of the before mentioned powers of the Parliament over the Commission.

Therefore the Council does actually prefer to speak straight to the Parliament and not to the Commission[4]. This again is very upsetting considering the independence of the Commission. If the other institutions don't see the Commission as independent the only conclusion that can be made is that the Commission really is not independent.

[1] The Commission is in an especially good position if the matter dealt with is technical rather than political and if the Member States for some reason want the Commission to advance with its proposal. See Nugent 2001, 188.
[2] Of course the Commission can not keep itself from making new legislation as it would very probably be faced with accusation of failure to act before the European Court of Justice. After all the Communities is not a place where emotions should get in the way. The Commission must always remember to protect the Community Interest which means that it must make new legislation when it sees the need for it.
[3] Gormley 2004, 43.
[4] Gormley 2004, 43.

3.3.4 Conclusions

This chapter shows quite clearly that the Parliament may have great influence not only on the composition of the College but also on the decisions the Commission makes and the views it takes. Although there is no Treaty based right for the Parliament to dismiss an individual Commissioner, there is a chance for this to happen. This will somewhat restrict the actions of individual Commissioners but on the other hand it is doubtful if the President will dismiss a Commissioner if the President doesn't think that the Commissioner has clearly made something wrong.

The Council negotiates with the Commission and requires legislation from it as has been seen.

3.4 The Draft Moves to the Council and the Parliament

3.4.1 The Procedure

After the Commission has made its draft the draft is forwarded to the Council. The Council has three different procedures. It can accept the proposal either by unanimity or by qualified majority vote. If the qualified majority procedure is used the Commission is much better placed in contrast to unanimity. This is because in qualified majority the Commission doesn't have to persuade the whole Council.[1] The third procedure naturally is that it won't accept the proposal.

Then again, if the Council would like to make amendments to the proposal the Commission is in a good position in contrast to the Council because the Council

[1] COM(2001) 130 final, 8: "The Commission will encourage the stricter application of qualified majority voting for Council decisions…". This shows that the Commission indeed knows that it is better placed in qualified majority voting, as it would like to see more of this in the Council.

can only amend the proposal by unanimity. Of course this doesn't mean that the Council can't reject a proposal completely.

The Council in a growing number of cases must make decisions with the Parliament. Shortly it can here be mentioned that according to the co-decision procedure the Parliament acting together with the Council can also hinder the acceptance of the Commission's proposal. This shows how the powers of the Parliament have developed lately.[1]

The co-decision procedure has been seen by many as a great diminishing of the powers of the Commission. The Commission has less and less power to see that its proposals get through the Parliament and the Council intact.[2] Especially this is the case in the conciliation committee because there the Article 250 EC does not apply[3]. This is the Article which states that the Council can make amendments to the Commission's proposal only by unanimity.

Another matter completely is the frequency of the use of the co-decision procedure. According to Nugent co-decision was used in about half of the directives adopted by 2003[4]. The procedure is only allowed in those cases where the Article which forms the basis of the draft so provides. The number of such articles is growing. In this way the Commission's power is slowly diminishing more and more.

Because what is called "Commission legislation" is technical and usually not that important this leads to an important realization. The Commission doesn't have to ask for the Parliaments opinion on the legislation that is called Commission legislation. This gives the Commission some freedom. But this freedom still is at least somewhat undermined by the Commissions fear of the Parliament.

As has been seen after the proposal is made and before it becomes legislation there can be many changes made to it by the Parliament or the Council. Therefore the Commission has made it its job to withdraw any proposals that are somehow not

[1] On the other hand the relations between the Council and the Parliament will not be discussed further here as this thesis concentrates on the Commission and its relations with the other institutions.
[2] Boyron 1998, 166.
[3] de Zwaan 2004, 57.
[4] Nugent 2003, 151.

appropriate anymore. This means that if inter-institutional bargaining has undermined the proportionality or subsidiarity principles the Commission will withdraw its proposal. Also if the Commission considers that its proposal will not anymore fulfil its purpose after amendments by the other institutions it will withdraw it.[1] The Commission also seeks to withdraw any pending proposals if it takes too long for them to be decided on.[2] Naturally the Commission has already had this right of withdrawal because as long as the Council has not made a decision on a proposal the Commission has had the right to withdraw it. But now the Commission uses this right more vigorously.

The right of withdrawal gives the Commission much power. The other institutions have to think carefully what amendments they want to make. If they make too fundamental changes to the proposal the proposal will never get to the next stage and become real legislation.

The Commission has stated that it would like to see the Parliament and the Council to collaborate with the Commission. The first thing to do would be to give priority to the Commission's proposals. According to the Commission one of the biggest problems at the moment is that the Council and the Parliament add cumbersome new requirements. The Commission would also like to see accelerated procedures.[3] This naturally would give the Commission more powers.

In any case the Commission seeks for more collaboration between all the actors in the Communities. This can bee seen in a report from the Commission: Better Lawmaking 2003, where the Commission states that the improvement of the regulatory environment is the joint responsibility of the Commission, the Parliament, the Council and the Member States.[4] The institutions have already agreed on an Inter-

[1] COM(2001) 428 final, 22. See also COM(2001) 130 final, 4, where the Commission states that the Community legislation is often too complex. One of the reasons for this is that there often are difficult negotiations with the other institutions. This shows that the negotiations can be very harmful for the Commission's proposals. Not only may the main purpose of the proposal not be fulfilled after amendments but also the understandability of the proposal may be endangered.
[2] COM(2003) 770 final, 11.
[3] COM(2003) 71 final, 18.
[4] COM(2003) 770 final, 4.

institutional Agreement on better lawmaking in 2002. One of the objectives of this agreement is to further the co-ordination and transparency between the institutions.[1]

In addition to this the Commission seeks to attend more of the Parliament's committee meetings and plenary sittings.[2] This would give the Commission a better view of the situation in the Parliament. Furthermore the Commission would get a way to influence the Parliaments decision making early on. Also if the overall proceedings of the institutions would be more transparent the Commission would gain still more knowledge of the situation in the other institutions.

3.4.2 The Changes the Constitution may Result in

According to the Constitution the Commission would maintain the powers it has at the moment after it has forwarded the draft to the Council. The Council could only amend the draft by unanimity. de Zwaan claims this a bad thing. He states that in a Union consisting of 25 Member States the changes to reach consensus in the Council is virtually impossible. Therefore the principle of amending Commission proposals only by unanimity will have no meaning. Following this de Zwaan claims that the principle would lose credibility.[3]

de Zwaan proposes that the answer to this would be to require only qualified majority in the Council to amend the proposal.[4] But what would this mean? Seen from the point of view of the Commission keeping the old unanimity obligation would mean that the amendments of the Commission would actually never be amended by the Council. This of course would make the Commission's position better compared to the Council. This would also make the Commission more independ-

[1] COM(2003) 770 final, 11.
[2] COM(2003) 770 final, 11.
[3] de Zwaan 2004, 60.
[4] de Zwaan 2004, 60.

ent as the Council would not have as much power over the Commission as it has now.

But on the other hand not changing the unanimity to qualified majority means that the balance between the institutions will change as the Commission gains power. The Treaties have provided that the Council may only unanimously amend the Commission's proposal. But as noted this was in a situation where there were only a few Member States. Therefore it would somehow seem to be against the Treaties to still keep the unanimity obligation. This is because the Treaties did not intend that it would be impossible to make amendments.

Nevertheless strictly from the Commission's point of view the unanimity obligation grants it more independence. Of course the Member States would still have the right not to act on a proposal.

4. The Commission's Part in the Implementation

The Commission has also other responsibilities than just making legislative drafts. The Member States are not fond of every legislative act that emanates from the Communities. This is so even though the Member States are represented in the Council that must approve every act. Therefore somebody has to watch over the implementation of the legislation made by the Communities. This job is reserved for the Commission which in some ways also works with the European Court of Justice.

As the Member States are the masters of the Treaties they have given the Commission the power to watch over themselves. This is interesting because it means that the Member States have given the Commission some powers but nothing more. From the Member States point of view there is the danger of the Commission trying to get more powers than desired.

This chapter will concentrate rather briefly on how the Commission makes sure that the legislation it has initiated gets followed. Therefore the different procedures are only outlined. The idea is to find how much the Commission has freedom at this stage. Comitology is part of this chapter as the Comitology procedure is divided from the normal committee procedures by calling the Comitology procedure an implementing procedure whereas the normal committees are preparing committees. After Comitology briefly will be studied how the Commission watches over the Member States and the other institutions.

4.1 Comitology

Although the Comitology procedure also uses committees, it differs from the regular consultation of the committees in that the creation of a Comitology committee is compulsory. The Comitology procedure is extremely important as it in some ways

takes away from the Commission its Treaty based right to make implementing legislation. On the other hand there have been many difficulties concerning the Comitology procedure and its use.

The Comitology procedure is seen as a light weight procedure in comparison to the normal procedure because the Parliament is not involved in it. What is the nature of the Comitology procedure? How does it affect the independence of the Commission?

4.1.1 What is Comitology and the Different Comitology Procedures

Simply put the Comitology procedure means that the Commission has to work together with a committee that is build up of nationals of the Member States. The Comitology procedure is used when the Council has made a decision and it needs implementation. The Council delegates the powers to make the implementing legislation to the Commission. The Commission works as the implementing body although it is watched over by the committee. There are four of these different Comitology procedures

In the *advisory procedure* the Commission has to forward its draft to the committee which then tells its opinion to the Commission. The Commission must consider this opinion but it is not obliged to make any changes based on it. On the other hand the Commission must report to the committee on how the Commission has acted based on the committee's opinion[1]. The Council has no part in the decision making under this procedure.[2]

In the *regulatory procedure* the Commission must again forward its draft to the committee which then must either accept or reject it. In the latter case the draft is forwarded to the Council which must also make the decision whether or not to ac-

[1] Council Decision 99/468/EC Article 3.
[2] Defensor Legis 2001, 344.

cept the draft. If not, the draft goes back to the Commission which may forward it again or amend it and then forward.

In the *management procedure* the Commission makes an implementing measure. If the committee doesn't like the measure after it has been applied the Commission forwards it to the Council. The Council can modify it or even completely reject it by a qualified majority vote.

Under the management procedure in a situation where the Commission has to contact the Council there emerges the important question what will happen to the application of the measure meanwhile? In the field of common agriculture the Commission may by itself decide if it will suspend the application. If it will not then it is difficult for the Council to greatly change the measure. This naturally makes the Commission's position better.

But on the other hand in the field of regional development the Commission must suspend the application.[1]

The *safeguard procedure* differs from the others in that there is no committee appointed. The Commission makes its decision and must communicate with the Member States. If any Member State doesn't agree with the Commission it may notify the Council. The Council may change the Commission's decision, make a new one or annul it.

4.1.2 Thoughts on the Committees

What can be noted from the different procedures? First it seems that the Commission would have much power in the advisory procedure. The Commission does not have to act on the committee's opinion. Furthermore the Council does not have any powers to affect the decision made in the procedure which then makes the independence of the Commission stronger.

[1] Bergström 2005, 199.

The same applies to some degree to the management procedure. Some have even stated that the Comitology procedure puts the Member Sates' control over the Commission in jeopardy[1]. But how could this be? Even if the Commission doesn't listen to the committee, in three out of the four procedures the matter goes after a negative vote to the Council. And the Council represents the Member States in the Union.

Furthermore it must be noted that the Commission only gets to make decisions in the Comitology procedure if the Council so decides. This fact is supported by Nugent, who states that if the Member States are unable to agree on some matter or the matter for some other reason is difficult, the Council may not give the Commission the right to take implementing measures.[2]

4.1.3 The Council Tries to Improve the Procedure

Because the Commission and the Parliament weren't satisfied with the Comitology procedure the Council made some changes to it in 1999 by delivering the Council Decision 99/468/EC. But even if the procedure is now more simplified, the reasons for the unhappiness of the other institutions remain. The Council uses the regulatory procedure too much. On the other hand the advisory procedure is not used enough.[3]

So even if the Decision made things clearer, it did not mean that everything was all right. There was the concern of the Member States that the Commission would have too great powers in the implementation. On the other hand the Parliament feared that the Commission would be out of control and therefore wanted to

[1] Nugent 2003, 139.
[2] Nugent 2003, 140. See also COM(2001)130 final, 9 where the Commission says that the delegation procedure should be used more frequently to ascertain the correct objectives of the legislative act.
[3] Nugent 2003, 138. See also Bergström 2005, 19, which states that 26 of 707 regulations and directives adopted by the Commission didn't come through a committee. 78 different committees were used and of these 36 were mainly regulatory committees and only 3 were advisory.

have the right to reject the result if not satisfied with the outcome of the Comitology procedure.

4.1.4 The Parliament in the Comitology Procedure

Considering the Parliament the Commission would seem to be in a good position if the Comitology procedure will be used.[1] Nowhere is the Parliament mentioned, it seems like the decisions are made between the Commission and the Council. The Parliament has also noticed this.

The main worry the Parliament has is that the Comitology procedure means that the Parliament really can't influence the decisions made in the procedure. This situation is made worse from the Parliament's point of view because the Council uses the Comitology procedure in a broad area. The greatest problem is that the Council uses the Comitology procedure to amend decisions that have been made in the normal procedure[2]. In this way the Parliament is quite efficiently blocked out of the decision making.

On the other hand the European Court of Justice has confirmed that the Parliament must be heard every time the text has been fundamentally changed after the Parliament has given its opinion on it[3]. But this is not the whole truth. In the same case the Court stated that it is not forbidden to change the text of a regulation without noticing the Parliament even if it in the first place was made through the normal procedure.[4]

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[1] This is actually rightly so. The matters dealt with in the Comitology procedure are implementing matters and therefore highly technical. It seems that the members of the Parliament don't actually have the expertise needed to control or have a say in the procedure. Therefore the fact that the Parliament has gained powers in the procedure as shown later is not necessarily for the best of the Communities.

[2] In the normal procedure the Parliament and the Council have often together negotiated some kind of compromise.

[3] Case C-417/93.

[4] Bergström 2005, 236. More accurately the Court has stated in case C-240/90 that matters concerning the essential subject matter of a decision belong to the Council's area of competence and that the matters of implementation are the Commission's area. See Bergström 2005, 3.

The Parliament has fought for a long time for a better place in the Comitology Procedure. As noted some improvement has actually happened. In the preface of Council Decision 99/468/EC the Commission is required to report to the Parliament about everything that happens in the committee meetings. The Parliament actually has the right to state its opinion on the matters dealt with in the committee but the Commission is not obliged to react on it.[1] Also the Parliament's opinion must be taken into account if the Parliament feels that the Commission has overstepped the limits of its power.

A way in which the Parliament has tried to develop its position was seen for example in 1995.[2] The Parliament in its budgetary control position requested the Commission to provide a list of all the committee-involved matters dealt with. If the Commission would not respond the funding for the committees would be put on hold.[3] This situation was resolved but it shows how the Parliament does not take lightly the Comitology issue.

As Bergström has put it, the bypassing of the Parliament is a known fact but it may not go beyond any limits. The fact is that the Comitology may only be used if the matter dealt with is not too far away from an implementing measure.[4]

[1] The Parliament wanted to amend the Comitology procedure in such a way that if the Parliament did not agree with a proposal coming from a committee the Commission would be obliged to amend the proposal. This had been a life-long want of the Parliament. But on 2 September 2003 the Parliament approved a proposal that stated that the Commission must take into account the wishes of the Parliament. So the situation remained in which the Commission is not obliged to act on the Parliament's wishes.
[2] Although it must be remembered that this is not an individual or unique case.
[3] Bergström 2005, 241. The matter was only resolved in 1996 after the Commission had agreed to report to the Parliament, among other things, the results of votes in management and regulatory committees and beforehand the agendas of future management and regulatory committee meetings. Bergström 2005, 242.
[4] Bergström 2005, 232.

4.1.5 Different Ways to See Comitology

In this way the Commission does have more power compared to the Parliament.[1] But does this mean that the Commission really has more power? It would seem not so as the Commission still is under the control of the Council.

One way to see Comitology is as Nugent sees it. He sees it as a control mechanism on the Commission[2]. Is this really so? Article 202 EC states that the Council may confer powers of implementation on the Commission in matters the Council has decided. The Council may also keep the power to itself. The Council then can decide if it wants to give this power to the Commission. Still the Council may keep the power to itself only in specified cases, according to the Treaties[3]. The Council may also add certain requirements on the Commission[4].

So it seems that although the Treaties provide that the normal way is to delegate implementing powers to the Commission this is not actually the case. As de Zwaan states the Council keeps these powers to itself often.[5] This is again against the meaning of the Treaties.

If the Council so decides the Commission gains more influence on matters than what it normally has. Actually the Council's right to delegate powers to the Commission is more like an obligation. In this light it would seem that the Comitology procedure actually is a gift to the Commission.

If the functioning of the Comitology procedure is seen against the results there are some interesting notions to make. As Nugent states, the Commission does not often get negative opinions from the committee. But because the Commission usually knows what is going on and really knows how the Comitology procedures

[1] Here it must be remembered though that the Commission still has to take the views of the Parliament into account if it wants to get things done in the future.
[2] Nugent 2001, 270.
[3] Article 202 EC.
[4] Bergström 2005, 2.
[5] de Zwaan 2004, 58.

work it actually may change its proposals to be more positively received in the committee than the original draft the Commission sees needed. The Commission may even stop working on a proposal.[1]

Nugent also writes that the representatives of the Commission usually have no problems in getting proposal accepted through the committees[2]. But doesn't here the same problem arise as already mentioned? Doesn't the knowledge that the proposal must be accepted by the committees affect the decisions made by the Commission? Of course it is good if the Commission can cope with the committees but this does actually restrict the innovativeness of the Commission. It can't freely work for the good of the Union. The Community interest is in jeopardy and threatened by the good of the Member States.

Bergström sees the fact that the Commission does not have difficulties with the committees as some kind of proof that there is no conflict of interest between the Institutions. This, he states, is important because the legislation that controls the Comitology procedure is based on the assumption that there really is this kind of conflict.[3] The only reason for the committees to exist is the need to control the Commission which in turn indicates that there is some kind of conflict between the institutions.

Based on the assumption that the Commission makes the kind of proposals that the committee wants to see, it would rather seem that the Commission just evades this kinds of conflict by providing the kind of proposals it does. What would the Commission actually gain by making proposals that would cause a conflict? It doesn't have any real decision powers in the Comitology procedure. There would be no real possibility that a too innovative proposal would be accepted. If the Commission would cause conflicts the Member States could begin blocking more and more

[1] Nugent 2001, 270-271. On the other hand only with 32 of 3000 matters dealt with in a committee between 1993-1998 had the Commission any trouble with the Committee. Bergström sees this as a fruitful cooperation. Bergström 2005, 9.
[2] Nugent 2001, 271.
[3] Bergström 2005, 32.

of the Commission's proposals. As is remembered the Commission must keep good relations with the Member States.

According to Bergström the Commission in addition to knowing what might be accepted in the committee knows what the committee wants. This means that it might very well make proposals not merely because it knows that the committee won't reject it but also because it knows the committee wants this kind of a proposal.[1] It would seem that the Commission does not really have powers in the Comitology procedure. It merely acts as a body that fulfils the wants of the Member States.

Yet another point of view is that there are so little problems between the Commission and the committee because the Commission actually has great influence over the committee. This is not least so because the Commission chairs the meetings of the committee.[2] This is an interesting point but on the other hand at the same time the Commission loathes the Comitology procedure[3]. Why would this be so if the Commission could very much influence the decisions of the committee?

4.1.6 The Legality of the Comitology Procedure

The legality of the Comitology procedure according to Advocate General Dutheillet de Lamothe is questionable. He sees the procedure breaching the Treaties. In relation of the Commission the problems are as follows. The Commission is, according to the Treaties, independent in its legislative tasks. But the management committee invades this independence. It takes part in the Commission's work. Also if the

[1] Bergström 2005, 25.
[2] Dehousse 2003, 802.
[3] Dehousse 2003, 801.

Member States in the committee are against a Commission decision they can have the Council annul the decision.[1]

One important fact is that most of the EU legislation is implementing legislation and as such made by the Commission.[2] But the real problem with Comitology concerning the Commission is that the Commission should in fact be the institution responsible for most of the implementing and administrative legislation. The Comitology procedure puts this obligation or right in jeopardy[3]. It does this by being a control mechanism on the Commission's work.

There is an ongoing power struggle inside the committees as the Commission tries to get its legislation accepted but on the other hand the members of the committee try to control the Commission.

4.1.7 Some of the Changes the Constitution Could Make

Concerning the Comitology procedure the Constitution states that there are two different kinds of acts. The legislative acts would include European Laws and European framework laws. On the other hand the non-legislative acts would include delegated regulations and implementing acts. The legislative acts would be the ones that are adopted by the Council and the Parliament jointly and the non-legislative by the Commission.

The Commission would in some cases get delegated powers emanating from the legislative acts to amend and supplement them. The powers would not include the right to take part in very important matters or parts of the legislation. Furthermore the Parliament and the Council could intervene at any time without having to

[1] Gormley 2004, 36. For an opposing view see Vos 2004, 111, where she speaks of the committees that assist the Commission in the implementation of Community legislation. It seems that she sees the Comitology procedure as a procedure that helps the Commission rather than limiting its Treaty-based rights.
[2] Nugent 2003, 354.
[3] Defensor Legis 2001, 343.

use the committee in between. This would effectively take importance away from the Comitology procedure.[1]

Because of this concerning the Comitology procedure the Constitution would give the Commission more power as the Constitution would diminish the power of the whole procedure. It goes as far as to make the Commission almost the sole executive, according to Vos[2].

Vos also argues that if the committees would be less used the decision making would be more efficient. But she then continues by asking whether it still would be effective. She argues that the committees help to reach consensus and also helps in everyday implementation[3].

Again it must be kept in mind that the Commission should be independent. Therefore a situation where there would be no committees would be better from the point of view of the Commission. Vos argues that the committees help and that may be true. But on the other hand the Commission can accomplish the same by other means. The Commission consults Member States and other actors all the time, not least when it comes to implementing new legislation. It seems the Commission has made great efforts to make the consultation process more efficient. The good thing concerning the consultations is that the Commission still at the end of the day is the one who makes the decisions. This is not the case in the Comitology procedure.

4.2 The Commission's Understaffing and the Commission as a Watch-dog

There is a multitude of areas to regulate in the European Union. After one area is regulated, the legislation should be implemented in every Member State. Because of

[1] Vos 2004, 115-116.
[2] Vos 2004, 117.
[3] Vos 2004, 118.

this the number of areas to regulate must be multiplied with the number of Member States to get the number of areas to watch over.

If this fact is joined by the fact that the Commission is understaffed in the legislative work it is obvious that the Commission is badly understaffed in its watch-dog role. There just are too many things to watch over.

Because this thesis doesn't concern individual actors in the Member States as such one thing must be clarified. The local administration of a Member State works in the field of individual actors. Therefore it would seem that they shouldn't be included here. But it must be kept in mind that the administration works under the surveillance of, and rules laid down by, the Member State. Therefore it is justified to include the local administration here.

4.2.1 The Commission Tries to Solve the Understaffing Problem

Because of the understaffing problem the Commission can't send a representative to investigate every Member State's implementing status. As the Commission has acknowledged this it has come up with different solutions. Most of them none the less evolve around one basic idea which actually is very close to the solution found in the committee system. The Commission delegates its watch-dog powers to other organs.

These organs are usually not organs of the European Union as such but instead the administration of the Member States. This means that the Commission delegates its powers to the Member States that then delegate this power to the national administrative organ responsible for the given area.[1]

The Member States then have to report back to the Commission on the actions they have taken to implement. If the actions taken do not please the Commis-

[1] The Commission can't delegate vast powers to the Member States, as it is stated that the Commission may only re-delegate powers very strictly. The Delegated powers may not be open ended.

sion it may initiate, after a procedure, a case in the European Court of Justice. Therefore Nugent rightly states that the Commission doesn't actually directly take part in the implementing but instead monitors and makes rules.[1] The only major area where the Commission is directly involved in implementing is the competition policy.

Here lies one problem the Commission has with its watch-dog obligation. How can it really know what happens in the Member States? In other words does the administration of the Member State really implement the Community legislation even if the Member State has changed its legislation accordingly? It is not very easy to know how the national administration deals with its day-to-day work. This is one of the greatest problems the Commission has with its monitoring task as it doesn't have enough staff even to monitor the national administration to which it has delegated the implementation. And even more difficult the monitoring job gets when the national administration doesn't want to implement.[2] In these cases it may be very difficult for the Commission to find evidence about non-implementation.

4.2.2 The Basics of the Procedure

Based on these things, the basic model of the Commission's watch-job is as follows: The Commissions sees to it that every Member State has implemented the legislation correctly. This is accomplished by the Member States making reports to the Commission of how they have changed their legislation.

The Commission will also launch target-based contracts to ensure the effective implementation of legislation.[3] The Commission makes tripartite contracts between itself, a Member State and local authorities.[4] This goes hand in hand with the

[1] Nugent 2001, 11
[2] Nugent 2001, 276
[3] COM(2001) 428 final, 14.
[4] COM(2002) 275 final, 5.

need to take the local situation into account when implementing. The Commission tries to make a contract with the abovementioned parties on some specified area.

The Commission doesn't just give the rights to implement as they see fit to the Member States or local administration. It also obligates them to notify it on how they transpose the Community law into national law. This is done by adding a provision that obliges to this in every draft the Commission prepares.[1] This gives the Commission more reason to notify the Member States if they don't oblige with the legislation. It also gives the Commission the possibility to know better how the Member States are implementing.

But it must be kept in mind that the changes to legislation are not the only criteria according to which the decision is made whether or not the Member State has fulfilled its obligations. The new legislation must also be actually used and followed. In this way the importance of the local administration comes to be seen.

It is not the Commission's task to choose whether the local administration or the Member State itself is to blame for a breach. Therefore the Commission will contact only the Member State if the implementation is not correct. It is the Member States responsibility to see to it that its administration follows the law.[2] If some individual actor does not follow the law it is the administration's responsibility to react. Therefore the Commission will react if some individual breaches the law and the national administration doesn't act on the matter. Because of this some individual's breach may be the reason for the Commission to act against a Member State.

[1] COM(2003) 770 final, 9.
[2] ECJ has decided in Commission v. Belgium in 1970 that the Member State is liable no matter what organ is in breach of the Community law, even if the organ is completely independent. Case 77/69. Timmermans 2004, 156.

4.2.3 In Case of Infringement

Article 226 EC regulates how the Commission must act if it sees an infringement. It states that if the Commission considers that a breach has taken place the Commission shall act on it.

The procedure which the Commission uses will not be dealt with in detail here but the outline will be made. When the Commission comes aware of a breach it will contact the Member State in question. Based on the answer the Commission either is pleased or not. In the latter case the subject will eventually be forwarded to the European Court of Justice.

The wording of Article 226 EC indicates that the Commission must proceed with the infringement proceedings if it considers that a breach has happened. But is this really so? Hartley seems to be of the opinion that in the legal point of view the Commission has to proceed if it sees a breach.[1]

4.2.4 The Reality of the Proceedings

All this is how things should be and therefore only theory. What really happens is more complex and unclear. Because the Commission has to work with the Member States directly and also in the formation of the Council of Minister's and in the European Council there is much subtlety in the proceedings concerning an alleged breach. The Commission doesn't want to make the Member States angry as this would also make the Council angry. Therefore the Commission first makes only unofficial contacts with the Member State in question.[2]

[1] Hartley 2003, 312

[2] Nugent 2001, 262. See also COM(2001) 428 final, 26: The Commission states that it is willing to continue the practice in which it negotiates with the Member States before going to court. In the Commission's words this gives it important feedback on how matters are implemented. Also it is faster to negotiate than going to court.

The Commission has stated that it seeks to find more flexible means to implementation.[1] The Commission already is doing this but his would mean that the Commission would still more negotiate with the Member States and would allow them to implement the Community legislation in a way that is most effective in the given state. Therefore the local conditions must be taken into account. On the other hand more uniform results between different Member States are sought after.[2]

Because of the same reasons the Commission never rushes its decisions. Instead it uses time to check every detail and only as a last resort goes to court.[3] The aim is to clear the matter with as little noise as possible. Therefore the Commission uses soft law methods. That is why the Commission gives the Member State a chance to correct itself before going to the Court.

As Nugent states the Commission uses any means possible to get its monitoring task fulfilled. Therefore it wants to get all the information from the Member States that concerns new legislation. To keep up-to-date the Commission checks very carefully all the information it gets from the Member States.[4]

The ideal situation would be that every Member State would completely implement and enforce the legislation needed. The Commission's responsibility actually is to make it so. But in reality the Commission doesn't even think about doing so. There just are matters that are too sensitive for the Member States to fully implement legislation.

The Commission also knows this and because of this doesn't follow every breach to the end. Some things it just lets go. This, again, is because the Commission must seek the way in which to get the European Union function correctly, or at least as correctly as possible.

It must be remembered that the Commission can't brutally press its opinions through. The Commission must take into account the Community Interest, which

[1] COM(2001) 428 final, 4.
[2] COM(2001) 428 final, 5.
[3] Nugent 2001, 282
[4] Nugent 2001, 278-279

means that the Commission's aim is to work smoothly with the Member States. This sets some limitations to the Commission's power. Because the Commission is not completely independent from the Member States every action that should be taken is not taken.

Hartley sees too the problems the Commission has. Even though he states that the Commission is legally bound to act, in reality it can't always do so. Hartley comes to the conclusion that the Commission has some discretion but on the other hand it also has a duty to perform.[1]

In addition to some areas being too sensitive for the Commission to start proceedings against a Member State, there are some cases which the Commission won't follow through because of practical reasons. The Commission won't for example use the infringement procedure against a Member State if the Highest Court of the State has ruled against the obligations laid down by the Community legislation. It would be very awkward for the Member State to be prosecuted in such a situation because often the highest court is completely independent and protected by the constitution of the given Member State. Therefore the Commission does not want the Member State to change the decision made by the highest court but instead the Member State may be liable to pay damages.[2]

The Commission's aim is to get the actual administrative or legal rule that has created this breach in line with the Community obligations. In other words the Commission tries to find and react on the cause not on the effect.[3]

[1] Hartley 2003, 313.
[2] Timmermans 2004, 157. But of course in some cases the Commission does act even if the Member State will get upset. Often the case is such that the highest court of a Member State asks the European Court of Justice how some Community legislation should be interpreted and doesn't act before it gets the matter cleared. On the other hand some highest courts just make decisions completely without paying attention to the Community legislation. In the latter cases the Commission simply has to act.
[3] Timmermans 2004, 158.

4.2.5 Regulatory Agencies

The Commission has realized the problems it has with keeping in touch with the real implementing status.

One way in which the Commission seeks to improve its watch-dog status is by creating new regulatory agencies.[1] The agencies would work only in clearly defined areas. They would have some independence but work in the framework made by the legislator. Because they would work in clearly specified areas they could gain expertise in their field. This would then allow the Commission to concentrate on its core tasks.[2] In this way the agencies would also take off some of the Commission's workload. This in turn will make the Commission's understaffing little less problematic.

The agencies can make individual decisions but they cannot adopt general regulatory measures[3]. They must be supervised and controlled effectively and they may not make any political decisions or act if the case before it is too delicate. The agencies should be fully accountable to the institutions and to the public. In other words their decision making should be as transparent as possible[4]. This all leads to the conclusion that the agencies are not there to make the balance between institutions any different.[5]

This means that the agencies are very useful for the Commission as the Commission's workload lessens but on the other hand the other institutions can't use the agencies in such a way as to undermine the Commission's status. The agencies do not take power actually away from the Commission, as the Commission gets to make the initiative concerning the creation of a new agency. Moreover the Commis-

[1] COM(2001) 428 final, 5. See also COM(2001) 428 final, 24: „The Treaties allow some responsibilities to be granted directly to agencies".
[2] COM(2001) 428 final, 24.
[3] See COM(2002) 718 final, 7, where it is stated that the powers of the agencies differ widely. Some of them only assist the Commission by making studies for the Commission to use in its preparatory work. On the other hand the agencies may also make specific decisions and make inspections and checks concerning the Commission's legal guardian role.
[4] COM(2002) 718 final, 5.
[5] COM(2001) 428 final, 24.

sion also has the right and responsibility to make an intervention if the agency seriously malfunctions[1].

But then again it must be made sure that the agencies "have genuine autonomy in their internal organisation and functioning". It is important that they are as independent as possible because they should make decisions only according to the facts. This means that the decisions of the agencies should not be coloured by politics.[2]

On the other hand the procedure in which the agencies are created does not only include the Commission. The Commission does make the proposal for a new agency but the Parliament and the Council make the final decision.[3] It would therefore seem that the decision to create an agency is much like the legislative procedure. In other words the Parliament and the Council have some power over the agencies and the Commission.

Although the Commission has the right to propose the creation of a new agency there are some restrictions. First of all the agencies cannot operate in fields for which the Treaties have given a direct power of decisions on the Commission[4]. Also the Commission must see to it that at the European level the integrity of the executive function remains. Especially the Commission's "capacity to assume responsibility to the satisfactory general exercise of that function" must be protected.[5]

Always when talking about the Commission's decision making the legal basis must be kept in mind. This is so also with the agencies. The regulatory agency is a way to implement of a Community policy. Therefore its creation must be based on the same legal basis as is the policy itself.[6]

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[1] COM(2002) 718 final, 6.
[2] COM(2002) 718 final, 5.
[3] COM(2001) 428 final, 24. See also COM(2001) 428 final, 24 where it is states that the Commission will define the criteria according to which new agencies are to be created. It seems that the Commission is willing to make its decision making more open and understandable.
[4] COM(2001) 428 final, 24.
[5] COM(2002) 718 final, 5-6.
[6] COM(2002) 718 final, 7.

4.2.6 The Problem of Unclear Legislation

The local administration must follow the new legislation. Here lies one problem the Member States have. Sometimes the legislation coming from the Communities is unclear on the matter as to what should exactly be achieved by implementing some directive. This problem is made more difficult because there is no way of getting a swift answer from the Commission.[1] This can cause much new work for the Commission as it has to contact the Member States that have implemented the Community legislation incorrectly.

As Sue Arrowsmith states it is not the Member States job to try to find out what a directive really seeks to achieve but instead it is the European Court of Justice's[2]. In the eyes of the Member States the Commission would have a better reason for prosecuting them for a breach if the Community legislation would have been clearer. This can also result in the Member States frustration concerning the Commission which in turn can make the Commission's co-operation with the Member States a little more difficult. The Commission won't be as respected as before.

One way in which the Commission has tried to solve this problem is by publishing guides on how to implement some directives. The problem with these has been that they are not very detailed and mostly not up to date.[3]

4.2.7 Conclusions

From the Commission's point of view this is clearly a matter which restricts the Commission. On the other hand because the Commission is obliged to further the Community Interest it clearly must work as it does. And because the Community

[1] Bekkers, de Moor-van Vught and Voermans 1998, 467. It must be noted though that the Commission seeks to make access to it better at the moment.
[2] Arrowsmith 1998, 497.
[3] One might ask whether this is the right solution at all? The main problem is the bad presentation of the Community legislation. There should be no problem to which such guides are the answer.

Interest exists is it even desirable that the Commission could have more power in this field? If the Commission would follow every case to the end the Union would not work.

The fundamental problem here is that the Commission does exist because of the Union and it has to work for the best of it. Therefore it can't be as effective as it actually could be. The Commission must always walk the thin line between the Community Interest and its other obligations.

Again the Member States limit the Commission's powers by not funding it adequately. In this case on the other hand this is actually more understandable because the Commission would need unlimited resources to be able to cope with its watch-dog status alone.[1] Nevertheless it still is a restriction. Now the Commission has to use national reports and make individual control visits to keep up with the situation.

The multitude of implementers also makes it difficult to reach uniform sanctions. To get rid of this problem the Commission has the right to prescribe the sanctions the Member States should use in case the Community legislation is breached.[2]

In addition the Commission uses networks to make the implementation more coherent. These network are formed around an individual Commission official and the corresponding national official. The networks change information for example on how to implement in different cases.[3]

But delegating the implementation responsibility to the Member States is not necessarily only a bad thing. In some cases the Member States know better than the Commission what will function. Therefore the Commission doesn't require uniform conformity to the law in all cases.[4]

And it must be remembered that every single Member State is not trying to sneak out of responsibility. Many actually are very obedient and try to fulfil their

[1] Nugent 2001, 263.
[2] Mortelmans 1999, 58.
[3] Kassim 2003, 160.
[4] Nugent 2001, 263.

obligations. This is shown by Roel de Langes example, in which there rose a panic in the Netherlands as there was some reason to suspect that all new legislation was not reported to the Commission.[1]

4.3 Legal Guardian

The Commission also acts as a legal guardian. In this position the Commission watches over the Member States and sees to it that the legislation of the Communities is respected. If it finds a suspected infringement it may contact the given Member State and it may also impose financial penalties.

The Commission may get to know infringements made by Member States by a few different ways. Of course the information gathered by the Commission is important and the on-spot checks made by its officials also. When dealing with first line implementation the Commission has to work together with the national officials when making inspections and on the spot checks.

In addition to this the Commission gets information from individuals in the Member States.

The chefs of the Commissioner's cabinets get together four or five times each year to discuss matters of possible infringement. If they find that an infringement is possibly happened the matter goes to the College. Here again the influence of the cabinets may be seen.[2] And the problem stays the same: the staff of the cabinets is in part chosen by the national governments.

But as well as watching over the Member States the Commission also has the obligation to watch over the European Parliament and the Council of Ministers.[3]

[1] de Lange 1999, 35.
[2] Stevens and Stevens 2001, 235.
[3] On the other hand the Parliament and the Council also keep a watching eye on the Commission. They use the same Articles as does the Commission.

The Commission may start proceedings against some other institution in the case of failure to act. This has been regulated in Article 232 EC, which states that if an institution has had the obligation to act but has not, then the other institutions or a Member State may bring the case before the Court. Naturally the Commission is included in the term "institutions".

In Article 230 EC the Commission is given the right to seek to annul an action made by the other institutions. The Court has stated that an act that can be annulled is an act binding in law[1]. Therefore the Commission can look further than just the name of the act it wants to challenge. If the nature of the act is "binding in law", then the Commission has good changes that the Court will also see it this way.

An act which the Commission may challenge in this way was for example the ERTA-case, in which the Commission challenged an act of the Council. The Commission stated that the Council had overstepped its Treaty-set boundaries when it made the decisions concerning the European Railroad because the decision would have belonged to the Commission's responsibilities. The Court did not accept the Commission's views but it stated that the Commission had the right to take the case before the Court.[2] This kind of proceedings where the Commission challenges an act of the Council are not very rare.[3]

As the cases needing the qualified majority vote in the Council are better for the Commission than cases that need unanimity, the Commission has frequently used the right to seek annulment of acts of the Council if the Council has used procedures needing unanimity instead of qualified majority.[4]

The Commission's powers before the case moves before the Court are quite good. The Commission has much discretion when deciding how to act. It may even not act at all. But again the Commission has to take very carefully into account the opinions of the Member States. It can't afford to alienate them. The power of the

[1] Brown & Kennedy 2000, 137.
[2] Brown & Kennedy 2000, 138. Case 22/70.
[3] Brown & Kennedy 2000, 142.
[4] Brown & Kennedy 2000, 143.

Member States can be seen in the fact that the Commission won't press charges if the matter is too sensitive. On the other hand if the Commission sees it fit to go before the Court it will fight vigorously for its cause.

4.4 The Ways in which the Commission Deals with the European Court of Justice

The Commission works together with the European Court of Justice. If the Commission is not satisfied with the outcome of the negotiations concerning the implementation of some Community legislation with some Member State, it shall refer the case to the Court. This doesn't mean that the Commission automatically wins the cases before the Court.

4.4.1 The Procedure as an Effective Means

For the Commission to be able to refer a case to the Court the Commission must have given a reasoned opinion for the Member State concerning the claimed infringement. In the opinion the Commission must give a detailed report on why it claims that the Member State is breaching the Community legislation.[1] Also if the Commission has not mentioned something in the reasoned opinion, it may not refer to the missing thing in the Court proceedings.

The number of the cases in which the Commission uses the infringement procedure has steadily increased.[2] This shows on the other hand that the Commission seeks to fulfil its obligations vigorously. But on the other hand it may be that the

[1] Hartley 2003, 313.
[2] In 2003 the Commission initiated 2709 infringement proceedings whereas the number in 2004 was 2993. On the other hand it seems that the Commission has very effective actors working for it as of the proceedings it initiated only 285 were initiated on base of the Commission's own investigations. See COM(2005) 570, 3-4.

Commission overuses this power. Brown and Kennedy state that the infringement procedure may lose its effectiveness if overused. This would also undermine the decisions and authority of the Court.[1] After all the proceedings before the Court are the biggest guns the Commission has.[2]

This increased use by the Commission of the infringement procedure indicates that the Commission sees this as an efficient way of securing correct implementation. This seems to be true, as although the Commission doesn't automatically win every case it still wins most of the times. If the Commission has formed the reasoned opinion correctly and with enough detail and has also followed other rules correctly, it is the Member State in most cases that gets proven guilty before the Court.

4.4.2 In Case the Offender is Found Guilty

If a Member State is proven guilty in the Court's eyes, it will be convicted to change the offending legislation or procedure. The Member State is obliged to heed to the judgement or it again breaches the Community law. In theory it would be possible to initiate new proceedings against it on these grounds but in reality the Commission only seldom uses this possibility. One reason for this is that the Member States obey the judgements amazingly well.[3]

The relative good obedience of the Member States is noteworthy because before the introduction of the financial sanctions neither the Court nor the Commission had any real powers to force the Member States to obey. This meant that there was a possibility for the judgements not to be taken seriously. But, as stated, this didn't happen.

[1] Brown & Kennedy 2000, 115-116.
[2] Then again this doesn't seem to be the case as the Commission uses mostly negotiation before all, and is very careful when going to Court.
[3] Brown & Kennedy 2000, 118

Be it as it may, the Commission got the power to enforce even more efficiently by setting a penalty payment if the judgement was not heeded. The Commission can ask the Court to set a penalty in case the Member State doesn't fulfil the meaning of the judgement.

Brown and Kennedy state that this power will not have any practical meaning because the judgements are so fully complied with.[1] But it seems that the additional need to comply with the judgement was welcome news especially now as the Communities are expanding. After all, the Commission vigorously seeks to put the offenders before justice.

As an example here may be noted the case Commission of the European Communities v French Republic[2]. In this case France had not obeyed a judgement made some 18 years before. The Commission first contacted France and warned it to heed to the judgement and threatened with financial penalties. France did not obey and the European Court of Justice judged that France was liable to pay 20 million Euros.

The Court decided that it was enough for the Commission to indicate in two reasoned opinions that there was a threat of financial penalties. This meant that the Court could impose these penalties on France.[3]

This decision of the Court means that the Commission can proceed in matters that are decided many years ago but haven't been followed through. On the other hand this demonstrates the possibility of a lump sum that may be imposed on a Member State for not obeying. The decision clarifies the situation in which a lump sum is seen as the best solution. In Paragraph 81 the Court states that it seeks to use the measure that will result in the Member State quitting the breach as soon as possible. The lump sum is seen as such a measure especially if the breach has existed for a long time.

[1] Brown & Kennedy 2000, 120.
[2] Case C-304/02
[3] C-304/02 Paragraph 95.

4.4.3 Conclusions

If the Commission just follows the rules it does have a lot of power over the Member States if it decides to "prosecute". On the other hand it must be taken into account that the Commission doesn't very lightly take cases before the Court.

The Court is one of the most powerful actors that can influence the Commission. If the Court decides a matter the Commission must obey. Therefore the Court has laid many rules for the Commission to follow in its day-to-day work. This is shown for example in the opinion of Advocate General Roemer as he stated that the Commission may drop the case if there is a possibility still to negotiate, if there was only minor infringement or if there is a major political crisis in the Member State concerned.[1] Although the opinions of the Advocates General are not binding, they may give some guidelines as to how the Court would see the matter.

As shown by the Advocate General Roemer example all influencing made by the Court is not necessarily bad for the Commission. Many times the Court has made decisions that have granted the Commission new powers or that have in other ways been in favour of the Commission.

It seems that in the Court procedure the Commission is in a different situation than in the legislative stage. The Commission has the right to prosecute the Member States and the Parliament and the Council too. It uses this right quite often. On the other hand it is very strictly bound by the legislation of the Communities and by the decisions of the Court.

Therefore it seems that the Commission has to follow the rules more strictly to be successful than in the legislative procedure. Before the Commission enters the Court-stage of its proceedings it has very much discretion as to what to do. But if the offender does not care to negotiate and the Commission brings the case before the

[1] Hartley 2003, 313.

Court it gets strictly bound by the rules. But if the Commission follows the rules, it will be successful in the Court.

As a result the Commission has very much power over the Member States, the Parliament and the Council. The Treaties have made the Commission a very powerful actor. This is natural as the Treaties must be followed. Because of this if somebody breaches the Treaties the Commission in most cases can't lose the case before the Court.

On the other hand if the Commission begins the infringement proceedings without enough reason, the Court will rule against it. This means that the Court has much power over the Commission. But unlike the situation in the legislative procedure[1] the Court does not limit the powers of the Commission. There isn't such a struggle between the Court and the Commission as there is between the Commission and the Parliament and the Council. This is naturally because the powers of the Commission and the Court are so different that they don't overlap very much.

[1] In which the Member States and the other institutions restrict the powers of the Commission all the time.

5. Wrapping Up

The first thing to consider regarding the question why the Commission is needed is the Community Interest. When the Treaties were created, the creators had in mind that the Communities need an institution that would be above the national interests: an institution that would have a better view of what is going on in the whole Communities and not just in individual Member States. Therefore the Commission was given the obligation and right to be independent.

The Commission also has the obligation to prepare legislation. Why is the Commission chosen to do this? The most logical answer is the independence of the Commission. The Commission is in a good position to make legislative drafts that don't further the needs of individual Member States but the whole Communities.

The making of new legislation requires expertise and staff. Expertise the Commission has and where it itself doesn't have it uses the committees. The Commission has developed a quite effective way of making new legislation. It has knowledge the other institutions do not have. It gains this knowledge not only because it asks the right actors but also because it is seen as independent and therefore the other institutions trust it[1]. On the other hand the Commission has the right to attend almost any meetings of the other institutions.

The Commission also is the only institution that is involved in all of the legislative phases. Therefore it has the best understanding of the case. This together with the other good things creates for the Commission a good position. The Commission has all what it needs to negotiate with every actor in the Communities. The Commission also uses this power all the time when preparing legislation.

Another reason the Commission is important is because it has an efficient system to watch over the implementation. The whole watch dog status would be im-

[1] This is what the Treaties want and would be the ideal situation. But as stated earlier this is not necessarily the case anymore. At least the Council seems to have lost faith in the Commission's independence.

possible if the Commission would not be independent. The Commission even works as some kind of prosecutor before the European Court of Justice.

Again it is very important that the Commission exists in this role because of its independence. If any other actor would deal with this area there would probably be some discomfort because the "prosecutor" would be seen as furthering the interest of some other actor than the Communities.

Here it must be remembered that the Commission is not the sole actor in the implementing area but it is mainly the Commission that watches over it.

If the Commission would not exist its tasks would be spread across the other institutions and they would therefore need new staff and the staff would need to be specially trained to sufficiently replace the Commission's staff.

This thesis' main purpose was to find out whether the Commission is independent or not. The answer is not quite clear or simple. It also depends on the subject. Many different procedures have been studied here and the situation is different in almost all of them.

It seems that in every turn the Commission's independence is protected first and foremost by the Treaties. So if one reads only the Treaties everything seems to be alright. But that is not the whole truth.

Many examples show that although the Commission is formally independent, it has to follow rules laid down by the other institutions or the Member States. The Commission formally does not have to follow the opinions of these other actors and they can't officially force the Commission to make anything. But in reality the Commission often has to make decisions that fulfil the wants of these other actors.

This is because the Commission isn't the sole deciding organ in the Communities. It has to work together with other actors to get things done. If it doesn't follow the wishes of the others the others can "retaliate" by jamming the whole legislative process or by making fundamental amendments to the drafts coming from the Commission. If the Commission makes the Member States too upset the Member

States may even make changes to the Treaties. If the situation is bad enough the Commission may find that it has again lost some of its powers.

Also the Commission doesn't have free hands to make the kind of legislation it wants because the other institutions have to accept the new legislation. They can make amendments to it or just let it lie for ever. The Commission does have the right to withdraw its proposals as long as the Council hasn't made a decision on it but nonetheless the result will be the same: The Commission doesn't get its will.

Of course the Commission doesn't have to fight for every legislative act it proposes. In fact many are accepted without any problems. But that is not the point here. There are different reasons for the Commission getting its proposals through but these do not include the strength of the Commission. The Commission does have some fruitful co-operation with the other institutions but it isn't independent.

There is a trend to make better legislation and governance. The Commission has to do this because the Member States and the nationals of the Member States are not happy with the situation as it is. There is too much legislation and it is too detailed and cumbersome. In addition the legislative procedure is claimed to be non-democratic and non-transparent.

The Commission has made much to improve the situation in the eyes of the Member States and nationals. This all does help the Commission to get more legitimate and better means to persuade the other institutions to accept its proposals without amendments. But then again the Commission loses power every time it decides not to regulate some area. It is true that better transparency and legitimacy in some ways gives more value to the Commission's proposals but the Commission still isn't independent.

This is clear in every phase of the legislative process. The Commission's independence is at stake because of the way it is nominated. In this way the Parliament and the Member States have great influence over the Commission. This is the case also before the drafting begins and moreover after the drafting has begun. At this stage all the different actors and interests working in the Communities influence the

Commission. The most worrying part of this is that the Commission is not protected against these influences. It seems that many of these interests get through as even the Commissioners are not as independent as should be.

The way in which the other actors get to influence the Commission is against the wording of the Treaties. Therefore the legality of the actions of the Communities is not complete.

Even though the Commissioners are not chosen directly by the people of the Union the problem becomes only bigger as the Commissioners and other staff of the Commission are influenced by other actors. Therefore nobody seems to know where the new legislation comes from.

Of course there must be some kind of a control mechanism that monitors the workings of the Commission. But at the moment it seems that there is overt control. This is mostly executed by the Member States, the Council and the Parliament. This problem comes to be as all the actors in the Communities fight for more power. It is only natural that every actor in the Communities seeks more power. But it is not good for the Communities if the other institutions try to force the Commission to make new legislation on the basis that it would increase the power of these institutions.

The Commission can’t quite fulfil its job of protecting the Community Interest if the other institutions get in the way too much.