

DIVESTING POWER – EC COMITOLOGY, GMO APPROVALS, AND THE  
ABDICATION OF POWER BY MEMBER STATES

by

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## **ABSTRACT**

Comitology procedure is the main decision-making mechanism of the European Community (EC) and from empirical records to date it appears to be an extremely efficient way of reaching consensus amongst the Member States. However, when attempting to reach a decision regarding the approval of Genetically Modified Organisms (GMO), the Comitology procedure consistently fails and Member States divest their decision-making responsibility to the Commission

This paper analyzes the decision-making dynamics that lead to such a decision. It argues that the external pressures on the Member States and the Commission prevent deliberation and consensual solutions. Furthermore, the Comitology procedure itself exacerbates the conflict between states and prevents deliberative methods from being utilized. Member States strategically divest themselves from the responsibility to make decisions and “pass-the-buck” to the Commission. The paper concludes that the issue of GMO approvals should be taken out of Comitology as further failure will increase dissatisfaction of the European institutions and lead to more democratic deficit.

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# 1 INTRODUCTION<sup>1</sup>

## 1.1 Relevance

The European Community (EC)<sup>2</sup> makes decisions on policies that have direct effect in a geographical area of more than 450 million inhabitants and yet the study of its decision-making dynamics often lags behind the numerous academic endeavors to explain its past-present-future evolution<sup>3</sup> This paper follows in the wake of recent<sup>4</sup> forays into the study of Comitology<sup>5</sup>, arguably the most important tool in the Community's decision-making tool-box, by attempting to modestly contribute to its theoretical and operational understanding through an analysis of a particularly unique case study, that of the authorization procedure for Genetically Modified Organisms (GMOs).

Comitology is often referred to in academic literature as “omnipresent”<sup>6</sup>, “most difficult conceptual and normative” challenge to the study of European decision-making<sup>7</sup>, “probably the most fervently contested interinstitutional battleground between the Commission, Council and the Parliament”<sup>8</sup> and an important variable “in the historical process of state-building in Europe.”<sup>9</sup> As Joseph Weiler concluded, Comitology is of great importance to the understanding

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<sup>1</sup> Research for this MA Thesis was conducted in conjunction with Dr. Yves Tiberghien's project on worldwide GMO regulation, funded by the Canadian Social Sciences and Humanities Research Council.

<sup>2</sup> Only the First Pillar has truly decision-making powers. Therefore, throughout this paper we will refer to the decision-making actor as the European Community (EC) rather than the European Union (EU).

<sup>3</sup> Jeffrey Lewis has as recently as in a 2003 edition of *Comparative Political Studies* commented that Comitology “has suffered from a kind of benign neglect in EU studies.” Lewis, p. 97.

<sup>4</sup> While Comitology is not a new concept, the watershed of its research occurred in 1997 with a special edition *European Law Journal* that was largely dedicated to its study.

<sup>5</sup> Can also be referred to as committee governance, will be capitalized throughout because of its definition here as an important institutional concept of the EC, not just a mechanism of governance. Throughout the paper, Comitology will refer to decision-making mechanism using “regulatory committees”. For an explanation of what Comitology is, please refer to Chapter Three.

<sup>6</sup> Christiansen and Kirchner, p. 1.

<sup>7</sup> Everson, p. 209.

<sup>8</sup> Haibach, p. 1.

<sup>9</sup> Wessels, p. 209.

of the entire EU project and can be characterized as “a new sub-atomic particle, a neutrino or a quark.”<sup>10</sup>

However, due to only the recent increase in academic interest, the theoretical “battle-lines” are still murky and the subject allows for considerable interpretive maneuvering. In this situation, any case study that illustrates deficiencies in the contemporary understanding of the process of Comitology should be a welcome addition and should lead to an adjustment of the dominant paradigm that has explanation of Comitology dynamics oscillating between the supranational/intergovernmental divide.

The decision-making mechanism of Comitology operates along the agent-principal axis where the Member States are the principals and the Commission is the agent. The Member States confer on the Commission the power to act as an agent on their behalf both because of the “complexity of society”<sup>11</sup> and because it ensures “efficient co-ordination mechanisms between the different levels of government.”<sup>12</sup> Comitology committees “serve as a forum in which the views of interested parties may be aired and likewise provide the Member States with a means to ensure their continuing influence over EC decision-making [...]”<sup>13</sup> Member States want to limit the “bureaucratic drift” of the Commission, defined as “the tendency of bureaucratic agents to follow their own interests rather than those of their legislative principal.”<sup>14</sup>

Committee governance in general refers to the process in the European Community in which Commission proposals are commented on or regulated by Member State formulated committees,

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<sup>10</sup> Quoted in Joerges, p.114.

<sup>11</sup> Neuhold, p. 5.

<sup>12</sup> Everson and Snyder, p. 207.

<sup>13</sup> Vos 1997, p. 229.

<sup>14</sup> Ballman et al., p. 555.

whereas Comitology specifically refers to the regulatory committees which have considerable control over Commission proposals. These committees are a step between Commission proposal and Council approval, so that the committee essentially acts on behalf of the Member States. The Council decides, on a Commission proposal, whether to establish a Comitology committee for a certain policy and in general Comitology is usually used in policies for which the Member States want to retain considerable regulatory control, such as foodstuffs, health and veterinary regulations. More than 65 per cent of all expenditure-related legislation uses the Comitology procedure for implementation<sup>15</sup>, clearly illustrating the importance that the Council places on this tool.

Comitology, as a process, starts with the Commission proposal, which the regulatory committee votes on through qualified majority voting (QMV). There are three possible decision outcomes in the regulatory committee:

1. Proposal is adopted through QMV majority (committee votes in favor of the Commission proposal) > Proposal adopted by the Commission;
2. Proposal is turned down through QMV majority (committee votes against the Commission proposal) > Referral to the Council;
3. Proposal is not decided on as no QMV majority is established (committee fails to reach a decision on the Commission proposal) > Referral to the Council.

The first outcome results in the adoption of the proposal, whereas the second and the third both lead to a reference to the Council, which then has three possible decision outcomes as well:

1. Proposal is adopted through QMV majority > Proposal adopted by the Commission;

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<sup>15</sup> Dogan, p. 52.

2. Proposal is turned down through QMV majority > Commission can resubmit the proposal to the committee as either a) amended proposal or b) same proposal or can c) initiate a legislation change through a proposal for a new legislation;
3. Proposal is not decided on as no QMV majority is established > Commission is entitled to adopt the proposal.

This paper deals with the third decision outcome in that it tries to explain the dynamics behind the decision making procedure that results in the Commission adopting the proposal despite the lack of QMV majority either in favor or against it in both the committee and the Council stages of the Comitology procedure. We should note, however, that it is not clear whether the Commission is *required* to adopt the proposal in case of a failure to reach QMV majority in the Council. The Commission has declared that in “‘particular sensitive sectors’ [it] would not go against ‘any predominant position which might emerge within the Council against the appropriateness of an implementing measure.’”<sup>16</sup> Commission would not declare such a position were it not legally capable to decide *not* to adopt a proposal despite a Council indecision. Fundamentally, the Commission still seems to have a choice in whether it wants to adopt its own proposal following a Council indecision. This may be an important point of departure for academic researchers wishing to use game theory modeling of this particular outcome.

It is further necessary to address the issue of “failure” of Comitology and whether this is significant or essentially even a proper way of understanding the outcome being tested. The Comitology procedure accounts for this outcome, it is in the genetic make up of governance by regulatory committees. Therefore, it is an efficient mechanism for a supranational institution,

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<sup>16</sup> Pollack, p. 133.

which has received competency in a specific policy area, to come to a decision in face of indecisiveness of the member states.

However, we argue that in fact it *is* a failure for three general reasons. First it is not perceived as legitimate decision-making. The debate on the democratic deficit<sup>17</sup> is well served by many of our empirics. If Member States are “passing the buck” to Brussels, this illustrates a considerable democratic deficit and should be of particular concern for the EP.<sup>18</sup> It also seems to reaffirm the argument that “Were the EU to apply to itself for membership, it might fare worse than, say, Turkey.”<sup>19</sup> Politically sensitive decisions made by the Commission without support from the Member States feed into the distrust of EU institutions and threaten legitimacy.

Considering the failures of The Constitutional Treaty in the summer of 2005, a treaty that was to underline “the importance of direct engagement of citizens and representative organizations in the policy-making process”<sup>20</sup>, we should take our conclusions regarding Comitology decision-making seriously. When governments decide to “pass-the-buck” to Brussels, they may essentially be increasing the general negative feeling concerning democratic governance of the EU amongst the population. It is no wonder then that in their research, Karp et al. conclude that the “most knowledgeable are more likely to view the democratic performance of the EU with skepticism”<sup>21</sup> (in direct opposition to what happens on the national level). The answer to this puzzle is very simple, the more people learn about the EU and its decision-making mechanisms (such as Comitology) the more they will realize how undemocratic it is. Those who see an incredible amount of consensus in Comitology and praise its efficiency should take into

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<sup>17</sup> In terms of how Comitology may increase the democratic deficit please refer to Neyer 2000.

<sup>18</sup> On Parliament’s considerable disdain of Comitology see Bradley.

<sup>19</sup> Joerges, p. 135 and see also the first paragraph of Demmke.

<sup>20</sup> Crum, p. 452.

<sup>21</sup> Karp et al., p. 271.



consideration that the true test of its democratic essence is not passed with non-politicized regulatory proposals that the people of Europe have no care for, but rather exactly the kind of issues that the GMO case study characterizes.

Furthermore, the case study here is one of a failure of Comitology in that Member States themselves are divesting their responsibility to make a decision and then a number of them end up introducing safeguard clauses to negate the effect of the decision made by the Commission. The recent negative (from EC's perspective) WTO ruling placed great emphasis on the role of these safeguards clauses. It is a suboptimal outcome to allow a GMO event to be approved and then enact safeguard clauses.

This brings us to the third failure which is the fact that not coming to a negotiated agreement invites outside actors, like the WTO, to attempt to resolve/influence the impasse, which simply further exacerbates the situation. Making concessions through bargaining at the intergovernmental stage would be the optimal outcome for Member States.

## 1.2 Case Study of GMO Approvals

Our case study is the GMO product authorization procedure. Since December 2003, 19 votes have been taken at various stages of the Comitology process (regulatory committee or the Council) and *not a single meeting resulted in a qualified majority vote (QMV)<sup>22</sup> in either favor or against the Commission proposal*, thus leading to Commission pushing through its original proposals in spite of a considerable Member State opposition<sup>23</sup> The empirical data clearly indicates that the inability of Member States to come to a decision through the Comitology procedure in terms of the GMO approvals case is significant and a reality behind which are causal dynamics that need to be elucidated.

There are four general research questions before us in terms of the GMO case, although this research paper will only concentrate on the first in its analysis and the second in its overall assessment of Comitology:

1. What dynamic explains the case in which the regulatory outcome continues to be passed down the Comitology chain until the Commission adopts it in its original form?
2. Can we infer certain mechanics from the case of GMO product authorizations or is the particular case in question *sui generis* and thus an insignificant phenomenon, or at best “an exception that proves the rule” of currently understood mechanics (generally those of intergovernmentalism/deliberative supranationalism)?
3. What does the history of the evolution of Comitology tell us about the GMO case, and vice-versa, what does our case study illustrate about the evolution of Comitology?

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<sup>22</sup> It should be noted, however, that in the Council meeting on June 24<sup>th</sup> 2005 the Council decided with an overwhelming QMV majority to reject the five separate proposals of the Commission terminating national bans on five GM products. However, this was not a vote on GMO product approvals and so is not counted along with 19 cases. Nevertheless, we will take it into consideration later on in the paper. Information on the voting can be discerned from Friends of Earth website.

<sup>23</sup> All data is provided by the Friends of Earth Europe website at [http://www.foeeurope.org/GMOs/pending/votes\\_results.htm](http://www.foeeurope.org/GMOs/pending/votes_results.htm) since the voting records of the regulatory committees and the Council are kept confidential. This fact further illustrates/explains the difficulty of researching Comitology.

4. How is this particular case relevant to the overall understanding of the EU, does it reveal something about the debate on democratic deficit, how does it relate to the study of the evolution of the EU?

While the last two questions are the most intriguing and reveal the significance of this research in the larger context of EU integration study, this paper will largely concentrate on the first two. We want to understand the causal mechanics affecting the dynamics of decision making in Comitology that lead to the kind of output exemplified by the GMO approvals case. We also want to attempt to generalize the specifics of our case study that may initiate the same type of outcomes from the Comitology procedure (is this what happens when an issue is polarized/politicized, is this what happens when Member States look to divest themselves of responsibility to make difficult decisions, etc.). Intuitively we will address the current theoretical explanations that dominate the study of Comitology and attempt to conclude whether/how they should be amended, improved or altogether replaced.

The causal argument therefore is that external pressures on the Commission (mainly from the WTO case) have caused it to eschew deliberative mechanism in order to force through GMO approvals while at the same time external pressures on certain Member States (in terms of interest groups and public outrage and how these influence their domestic politics) force them to take a firm position that is in extreme opposition of the Commission. Instead of providing incentives for the stalemate to be solved, the structural characteristic of the Comitology procedure insulates the Commission from having to modify its preference while at the same time giving the Member States an excuse to divest their decision-making and “blame Brussels” in the face of domestic criticism.

Furthermore, we identify that a dynamic of "strategic institutional decay" is in operation as Member States continue to divest themselves of the power and responsibility to resolve the impasse largely because the structure of Comitology as a process does not create sufficient incentives and support for them to conduct bargaining and resolve the situation. Aside from the "failure" of Comitology in the specific case of GMO approvals, it also indicates an overall poor "fitness" level of the European Community decision-making system. This can have very negative implications for the future of the institution.

This case study also indicates that improving the quality of scientific assessment, as the Commission seems to want to do, will not resolve this problem. The issue has never been one of science, but rather politics. It may be necessary to take the GMO approval regulation completely out of Comitology in order to allow intergovernmental deliberation to operate and resolve the situation.

The hypothesis of our research is that the current theoretical frameworks, mainly those of rational-choice/intergovernmentalism and social constructivism/deliberative supranationalism do not sufficiently explain the outcomes in our case study in of themselves. The Member State decisions largely conform to and thus reinforce rational choice explanations of Comitology dynamics, but current research has not attempted to account for polarization among the Member State position and when it has, Fabio Franchino's *Journal of Theoretical Politics* (2000) article, it has not tried to explain the rationality behind the conscious divestiture of decision-making that is inherent in this case. The conclusion this paper reaches is that greater emphasis must be placed on domestic politics (from the Member States' perspective) and how these are affected by interest groups and "public outrage" (as conceived by Erika Meins) and on the similar external pressures that the Commission feels (in Commission's case this is illustrated by the pressure

from the World Trade Organization case against the EU stemming from the moratorium on GMO approvals imposed in 1999). Furthermore, the very structural dynamics inherent in Comitology are part of the causal mechanism, as they are incapable of allowing for successful deliberation of the kind of politicized decisions that the GMO case is a great example of. While rational choice can still explain the outcome of our case (but needs to be modified to take into account external pressures of the pertinent actors), deliberative supranationalism is extremely flawed. Especially problematic is the normative element within deliberative supranationalism that considers Comitology as a positive development in the Community decision-making process. The highly politicized/polarized issues, the kind that the Community may have increasing competency over, simply does not lend to deliberation.

The European Commission is not ignorant of the problem that the GMO case presents. The post moratorium legislation on GMO approval procedure and labeling were in part introduced because of the problems encountered through the Comitology procedure in GMO regulation throughout the late 90s. In April of 2006 the Commission tried to address the current impasse by asserting that it is vital to:

“[...]reassure Member States, stakeholders and the general public that Community decisions are based on high quality scientific assessments which deliver a high level of protection of human health and environment. These improvements will be made within the existing legal framework, in compliance with EC and WTO law, and avoiding any undue delays in authorization procedures.”<sup>24</sup>

However, this paper will show that it is exactly the “existing legal framework” (Comitology), “compliance with WTO law” (WTO legal decision) and “avoiding undue delays in authorization” (due to polarization in Member State positions) that cause Member States to divest their responsibility to make a decision on GMO approvals and thus any solution would

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<sup>24</sup> Commission Press Release IP/06/498.

have to take these variables into account. The Commission will fail to improve the efficiency of voting by attempting to “reassure the Member States” with “high quality scientific assessments”, just as it failed to resolve the situation with the new legislation, since the issue is not contested on the basis of science, but rather politics. The Comitology process exacerbates this combination of variables by preventing deliberation in face of such a politicized issue.

## 2 METHODOLOGY

Single case studies are generally regarded as inferior to big n study<sup>25</sup>; however in this paper we employ an examination of a particularly important and critical study and are confident that our research has utility beyond mere descriptive analysis. There are essentially four reasons for looking at the case of GMO approvals in great detail, without a comprehensive comparison with other examples of Comitology “failure”.

The logic to use a single case study begins with Eckstein’s “critical-case study” concept. Converse of this rationalization is the possibility that the case-study itself, since there are many other regulatory proposals by the Commission that the committees *do* make a decision on, could be the “exception that proves the rule”<sup>26</sup>, a case that contemporary theoretical explanations of Comitology already envision would be inexplicable. However, this paper adopts a Kuhnian proposition that, if understood correctly, “exceptions” (or “anomalies” as Kuhn would prefer) more often cause “paradigm shifts” than reaffirm the dominant theories.<sup>27</sup> This position is further elucidated by Eckstein in his assertion that “a single crucial case may certainly score a clean knockout over a theory.”<sup>28</sup>

The second reasoning is that GMO approvals are a critical and a significant phenomenon that reveal something important about the *institutions* themselves, therefore not just about the theory of institutions. Essentially, the GMO case reveals how the European Community decision-making institutions perform under duress. The case study is therefore a form of a “stress-test”

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<sup>25</sup> See King, Keohane and Verba.

<sup>26</sup> I wish to thank Fernando de la Mora for illuminating this avenue of thinking for me.

<sup>27</sup> Kuhn, the entire Chapter 9 illustrates this concept.

<sup>28</sup> Eckstein, p. 127.

from which we can infer institutional dynamics of the Community. An analogy from the field of medicine may explain further the significance of our approach. When the heart is tested for failures and abnormalities that may lead to a heart attack, it is not observed while it is at rest or in a situation where it is performing at its regular rate, rather the patient is subjected to a Cardiac Stress Test in which they run or walk on the treadmill while an EKG is performed. Not only does such a test tell us the potential problems in the system dynamics (is the blood flow normal and regular, is the heart performing normally, etc.) it also actually tests the overall physical fitness of the subject. Therefore, our test case of GMO approvals is assumed to be the treadmill on which the decision-making institutions of the EC have been forced to run on. The test has already been performed, we have the figures of voting records and they show that a decision has not been reached via QMV in any of the meetings; it is now up to us to explain the significance of this EKG, what it means for the “cardiac” system of decision making and the overall fitness of the European Community.

The third reason why our single case study is relevant and useful is the perspective which understands the GMO approvals case as a critical case lying within the core of the spectrum of issues for which Comitology was essentially designed for. As will be evident in our rundown of the history and evolution of this decision-making mechanism, Comitology was in fact proposed by the Member States in order to control the agency of the Commission in the highly sensitive fields of veterinary, health and food policy. Therefore, this is not just a random policy that is under testing, but rather the critical field for which Comitology was introduced into the EC decision-making mechanism. The empirical evidence pointing to the efficiency of Comitology is still relevant, but a statistical variance even if it is only in one case is still highly significant if it is in the very policy area that Comitology was created for. It is important to take into consideration the significance of this issue and not become a slave to statistical data. While it is



true that in one year, only a small percentage of proposals fail to reach a QMV majority we should not ignore the essential truth that the vast majority of Commission proposals are completely apolitical and irrelevant in the minds of most people. If Comitology keeps “failing” in the few cases where it handles politicized issues, then that in itself is a significant test of its performance in political issues.

Final aspect of the significance is that we have 19 cases as our primary source of data, 19 cases that are temporally significant. Our first case is from December 8<sup>th</sup> 2003 and our last case is from October 24<sup>th</sup> 2005. We could also have included the pre-moratorium GMO approval meetings that failed to reach a QMV majority, but we do not have the proper data on the voting records. In any case, the point is that this is not really a single N study, it is a 19n study. Nineteen cases spread over three years of Comitology procedure failing to reach a QMV majority. It may be in only single N *issue*, but the fact may very well be that this is the *only* issue that is politicized to the extent that the GMO case is. There actually are other votes we could look at, such as the 1996 BSE vote which also failed to reach a majority, but no other *issue* offers us 19n samples of Comitology failure. When one is faced with 19 unfavorable EKG results illustrating irregularities in one's cardiac system, it is time for an analysis and perhaps some kind of a prescription.

The research model will be that of “competitive testing” which means that “we do not evaluate our claims only against ‘the evidence’ but against other theories [and thus other evidence] as well”<sup>29</sup> The competitive model will allow us to “learn something about the scope (domain) of each theory's predictions, where the overlap occurs, and thus where they are observationally equivalent or distinct.”<sup>30</sup>

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<sup>29</sup> Jupile, p. 20.

<sup>30</sup> Jupile, p. 26.

While we only seek to understand one case study (and thus our research could be considered a single case study variety), the competitive model increases the amount of observations/variables being tested. The case study itself is enough of a puzzle to require an exhaustive investigation (it is an example of the “least-likely”<sup>31</sup> observation, especially in relation to the dominant theories of EU integration), but we will follow the advice of King, Keohane and Verba and attempt to increase the testing range of our methodology by subjecting our case study to variations “across space and [...] across time.”<sup>32</sup> “Across space” we will test the preference formulation of different actors (Commission and Member States) with the competitive model of theoretical testing (thus space will be two-dimensional, with variation across actors and theoretical variables); while “across time” we will look at how the change in GMO approval legislation and the WTO case have affected the outcome. The temporal/spatial variation in testing may not be stressed in the structure of the paper, but it is inherent in the decision to look at the history of Comitology as a process and in the pre/post-moratorium variation.

This paper will proceed to answer the two main research questions (why Comitology fails and what can be inferred from the case study in which it fails) by outlining first the evolution of Comitology and its contemporary procedural mechanisms. There is actually nothing new to Comitology, just as the “quarks”, as cited by Weiler in the introduction, are not “new”, but rather recently discovered particles that further help the theoretical physicists explain reality. This is why it is helpful for our research to elucidate the historical development of Comitology and gauge how much of the original intention still exists in the process as it pertains to our case study.

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<sup>31</sup> King et al., p.209.

<sup>32</sup> King et al., p.219.

We will then turn to the theoretical explanations of Comitology, both in its evolution and in terms of its decision-making process. Following the theoretical rundown we will present the empirics of the GMO approvals case study and then subject it to our competitive model of research in the analysis section. The analysis will be followed by an attempt to generalize and infer from our case study the nature of phenomena that may cause the “failure” of the Comitology procedure. We will conclude with a brief overview of policy relevance and analysis of the contribution to the democratic deficit argument that this research makes.

Before we proceed with the analysis we should note that researching Comitology is fraught with extreme difficulty. There is a serious problem of data collection since the committee meetings are not open to the public and transparency is seriously lacking<sup>33</sup>. This paper relies on the empirical studies collected by various academic researchers and by the non-governmental organization (NGO) Friends of the Earth (FoE), which has researched and collected the voting records of all post-moratorium regulatory committee meetings.

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<sup>33</sup> See: Larsson, Torbjorn and Andreas Maurer. and Demmke, p. 17.

### 3 COMITOLOGY EVOLUTION AND MECHANISM

#### 3.1 Evolution of Comitology

Comitology was developed in the 1960s as a mechanism through which the Council would be able to control the regulatory work of the Commission, as it expanded from the Common Agricultural Policy (CAP) to the Common Market. It is also seen as a solution to the growing complexity (mainly scientific, but also informational) of the legislative work of the Commission. We will show in the subsequent analysis of our case study that neither of these two generally accepted reasons for the development of Comitology operates within the causal dynamics influencing the outcome of decision-making in the GMO example. The Member States are definitely not successful in retaining control over regulatory decisions of the Commission (as a majority is in fact consistently opposed to the Commission proposals) while the scientific complexity is *not* the main source of contention, but is rather superseded by the political considerations of the Member States and the desire of the Commission to avoid further WTO litigation. The history and evolution of Comitology are analyzed by many academics<sup>34</sup> and will only briefly be outlined here.

The CAP was established in 1961/62 and to resolve the complexity/control dilemma noted above the Council opted for the creation of "Management Committees" which included national government representatives offering opinions on Commission's proposals, although initially without any real power. The first management committee was set up on April 4<sup>th</sup> 1962 by Article

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<sup>34</sup> See Christiansen and Kirchner, pp. 13-17; Schafer, p. 78; Neuhold, pp. 3-5; Joerges 1997, p. 275; Vos 1997, pp. 211-217; Pollack, p. 127-132 and especially Haibach's "Council Decision 1999/468 – A New Comitology Decision for the 21<sup>st</sup> Century", in its entirety. This paper relies mostly on Haibach's analysis.

25f of regulation 19/62 and they became a permanent feature of the Community on December 31<sup>st</sup> 1969<sup>35</sup>

The first “regulatory committee”, where the committee had to approve the Commission proposal with qualified majority or else it would go to the Council for another vote (thus a Comitology committee), was created on June 27<sup>th</sup> 1968 by regulations 802 and 803/68. It sprang out of the desire of the Council to have oversight over the way the Commission regulated customs, veterinary legislation and foodstuffs.<sup>36</sup> It is interesting to note that the Comitology procedure has its origins in the high level of politicization of food and safety regulation, especially when we consider the current impasse where the Commission keeps authorizing products despite opposition from Member States.

It was with the 1987 Single European Act (SEA) that the Comitology procedure obtained its legal basis. As Haibach points out, prior to 1987 the Comitology procedure was based on Article 155 [*new* 211] which “only stated that ‘the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.’”<sup>37</sup> The SEA amended Article 145 [*new* 202] so that, as Haibach explains, “Conferring implementing powers on the Commission was to be the rule; the Council could only resort to reserving such powers for itself in ‘special cases’”. The Article 145 [*new* 202] also “recognized that ‘the Council may impose certain requirements in respect of the exercise of these powers.’”<sup>38</sup> Finally, the Council’s Comitology Decision of July 13<sup>th</sup> 1987 (87/373/EEC) made a differentiation between the three types of committees it could establish: advisory, management and regulatory.<sup>39</sup> The regulatory

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<sup>35</sup> Haibach, p. 10.

<sup>36</sup> Haibach, p. 10.

<sup>37</sup> Haibach, p. 11.

<sup>38</sup> Haibach, p. 11.

<sup>39</sup> Pollack, p. 129.

committees, which constitute the Comitology procedure, were separated into two distinct categories: IIIa (the *filet* procedure where the Council would make its decision through QMV, or failing the decision the Commission would adopt its original proposal) and IIIb (the *contrefilet* procedure where the Council would make its decision through a simple majority without proposing an alternative policy). It is again interesting to note, in light of our GMO approval case study, that the motivation behind the IIIb, *contrefilet*, procedure was the opposition of Member States to giving up control over Commission proposals in the fields of veterinary, plant health and foodstuffs regulation.<sup>40</sup>

The Commission was extremely opposed to the IIIb procedure and in July of 1987 announced that it would never recommend it (although since the Council decides on what procedure is used this announcement had little effect).<sup>41</sup> The European Parliament (EP) was similarly opposed to the *contrefilet* procedure, but also Comitology in general. It challenged Comitology Decision very early, in 1988, before the European Court of Justice (ECJ), arguing that it was “incompatible with the spirit of the Treaty and the Single European Act”.<sup>42</sup> While the case was “declared inadmissible by the Court”<sup>43</sup> it was quite clear that the opposition to Comitology from the Commission and the EP would have to be addressed, especially following the introduction of the co-decision procedure in the Maastricht Treaty which gave the Parliament a sense of equal status to the Council. The Council, Commission and the Parliament reached an agreement referred to as the *Modus vivendi* in December 1994 which guaranteed that the Parliament would

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<sup>40</sup> Haibach, p. 10.

<sup>41</sup> Haibach, p. 11.

<sup>42</sup> Haibach, p. 11. For more on the intrainstitutional conflict between the Commissions, the Council and the European Parliament refer to Pollack, pp. 131-132 and Haibach, pp. 11-12.

<sup>43</sup> Haibach, p. 11.

be notified and consulted during various stages of the Comitology procedure, but most importantly it referred the question to the 1996 Intergovernmental Conference (IGC).<sup>44</sup>

The 1996 IGC that resulted in the Amsterdam Treaty did not resolve the conflict, but it did call on the Commission to make a proposal for a new Comitology decision.<sup>45</sup> The Commission complied and on July 16<sup>th</sup> 1998 submitted a proposal that sought to overhaul the Procedure III considerably. In essence, it would be limited to “measures of general scope” and “provided for the full legislative procedures if there was no qualified majority in favor of the proposal.”<sup>46</sup>

While the EP was unsatisfied with the fact that it was still only the committees that had the power to request the Commission to “refer back an implementing measure”, Member States were opposed to having to choose between “the Commission’s proposal on one hand and an extended legislative process involving long delays and, in some cases, codecision with the EP on the other.”<sup>47</sup> To solve this impasse the German presidency offered a solution, referred to as the “German Compromise”, which as Pollack clarifies fused the IIIa and IIIb procedures so that:

“[...]a failure to agree in the committee would result in a reference to the Council of Ministers, which would have 3 months to either (a) endorse the measures by QMV, after which the measures would be adopted; (b) fail to act, in which case the Commission would adopt the measures; or (c) oppose the measures by QMV, in which case the Commission would reexamine the measures and resubmit them to the committee, with or without the amendments, or as a legislative proposal.”<sup>48</sup>

Since simple majority would no longer be enough to oppose the Commission proposal, Denmark, Portugal and Spain were against the German Compromise. To resolve this dispute, the Commission issued a declaration affirming that in “particular sensitive sectors” [it] would not

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<sup>44</sup> Pollack, p. 131.

<sup>45</sup> Pollack, p. 132.

<sup>46</sup> Haibach, p. 13.

<sup>47</sup> Pollack, p. 133.

<sup>48</sup> Pollack 133.

go against ‘any predominant position which might emerge within the Council against the appropriateness of an implementing measure.’”<sup>49</sup>

Considering that in the case of GMO approvals, clearly a “particularly sensitive sector”, the Commission has managed to push through approvals of GMO products “against predominant position” of Member States, which has been to oppose the Commission proposals, it is obvious that the Commission has not remained committed to its guarantee. The fears of Denmark, Portugal and Spain (fears that Mark Pollack argues were based on preferences for environmental policy oversight)<sup>50</sup> were thus well founded.

### **3.2 Decision-Making Mechanism**

Comitology as a decision-making process is not unique to the European Community, the US, Germany and Switzerland all exhibit on some level aspects of committee governance.<sup>51</sup> In the EC there are around 1,400 committees operating at any one time of which about 400 are of the Comitology variety.<sup>52</sup> Most of the decisions made by these committees are in fact favorable to the proposal made by the Commission; out of an estimated 52,000 decisions only 13 opinions were negative.<sup>53</sup> Furthermore, in 2000, out of the 2,838 proposals only six failed to obtain a majority either way.<sup>54</sup>

There are essentially two opposing ways to interpret the quantitative data illustrating the decision-making process. The obvious conclusion would be to characterize the extremely high success rate of Commission proposals as evidence of “[...] good policy performance [...] product of an

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<sup>49</sup> Pollack, p. 133.

<sup>50</sup> Pollack, p. 147.

<sup>51</sup> Christiansen and Kirchner, p. 12.

<sup>52</sup> See Rhinard.

<sup>53</sup> Wessels, p. 225.

<sup>54</sup> Dehousse, p. 802.



institutional design [...] systematically providing incentives to transform strategic interaction into deliberative problem-solving.”<sup>55</sup> However, as Ellen Vos counters, even though “only a few decisions have been referred back to the Council, re-referral has almost always concerned highly controversial issues such as health and safety [...] exact issues upon which the Council may fail to reach a qualified majority.”<sup>56</sup> These two “images of Comitology”<sup>57</sup> present the main theoretical divide in explanatory mechanisms of the evolution and operation of EC committee governance. While this paper is definitely concerned with the overall theoretical dynamics behind Comitology as a whole, our theoretical section will be succinct so as to proceed with the analysis of which theory, if any, best explains the case where the Member States fail to make a decision through Comitology.

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<sup>55</sup> Neyer 2004, p. 38.

<sup>56</sup> Vos 1997, p. 214.

<sup>57</sup> Pollack, p. 125

## 4 THEORY

The advent of Comitology can largely be framed as result of “both functionalist institution-building and bargaining”<sup>58</sup> while the actual decision-making dynamics are usually framed as a contest between deliberative supranationalism and rational choice intergovernmentalism. From a slew of theoretical explanations of Comitology it is evident that “committees can be different things to different people.”<sup>59</sup> In this paper alone, academic journals from the legal, theoretical, international relations, comparative politics and public policy fields have all been used to research the theoretical approaches to Comitology.

By surveying these various fields we will try to analyze each theoretical model in terms of how it explains the evolution of Comitology (why it exists) and the decision-making mechanisms of Comitology (how it operates). We will then introduce the case study of GMO approvals that points to the obvious deficiencies in explanatory powers of most of these theories, but especially of the constructivist/deliberative supranationalist models. The case of GMO approvals will “bring back” the domestic politics, interest group politics and “public outrage” dynamics into the study of Comitology in what will be termed the model (not theory) of Strategic Institutional Decay. It will also illuminate how Comitology structure itself exacerbates the effects of outside polarization.

We will also be able to assess Comitology, as a decision-making tool of the EC, in light of what we can infer from the success of the aforementioned factors to illustrate causal dynamics in our specific example. In essence, the fact that high degree of politicization causes Member States to

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<sup>58</sup> Schafer, p. 89.

<sup>59</sup> Christiansen and Kirchner, p. 1.

“divest their power” (whether willingly or not) illustrates both the absence of deliberative process within Comitology as well as structural failures of the process itself. While there are certainly elements unique to our case study (the particularities of the WTO case for example) the institutional setup of Comitology and decision-making dynamics in the face of extreme polarization and politicization can be extrapolated as variables that may decrease the normative value of the Comitology process. If Comitology mainly exhibits deliberative decision-making dynamics in cases of low polarization, we cannot assume that deliberative decision-making dynamics are inherent to or given in Comitology.

#### 4.1 Federalism

Federalism in the context of European Union study refers to the highly normative “theory”<sup>60</sup> that offers an evolutionary dynamic through which the EC can strive towards an “ever closer Union”. Since federalism is essentially normative, the take on Comitology would be to criticize its development. Comitology would be seen “as a major obstacle to a proper *federal* institutional balance which alone could guarantee efficient, effective and legitimate European policies [...] the existing comitology should be totally abolished or at least radically reformed.”<sup>61</sup> Federalism would expect that Member States would slowly be “marginalized and substituted by EC/EU bodies and institutions which are being transformed from arenas into actors”.<sup>62</sup>

Seeing as it is extremely normative and offers a critique, rather than an analysis, of Comitology federalism is easy to dismiss as an explanatory theory in our paper. Without even seriously delving into our case study, we can safely discount it on the basis that Comitology *has*

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<sup>60</sup> Such a normative model cannot really be considered a theory.

<sup>61</sup> Wessels, p. 212.

<sup>62</sup> Schafer, p. 81.

developed, *does* operate as an important decision-making mechanism of the EC and is *not* likely to be replaced by institutions that are “transformed from arenas into actors”.

However, our GMO case study cannot be viewed through a federalist lens. Aside from normatively being opposed to Comitology, federalism largely fails to even take it into account. The problem with Comitology is that it tries to place supranational deliberation mechanisms on policy formulations of issues that are inherently not supranational, but rather immersed in the domestic politics of Member States. Therefore, federalism is of little use to us in our subsequent empirical analysis.

## 4.2 Erosion

The erosion model explains the development of a “mega-bureaucracy” as the result of a “conspiracy” by both the national government bureaucrats and “Eurocrats” to increase their power and influence over policy-making.<sup>63</sup> It would exemplify Comitology as an “example of the in-built dynamics of bureaucratic expansion” offering Member States the “opportunity [...] to ‘pool’ their bureaucratic self-interests in order to establish an impenetrable ‘network’ [...]”<sup>64</sup>

However, as our case study is an example of serious opposition between Member States and the Commission, it is difficult to see how the erosion view would explain it. The model would instead predict that the Comitology committee, through collusion with the Commission, would be able to solve the issue of GMO approvals by itself through a “mega-bureaucracy plot”. Conversely, the issue of GMO product regulation is clearly far too politicized for bureaucrats to risk resolving on their own. A regulatory committee official voting with the Commission in

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<sup>63</sup> Schafer, p. 83.

<sup>64</sup> Wessels, p. 214.

opposition to his government on such an important topic would likely not have much of a professional future.

### **4.3 Multi-Level Governance**

Multi-level governance can be explained as “a system of decision-making in which various territorial levels form intermeshing network and require mutual co-operation in order to carry out joint tasks.”<sup>65</sup> Examples of this model are the regional and structural policy. Regulatory committees can be explained in terms of how they link different tiers of government.

Christiansen and Kirchner make the argument that multi-level governance is in part made possible by Comitology. However, multi-level governance does not really offer much in terms of explanatory power of how Comitology operates. It more re-affirms its existence as a part of the multi-level governance system.

### **4.4 Neofunctionalism**

Neofunctionalism, as formulated by Ernst Haas and Leon Lindberg<sup>66</sup>, elucidates EU integration as a movement toward political integration while emphasizing the process by which group pressures are causing shifting of loyalties towards a new center, with the end result being the creation of a new political community. As Haas argued “Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states.”<sup>67</sup> Neofunctionalism sees Comitology as a “functional necessity” which deals with the issues too technical and scientific for the Council to legislate on.

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<sup>65</sup> Christiansen and Kirchner, p. 10.

<sup>66</sup> See Haas.

<sup>67</sup> Haas, p. 16.

While neofunctionalism predicts that with the growing complexity of Community regulation the number of committees would grow, one should be careful in characterizing the expansion of Comitology as evidence of the spill-over effect. Comitology is a tool for decision-making that can be applied to various policy areas as spill-over effects give the Commission competency over them, but spill-over itself does not explain the rise in Comitology.

In terms of the dynamic of decision-making within Comitology, neofunctionalism would predict that regulatory committees would become an arena where “the Commission would act both as engine and broker, with powerful instruments for mediation at hand, and would be increasingly dominant as expectations among the committee members converge.”<sup>68</sup>

Neofunctionalism is a formidable assessment of the evolution of Comitology and largely predicts that the Commission would gain power. This is something to consider as the very fact that the Commission has pressure exerted on *it*, rather than just on Member States, by the WTO is a rather neofunctionalist image. Therefore, we could conclude that neofunctionalist explanations increase our understanding of the conditions that allow for Comitology to be the kind of a process it is. However, neofunctionalism largely fails to explain the GMO case study in other ways.

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<sup>68</sup> Wessels, p. 213.

## 4.5 Fusion

Fusion view argues that “policy-making in the Community is at its heart a multilateral inter-bureaucratic negotiation marathon”.<sup>69</sup> The trends of Europeanization and re-nationalization “come into a close competition” and committees are regarded “as indicators of the permanent process of combining and sharing resources from several institutional and instrumental levels”, therefore being “the manifestation of growing Europeanization of national administration.”<sup>70</sup>

In terms of outcomes and decision-making dynamics, “the fusion theory would expect that committees [...] would neither act as the ‘guard dogs’ of national governments charged with controlling the [...] European Commission nor as forums for more intergovernmental negotiations. In opposition to both views committees would rather behave as specialized bodies for joint action.”<sup>71</sup> The fusion theory makes the assumption that the nation state is in an inherent need of strengthening and that the “process of Europeanization and fusion transforms the state and creates a new stage in the evolution of Western states [...]”<sup>72</sup>

Fusion view also explains the rise in Comitology committees and to an extent also concentrates on explaining the successes of the process in fostering deliberative decision making. Schafer expects that ““a constructive team spirit, a confidential club atmosphere, an effective collegiality will dominate over strict interpretation of legal texts and formal rules.””<sup>73</sup> From the particularities of our case study, we can safely conclude that the fusion view does not explain our empirics either.

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<sup>69</sup> Schafer, p. 84 quoting Kohler-Kock 1996, p. 367.

<sup>70</sup> Schafer, pp. 85-86.

<sup>71</sup> Schafer, p. 86.

<sup>72</sup> Wessels, p. 217.

<sup>73</sup> Schafer, p. 86.

## 4.6 Deliberative Supranationalism and Constructivism

In their seminal 1997 article “From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology” Christian Joerges and Jurgen Neyer introduce deliberative supranationalism as a fusion of political science and law that is both a normative and theoretical approach. It essentially draws its roots from the failure of functionalism and intergovernmentalism to explain the wealth of empirical evidence depicting “committees as peer structures in which the quest for consensus is a prevailing concern.”<sup>74</sup> One of the studies confirming such phenomena is the study of Swedish participants in committees which confirms that more than 80 per cent of officials “affirm that ‘a spirit of co-operation’ characterizes group activities to a high level.”<sup>75</sup>

Social constructivism<sup>76</sup> inspires deliberative supranationalism to question “the materialism and methodological individualism on which much contemporary scholarship, including much rational choice work, has been built.”<sup>77</sup> Constructivism places an emphasis on deliberation and “appropriate behavior driven by (complex) learning and dynamics of socialization”<sup>78</sup> while opening the “black box around the internal working of institutions.”<sup>79</sup>

While Joerges and Neyer do admit that the Comitology procedure is the result of “tensions between the dual supranational and intergovernmentalist” institutions and decision making tasks of the EC they still contend that “in the gap between the EC structure and its tasks, Comitology has provided a forum for the development of novel and mediating forms of interest formation and decision making [...] which fit neither into the analytical models of functionalism and

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<sup>74</sup> Dehousse, p. 802.

<sup>75</sup> Neuhold, p. 7.

<sup>76</sup> As formulated by: Checkel 1999. and Ruggie.

<sup>77</sup> Jupille, p. 13.

<sup>78</sup> Jupille, p. 14.

<sup>79</sup> Checkel 2003, p. 228.



intergovernmentalism, nor into normative concepts of corresponding legal theories.”<sup>80</sup> Therefore, deliberative supranationalism does not offer an explanation for Comitology’s development in the 60s, but it rather offers an explanation of its decision-making mechanics (inherently deliberative and consensual) and a normative assessment asserting that once deliberative style of problem solving takes hold the “motives of decision-makers become irrelevant.”<sup>81</sup>

Neyer concludes that “the astonishingly good policy performance of the EU is explained as the product of an institutional design that overcomes a great number of the difficulties associated with EU policy-making by systematically providing incentives to transform strategic interaction into deliberative problem-solving.”<sup>82</sup> Therefore, while “bargaining relies on the use of promises and threats [...] arguing [deliberation] rests on claims of factual truth and/or normative validity.”<sup>83</sup>

The essential normative argument behind deliberative supranationalism is, as Christian Joerges and Jurgen Neyer argue, that the EC cannot use coercive measures to implement its policies, but rather must rely on “communicative processes and political efforts that make the addressees of rules comply voluntarily.”<sup>84</sup> The best summary of the argument behind deliberative supranationalism is made by Mark Rhinard who posits that:

“These scholars argue that, rather than castigating committees, we should appreciate the novel function of committee governance and its success in resolving the inherent tension between intergovernmental and supranational modes of policy-making.... Committees increase deliberative and communicative processes that improve societal decision-making-and can even bring an element of democratically legitimated politics to the EU. In sum, according to the viewpoint of committee ‘apologists’, committees play a crucial role in European governance, and may even help to legitimize the EU far into the future.”<sup>85</sup>

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<sup>80</sup> Joerges and Neyer, p. 279.

<sup>81</sup> Joerges and Neyer, p. 282.

<sup>82</sup> Neyer 2004, p. 19.

<sup>83</sup> Neyer 2004, p. 28.

<sup>84</sup> Neyer 2004, p. 26.

<sup>85</sup> Rhinard, p. 11.

Our GMO case study largely discounts this theoretical explanation. Deliberative supranationalism concentrates on the “successes” of committee governance and largely ignores the cases where Comitology procedure does not lead to deliberative outcomes. It should be noted that Neyer (2004) recognizes the regulatory problem in the biotechnology sector and argues that the non-deliberative outcome was result of “the veto of individual players {the US with regard to international environmental policy [...]}) which condemned everyone to an outcome that did not satisfy anyone.”<sup>86</sup> He is correct in his assessment, one of the variables this research uncovers is the external pressure that the WTO ruling has on the Commission. Nevertheless, these politicizing/polarizing effects are never further investigated by the proponents of deliberative supranationalism for whom Comitology is a positive development because it offers a deliberative decision-making mechanism based on expertise.

However, democratic legitimacy is most needed in cases where the Commission deals with sensitive, political and controversial decisions. Deliberation is unnecessary in non-conflictual situations characterized by non-competitive preferences which allow rational actors to make decisions. Joerges and Neyer largely fail to submit their theory of deliberative supranationalism to the “least likely fit” test. It is hardly significant that the process of deliberation is so successful in mundane regulatory cases where the Member States either all have similar preferences, are ambivalent of their preferences (and thus open to deliberation) or willing to sacrifice preferences due to the non-politicized nature of the regulation at hand for future concessions. Where deliberative supranationalism would need to be seen in action is in those cases (such as the GMO approvals) where political stakes are high. As we can tell from our empirical data, deliberative supranationalism does not explain the outcome. Furthermore, since deliberative supranationalism makes a normative claim on Comitology and largely evaluates it as a positive development, we

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<sup>86</sup> Neyer 2004, p. 31.

can present our case study of GMO approvals as a clear empirical rebuff of this theory/approach. Comitology can not be a positive development in EC decision-making when it clearly fails in the face of most politicized and divisive questions. It is extremely successful in non-political cases where it should remain the main decision-making device, but the very structure of Comitology, as our qualitative study extrapolates, can exacerbate the problem in politicized situations and in fact deter from deliberation (by encouraging “pass-the-buck” voting and safeguard action). Essentially, Ellen Vos is correct in her assessment that to date “re-referral has almost always concerned highly controversial issues such as health and safety”<sup>87</sup>, and thus the normative assessment of Comitology should be negative rather than positive.

#### **4.7 Intergovernmentalism and Rational Choice**

Intergovernmentalism<sup>88</sup> sees the “nation state as the authoritative actor in cross-border interactions”<sup>89</sup> and is essentially an “agent-centered view assert[ing] that all social phenomena are explicable in ways that only involve individual agents and their goals and actions; the starting point of the analysis is actors with given properties.”<sup>90</sup> It argues that the institutional setup of the EC and therefore Comitology is the product of the “general strategy of national governments [...] Masters of the Treaty.”<sup>91</sup>

The advent of Comitology is therefore an answer to the question of how should the Council exert control over the Commission and prevent “bureaucratic drift”. As Ballmann et al, argue, “Legislative bodies often limit drift by establishing specialized committees and subcommittees

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<sup>87</sup> Vos 1997, p. 226.

<sup>88</sup> As formulated by Keohane and Hoffman and Moravcsik 1998.

<sup>89</sup> Schafer, p. 79.

<sup>90</sup> Jupile, p 14.

<sup>91</sup> Schafer, p. 79.

which work as a sort of fire alarm system.”<sup>92</sup> The prediction regarding decision-making dynamics is that “conflictual voting will frequently occur and the propensity to shift responsibility from the committee level to the Council, which is seen as preserving national interests, will be high.”<sup>93</sup>

Decision-making mechanics are largely conceptualized by intergovernmentalism through game theoretical modeling. Two particularly important studies should be noted here: the Alexander Ballmann et al. and the Fabio Franchino. Ballmann et al. attempt to answer the query of whether the committees influence policy outcomes. They posit that “overall comitology committees move outcomes toward the *Commission's* preferred policies rather than those of the Council.”<sup>94</sup> The Commission will formulate its proposals by strategically thinking ahead to policy preferences of both the regulatory committee and the Council and “relative to council oversight alone, the committee procedures, if they have any effect at all, *move outcomes closer to the Commission's ideal point* [...] thus the Commission [...] might actually welcome the presence of comitology committees in the policymaking process, as they give the Commission more leverage in its bargaining vis-à-vis the Council.”<sup>95</sup>

Fabio Franchino introduces differentiated preference modeling for cases where Member States have different policy preferences and concludes that:

“The management committee procedure works by favoring governments with preferences moderately distant from the Commission's [...] For governments with preferences close to the Commission's, this committee generates disutility because it consistently shifts the policy away from their ideal points. For governments with extreme preferences opposite to the Commission, it is only an opportunity to limit agency losses. Conflict across principals over the degree of discretion to delegate to the Commission is likely to increase with ex post control [...]

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<sup>92</sup> Ballmann et al., 555.

<sup>93</sup> Wessels, p. 212.

<sup>94</sup> Ballmann et al., p. 574.

<sup>95</sup> Ballmann et al., p. 567.

implementation control in the form of a management committee increases the conflict across principals over the degree of discretion to delegate to the Commission.”<sup>96</sup>

As we know from the evidence submitted in the section on deliberative supranationalism, intergovernmental theory expectations regarding Comitology conflictual voting does not come to fruition in reality. Conflictual voting occurs rarely and responsibility shifts to the Council occurs only in some cases (like the GMO approvals case). However, there is considerable empirical evidence that points to a high degree of politicization within regulatory committees (and EC governance in general) and that therefore foresees conflictual voting occurring in cases where the issue at hand is one that polarizes and that is highly political.

One such study shows that most committee officials are in fact “delegated by ministries”<sup>97</sup> back in their home government, meaning that they have to take into consideration domestic politics. The same study points to the fact that 69 per cent of all Swedish officials feel primary allegiance to their own government, rather than some supranational institution.<sup>98</sup> Similar results that support the argument that politicization is high in regulatory committees are posited in a number of excellent studies by Jarle Trondal<sup>99</sup>, Simon Hug<sup>100</sup>, Mark Pollack<sup>101</sup> and Morten Egeberg et al.<sup>102</sup>

Two further studies introduce the concept of domestic political cleavages and how they ultimately find expression on the EC decision-making plane. A study by Gary Marks and Marco Steenbergen concludes that “whereas the international relations model implies that European integration is autonomous from the conflicts that have historically structured domestic

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<sup>96</sup> Franchino, p. 172.

<sup>97</sup> Neuhold, p. 5.

<sup>98</sup> Neuhold, p. 7.

<sup>99</sup> Trondal, p. 1.

<sup>100</sup> Hug, p. 41.

<sup>101</sup> Pollack, p. 125.

<sup>102</sup> Egeberg et al., p. 19.

contestation, the regulation scenario hypothesizes that European conflicts are expressions of such conflicts.”<sup>103</sup> Meanwhile, a paper by Jan Beyers and Bart Kerremans posits that “the preferences of actors (parties, social movements, and bureaucrats) involved in European policy making resemble the structure of political cleavages that exist at the domestic level [...] despite the potential for technocracy, a strong political component seems to be present in EU politics.”<sup>104</sup> Part of their explanation also points to the persuasion network in which the environmental NGOs are particularly strong occupying a “special position” that includes a considerable number of allies, while themselves are considered as both allies and opponents “that are worthwhile to be convinced.”<sup>105</sup>

Domestic politics is inherently an extension of the rational-choice paradigm.

Intergovernmentalism also places great emphasis on domestic politics and as posited by Andrew Moravcsik: “States (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics.”<sup>106</sup>

Intergovernmentalism is supposed to give primacy to domestic politics when assessing policy preference formulation of Member States. Our empirics largely fit in this line of thinking. The public outrage dynamics seriously politicized the issue of GMOs across the European spectrum. How and why it affected some countries and not others is not the scope of this research, but the bottom line is that the issue of GMOs is inherently politicized at the domestic level, subsequently leading to European level polarization. This conforms to the research of Jan Beyers and Bart Kerremans who posit the argument that despite the arguments of deliberative supranationalism

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<sup>103</sup> Marks and Steenbergen, p. 886.

<sup>104</sup> Beyers and Kerremans, p. 1120.

<sup>105</sup> Beyers and Kerremans, p. 1129.

<sup>106</sup> Moravcsik 1997, p. 519.

about the primacy of technocracy and scientific knowledge of the Commission the preferences of European actors in fact reflect “the structure of political cleavages that exist at the domestic level” and that therefore European decision making is politicized concurrently.<sup>107</sup>

However, intergovernmentalism and especially its theoretical modeling arm of game theory, has so far been unable to predict the kind of interaction as the GMO case study. The conclusions of Ballman et al. on Commission formulating its proposals strategically and how the committee governance effects subsequent decision-making output is fascinating, but largely fails to take into account “noncooperative game among the member states”, which should be noted they note themselves. There game modeling suffers from a rather one dimensional axis of policy preference, exemplified by characterizing regulatory committee preferences as points on a number line that only move according to the extent that the stated preference is of supranational or intergovernmental nature. It is necessary for game theory to attempt to deal with heterogeneous Member State policy preferences, such as the research conducted by Fabio Franchino, and perhaps take into account the safeguard clauses as a post-facto measure of principal control over actor decision making.

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<sup>107</sup> Beyers and Kerremans, p. 1120.

## 5 STRATEGIC INSTITUTIONAL DECAY

The mode of analysis employed in this paper is firmly entrenched within the Intergovernmental / Rational Choice field of European studies and Political Science in general. Generally summarized, it is understood that “European integration was no accident”<sup>108</sup> and that “the configuration of state preferences matters most in world politics – not, as realists argue, the configuration of capabilities and not, as institutionalists (that is functional regime theorists) maintain, the configuration of information and institutions.”<sup>109</sup> Comitology as a procedure can be understood through this lens.

Taking intergovernmentalist assumptions as most applicable in our case study we still find that they do not explain our data in a sufficient manner. Our case of GMO approvals throws quite a hefty empirical wrench into the notion that “fundamental actors in international politics [...] *organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence.*”<sup>110</sup> In essence, taking Moravscik’s thinking as the causal starting point, we would expect Member States to overcome their differences over GMO approvals in some way. Genetically Modified Organisms are neither the first fiercely politicized and polarized issue, nor the only point of contention that Member States have had to deal with prior to integration (for an analysis of conflicting state preferences one only has to re-read Moravscik’s seminal *The Choice for Europe*. Allowing the issue of GMO approvals to divide them and to show signs of institutional “failure” invites outside actors into the game by shedding light on what is supposed to be an internalized process. Like vultures circling a sick animal, NGOs, the WTO and industry lobbyists all become

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<sup>108</sup> Moravscik 1998, p. 501.

<sup>109</sup> Moravscik 1997, p. 512.

<sup>110</sup> Moravscik 1997, p. 516. Emphasis added.



aware of the issue only once Member States fail to resolve it. This is a *suboptimal outcome* for the Member States and they must be aware of that, therefore illustrating the notion of Strategic Institutional Decay of the European Union<sup>111</sup>.

Strategic institutional decay accounts for the fact that states are in control of the institutions, they have the power, but refuse to exercise it. The EU institutions and the Community in particular is unable to resolve institutional problems on its own, it requires leadership and legislation from the states, yet states are divesting their responsibility and therefore their power to resolve this issue. Under intergovernmentalist assumptions we would expect Member States to bargain their way out of the GMO issue, to form strategic alliances and barter various policy outcomes so as to reach a resolution. Not resolving this situation is a suboptimal outcome, it allows Member States to “pass-the-buck” on to the EC and to resolve the issue through safeguard clauses, but it also invites the WTO and other actors who can “smell” the decay of Member State policy. The crucial questions becomes, as Flynn asks: “Are they [regulatory committees] being used by Council to take hard and unpopular decisions in environmental policy that it would rather not be seen taking?”<sup>112</sup> The evolution of Comitology into this kind of a process is almost impossible to account for by contemporary EC integration theories.

The process of strategic institutional decay essentially revises the intergovernmental / rational choice state-centered model through a slightly better understanding of domestic embeddedness of states. We should be careful not to take too much credit for that, as Moravscik does emphasize domestic politics in his approach. However, in our case it is more than just about economics and monetary incentives, the utility function is more complicated than what Moravscik states. Under

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<sup>111</sup> The author is indebted to Dr. Yves Tiberghien for his considerable contribution to the formulation of this concept.

<sup>112</sup> Flynn, p. 95.

intergovernmentalist assumptions, the threat (and eventually the outcome) of the WTO case should form enough of an economic incentive (except maybe in the heavily organic farming Austria) for Member States to lobby each other and find a solution to the issue. Instead, Member States maneuver between a lot of different aspects (they want economic interests, but also want to deal with NGO and the civil society). This is an example of rational states responding to interest groups, but unlike in Moravscik's examples, the interest groups are highly varied.

Our model explains institutional strategic decay as a rational outcome in which Member States give up power rather than take up leadership. While our argument is that such an outcome is still suboptimal, especially by Moravscik intergovernmental standards, it is not irrational. The external pressures on the actors, both Member States and the Commission, and the particular institutional dynamics underpinning the decision-making process of Comitology, allow states to be "lazy", to strategically refuse to resolve this issue through interstate bargaining and to "pass-the-buck" to Brussels. The issue at hand is really of Member States not using their "big stick", their power, to resolve the current impasse. The EC, and essentially the Commission, cannot force Member States to resolve the situation.

Interestingly, what our analysis inherently concludes is that suboptimal outcome in the face of rationality is difficult to correct for, but eventually will have to be corrected for. Member States cannot keep divesting their power in the case of GMO approvals because: a) the Commission is not going to let them, as their recent comments on the issue suggest; b) because they will start incurring financial losses from the WTO and c) because public opinion of EC institutions will decline and that will affect more important issues surrounding European institutions. Member States are rational and they understand this, which is why we term our mode of analysis as *strategic decay*.

Our analysis essentially reveals that Comitology is not designed for high-stake political battles because it is in fact a *very* poor model of deliberative decision-making. Under Moravscik's assumptions national preference formation leads to interstate bargaining, which leads to the choice of whether or not to delegate decision-making to an interstate commitment, which ultimately rests on its economic costs and benefits. In this case, the decision to place GMO approvals under the Comitology procedure is of suboptimal efficiency and will have to be corrected for.

The analysis of the external pressures being exerted on the Commission and the Member States will reveal in what ways this issue is in fact a high-stakes political battle, while the analysis of the Comitology procedure will reveal the inability of such a decision-making mechanism to handle them. In the case of GMO approvals, the Comitology procedure is neither "a control mechanism in which the primary aim is control and decision-rules matter [n]or a forum for deliberation in which the national/supranational line breaks down..."<sup>113</sup> It is truly an institutional dynamic in of itself that in our particular case study actually exacerbates the conflict and to some extent prevented deliberative mechanics to take hold. It works almost flawlessly when dealing with technocratic, scientific issues, but when these issues become highly politicized the system breaks down.

The essential conclusion is that GMO approvals are being regulated through the wrong forum and will have to be removed from the Comitology procedure in order to return to optimal efficiency the decision-making in that policy area. This case study is a revealing case for the conditions under which Comitology works and does not work. We add missing stories and

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<sup>113</sup> Pollack, p.126.

missing assumptions to the intergovernmental dynamic. Instead of building coalitions, as intergovernmentalism would assume they would, Member States are not pursuing bargains, they are being “lazy”, they are “giving up” and “passing-the-buck”, and they are “abdicating power”.

## 6 EMPIRICS AND ANALYSIS

This research subscribes to the assessment that “strong tests are those that explain outcomes when other theories do not. They discriminate. Weak tests share explanatory success with many other theories.”<sup>114</sup> As the following analysis will show, only intergovernmentalism/rational choice offers theoretical dynamics that explain our empirics and even then a serious revision of scholarship and a new research program would be necessary to explain fully the effect of polarizing politicization amongst Member States and the subsequent outcome of decision-making mechanics of the Comitology procedure. This case study is also a considerable blow to the deliberative supranationalism research project as it in fact illustrates the inability of Comitology to influence and inspire deliberative decision-making in the face of political polarization.

The issue of GMO approvals is an appropriate case study in terms of the larger scholarship on Comitology because it is a highly politicized issue that internalizes unique dynamics clearly absent from most regulatory decisions made through the Comitology procedure that generally seem to exhibit “a degree of sanguinity in practice”<sup>115</sup>. This is immediately evident from the fact that most Comitology decisions, as already discussed, are made in the regulatory committee and that most of them are in fact in favor of the Commission proposal.

Ellen Vos argues that national provisions for health and safety in foodstuffs have always been among “the Community’s first priorities for harmonization to eliminate trade barriers.”<sup>116</sup> With all regular trade barriers removed through the Common Market, health and food regulations form

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<sup>114</sup>Jupile, p. 20.

<sup>115</sup> Dogan, p. 55.

<sup>116</sup> Vos 2000, p. 228.

an important impediment to trade. Egeberg et al. argue that “the ‘scientification’ of foodstuffs’ regulation, taken together with its ‘politicization’ has exerted such pressure on traditional foodstuffs’ law that innovations would have occurred at the national level” to force regulators to deal with the complexity of regulating them even without “any European market-building and harmonizing efforts.”<sup>117</sup>

## **6.1 Temporal Analysis Pre-Moratorium**

To assess the GMO case temporally we will divide it into two chronological intervals, the pre-moratorium situation and the post-moratorium situation. Moratorium itself is also an interesting event and can be analyzed as a part of the temporal picture of the GMO regulatory controversy.

The cornerstone of EU’s GMO regulatory policy prior to the moratorium was the Directive 90/220, which specifically dealt with the Deliberate Release into the Environment of Genetically Modified Organisms. Deliberate release of GMOs was governed by 90/219 and 90/220, while placing on the market was governed by the 1997 Novel Foods Regulation (258/1997).<sup>118</sup> The procedure for GMO release and marketing as set out by 90/220 was complicated and confusing. The GMO manufacturer had to conduct all the scientific study concerning the GMO’s safety and submit an application to the member state at which point the member state would scrutinize the application and decide on whether to permit GMO’s release or not. However, the procedure would still continue because the member state to which the application was submitted had to allow the European Commission or any other member state the opportunity to raise objection to the approval of the GMO product. Once an objection was raised, the decision was bumped up to

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<sup>117</sup> Egeberg et al., p. 37.

<sup>118</sup> Garcia , p.3.

the level of the European Commission through the Comitology procedure.<sup>119</sup> Under 90/220/EEC 18 authorizations were granted and two GMO events were authorized for food, prior to the 1997 Novel Food Regulation and thousand of research field trials went ahead.<sup>120</sup> Since no separate legislation existed governing feed prior to the Regulation 1829/2003, eight GMOs were also authorized under 90/220/EC.<sup>121</sup>

Directive 90/220 was replaced by the “Novel Foods Regulation” 258/97. This regulation expanded its scope by regulating foods derived from GMOs, but not necessarily containing any. It also included provisions for the labeling of foods that contained GMOs or that were derived from GMOs. “Novel Foods Regulation” looked to simplify the regulatory process for foods termed “substantially equivalent” to normal food, therefore such food as that derived from GMOs, or containing very little, almost untraceable amount of, GMO ingredients.<sup>122</sup> Both 90/220 and 258/97 allowed a member state to ban a GMO product temporarily, until enough assessment was completed to judge that the product was safe.

The Novel Food Regulation was problematic, however, because it did not include enzymes, vitamins, flavorings and food additives in its regulation. Furthermore, it was “largely inoperable” as there were no specifics as to how regulation was to be implemented. Member States were left with the power to decide thresholds, testing methods, products subject to testing and the content of labels. If one is to take into consideration the fact that the European Union is a common market where goods travel freely, one can foresee problems arising in allowing Member States (some of them already considerably skittish on the issue of GMOs) to enact independent regulation. Another problem with the Novel Food Regulation was the fact that it did not try to

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<sup>119</sup> Council Directive 90/220/EEC.

<sup>120</sup> Skogstad, p. 321.

<sup>121</sup> Garcia, p. 4.

<sup>122</sup> Regulation (EC) No. 258/97

regulate the already approved Bt corn and Roundup Ready soybeans, approved by the EU in 1996.<sup>123</sup>

In Brendan Flynn's "Postcards from the edge of integration? The role of committees in EU environment policy-making" the GMO controversy is presented through the lens of Comitology dynamics. The Novartis GM maize application, subsequently approved in 1997 through the Comitology procedure, first encountered stiff opposition, primarily from Austria, the UK, Sweden and Denmark (as a result of a rather negative opinion of the UK's Advisory Committee on Novel Foods and Process). As Flynn argues, "the whole issue was transferred to the Commission for solving, as it remained deadlocked at Council level." Subsequent regulatory committees (Scientific Committee on pesticides, Scientific Committee on Animal Nutrition and the Scientific Committee on Foods) approved Novartis GM maize (despite considerable opposition) on 18 December 1996 leading to national bans by Austria, Luxemburg and Italy. The Austrian and Luxembourg bans were examined on April 9<sup>th</sup> 1997 by the Scientific Committees on Pesticides, Foods and Animal Nutrition under the Article 16 of the Directive 90/220/EC and were found to be unjustified. However, the Council, which now had to act and remove the bans as per decision of the committee, refused to make a decision, forcing the Commission to subsequently demand in September 1997 that Austria, Luxembourg and Italian bans be dropped.

The situation by April 1998 was that 16 GMOs were approved and another 11 were pending. As Bernauer and Meins note, "Facing disarray in the approval process, and the fact that several GM products had already been approved by the EU for commercial use by 1997, the EU engaged in further efforts to harmonize approval and labeling requirements for GMOs."<sup>124</sup> If Member States

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<sup>123</sup> Chege, p. 179.

<sup>124</sup> Bernauer and Meins, p.659



felt that the regulations in place were insufficient while those same regulations allowed Member States to enact country-specific regulation, then EU's internal, common market would be compromised. One could conclude from this line of reasoning that the moratorium was therefore not solely enacted in order to protect the consumers and health standards, but also to prevent a situation where the internal market was "belittled" (in terms of legislation) and in some ways, "regulated out of". The June 25<sup>th</sup> 1999 Council meeting that enacted the moratorium accepted the Commission proposal to amend the 90/220/EEC Directive.

The situation that led to the moratorium is therefore strikingly similar to the situation today. This points to the fact that the legislation passed by the EC post-moratorium did not resolve the essential source of conflict. The Member States are still pressured by their domestic politics and the Commission is still pressured by the WTO and other actors, such as the industry and NGO interest groups.

Important to note is the role that the Comitology procedure plays as well. If we argue that the new legislation, enacted after the moratorium to resolve conflict, did not resolve anything and the conflict still exists, then we basically argue that labeling and concerns about traceability were not in fact the reasons for Member States to keep failing to vote by QMV in majority either way. If the outcomes of votes are still the same, then the change of legislation had no effect and therefore the kind of problems the Commission tried to legislate its way out of are in fact not the problems creating the impasse. Comitology procedure and the fact that external pressures are being exerted on the states therefore become the only other possible explanations for the resumption of conflict post-moratorium.

Therefore, as early as 1999 the Comitology procedure was largely ineffective in regulating the GMO approvals. As Flynn argues “controversy with GMOs was caused as much by the way in which the comitology procedure dealt with the issue as in the fact that the subject matter is contentious in its own right [...]”<sup>125</sup> The situation after the moratorium is no different, seriously questioning the success of legislation enacted following the ban.

## 6.2 Temporal Analysis Post-Moratorium

Directive 2001/18/EC entered into force on April 17<sup>th</sup> 2001, it became applicable as of October 17<sup>th</sup> 2002, although France has still not transposed it (The Senate passed the law on March 24<sup>th</sup> 2006, but it now has to pass the Assemblée Nationale, on whose agenda it is apparently only in June).<sup>126</sup> Directive 2001/18/EC explicitly incorporates the precautionary principle, going one step further than the previous Directive. The precautionary principle is now a central element of the Directive, which notes in its recital eight that the principle was taken into account during the drafting and “‘must be taken into account when implementing it’.”<sup>127</sup>

A proposal for a legislation on traceability and labeling of GMOs was presented by the Commission on 25<sup>th</sup> July 2001 and subsequently resulted in the adoption in September 2003 of 1830/2003 and also in adoption in 2004 of a Directive on environmental liability 2004/35.<sup>128</sup> Further complicating (or rather simplifying) the matter was the introduction of Regulation 1829/2003 which regulates the placing on the market of GMO food and feed. Garcia explains:

“A single application for a GMO and all of its uses may be filed under this Regulation provided one of its uses concerns food or feed. Regulation 1829/2003 also lays down specific labeling requirements for genetically modified food and feed. However, as regards environmental risk assessment it relies on the provisions of the horizontal Directive 2001/18/EC.”<sup>129</sup>

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<sup>125</sup> Flynn, p. 91.

<sup>126</sup> Personal correspondence with Dr. Yves Tiberghien.

<sup>127</sup> Garcia, p. 6.

<sup>128</sup> Garcia, p. 5.

<sup>129</sup> Garcia, p. 6.

Under the Directive 2001/18/EC GMO product is submitted to the national authority in one country. The application can be rejected, in which case the submitting company may choose to submit the GMO application in another Member State (thus allowing biotechnology firms to pick and choose the most GM friendly national authority). If the assessment (which is meant to include “possible direct and immediate effects of releasing the GMO, but also any indirect and delayed effects on human health and the environment, as well as cumulative long term effects”<sup>130</sup>) is favorable, then the application is forwarded to the other Member States which may choose to voice their concerns. In case of objections from Member States, the Commission submits the application for assessment to European Food and Safety Authority. Following EFSA’s opinion, the Commission will make a regulatory proposal and draft a decision. This in turn initiates the Comitology procedure. A regulatory committee chaired by the European Commission needs to agree to make a decision. “This inter-institutional procedure is laid down in Decision 1999/468/EC and provides for the adoption of the decision by the Commission when the Committee gives a favorable opinion by qualified majority.”<sup>131</sup> However, if the regulatory committee fails to make a decision, or even if it votes against the Commission draft proposal, the application is forwarded to the Council, and the European Parliament is informed. The Council of Ministers makes a decision based on the QMV, but if it fails to make a decision or makes no decision at all within three months, the Commission adopts the decision automatically. Rejecting the Commission draft proposal with QMV majority means that the Commission will have to amend it, re-submit it or make a legislative proposal.<sup>132</sup>

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<sup>130</sup> Garcia, p. 8.

<sup>131</sup> Garcia, p. 8.

<sup>132</sup> Garcia, p. 9.

Brosset, concluding in late 2003, posits that “It is difficult to evaluate the effectiveness of the remedies introduced in 2001, since they have not yet been applied.”<sup>133</sup> She saw the process as totally “paralyzed, *in fine*, because the Commission has refused to shoulder the burden of taking responsibility for its decisions in such controversial areas.”<sup>134</sup> However, this is no longer the case. Since December 2003, the Commission has started making decisions on GMO approvals. All of these decisions have been reached without QMV in favor or against in either the regulatory committee or the Council. It is fascinating to note that the current situation is in many ways very similar to the one pre-moratorium. This essentially means that the legislation enacted by the EC has completely failed in resolving the pre-moratorium impasse. The introduction of EFSA into the equation has clearly done nothing to reassure Member States opposed to the GMO approvals, indicating that scientific proof was never the issue and that the Commission’s attempts to improve the “quality” of scientific evidence will be futile in the future. The issue still remains politicized and since the Comitology process has not altered at all, the outcomes of committee votes remain divisive and fail to reach a QMV decision. The only difference is that with the negative WTO ruling and threat of further litigation, the Commission is under enormous pressure to keep pushing through approvals, a situation that in 1998 it decided could not continue and agreed to change the legislation. However, as long as the GMO approvals remain a controversy and the Comitology procedure remains in place, forcing the Member States to abdicate power, the impasse is likely to continue.

As has already been discussed, the legislation enacted has not been able to resolve the situation. In fact, it may have even further exacerbated the problems. Member States find it easier to do nothing and pass-the-buck to the Commission since those who are opposed to GMO approvals

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<sup>133</sup> Brosset, p. 573.

<sup>134</sup> Brosset, p. 569.

can simply enact safeguard measures post-facto. Therefore, Member States are rationalizing that they can abdicate power and still get their way, those who are opposed to GMOs get to use safeguards and those concerned with internal consistency of the market and biotech industry growth can always count on the Commission to push the GMO approvals regardless of the failure of Comitology to reach a decision. The countries in the middle are just glad that they do not have to make a choice either way. Instead of motivating states to try to resolve the issue through negotiated settlements and bargaining, Comitology allows them to be “lazy” and strategically let the institutions fail.

Meanwhile, the Commission is under incredible pressure from the WTO as well as biotech lobby groups to allow GMOs to go forward. Emphasis placed on biotech development in the Lisbon Agenda is a powerful motivator as well. The Commission is simply unable to take into account the precautionary principle and has to force the GMO approvals despite having guaranteed in the past that it would never do so.

## 6.3 Member States

Actor preferences and variations between actors should also be analyzed in order to completely conceptualize the outcome where Member States do not make a decision on GMO approvals. From the above section we have gathered that the issue is highly politicized, that the quality of scientific evidence is not sufficient to trump that politicization and that the Commission is under pressure to force through approvals, something it loathed to do before the moratorium and sought to remedy with new legislation. Hopefully, by concentrating on the direct analysis of actors involved we can try to infer more detailed causal dynamics.

The first level of analysis will be the Member States. Member States can be separated, according to voting patterns, into those that are vehemently opposed to GMO approvals (Denmark, Cyprus, Malta, Greece, Italy, Luxemburg and Austria), those that are in favor of GMO approvals (The UK, The Netherlands, Czech Republic, Sweden, Finland and Estonia) and those that abstain almost regularly (Germany and Spain)<sup>135</sup>. A number of pro-biotech countries also abstain from time to time (like Ireland, which abstained 50% of the time) and some major players, such as France, vote regularly in favor despite considerable reputation as an anti-biotech bastion.

Of greatest interest are the states that are opposed to GMO approvals since they seem to be a consistent and determined block. The main explanation for their opposition can be separated in two ways. One is an economic explanation that argues that organic farming industry would be affected adversely by the GMO approvals, but this explanation does not hold for the entire

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<sup>135</sup> I have decided to categorize the states according to their voting patterns in the regulatory committee and the Council. Spain, which abstains on almost all of its decisions, is often regarded as a pro-biotech country because of the fact that it has a lot of field trials and actual planting of GM crops, but in this research I am concentrating mainly on GMO approvals through the Comitology procedure and therefore make an assessment purely on voting records.

group, as they are quite diverse and not uniform in terms of organic farming (although Austria is probably the most affected by this preference formation variable).

The other explanation looks at the public opinion and especially environmental NGO group dynamics. The acceptance of biotechnology in Europe is extremely low (Eurobarometer 2001)<sup>136</sup> As Thomas Bernauer posits, “33-50% of European respondents regarded GE food as a health hazard (as compared to 27% in the US in 1999). European consumers also appear to have been concerned about labeling before 1996.”[...] Eurobarometer (2002) survey shows that opposition is going down, but on average, remains strong. Bernauer’s argument is that NGOs did not create this public opinion. He cites that surveys showed low public opinion prior to 1996, before GE food went on the EU market or extensive NGO campaigns began.<sup>137</sup> It is not the NGOs who are creating the public opinion, it is the NGOs who are rather “piggy-backing on the pre-existing negative public perceptions of agri-biotechnology.”<sup>138</sup> Eurobarometer report *Europeans, Science and Technology* from 2005 also largely confirms these conclusions.<sup>139</sup>

For explanation on this dynamic we turn to Erika Meins who introduces the concept of “public outrage” into the study of regulatory outcomes in her seminal work *Politics and Public Outrage* and also along with Thomas Bernauer in their paper “Technological revolution meets policy and the market: Explaining cross-national differences in agricultural biotechnology regulation”. This concept essentially re-affirms that “owing to their dependence on voluntary funding and the corresponding need to listen closely to the perceptions of public problems, most non-governmental organizations keep a close eye on public opinion.”<sup>140</sup> Thomas Bernauer and Erika

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<sup>136</sup> Landfried, p. 261 and Skogstad, p. 331.

<sup>137</sup> Bernauer, p. 75 citing Gaskell and Bauer (2001).

<sup>138</sup> Bernauer, p. 69.

<sup>139</sup> Eurobarometer 2005.

<sup>140</sup> Neyer 2004, p. 33.

Meins argue that the opposition to the biotech sector was formed by a very heterogeneous coalition. Bernauer and Meins expand upon research done concerning collective action and argue that, despite the obvious free-rider problem, anti-GMO coalition was able to overcome the traditional collective action problem by rallying around the GMO issue. Therefore, despite the traditional links in Europe between national and supranational regulators with the industries they regulate, the anti-GMO lobby was able to rally enough support to show that it was a powerful player.<sup>141</sup> This meant that governments and the EU became acutely aware of this issue.

In terms of public outrage, typically, Meins argues, the issues affected are those in the realms of environmental, health and safety regulations. This leads Meins to conclude that “Public outrage can have two effects on the regulatory process and its outcome. First it can change the distribution of power between producers and consumers, and, second, it may affect producer’s interests.”<sup>142</sup> She argues that public outrage helps consumer groups overcome collective action problems, especially the environmental NGOs. It also diminishes producers’ power and increases consumers’ power. To explain the success of NGOs, Meins points to their strategy of “fostering a negative image of certain multinationals” and linking the issue to globalization. GMOs were perceived as vessels through which US MNCs would come to dominate the food production and selection. Nevertheless, she does not explore the topic of whether these fears were created by NGOs, fostered by NGOs, played upon by NGOs or simply spurred NGOs into action.<sup>143</sup>

Therefore, the effect of “public outrage” coupled with the growth in the importance of NGOs in Brussels<sup>144</sup> has resulted in the polarization of Member States along the lines of those governments open to forming coalitions with anti-GMO elements and those who are not. An

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<sup>141</sup> Bernauer and Meins, p. 653.

<sup>142</sup> Meins, p. 30.

<sup>143</sup> Meins, p. 132.

<sup>144</sup> Wessels, p. 226.



interesting dynamic that would explain such an outcome is offered by a Brussels biotech industry lobbyists who suggests that most governments give the environmental portfolios to the Green Members of their coalition, to keep them out of other agendas, and they are usually the most open to influence from environmental NGOs.<sup>145</sup>

This level of analysis largely conforms to the intergovernmental lens, it illustrates the importance that domestic politics play in preference formulation of state actors. However, important issue to take out of this is the fact that economic factors are not the only ones that concern Member States. This paper has not analyzed these economic factors, but they are nonetheless extremely important. The UK and the Netherlands consistently vote in favor of GMO approvals because of economic considerations. However, we have concentrated on the concept of public outrage as introduced by Erika Meins in order to reaffirm that the domestic politics reformulate actor preferences in very complex ways. Member State's take into consideration economic but also non-economic factors, such as public opinion and perception.

#### **6.4 The Pressures on the Commission and Comitology Structure**

However, the Member States are not the only actor in this puzzle feeling considerable outside pressure. The Commission is in a difficult position where its post-moratorium legislation calls for an extensive use of the precautionary principle while the WTO case/litigation procedure counters with extreme pressure to only emphasize scientific evaluations of GMO approvals.

Even before the moratorium the EC rules on GMO approvals came under criticism for "defining political question as being overwhelmingly technical in character and reducing the transparency

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<sup>145</sup> Interview with a biotech industry lobbyists, June 17<sup>th</sup> 2005, Brussels.

of decision-making.”<sup>146</sup> The Commission looked to appease the EP and anti-biotech states by incorporating the precautionary principle in the new EC Directive 2001/18/EC. However, there is a limit to how far the Commission can go with the precautionary principle because of the WTO.

Ellen Vos makes a strong argument for how the WTO influences Community GMO approvals:

“This [paying attention to scientific facts, but also the manner in which one deals with them] became even more important when the Community is called upon to justify its safety measures in international fora [WTO]... It is noteworthy that in its approach the Commission insists on severing risk assessment from risk management; with assessment performed by scientific experts... and the acceptability of risk discussed by the Commission and national representatives. However, such an approach denies the difficulties of separating risk assessment from societal and political values. This is underlined by the fact that in situations where scientific activities attract great attention from the public, even scientists – ‘very esoteric, sophisticated, all-knowing, discerning individuals’ – are likely to be subjected to powerful political pressure. Pressure was, for instance, openly admitted by scientists working on BSE within various scientific committees.”<sup>147</sup>

Vos introduces the dilemma that is intrinsic to all food safety regulation. While science is important, Member States are also looking at the issue from the perspective of “socio-economic elements.”<sup>148</sup> Looking at how the post-BSE situation may affect the way the Commission approaches food safety regulation, Vos concludes that,

“[...] Communication [...] use of the precautionary principle seems to be intended to defend and justify the Community’s refusal to allow American beef with hormones within the WTO context. It pays only little attention to the institutional designs by means of which the precautionary principle may be implemented by the Community in food safety regulation within the Community context. In addition it remains unclear whether and in how far Member States should be able to rely on precaution within the Community context, in particular to the ‘opt out’ clause... This raises queries such as ‘how certain’ is ‘certain enough’, and entails the risk of creating a ‘scientific trap in which the public could be encouraged to demand ‘certainty’...”<sup>149</sup>

The analysis provided by Vos as early as 1999 is exemplary because it predicts the problems with the implementation of the precautionary principle in future GMO regulation. The Commission allowed the precautionary principle into Directive 2001/18/EC in principle, but in

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<sup>146</sup> Landfried, p. 255.

<sup>147</sup> Vos 2000, p. 243.

<sup>148</sup> Vos 2000, p. 248.

<sup>149</sup> Vos 2000, p. 249.

fact has no intention of following up on it. However, anti-biotech states are firmly committed to using it. The Commission itself argues that ‘application of the precautionary principle is part of [...] risk management, when scientific uncertainty precludes a full assessment of the risk,’<sup>150</sup> but it still relies on EFSA rulings as the most important benchmark of GMO safety. The anti-biotech states, meanwhile, read the precautionary principle as allowing them to block GMO approvals without clear scientific evidence, but rather on the grounds of precaution. Zeynep Forsman posits that “[...]the Commission requires that the analysis of scientific data relating to risk be done prior to resorting to this principle [and] the Commission requires that during preliminary evaluation, it is scientific evaluation that will determine the degree of scientific uncertainty [but] this approach seems contrary to the founding notions of the precautionary principle.”<sup>151</sup>

The external pressure on the Commission is clearly coming from the WTO. It would be useful to remind oneself that the Commission agreed to make new legislation in 1999 because it itself realized that forcing GMO approvals could simply not continue, even if it was opposed in principle to the moratorium. Furthermore, in formulating the 1999 Comitology rules the Commission “Commission agreed to issue a declaration undertaking in ‘particular sensitive sectors’ not to go against ‘any predominant position which might emerge within the Council against the appropriateness of an implementing measure.’”<sup>152</sup> Moreover, it introduced the precautionary principle into the Directive 2001/18/EC. And yet the empirics of the 19 GMO approval votes suggest that the Commission has eschewed all these aspects of its thinking.

The temporal data of the WTO case correlates exactly to the Commission’s drive to push GMO approvals. The WTO proceedings began in May 2003 and the Commission began proposing

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<sup>150</sup> Forsman, p. 591.

<sup>151</sup> Forsman, p. 591.

<sup>152</sup> Pollack, p. 133.

GMO approvals late that year, despite being conscious of the probability that no QMV majority would ever be reached, as was already discussed. The pressure on the Commission has culminated in the negative opinion of the WTO panel ruling that the GMO ban was illegal, under WTO rules, on February 7<sup>th</sup>, 2006.

In his analysis of the telecommunication regulation, Mark Thatcher<sup>153</sup> identifies “incrementalism” (expanding regulation in carefully calculated steps that allow all Member States to acclimate to it) as a concept that allows the Commission to slowly solve the opposition on its regulation from Member States. It is clear that no such strategy could be applied to the GMO approvals, not with such intense pressure coming from the WTO. Interestingly, this places the Community on the exact same path it was prior to the 1999 moratorium with the Commission approving GMO products through a hostile committee and Council.

Final element of analysis is the Comitology procedure itself and what effect the decision-making mechanics in of themselves have on the GMO approvals process. A Commission official noted in summer of 2005 that “There is a feeling, however, for some Commissioners, that it is unsustainable to keep forcing Member States to make decisions [...] It is very easy to abstain and then blame Brussels. Take into account that when Regulation 1829 was approved, member states did agree through co-decision. But when it comes to implementation they are not taking positions.”<sup>154</sup>

This “Brussels blaming” is what Brendan Flynn characterizes as an example of “classic buck passing politics [...] of] thorny question which environmental ministers cannot or simply do not

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<sup>153</sup> Thatcher, p. 584.

<sup>154</sup> Interview with a European Union Commission official, DG SANCO, June 17<sup>th</sup> 2005, Brussels.

want to solve.”<sup>155</sup> The EU becomes “a functional scapegoat for getting through policies which at the national level would prove to be politically sensitive.”<sup>156</sup> Flynn offers some anecdotal evidence of this when he cites,

“the Belgian newspaper *Le Soir*, which managed to leak the discussion of the GMOs issue by the collegiate commission, in a story which suggested that Commissioners seemed predominantly concerned with the commercial pressures associated with the policy rather than environmental or health concerns. Indeed, Greenpeace were less circumspect, calling the entire comitology procedure inherently undemocratic as a means by which the Council could absolve itself of responsibility for approving GMO food... The Member States find in it a convenient method of buck passing for a policy which would inevitably attract criticism whatever the decision, either from industry or environmentalists.”<sup>157</sup>

It is important to note that there is really only circumstantial evidence regarding the “buck-passing” thesis. It is impossible to confirm Flynn’s hypothesis since all committee meeting deliberation is secret. However, there is considerable proof that such thinking may permeate certain Member States unwilling to make the difficult choice of either halting or approving GMO products. Aside from Flynn’s research and the comment from the Commission official quoted above, there is also the voting record as collected by FoE.<sup>158</sup> The fact that such a high number of Member States fails to take a vote and abstains, combined with the fact that it is usually the same countries that abstain (Germany 15 times and Spain 16 out of 19, together they have a considerable block of 56 votes) points towards strategic voting. That not a single product has been authorized, or even opposed, is quite a statistical anomaly, especially when one considers the fact that Comitology is almost always consensual.

The possibility of enacting safeguard clauses is also something to consider here. Member State can restrict or prohibit use or sale of GMOs if it introduces new scientific evidence of its

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<sup>155</sup> Flynn, p. 89.

<sup>156</sup> Flynn, p. 90.

<sup>157</sup> Flynn 91-92.

<sup>158</sup> Friends of Earth Europe. “Table on how EU Member States voted on GMOs.” Accessed on April 21, 2006. website at [http://www.foeeurope.org/GMOs/pending/votes\\_results.htm](http://www.foeeurope.org/GMOs/pending/votes_results.htm)

negative effects. However, this is still conditional on an EFSA evaluation of the evidence supporting the safeguard clause. The Commission then makes a draft proposal to lift the ban in case of a negative EFSA assessment regarding the validity of the ban. Perhaps it is easier for countries to abstain and not oppose the Commission (or their fellow Member States) when they know that the countries opposed to the GMO approval can always use the safeguard clauses. As a Member State representative said in an interview in the summer of 2005:

“It is hard to say no to another member states’ safeguard clause [...] this might be ‘returned’ later on. There is a lot of cooking going on. There is a lot of lobbying going on as well. Countries have been talking to me already. When you work like I do you have a lot of discussion in the corridor. Mostly, those member states that want the safeguard, they are talking. The Environmental Ministers are talking to each other.”<sup>159</sup>

It may be a stretch to conclude that there is coordination (“cooking” among Member States on voting, especially from just that one interview. However, a further avenue of research may be to attempt to assess how much the votes in regulatory committees and the Council are to an extent predetermined so as to force the Commission to make an opinion on its own with the foresight and an agreement that those countries that oppose GMOs would enact safeguard measures and the rest would not oppose them. When one considers that only the UK and the Netherlands voted for the lifting on all 5 safeguard clauses (Czech Republic voted for the lifting of the Austrian ban only) in the June 24<sup>th</sup> 2005 Council Meeting (voting on safeguards does not go through the regulatory committee, but is immediately taken to the Council) elements of this hypothesis start to crystallize. It is too much of a coincidence that the only decision that Member States have been able to agree on, in the case of GMOs, has been to not turn down safeguard clauses.

Therefore, we have in this section illustrated the kind of pressures that are exerted on the Commission and how they force it to come into conflict with the Member States. We have also

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<sup>159</sup> Interview with an official of the government of Sweden, June 17<sup>th</sup> 2005, Brussels.

illustrated how the notion that the Commission will *have* to push GMOs through liberates Member States from their responsibility to make decisions on their own. They are aware of the position that the Commission takes and are well aware that the WTO exerts pressures on them as well (as do biotech lobbyists and Lisbon Agenda principles). Nevertheless, they are comfortable in divesting their decision-making power because the safeguard clauses can always be enacted and they can always allow Member States enacting these safeguard clauses to retain them, since they all vote on the Commission proposal to remove them.

Comitology structure, meanwhile allows them to abdicate their power to the Commission, it makes this option a possibility. Without Comitology structure, Member States would not have the Commission to pass-the-buck to. This analysis largely conforms to the model of strategic institutional decay. Instead of bargaining and negotiation Member States come to a heads on collision with both each other and the Commission in terms of GMO approvals, a clearly suboptimal outcome. The external pressures exerted on each would better be resolved were they forced to come to a decision. GMO issue is extremely politicized, but it is not politicized beyond resolution, the EU has proved that it can negotiate through many complex concerns. Therefore, the issue and the external conflicts around it are exacerbated by the Comitology structure which has allowed the Member States to strategically divest their power.

## 6.5 Other Cases

In our final analysis, we will look at a few similar cases where the Comitology procedure resulted in the Commission adopting its proposals due to the lack of consensus in the regulatory committee and the Council. The main such case would be the BSE crisis<sup>160</sup> Ellen Vos argues that prior to the BSE crisis, food regulation was largely characterized as being “led by pragmatic considerations.”<sup>161</sup>

The Commission proposed lifting of a ban on British beef imports and submitted it to the Standing Veterinary Committee which could not come to a decision. The Agricultural Council of June 3<sup>rd</sup> 1996 did not reach a decision either, which meant that the Commission ultimately lifted the ban on June 11<sup>th</sup> 1996 because of the comitology procedure.<sup>162</sup> This is a very important case as it is another example of a highly politicized issue not being able to be resolved by the Comitology procedure. Neuhold suggests that the British scientific experts played a major role in deadlocking the regulatory committee.

The temporary Committee of Inquiry into BSE crisis, set up by the Parliament in July 1996, disclosed that a policy of “disinformation” was practiced by the Commission in the 1990-1994 period. “The Inquiry Committee, moreover, observed that the Commission had been very much influenced by ‘British thinking’ due to the number of British officials present in the two committees operating in this field: the Scientific Veterinary Committee (composed of scientists with a high-standing reputation) and the Standing veterinary Committee (composed of national representatives). The operation of the Standing Veterinary Committee during this period had

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<sup>160</sup> Gunther et al.

<sup>161</sup> Vos 2000, p. 231.

<sup>162</sup> Neuhold, p. 20.



been clearly put under political pressure, whilst the information diffused by the Scientific Veterinary Committee had not been free from political influence either.”<sup>163</sup>

Brandan Flynn offers another case, the EU’s Eco-management and Audit Scheme (EMAS). In the EMAS case, a committee of national experts found the Irish and Spanish eco-audit schemes as incompatible with EMAS and referred the issue to the Council, which did not even take a vote on the issue. The Commission thus simply approved the Irish and Spanish schemes despite opposition in the regulatory committee.<sup>164</sup> This case therefore reaffirms the fact that politicized issues do not lend themselves to committee governance, although it is of a slightly different nature since the Council actually allowed the Commission to overturn the decision made by the national experts in the regulatory committee.

From this empirical analysis of the case we can start discerning a considerable puzzle: in the face of overwhelming evidence that Comitology fosters deliberative decision-making, the GMO approvals case stands in an incredibly stark contrast. The main variables are essentially ordered along the axis between the Member States, the Commission and the Comitology structure. We will now present the dynamics behind Comitology decision-making procedure outcome in the case of GMOs and thus answer our first research question. Following the run-down of the dynamics we will attempt to assess them through the theoretical lenses presented early on in the paper.

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<sup>163</sup> Vos 2000, p. 232.

<sup>164</sup> Flynn, p. 92.

## 7 CONCLUSION

Our analysis has concluded that external pressures on the Member States and the Commission along with the decision-making mechanisms of the Comitology procedure have created the current impasse over GMO approvals. The politicization of GMOs in some Member States due to the incredible increase in environmental NGO bargaining power, resulting from the public outrage concept, has made them extremely opposed to GMOs. This opposition, while rooted in the misgivings about the safety of the food within the larger populace, is inherently political as it is based on governments' apprehensions that a pro-GMO stand will result in loss of support at home. No matter what kind of scientific evidence the Commission proposes, these Member States will be opposed, especially when the precautionary principle (which the Commission negotiated into the new GMO legislation in order to resolve the 1999 impasse) allows them to consider long term effects that may not even be testable and enact safeguard clauses accordingly. Therefore, the new, post-moratorium, GMO legislation and scientific assessment procedures are irrelevant to this considerable block of countries (anti-GMO countries together form a block of 69 votes, only 21 votes away from a blocking vote in the 232 qualified majority procedure) that base their opinion purely on the political aspects of the issue.

This impasse further illustrates the problem with the structure of Comitology when faced with a considerable politicization of an issue. Aside from the fact that the committees will always be split and thus unable to make a decision when a strong number of countries has a blocking minority, the structure of Comitology in this case also reveals the inherent flaw in fostering deliberative solutions. In the face of a politicized issue, Comitology encourages deadlock because Member States can always rely on their safeguard clauses to opt out of the regulation proposed by the Commission. This gives Member States indifferent about the outcome of the

proposal the incentive to not ally with their colleagues, since these will be able to opt out later anyways. Instead, "passing the buck" dynamics may emerge where the unpopular decision is forced on to the Commission and then those opposed opt out through safeguards.

Much as in the case of the Member States, the Commission is under considerable external pressure to force through the GMO products. The Commission began proposing GMO approvals as the WTO case started and has disregarded its own commitments not to push sensitive proposals in the face of considerable (if not QMV) opposition. In trying to resolve the moratorium, the Commission agreed to the precautionary principle being entrenched in GMO legislation, but it has recently concentrated solely on the scientific assessments in order to comply with the WTO rules. Unlike in other cases, the Commission does not have the luxury to practice incrementalism and deliberative strategies.

The dynamic that is occurring is one we have dubbed strategic institutional decay. Member States do not have sufficient incentive to resolve the politicized impasse through regular bargaining and negotiations. They are abdicating power to the Commission and skirting their responsibility to make a decision. This form of decision-making is a serious threat to the legitimacy of the European Union and is likely to increase the dissatisfaction of its citizens. Comitology as a procedure is incapable of bringing the conflict over GMO approvals to an end and the issue, far too politicized as it is, should be removed from this form of decision-making.

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