The regulatory state goes global: 
EU participation in international food standard-setting 
by the Codex Alimentarius Commission

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1. INTRODUCTION: FOOD-SAFETY POLICY AND EU EXTERNAL RELATIONS

Contributors to the current debate on the future of the European Union (EU) disagree on many things, but one thing appears to be widely agreed: the EU should play a bigger role in international affairs. Not least under the impression of more or less severe crises, areas such as energy, climate change, and immigration have been included in recent calls for expanded global activities. Only by joining forces and “speaking with one voice” on the international stage, the reasoning goes, will EU countries be able to defend their interests in the face of economic globalisation and other developments, which are far beyond the control of individual states. From the history of European integration, however, it is clear that in foreign policy high-flying expectations are often not matched by relevant capabilities at EU level. Member states have been much more hesitant when it comes to delegating power over external relations to supranational institutions than if such delegation concerns (previously) domestic policies. This is hardly surprising, given the central role which the autonomous conduct of foreign policy plays in traditional concepts of statehood and sovereignty.

The notion of the “capability-expectations gap” has been coined with a focus on the common foreign and security policy (CFSP), i.e. in an area where the means of conducting foreign policy are especially costly and sovereignty issues are especially notorious (Hill 1993). In issue areas traditionally considered to be “low politics”, one might expect the gap to be smaller. And indeed, at the other end of the spectrum of EU foreign relations, external trade policy has – with some exceptions – been conducted at EU rather than at member-state level for several decades. The goal of creating a customs union, together with the general prohibition of internal barriers to trade, made it virtually impossible not to have a common external trade policy, too.

Both the CFSP and external trade policy are obviously very important. However, the bulk of EU external activities belongs to neither of these two “extreme” categories, but rather to a large and somewhat underexplored area inbetween, which encompasses the external dimension of various internal, predominantly (but not exclusively) regulatory policies of the EU.¹ Food-safety policy, which regulates the conditions under which foodstuffs can legally

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¹ The predominance of regulatory policies in the EU’s portfolio of activities famously led Majone (1996) to conceptualise it as a “regulatory state”. Although for good reasons this remains a contested concept (Eberlein and Grande 2003), I have borrowed it for the title of this paper, firstly because I deal with one of those policies to which Majone’s conceptualisation refers, and secondly because, although the EU remains far from being a state in the traditional sense, its increasing involvement in international affairs,
be produced and placed on the market, is a case in point on which this paper focuses. Alternatively, one could for example refer to public-health policy more broadly conceived, or to environmental policy. In these and in several other areas, the *acquis communautaire* encompasses many detailed legal provisions which, although they are directly addressed to actors within the EU, have important indirect consequences beyond its borders. Among the mechanisms which create such consequences, international trade remains an especially important one. Thus for exporters from non-EU countries, European food regulation can constitute a significant “non-tariff” barrier to trade, if it diverges from, and in particular if it is more stringent than, relevant regulation in the exporter’s home country. At the same time, in all these areas there are more or less far-reaching international treaties and organisations, which attempt to influence the policies of their contracting parties. Food-safety policy is an interesting case also in this respect, for unlike in the more extensively researched field of environmental regulation, a single multilateral organisation in charge of setting relevant international standards has been in existence for over forty years now, namely the Codex Alimentarius Commission (CAC) of the United Nations (UN), which thus creates a particular opportunity structure for the conduct of external food-safety policy.

Unlike external trade policy, however, the external dimension of European food-safety policy until recently remained within the domain of member-state competence. This situation changed in 2003 when, after ten years of internal and external negotiations, the European Community (EC)\(^2\) joined the member states in becoming a full member of the CAC in its own right – one of very few international organisations where it has gained this status.\(^3\)

The remainder of the paper traces the process which led to the EC’s accession to the CAC, and it begins to assess the consequences of this accession, to the extent that these have become visible during the first three years of membership. In particular, subsequent sections address the following questions: What does the CAC do, why did EU actors want to join it, and how was the target reached in the face of considerable scepticism among both EU

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2 Given the contested legal personality of the European Union and its resulting incapacity to conclude international agreements (Marchisio 2002), it had to be the European Community, on whom legal personality is conferred by Art. 281 EC Treaty. The Constitutional Treaty, had it been ratified across all member states, would have eliminated this source of confusion by conferring legal personality directly to the EU (Art. I-7). In this paper I refer to the “EU” when I am concerned with the ensemble of institutions and/or member states, and to the “EC” when the particular international persona is concerned.

3 The best-know earlier cases are the UN Food and Agriculture Organisation (FAO) and the World Trade Organisation (WTO). Another example on a less-than-global scale is the European Bank for Reconstruction and Development (EBRD). According to Eeckhout (2004: 200), apart from “a number of fisheries organisations” this constitutes the sum total EC membership in international organisations. One additional, more recent example is mentioned below (fn. 96) but there may be more by now.
member states and other CAC members (2.)? What are the legal and institutional terms of EC membership in the CAC, how is a coordinated EC position normally arrived at in the CAC, and what happens if routine coordination processes fail (3.)? And what, if anything, has changed as a consequence of membership for “vertical” relations between the EU and its member states, and for “horizontal” relations with other international actors (4.)? The concluding section (5.) reviews the main findings and reflects on their applicability to other areas of EU external relations.

In terms of methods and materials, the analysis largely relies on official documents, by far the biggest part of which is publicly accessible on the internet, whereas a small number has been released (at least partially) upon my explicit request to the EU institutions concerned, i.e. the Commission and the Council. Meetings of the CAC and its subsidiaries are, with a few exceptions, also open to the public, and my own observation of two different Codex committee meetings helps to contextualise the documentary evidence. In addition, I had the opportunity to follow a series of intra-EU preparatory meetings as an in-service trainee at the European Commission’s Codex coordination team (on which see in detail below, 3.2) in 2005/06. The analysis in Section 3 in particular would not have been possible without the traineeship experience, and for what it is worth, the rest of the paper has also greatly benefitted from it.4

2. WHY AND HOW THE EC BECAME A CODEX MEMBER

2.1 Codex and its role in global food-safety governance

The Codex Alimentarius Commission (CAC) was created jointly by the UN Food and Agriculture Organization of the (FAO) and the World Health Organization (WHO) in 1962, with the aim of furthering the development of international food standards. The “Codex”, as the CAC and its subsidiary bodies are collectively referred to, is committed by its statutes to the dual goal of protecting the health of food consumers, on the one hand, and ensuring fair practices in food trade, on the other.5

Strictly speaking, Codex standards are not binding as such, and acquire binding force only as a consequence of explicit adoption by individual members. However, the legal status of these standards has increased significantly by virtue of being referenced in the Agreement

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4 I am indebted to Commission officials in the Codex team and in other parts of the Health and Consumer Protection Directorate-General (DG SANCO) for sharing their experience and patiently answering my questions during a stage in 2005/06.
on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) of the WTO, which entered into force in 1995 as part of the package of multilateral treaties agreed in the Uruguay Round of trade negotiations (cf. Maier 2007: 5-6 for a very short overview of the SPS Agreement’s core provisions). In addition to applying the general WTO principle of non-discrimination, whereby imported goods must not be subjected to stricter regulatory requirements than domestically produced goods, the SPS Agreement also obliges WTO members to base their national food-safety policy measures on a scientific assessment of health risk, the characteristics of which are further specified in the Agreement. Unless measures are based on such a risk assessment or conform to internationally harmonised food standards, such as those set by the CAC, they are open to challenge before the powerful WTO dispute settlement institutions, if they can be shown by other members to have negative impacts on international trade. Thus if they cannot scientifically demonstrate the need for nationally specific trade-impeding food-safety measures, WTO members are virtually obliged to adopt Codex standards in trade-sensitive areas, unless they want to risk ending up “in court”.

Codex standards – and related Codex texts such as guidelines or codes of practice – cover a very wide range of internationally traded food products. Altogether, there are now more than 400 Codex standards and related texts (guidelines and codes of practice), many of which have been repeatedly updated and amended.\(^6\) Final responsibility for the setting, updating and amending of Codex texts lies with the plenary of the CAC, which is in session either in Rome (at the FAO headquarters) or in Geneva (at the WHO) for one week every year (prior to 2003 every other year). The substantive negotiations on standards and related texts, however, are conducted in the framework of about two dozen subsidiary bodies – specialised committees and task forces, which are hosted and funded by individual Codex member countries. Most of these also meet physically once per year, but delegate the drafting of texts to physical and electronic working groups which interact more frequently. Scientific input for the work of the CAC and its subsidiary bodies comes from a handful of expert committees, which are managed not by the Codex but directly by its parent organisations, FAO and WHO, and remain institutionally independent from the Codex itself.

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\(^6\) Available at http://www.codexalimentarius.net/web/standard_list.do?lang=en.
2.2 Pre-accession negotiations inside the EU

For most of the Codex’s life to date, the EU’s individual member states were Codex members but the Union or the Community as such was not. The EC, represented by the European Commission, participated in Codex meetings as an observer, but in that capacity – like all Codex observers – it was entitled to speak only if invited by the chair, and after all the Codex members had spoken; it was not entitled to vote either. This is not an uncommon situation for EC representation in international organisations more generally (cf. Wouters and De Meester 2005: 12-14), but it was obviously unsatisfactory from the Commission’s point of view. It was potentially confusing also for other, non-EU Codex members, insofar as it created the impression of persistent national competencies, while food-safety legislation in fact was increasingly harmonised within the EU.

Already in the mid-1980s some attempts were made to revise the legal and practical conditions of EC participation in the Codex (Fondu 1987: 46). A major opportunity for further change arose in 1991, when the EC joined one of the Codex’s mother organisations, the FAO – the first “significant” international organisation ever to which it acceded as a member in its own right, after four years of negotiations (Sack 1995: 1237). The FAO was chosen as a “test case” for EC membership in international organizations because of its technical but nonetheless important nature and because of the extent of relevant EC competence, especially (at that time) in the framework of the common agricultural policy (Sack 1995: 1246). In purely legal terms, membership in the FAO would already have entitled the EC to become a Codex member, too; a simple declaration of intent, addressed to the Director-General of FAO or WHO, is sufficient for members of either of these organisations to join the Codex.7 The possibility of EC membership also in the Codex was explicitly mentioned in the context of its accession to the FAO, and in accordance with Article 300 of the EC Treaty, in January 1994 the Council indeed authorised the Commission – in consultation with a designated working group of the Council – to negotiate the conditions and the modalities of the EC’s accession to the Codex.8

The case for accession was further strengthened when the WTO Agreement entered into force in 1995. Generally speaking, the increased relevance of Codex standards in the context of WTO law (see above, 2.1) provided an additional incentive for EU member states to organise their participation in the Codex in the most effective way possible. In addition, the

7 CAC Statutes (fn. 5), Art. 2. The EC is not a member of the WHO, hence the route via the FAO is the obvious one to take.
8 Council doc. 11538/93, 22 December 1993.
SPS Agreement explicitly stipulates that “[WTO] Members shall play a full part […] in the relevant international organisations and their subsidiary bodies, in particular the Codex Alimentarius Commission […]” (Art. 3.4). Given that the EC was a founding member of the WTO, its continued exclusion from the Codex could be seen as incoherent with WTO law.\(^9\)

In close temporal, if not necessarily causal, connection with the entry into force of the WTO and SPS Agreements, the European Commission reached agreement with the FAO in March 1995 on the general modalities of accession and on the necessary amendments to the Codex Procedural Manual and Statute, as well as on a general “Declaration of competence”.\(^10\) In this Declaration, it was concluded from the Community’s exclusive competence in matters of external trade in goods that the competence to negotiate and adopt Codex standards also fell onto the Community, while member-state competences were deemed limited to budgetary and electoral questions. This proposal, however, was flatly rejected in September 1996 by member states in the Council’s Codex working group, who considered that “their rights as individual members of the Codex Alimentarius were not sufficiently guaranteed”.\(^11\) Member states likewise rejected the Commission’s proposal for the Council to request that the EC accession be put on the agenda of the Codex committee in charge (Committee on General Principles – CCGP), arguing that the issues of competence and internal coordination needed to be settled first.\(^12\) This reaction can be seen in the context of a more general backlash in the mid-1990s, triggered inter alia by the ratification crisis of the Maastricht Treaty, against the delegation of foreign-policy authority to the EU level, which affected also external trade policy (cf. Billiet 2006: 903).

In any event, for the next couple of years negotiations on accession to the Codex effectively went on hold. Meanwhile the famous Hormones case demonstrated drastically the possible consequences of not being able to assert the European position in the Codex.\(^13\) The Codex Committee on Residues of Veterinary Drugs in Food (CCRVDF) and eventu-

\(^9\) EC representatives actually made this argument later on in negotiations with other Codex members (below, 2.3) – cf. Membership in the Codex Alimentarius Commission of Regional Economic Integration Organizations, undated Information Note submitted by the European Community to the Codex Committee on General Principles, CX/GP 02/INF.1, paras. 16-19.


\(^12\) Ibid.
ally also the CAC plenary had agreed to set standards for the bovine growth hormones in question, thus declaring them to be safe as long as maximum residue levels are complied with.\textsuperscript{14} Not least for this reason the complete ban applied by the EU to these hormones was considered inconsistent with the SPS Agreement by the WTO dispute settlement bodies, and the complainants (US and Canada) were authorised to impose trade sanctions on the EC.\textsuperscript{15} The EU member states and their allies had won a first vote on this issue in the CAC in 1991, but in 1995 they failed to prevent a majority for the proposed hormone standards. In 1999 the EU member states again failed to prevent the CCRVDF from adopting maximum levels for a similar substance, bovine somatotropin (BST).

Citing the BST experience as yet another reasons to seek EC accession to the Codex, the Commission took an initiative to re-launch the negotiations with member states in 1999.\textsuperscript{16} From the failure of its earlier proposal it must have been clear that with regard to the division of competence, concessions had to made to gain member-state agreement in the Council. In May 2000, the Committee of Permanent Representatives (Coreper)\textsuperscript{17} invited the Commission to conclude its negotiations with the FAO and Codex Secretariat and agreed to reconsider the issue of accession on the basis of the results obtained.\textsuperscript{18} These were presented by the Commission in February 2001. The proposed Declaration of Competence had swollen from nine lines in the 1996 version to one and a half pages, and now it included a third category of “shared competence” in addition to EC and member-state competence, listing for each category the individual policy areas and Treaty articles concerned.\textsuperscript{19} In addition, the Commission proposed a five-page long Arrangement between the Council and the Commission regarding preparation for Codex Alimentarius meetings and statements and exercise of voting rights (hereafter “Internal Arrangement”).\textsuperscript{20}

\textsuperscript{13} European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26 (US complaint) and WT/DS48 (Canadian complaint). Analyses of the Hormones case are legion; see Godt (1998), McNiel (1998) and Walker (1998), among others.

\textsuperscript{14} Report of the 21\textsuperscript{st} Session of the CAC, ALINORM 95/37, para. 45.

\textsuperscript{15} Another reason for this decision was the lack of a proper risk assessment – in the sense of the SPS Agreement, as interpreted by the WTO panel and Appellate Body – justifying the EU’s divergence from the Codex standard.

\textsuperscript{16} In its White Paper on Food Safety, which in the wake of the BSE crisis set out the general principles of a revamped Community policy in this area, the Commission also re-emphasised its commitment to pursue accession to the Codex (COM(1999) 719, 12 January 2000, para. 111).

\textsuperscript{17} Coreper is of course the body which directly prepares the work of the Council (Art. 207 EC Treaty). Its own work is in turn prepared by numerous Council working group, among them one specifically dealing with Codex matters (mentioned above, at fn. 8, and further explained below).


\textsuperscript{19} Ibid., Annex 2.

\textsuperscript{20} Ibid., Annex 3.
initially it had been assumed that amendments to the Codex’s own Rules of Procedure could be limited to technical and editorial changes that would not even have to be discussed separately\textsuperscript{21}, the proposed amendments now included a separate new rule on “Member Organizations”, subdivided into nine paragraphs.\textsuperscript{22}

Despite the effort that had gone into the preparation of this revised package of proposals, some member states still turned out to be unhappy with it. Interestingly, the Council Secretariat today considers that revealing the number and the identity of the then critics “still could weaken the position of the EU [!] in the Codex Alimentarius Commission and in the framework of future negotiations of this kind”, and therefore it refuses to grant full access to the relevant Council documents.\textsuperscript{23} The substance of member-state objections to the Commission proposals, which kept the Council’s working group on Codex busy for another couple of months, can nonetheless be roughly reconstructed from the available documentary evidence. It appears to have been clear by then that EC accession to the Codex was only a matter of time. On several points member states still tried to further constrain the power of the Commission. This concerned the Declaration of Competence, in particular the framing of exclusive Community competence, but most member-state reservations turned on the Internal Arrangement. A majority of member states felt that, even on matters of exclusive Community competence, member states should be able to speak in Codex meetings alongside the Commission.\textsuperscript{24} The final agreement (in more detail below, 3.1) indeed gives member-state delegates the right to intervene – but not to vote – on matters of exclusive EC competence; in this respect it is slightly more “intergovernmental” than the FAO model which it otherwise follows (see fn. 37). One member state – not identified in the accessible part of the Council document – proposed a series of further amendments, in particular with a view to preventing the Commission from speaking or voting on behalf of the EC in the absence of previously agreed common negotiating position\textsuperscript{25}, but only one of these amendments was included in the eventual agreement in a weaker form. Thus major concessions were not gained by the member states in this final phase of the in-

\textsuperscript{21} Rapport intermédiaire (fn. 10), p. 5.
\textsuperscript{22} Accession of the European Community (fn. 18), Annex 1.
\textsuperscript{24} Report from Codex Alimentarius Working Party to Coreper, 22 February 2001, Council doc. 6304/01, p. 4 (only partially accessible).
\textsuperscript{25} Report from Codex Alimentarius Working Party to Coreper, 3 April 2001, Council doc. 7654/01, p. 2 (only partially accessible).
ternal preparations, but the schedule for accession was considerably strained. Thus the final proposal for a Council decision on accession, including the agreed versions of the Declaration of Competence and the Internal Arrangement, was issued by the Commission only a few weeks before the CAC meeting which was meant to decide on the necessary changes to the Codex rules.26

2.3 Accession negotiations in the Codex

Amendments to the Rules of Procedure, which would allow accession of the EC to the Codex, were first discussed in the Committee on General Principles (CCGP) in April 2001. These amendments referred to the membership of “regional economic integration organisations” (REIOs) in general, rather than the EC in particular.27 It was clear that the EC would remain the only case for the time being, but some Codex members from other regions of the world at several points intervened in support of the EC, with a view to other REIOs’ potential accession in the future.28

At the same time, there was also considerable resistance from Codex members – above all the US – against EC membership. In a certain sense these countries’ concerns mirrored those of the EU member states. Where the latter wanted to avoid being completely supplanted in the Codex by the European Commission, the former were afraid of an increase in power which might result from both the Commission and member states speaking, not to mention voting, on behalf of the Community.29 Thus the US invoked the general UN principle of “one nation, one vote” and claimed that the proposed changes would allow REIO member states to enjoy privileges not available to other Codex members.30 In the CCGP the EC tried hard to dispel fears that its membership would result in additional rights or privileges for the ensemble of its then 15 member states, but with limited success. The above-mentioned intra-European compromise on speaking rights proved particularly controversial with some other Codex members. Thus the US tabled a proposal which


27 Following the example of Art. II.3 of the FAO’s own Constitution (available at http://www.fao.org/docrep/009/j8038e/j8038e00.htm) as well as that of many other international organisations and agreements, where the concept of REIOs and their participation is well established.

28 Report of the 16th Session of the CCGP (ALINORM 01/33A), para. 130 (Argentina and Paraguay); Report of the 26th Session of the CAC (ALINORM 03/41), para. 21 (“several delegations”).

29 On the reasons for resistance among third countries against EC membership in international organisations see also, from a more general perspective, Eeckhout (2004: 200-1).

30 Report of the 16th Session of the CCGP (ALINORM 01/33A), para. 129.
Changes to the Codex Rules of Procedure have to be agreed by its highest decision-making body, the CAC itself, with two-thirds majority. The amendments provisionally agreed between the EC and the FAO/WHO were presented for adoption to the 24th session of the CAC in June/July 2001. Despite previous discussions in the CCGP, several Codex members were reported to be “perplexed with the subject”, probably also because of the late arrival of the final version of the proposal. A two-thirds majority may have been difficult to achieve under these circumstances, but in the end no decision could be taken at all on this proposal, because the necessary quorum (a majority of CAC members, i.e. 83 out of 165 at that time) was not attained, with only 75 delegations present at the meeting. At its next meeting in 2003 the quorum was met, but the CAC had to resort to one of its rare roll-call votes to settle the substantive issue. Despite the continued opposition of the US and eleven other Codex members, the proposed amendments to the Rules of procedures gained the necessary majority and were thus adopted.

With the necessary statutory provisions in place on the side of Codex, in November 2003 the Council of the EU adopted a decision, based on the above-mentioned Commission proposal (fn. 26), to request officially the Community’s accession. A formal instrument of accession was submitted to the FAO Director-General immediately thereafter by the chair of Coreper I on behalf of the Council Presidency. Almost exactly ten years after Council’s initial negotiating mandate, the EC thus joined the Codex as a full member.

31 Report of the 18th Session of the CCGP (ALINORM 03/33A), para. 81.
34 Ibid.
35 Report of the 26th Session of the CAC (ALINORM 03/41), para. 22.
Table 1: Chronology of EC accession to the Codex

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov. 1991</td>
<td>EC becomes a member of FAO</td>
</tr>
<tr>
<td>Jan. 1994</td>
<td>Council authorises Commission to negotiate conditions and modalities of Codex accession</td>
</tr>
<tr>
<td>Jan. 1995</td>
<td>WTO and SPS Agreements enter into force</td>
</tr>
<tr>
<td>Jan./Feb. 1995</td>
<td>Commission informs FAO Secretariat of EC's intention to become a Codex member; FAO confirms that EC is entitled to seek membership</td>
</tr>
<tr>
<td>March 1995</td>
<td>EC and FAO representatives reach consensus on general modalities of accession (incl. amendments to Codex Procedural Manual and Statute, general declaration of competence)</td>
</tr>
<tr>
<td>Sept. 1996</td>
<td>Commission proposal to Council WG on amendments to Codex Procedural Manual, declaration of competence and modalities of internal coordination – rejected by member states as not sufficiently respecting their rights as individual Codex members</td>
</tr>
<tr>
<td>Oct. 1996</td>
<td>Commission draft request for accession to be put on CCGP agenda – rejected by member states until after agreement on internal coordination and declaration of competence</td>
</tr>
<tr>
<td>June 1999</td>
<td>Commission proposes to re-launch negotiations on accession in Council WG/Coreper</td>
</tr>
<tr>
<td>May 2000</td>
<td>Coreper agrees to reconsider the issue in light of results from Commissions negotiations with FAO/Codex</td>
</tr>
<tr>
<td>Feb. 2001</td>
<td>Commission presents revised proposals for amendments to Codex rules, Declaration of competence and new Internal arrangement for coordination with member states</td>
</tr>
<tr>
<td>May 2001</td>
<td>Formal Commission proposal for a Council Decision on accession</td>
</tr>
<tr>
<td>June 2001</td>
<td>Coreper agrees on Commission proposals in slightly revised form</td>
</tr>
<tr>
<td>July 2001</td>
<td>CAC misses necessary quorum for decision on proposed amendments</td>
</tr>
<tr>
<td>July 2003</td>
<td>CAC adopts amended Rules of procedure, allowing accession of EC</td>
</tr>
<tr>
<td>Nov. 2003</td>
<td>EC accedes to the Codex</td>
</tr>
</tbody>
</table>

See text for sources.

3. HOW THE EC OPERATES AS A CODEX MEMBER

3.1 Terms of EC membership in the Codex

The terms of EC membership in the Codex, as agreed in the lengthy negotiating process recounted above, follow the example of its membership in the FAO in most respects. The core principle is that the Community and the Member States exercise their membership rights on an alternate basis (Rule II.1). In other words, on any given issue on the agenda of a Codex meeting, either the EC or the Member States are considered to have competence. Accordingly, it is either the Commission (on behalf of the EC) or the rotating Council Presidency (on behalf of the member states) which presents the European point of view. Which issues fall into which of these categories is set out in the Declaration of

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38 Rules cited in this section are those of the Codex Rules of Procedure, as revised by the CAC in 2003 so as to enable organisations to become members (fn. 32).
39 This differs from the situation in the WTO. There, too, both the EC and the member states are members but EC membership is not limited according to fields of competencies, and the Commission represents both the EC and the member states as a rule (the WTO Budget Committee being an exception) (Petersmann 2002: 331).
Competence, the final version of which is annexed to the Accession Decision. What emerged as the decisive criterion from negotiations between the Commission and member states is the extent to which relevant European legislation has been harmonised:

(1) The Community has exclusive competence for Codex agenda items if relevant European legislation is harmonised “either completely or to a large extent”. Below (3.3) we shall discuss an example for such an issue from the area of food contaminants regulation, where admissible maximum levels of certain harmful substances have been fully harmonised at the Community level, and competence thus lies with the EC.

(2) Competence is shared or “mixed” in only partially harmonised areas – e.g., if a legal basis for Community legislation exists but no specific provisions have been adopted on the substance under discussion. Mixed competence can also refer to Codex agenda items which concern both harmonised and non-harmonised areas of intra-European law. In situations of mixed competence, the internal rules further differentiate between situations where competence lies mainly with the EC or mainly with the member states. In the former case (2a), the Commission presents the agreed position and casts the vote (if one is taken); in the latter case (2b), the Presidency presents the position and the member states vote individually.

(3) As a general rule, Member States have competence in areas where no harmonisation exists on the European level – a situation which has become relatively rare in food regulation but still occurs. In addition, and as foreseen already in the Commission’s first (1996) proposal (see above, at fn. 10), member states also have competence for all organisational and procedural matters – i.e., budgetary issues, amendments to the rules of procedure, election of committee chairs, adoption of the agenda and of the report, etc. Thus, inter alia, many issues on the agenda of the Codex Committee on General Principles come under member-state competence.

While the principles underlying these arrangements are relatively clear, the devil is often enough in the detail. And indeed, the arrangements initially caused some confusion within the Codex but also among EU actors themselves, not least with regard to the precise identity of the actor(s) intervening in a Codex meeting. The Informal Guide was amended in 2005 so as to clarify things; now it includes a new paragraph on the attribution of interven-

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40 Single Declaration by the European Community on the exercise of competence according to Rule VI of the Rules of Procedure of the Codex Alimentarius Commission, Annex II to the Accession Decision.

tions (see Table 2 below). This may have helped to arrive at a more consistent use of language, but the different configurations of Europe’s external representation certainly still constitute a significant challenge for the Codex, and an anomaly in the context of international organisations more generally.42

**Table 2: Division of competence and attribution of EC negotiating position in the Codex**

<table>
<thead>
<tr>
<th>Harmonisation of European law</th>
<th>Competence</th>
<th>Voting rights</th>
<th>Nature of EC position</th>
<th>Position presented by ...</th>
<th>Position attributed to ...</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Full or to a large extent</td>
<td>EC</td>
<td>EC</td>
<td>Community position</td>
<td>Commission</td>
<td>“EC”</td>
</tr>
<tr>
<td>2a Partial</td>
<td>Mixed – mainly EC</td>
<td>EC</td>
<td>Common position</td>
<td>Commission</td>
<td>“EC and its Member States” (ECMS)</td>
</tr>
<tr>
<td>2b Partial</td>
<td>Mixed – mainly MS</td>
<td>MS</td>
<td>Common position</td>
<td>Presidency</td>
<td>“ECMS”</td>
</tr>
<tr>
<td>3a None</td>
<td>MS</td>
<td>MS</td>
<td>Common position</td>
<td>Presidency</td>
<td>“Member States of the EC”</td>
</tr>
<tr>
<td>3b None</td>
<td>MS</td>
<td>MS</td>
<td>No common position</td>
<td>MS</td>
<td>“Member States of the EC”</td>
</tr>
</tbody>
</table>

MS = member states. Compiled on the basis of the Informal Guide (fn. 41).

The Council working group in which member states and the Commission negotiated the internal preconditions of accession, whose official name is “Codex Alimentarius Working Party”, in practice now determines the division of competence separately for each agenda item. When it joined the Codex, the EC committed itself to make the results of these coordination meetings, as far as the division of competence is concerned, available to other Codex members during the first two years of its membership.43 Not least because member states are still very sensitive to the issue of competence, this practice has been extended for the time being, but it may eventually be replaced by application of the general (“Single”) Declaration of Competence (Rule II.5). For now, a version of the agenda, annotated with regard to whether EC or member states exercise the competence and voting rights, is distributed as a conference-room document in each Codex meeting (see below, Annex B, for an example). However, the version of the annotated agenda that is made available to other Codex members does not contain the justification for the allocation of competence which the Commission provides by quoting relevant European legislation, and which is included only in the version circulated among Member States.

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42 See Hoffmeister and Kuijper (2006: 9) for another telling example to this effect, taken from the UN General Assembly.

43 *Arrangement between the Council and the Commission regarding preparation for Codex Alimentarius Meetings and statements and exercise of voting rights*, Annex III to the Accession Decision (hereafter “Internal Arrangement”), para. 4.6.
While the division of competence thus broadly follows the FAO model, there is a specificity with regard to voting rights in the Codex. The importance of this issue must not be overestimated, for the number of Codex decisions that are actually adopted by voting is very small, compared to an overwhelming majority which are taken by consensus, and the propensity to proceed to a vote on controversial issues has declined even more in the recent past.\textsuperscript{44} However, its importance is not entirely academic either, for some particularly controversial Codex decisions have indeed been made by voting (e.g., the beef hormones decision mentioned above, at fn. 15), and negotiations generally take place “under the shadow” of a possible vote, even if consensus is always aimed at. The specificity of Codex Rules in this respect is that, in cases where the EC has competence and thus enjoys voting rights, the number of votes it can cast is equal to the number of member states actually present in the meeting at that time (Rule II.3). Under the arrangements made for EC membership in the FAO as a whole, by contrast, in matters of Community competence it can cast the votes of all its member states “which are entitled to vote in such meetings”.\textsuperscript{45} In its negotiations with the FAO, the Commission had obtained the agreement to apply the same rule to its participation in the Codex. According to the FAO Legal Office, it “does \textit{not} mean that the delegations of Member States must be physically present in a meeting […]. It simply means that its Member States must have submitted credentials, or that their delegations must have registered, when these formalities are required”.\textsuperscript{46}

The additional restriction, limiting the number of votes to member states actually present, was later on inserted in the Codex Rules at the insistence of developing countries, many of which do not have the necessary resources to attend all relevant Codex meetings, and who argued in the CCGP that “if the voting right of a registered, but absent, participant could be exercised this practice would dilute the rights of other Members, especially those smaller countries with single person delegations”.\textsuperscript{47} The EC delegation did not agree immediately to this proposal and probably could have rejected it on legal grounds. For where the Community enjoys competence, it does so by virtue of the Treaty and not as a consequence of

\textsuperscript{44} There are strong formal – and even stronger informal – norms to avoid a vote if at all possible, especially in the Codex’s subsidiary bodies (as opposed to the CAC). See, on the formal side, Rules of Procedure (fn. 32), Rule XII and Measures to Facilitate Consensus (Procedural Manual, p. 162). For a more general discussion of voting in the Codex, see Hüller and Maier (2006).

\textsuperscript{45} FAO Constitution (fn. 27), Art. 2.10, emphasis added. The same is true in the WTO; see Arts. IX, XI, XIV WTO Agreement.

\textsuperscript{46} E-mail from Giuliano Pucci, FAO Legal Officer-in-Charge, to the European Commission’s Legal Service, annexed to Commission Staff Working Paper (fn. 18), emphasis added.

\textsuperscript{47} Report of the 17th Session of the CCGP (ALINORM 03/33), para. 108.
ad-hoc empowerment through the member states (Sack 1995: 1241). However, after the FAO’s Committee on Constitutional and Legal Matter had also endorsed the restriction, the EC no longer resisted. Most likely this concession was seen as a way of placating more general concerns (mentioned above, 2.3) that EC membership would result in privileges to its member states vis-à-vis other Codex member countries.

3.2 Internal coordination between member states and Community institutions

It is one thing to determine that the distribution of competence justifies a “Community position” or “common position” to be presented in a Codex meeting. Actually formulating such a position is another thing, even if the same body performs both tasks – the Codex Alimentarius Working Party of the Council is the designated forum also for substantive coordination between member states and the Commission on Codex matters. It meets in Brussels on the Council premises normally at least once per month, sometimes for two days in a row. It is chaired by the country holding the rotating Council Presidency and is composed, as Council working groups generally are, of senior officials from member-state ministries and/or national food-safety agencies. They are joined by Commission officials from the Codex coordination team in the Directorate-General for Health and Consumer Protection (DG SANCO) and from other departments of the Commission services, depending on the specific issues at stake. Every item on the agenda of each Codex meeting is prepared in the Working Party with regard to the division of competence and, except in cases of purely national competence (and sometimes even then – see no. 3a in Table 2, above), in substantive terms. Deliberations in the Working Party are prepared by, on the one hand, the EC’s “Codex Contact Point”, which is run and staffed by DG SANCO, and, on the other hand, officials in the Agriculture DG of the Council’s Secretariat-General. Officials from the Commission’s and the Council Secretariat’s Codex teams are also members of the EC delegation to each and every Codex meeting; they thus provide for an important element of horizontal coordination between different areas of Codex activity.

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48 See also the statement to this effect by the UK delegation to the CCGP (ibid.).
49 Report of the 18th Session of the CCGP (ALINORM 03/33A), para. 78.
50 Every Codex member is encouraged to establish its Contact Point, which serves as the link to the Codex Secretariat and coordinates relevant activities within the member’s territory – see Core Functions of Codex Contact Points, CAC Procedural Manual, p. 99. Individual EU member states also maintain Contact Points.
51 Commission and Council Secretariat taken together, there is no more than a handful of officials charged with these coordination tasks. Given the substantial number of Codex meetings – some 40 meetings in 2006, taking more than 130 days altogether and involving travel to all five continents – this makes for a rather heavy workload.
The rules which were set up in the process of acceding to Codex determine not only the division of competence, but also a procedure for arriving at a coordinated EC position in substantive terms. The flow chart in Annex A (below) graphically depicts this process. The Codex Secretariat kicks it off by distributing to all members the draft of a Codex standard or related text, as agreed by the preceding session of the Codex committee in charge. Fifty to sixty of these “Circular Letters” are distributed every year across the different committees, in most cases containing a request for comments on the draft by a certain date. In the European Codex coordination process, a negotiating position is then drafted by the Commission services, in collaboration between the Codex coordination team at DG SANCO (dubbed “SANCO CODEX” in the chart) and specialised departments in this and in other DGs as well as drawing on input from individual member states. The draft position is forwarded via the Council Secretariat to the member states, who subsequently discuss the draft in the Working Party. If the latter agrees on a substantial modification of the draft position paper, the Commission once again circulates the revised version to the member states for comments. Afterwards, or if there are only minor modifications to be made in the first place, the Commission finalises the position paper, has it translated into the other official Codex languages (French and Spanish in addition to English) and forwards it to the Codex Secretariat for distribution to the other Codex members. In most cases the final EC position paper is also published on the internet for the information of stakeholders and the general public. The entire procedure can sometimes take up the biggest part of the time which passes between two Codex committee meeting (i.e., close to one year). But if Circular Letters are issued closer to an upcoming meeting than to the preceding one – e.g., because they result from working group discussions held between two meetings – the time available for the coordination procedure can be cut down to several weeks, which obviously puts considerable time pressure on all participants.

In order to respond to developments during Codex meetings, and to conference-room documents submitted by other Codex members and observers, further coordination meetings between the Commission and member states take place on the spot during each meeting, usually early in the morning and additionally during lunch or coffee breaks in urgent cases. In the latter case, the ad-hoc character of these meetings can hardly be exaggerated.

52 The most detailed version of the procedural rules is the “Codex Vademecum” produced by the Commission’s DG SANCO (Manual of Procedure – SANCO Codex, updated draft version, 27 July 2005, on file with the author).

53 At http://ec.europa.eu/food/fs/ifs/eupositions/eupositions_list_en.html. Whether the complete set of commonly agreed papers is online, the Commission does not say, but there do not appear to be any systematic omissions.
Depending on the distribution of competence, either the Commission or Presidency calls upon member-state representatives available in the room and tries to get oral agreement on the negotiating position it intends to shift to. As a rule, however, only minor shifts in position are determined in this ad-hoc way. If major shifts are required to agree to an emerging consensus in the Codex committee, the EC has to ask for postponement of the decision until the next meeting of the committee (normally the following year) and once again feed the revised draft text through the coordination machinery.

### 3.3 Coordination at its limits

For most of the three years (2004-06) during which the EC has now been a Codex member, the procedure described above has worked quite effectively, in terms of actually producing a coordinated position. During that time close to 50 meetings of the CAC and its subsidiary bodies have been prepared in this way. Normally there are 10 to 15 items on the agenda of each meeting (sometimes more than 20), and even if a coordinated position is not prepared for every single item, the output of the coordination procedure amounts to many hundred commonly agreed position papers during that time. Among these there is a total of only three cases in which agreement was not reached in the Working Party but required the intervention of higher decision-making bodies – specifically, the Coreper whose intervention is foreseen in this case. A somewhat closer look at two of these three exceptional “hard cases” will help us determine the limits of the coordination procedure.

The first big stir in the Codex coordination process was caused by the “parmesan” incident, just a few months after the EC had become a member. It concerned the question, on the agenda of the Codex Committee on Milk and Milk Products (CCMMP), of whether a new global – i.e., Codex-wide – standard for parmesan cheese should be developed or not. This issue is less about food safety, strictly speaking, than about quality characteristics of a food product. Italy in particular wants the name “parmesan” to be associated as closely as possible with the Parmigiano Reggiano cheese traditionally produced in its Emilia Romagna region. Producers of more or less similar types of cheese from other parts of the world, in particular from the US, want to market their product as “parmesan”, too, thus using it as a generic name. Intra-European coordination was particularly difficult here because there are

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54 Some Codex agenda items actually cover several different issues, for each of which a separate position paper may then be prepared.

55 Interinstitutional Arrangement (fn. 40), para. 3.7. Two of the three cases involving Coreper are identified in: On the Accession of the European Community to the Codex Alimentarius Commission (Council Decision 2003/822/EC): Situation after two years, Commission Staff Working Paper, SEC(2006) 399/1 (hereafter “Two-year Report”), p. 6; the third one occurred only after that report had been issued.
also other EU countries, Germany in particular, which allow domestically produced cheeses to be traded as “parmesan”, even though in the EU Parmigiano Reggiano is officially registered as a Protected Designation of Origin (PDO).\(^{56}\)

The Commission adopted the Italian line of argument, according to which “‘Parmesan’ is a French inspired translation of ‘Parmigiano Reggiano’”.\(^{57}\) Its proposed Community position for the CCMMP would not have prevented other countries from producing “parmesan”, but work on a separate Codex standard would have been stopped for good. Behind this position there is probably the concern that, if a Codex standard on “parmesan” as a generic name was eventually adopted, the European PDO regulation might become vulnerable as an unjustified barrier to trade before the WTO. In the Codex Working Party, however, Germany and a few allies opposed the Commission’s proposal and questioned whether this was an issue of Community competence in the first place. They would not let themselves be convinced in the Working Party but were subsequently outvoted in the Coreper with regard to both the division of competence and the substantive position.\(^{58}\) In “revenge” Germany and Austria took advantage of the restrictions imposed on the EC with regard to voting rights in the Codex (see above, 3.1), and left the room when the issue came up in the CCMMP meeting in Auckland, New Zealand, thus reducing by two the number of votes the EC would have been able to cast. Eventually, the Committee followed the informal Codex rule of avoiding a vote whenever possible and instead forwarded the issue to the CAC in search of “guidance” on the substance matter, agreeing to take it up again in its next session.\(^{59}\)

The German and Austrian delegations’ behaviour was taken very seriously in particular by the Commission, not only because the EC was already in serious danger of losing a vote on this issue if one was eventually taken, but also for principled reasons, as a negative precedent with regard to the EC’s internal cohesion on the international scene. On the Commission’s initiative the Auckland incident was dealt with a second time in the Coreper, where

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\(^{58}\) Note à l’attention des membres de la Commission – Objet: 2049ème réunion du Comité des Représentants Permanents (1ère Partie), SI(2004) 316, 22 April. As in the Working Party, decision-making by consensus is the (informal) rule in the Coreper, but qualified-majority votes can also be taken there as a last resort, unless the relevant legal basis in Community law provides for unanimity decisions on the issue in question.

\(^{59}\) Report of the Sixth Session of the Codex Committee on Milk and Milk Products (ALINORM 04/27/11), para. 121.
Germany and Austria argued that their Codex delegations had found an elegant way of abstaining, given that they continued to be opposed to the EC’s negotiating position but could not openly oppose it. This was refuted not only by the Commission but also by the Council’s own legal service, who recalled the Court’s jurisprudence on related cases, according to which the member states’ duty of loyalty also extends to the Community’s external relations. The substantive issue concerning a Codex parmesan standard is not yet settled, but the EC has apparently managed to get it off the agenda for the time being. Meanwhile the Commission has taken Germany to the European Court of Justice (ECJ) over its alleged failure to comply with the Regulation on geographical indications and designations of origin.

Given that its position was confirmed by the Coreper, it is hardly surprising that the Commission pictures the parmesan experience as proof of the existing coordinating procedures’ effectiveness. This assessment is bolstered, however, by the fact that a similar instance of member states openly departing in the Codex from a previously agreed EC position has not been reported again since then. Nevertheless, the internal coordination procedures did reach their limits once again in a recent conflict over the contamination of certain food products with poisonous mould – so-called aflatoxins. This, too, is a case where existing European legislation is potentially in conflict with an emerging Codex standard. But rather than the setting of a global standard as such (as in the Parmesan case), the conflict concerns the level at which this standard is set, i.e. the maximum amount of aflatoxin contamination allowed in particular products. The division of competence between Community and member states was not disputed in this case – given the existence of harmonised EU standards, it clearly came under Community competence. In the EU aflatoxins are covered

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60 Note à l’attention des membres de la Commission – Objet: 2051ème réunion du Comité des Représentants Permanents (1ère Partie), SI(2004) 414, 5 May 2004. Member States’ duty of loyalty is enshrined in Art. 10 of the EC Treaty, and the applicability of this provision to external affairs was confirmed by the ECJ (cf. Hoffmeister and Kuijper 2006: 22).

61 The CAC, to which the issue had been referred by the CCMP, deferred indefinitely the decision on whether to elaborate a standard but left open the possibility for the CCMP to bring it up again; see Report of the Twenty-eighth Session of the Codex Alimentarius Commission (ALINORM 05/28/41), para. 174-175. The stand-off between the EC and the US continued at a recent CCMP meeting but no further conclusions were drawn by the committee: Report of the Seventh Session of the Codex Committee on Milk and Milk Products (ALINORM 06/29/11), para. 15.

62 Commission of the European Communities v Germany, Case C 132/05 – the case had not been decided in April 2007.

63 Two-year Report (fn. 55), p. 6. The report at this juncture also refers to the third, less salient case concerning maximum levels of accidental nuclear contamination of foods, where the proposed categorisation as case of Community competence was also contested by Germany but ultimately confirmed by Coreper.
in general by the Contaminants Regulation, which provides for specific maximum levels (MLs) to be set by way of Commission Regulation (i.e., in a Comitology procedure).64

The recent conflict specifically concerns a Codex standard for aflatoxin MLs in various sorts of tree nuts (hazelnuts, almonds and pistachios).65 To understand the issues that strained the European Codex process, we need to look at the international context first.

Work on this standard began in the Codex Committee on Food Additives and Contaminants (CCFAC) in 2002 but specific numbers were not seriously discussed before 2004. At that point the EC delegation argued, based on existing European legislation, for a standard differentiating between total aflatoxins and the most dangerous sub-type (aflatoxin B1), as well as between nuts intended for further processing and for direct consumption.66 But the EC was rather isolated in the Committee, which instead followed a proposal by Iran and other nut-exporting countries to set a single ML for total aflatoxins only, and for both processed and unprocessed nuts, at 15 µg/kg. Only a handful of EU candidate countries and Norway followed the EC delegation in expressing its reservation on this decision.67 At the next CCFAC meeting, in 2005, the EC achieved a partial success in preventing the 15 µg/kg ML from being applied to both unprocessed and processed nuts, arguing that processing can reduce aflatoxin levels, and hence a lower level is achievable for the latter category. Thus the ML of 15 µg/kg for total aflatoxins in unprocessed nuts was forwarded for final adoption by the CAC, whereas a working group, led jointly by the EC and Iran, was established to prepare a separate ML for processed nuts.68

During the CCFAC discussions a level of 10 µg/kg had emerged as a potential compromise for processed nuts, and given this state of Codex discussions, it was clear that the EU’s own, much lower MLs (see fn. 66) would hardly stand a chance of being adopted by the

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65 For analysis of earlier Codex negotiations on aflatoxin MLs in groundnuts (peanuts), see Post (2006: 1268-70).
66 Report of the Thirty-sixth Session of the Codex Committee on Food Additives and Contaminants (ALINORM 04/27/12), para. 153. The EU legislation in force, which applies to nuts and dried fruits in general, sets an ML of 10 µg/kg for total aflatoxins in unprocessed nuts and dried fruits, and the corresponding limit applicable after processing is set at 4 µg/kg, with a separate ML for aflatoxin B1 set at half these values in both categories (i.e., 5 µg/kg in unprocessed and 2 µg/kg in processed nuts) – Commission Regulation (EC) No 466/2001 of 8 March 2001 setting maximum levels for certain contaminants in foodstuffs, OJ L 77, 16 March 2001, p. 1.
67 CCFAC 36 (fn. 66), para. 155. Entering a minority’s “reservation” into the committee proceedings is a common way for the Codex to make “consensus” decisions in the face of opposition, without having to resort to a formal vote. How big an opposing minority can be before it is considered to thwart consensus, is very much open to interpretation, in particular by a committee’s chairperson.
68 Report of the Thirty-seventh Session of the Codex Committee on Food Additives and Contaminants (ALINORM 05/28/12), para. 141 and Appendix XXII.
Codex. In several meetings of the Council’s Working Party prior to the 2006 session of the CCFAC, the member states and the Commission tried to reach agreement on a new Community position on this issue, reflecting the options on the table at the Codex. Even more than in the Parmesan case, the shadow of WTO law loomed large in these discussions. Negotiators in the Working Party faced the strategic issue of whether (a) to stick to the position suggested by internal legislation at the risk of being defeated – either as a marginal, non-blocking opposition to consensus (see fn. 67) or in a formal vote – in the Codex, and perhaps subsequently challenged before the WTO, if stricter EU standards were to be kept up. The alternative (b) was to try and achieve a compromise solution somewhere between the draft Codex standard and the EU’s own existing standards – a solution, nota bene, which would nonetheless require subsequent adaptation of EU law so as to make it “WTO-proof”.

This issue turned out to be a very difficult one, not least because recent scientific analyses can be read to entail that even the existing EU standards are not stringent enough to avoid health damage from the consumption of nuts, given the increasing amounts of these eaten in several EU countries.\(^{69}\) On more general grounds, several member states recalled in the Working Party that aflatoxins had been categorised by the relevant scientific body at UN level as genotoxic carcinogens, meaning that for these substances it was actually impossible to set a level below which their consumption poses no health risk at all.\(^{70}\) If an ML was set nevertheless, they argued, it should at least not exceed the existing one. The Commission, supported by several other member states, instead insisted on the need to avoid the worst case of simply being outvoted and ending up with Codex levels 50% (15 as opposed to 10 µg/kg for unprocessed nuts) or even 150% (10 as opposed to 4 µg/kg for processed ones) above EU levels. It also observed that the EC was already perceived by many other Codex members, especially developing countries, as using food-safety regulation for protectionist purposes, and that it ought to aim at greater coherence between its food-safety and development-assistance policies.\(^{71}\) Hence the Commission argued for flexibility in the

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\(^{69}\) Relevant consumption data and exposure assessment calculations are contained in a discussion paper prepared by the British Food Standards Agency (FSA) on behalf of the UK Council Presidency in late 2005 (on file with the author).

\(^{70}\) Author’s notes from Working Party meetings on 13 December 2005 and 31 January 2006. The scientific body concerned is the Joint (FAO/WHO) Expert Committee on Food Additives (JECFA).

\(^{71}\) In a series of widely-cited studies the World Bank had criticised EU aflatoxins regulation for its expected negative impacts on developing-country food exports (Otsuki, Wilson, and Sewadeh 2001b; Otsuki, Wilson, and Sewadeh 2001a), and some European critics of allegedly irrational regulation also jumped on the bandwagon (Majone 2002). The Bank itself later corrected its pessimistic predictions on the basis of empirical analysis (World Bank 2005), but the image problem to which the Commission alluded in the Working Party probably has a broader basis and appears to persist in any event.
negotiating position on the aflatoxins issue, and for not letting it be determined exclusively by existing EU law.\textsuperscript{72}

Several roundabout or procedural solutions were discussed in the Working Party, such as agreeing to less stringent Codex levels on the condition that they be reviewed within a fixed period of time; requesting a new risk assessment from JECFA before agreeing to any levels at all; or offering additional technical assistance to nut-exporting developing countries, so as to make it easier for them to meet the EU levels. The Commission insisted, however, that none of this would suffice to prevent the Community from losing out in the CCFAC and CAC, while several member-state delegations conversely insisted that their mandates did not allow them to agree to a negotiating position significantly above the current EU limits. When the Working Party was still unable to agree on a position one month before the CCFAC session decisive to be decisive, the Commission took this issue to the Coreper. Its expectation that the member states’ ambassadors – or, more precisely, their deputies (Coreper I) in this case – would support a more compromising position turned out to be correct. The final EC position for the CCFAC makes agreement to a level of 15 $\mu$g/kg for unprocessed nuts dependent on the level agreed for processed nuts but does not oppose it as such and, crucially, it announces that “the EC will not oppose the forwarding of a level of 8 $\mu$g/kg total aflatoxins in processed almonds, hazelnuts and pistachios for adoption at Step 5 by the Codex Alimentarius Commission”.\textsuperscript{73} However, the final acceptance of this level, which still exceeds the current EU level by 100%, is explicitly made dependent on the results of a new risk assessment by the EU’s own scientific advisory body, the European Food Safety Authority (EFSA).\textsuperscript{74}

Through some apparently quite effective work behind the scenes, the EC delegation prepared the ground for this position to get largely accepted by the CCFAC in April 2006: a level of 8 $\mu$g/kg was agreed for processed nuts, the level of 15 $\mu$g/kg for unprocessed ones was held at the next-but-last step of the Codex procedure, and in addition JECFA was requested to conduct a new assessment on hypothetical levels of 4, 8, 10 and 15 $\mu$g/kg on the basis of the most recent exposure data available.\textsuperscript{75} Despite continued objections from the

\textsuperscript{72} Author’s notes (fn. 70).

\textsuperscript{73} European Community comments for the Codex Committee on Food Additives and Contaminants, 38\textsuperscript{th} Session, Agenda item 13 (c), 12 April 2006, at http://ec.europa.eu/food/fs/sfsi/eupositions/ccfac/ccfac_cont_13c_en.pdf.

\textsuperscript{74} Between the adoption as a draft standard (Step 5) and the final adoption as standard (Step 8) there is in the normal elaboration procedure another round of comments from Codex members and discussion in the committee in charge, which takes at least one year.

\textsuperscript{75} Report of the 38th Session of the Codex Committee on Food Additives and Contaminants (ALINORM 06/29/12), paras. 127-132.
Iranian and some other delegations, the subsequent CAC meeting followed the CCFAC and advanced the 8 µg/kg ML for processed nuts to the next step in the Codex standard-setting procedure.76

4. WHAT CODEX MEMBERSHIP HAS CHANGED: “VERTICAL” AND “HORIZONTAL” PERSPECTIVES

We have seen above that different European and international actors each had their particular concerns and expectations with regard to EC membership in the Codex. Whereas the Commission had an obvious interest in being able to act on behalf of a Codex member, rather than just an observer, member states were anxious that their role would be downgraded as a consequence of EC membership. But member states, too, had an interest in increasing the common European influence in the process of setting global food-safety standards, not least in the light of the hormones and other cases the EC had lost before the WTO, given that its respective regulations did not conform with Codex standards. Conversely, it was the anticipation of such an increase in European power which led other Codex members to resist EC accession. To what extent have these different hopes and fears been fulfilled during the first three years of membership?

4.1 Community institutions and member states

Against the backdrop of the large number of Codex agenda items handled routinely in the European coordination procedure, the importance of a few borderline cases must not be exaggerated. Nevertheless, the parmesan and aflatoxins cases demonstrate quite clearly that Codex membership has not left the “vertical” balance of power in the EU, between member states and Community institutions, unaffected. In pre-accession times, nobody could have prevented individual member states from articulating their view in a Codex committee, even if it diverged from the EU majority view. Under present conditions, by contrast, if a member state fails to either make its point of view part of the commonly agreed position or reach an agreement to disagree among member states, it is effectively obliged to at least passively support the common position anyway. In the light of the Coreper’s harsh reaction to Germany and Austria’s behaviour in the parmesan episode, the most a member state could do nowadays to express its diverging position is stay away from the entire meeting concerned. This is a costly option in instrumental terms, for it would also prevent the state in question from participating in the negotiation of other issues on the agenda of that meeting. It is costly also in reputational terms, for the absent member state

76 Report of the 29th Session of the Codex Alimentarius Commission, ALINORM 06/29/41, paras. 103-104.
would become vulnerable to charges of neglecting its duty of loyalty towards the Community – if not legally (fn. 60), then at least morally speaking.

At the same time, the value of individual member states’ freedom to dissent from the common position is of little value, if it means being defeated all the more easily in the Codex. The parmesan and aflatoxins cases differ in this respect. In the parmesan case, the dissenting member states were closer to the median position in the Codex committee than the official EC position was. In theory, at least, they could thus have contributed to creating a “consensus” on their own position (or somewhere close to it) in the Codex, to the detriment of the majority of EU member states. Quite likely it was precisely this danger that led the Commission and the Coreper to condemn the dissenters so strongly. In the aflatoxins case, by contrast, the dissenting member states were even further away from the Codex median than the majority of member states was. In terms of international outcomes, they would have had nothing to gain whatsoever from “going it alone”. However, by holding out on an extreme position in the Codex, even if this position is not reflected in the final outcome, these governments could perhaps have saved their face vis-à-vis domestic actors, if the issue concerned is sufficiently salient “at home”. This may not often be the case with Codex issues in general, but it cannot be dismissed offhand. The question then remains what is the more promising course of action in this interaction between governments and domestic publics: defending a lost cause in the intra-European coordination bodies (which member states still can) or in the Codex itself (which they may be prevented from doing under current conditions). To the extent that the latter has any potential value for a member-state government interacting with its domestic public, the terms of EC membership in the Codex have deprived even those member states of a relevant policy option whose policy position stands no chance of becoming consensual in the Codex.

Things quickly get rather complicated if we try to keep all these different concerns and constellations in mind. But the basic trade-off is clear enough, and it is inherent in all instances of European integration, whether they concern internal or external policies. On one hand, member states can generally increase their policy-making leverage by joining forces and, specifically in external relations, by “speaking with one voice” to their interlocutors from other parts of the world. On the other hand, unless preferences among member states are entirely homogeneous, agreeing on a common position to be presented to the outside
world necessarily means that not all member states’ preferences will be reflected to the same extent in this position.77

Generally speaking, the simplest way of handling this trade-off is to restrict the common position to the “least common denominator”, i.e. include only those elements which are consistent with every single member state’s preferences. In the EU’s external regulatory relations (and in foreign food-safety policy in particular), the existing EU (food) law fulfills a somewhat similar function. Where a European standard already exists in an area under discussion in the Codex, this standard almost automatically constitutes the EC’s default negotiating position. Given that most EU food law is now adopted in the codecision procedure, involving qualified-majority voting in the Council and a strong role for the European Parliament, it is far from limited to the least common denominator of member-state preferences. Nevertheless, it is very rare that – as in the parmesan case – an existing EU standards is not accepted by all member states as basis for negotiations with other Codex members.78

But in spite of the impressive scope of current EU food law, it still happens that the Codex debates draft standards for which there is no European precedent, for instance because the product concerned is not produced in Europe.79 Moreover, as the aflatoxin case makes clear, the least common denominator, as defined by pre-existing EU law, may turn out not to be an internationally viable position if other Codex members have very different preferences. In such cases, more sophisticated ways of handling the trade-off between the power gains and the policy losses that result for member states from joint representation are called for. The actors which are best placed to provide such added sophistication are the Council Presidency and the Commission. The Presidency, with the support it regularly receives from the Council Secretariat, sets the agenda in the Codex Working Party, and thus has a prime opportunity for suggesting creative solutions which transcend the least common denominator. In the aflatoxins story, the British presidency (second semester of 2005) made a considerable effort in this respect. They outlined a whole series of options that might be pursued by the EC in the relevant Codex meeting, including not only the compromise position on limit values that was eventually agreed but also a sort of delaying tactics with reference to incomplete scientific data as well as a more confrontational course, whereby nut-exporting countries would have been challenged to demonstrate that the strict EU levels

77 For an analysis of this trade-off in more formal terms, see Frieden (2004).
78 And even in the parmesan case, it was not the relevant Regulation as such that was questioned by the dissenting member states but rather its application to a particular product.
are in fact not achievable for them.\textsuperscript{80} The subsequent Austrian Presidency (first semester of 2006) was less systematic in its approach but also urged member states repeatedly to show a modicum of flexibility, rather than rigidly defending the existing EU levels. None of the two succeeded, however, in getting agreement, and it was only when the Commission used its powers to appeal to the Coreper that the issue was resolved. The Commission thus plays multiple roles in the intra-European coordination process. First, similar to the classic role of the Presidency, it acts as an “honest broker” by collecting, and trying to synthesise, the different member states’ positions on individual Codex agenda items. Second, various Commission departments provide expert input of both scientific and legal type. And last but not least, the Commission also disciplines the decision-making process in the Working Party, most drastically by involving the higher authorities of the Coreper. Taken together, it clearly plays a pivotal role in the coordination process – albeit for reasons which are partly different from those anticipated by member states in the pre-accession negotiations.

In sum, the reluctance which member states demonstrated during pre-accession negotiations, with regard to pooling their Codex membership rights and empowering the Commission to speak on their behalf on issues of EC competence, was not entirely unfounded. The complex arrangement for the division of competence, which helped to reduce and eventually overcome this reluctance, does not guarantee that member states remain in charge on all issues for which they have strong preferences. Nor do extensive deliberations in the Council’s Codex Working Party prevent individual member states from being outvoted in cases of persistent conflict, if and when these cases are eventually dealt with in the Coreper. What, then, did member states get in return for letting themselves be constrained in this manner – is the European voice on Codex issues better heard now in other parts of the world?

4.2 The EU and other global actors

In its above-mentioned report on the first two years of Codex membership, the Commission notes a “fruitful harvest” of EC membership and “an overall strengthening of the influence of both the Member States and the EC in the Codex”.\textsuperscript{81} The above-mentioned cases of conflict cast some doubt on the possibility of always creating such a win-win situation, and instead highlight the potential trade-off involved in joint external representation. It is nevertheless worthwhile probing whether external influence has indeed in-

\textsuperscript{79} For a recent example see Maier (2007: 11-12).
\textsuperscript{80} See the FSA discussion paper mentioned above (fn. 69).
\textsuperscript{81} Two-year Report (fn. 55), pp. 8-9 – emphasis added.
creased. For if this was generally the case, individual instances of having their own preferences overridden in the coordination process would be much easier to bear for member states.

Unfortunately, the effectiveness of external representation is far from straightforward to conceptualise and measure. The evidence that is mostly used for this purpose consists of a relatively small number of high-profile cases of international conflict, many of which pit the EU against the US. The question then becomes one of assessing who “wins” in these conflicts. In the hormones case the EU famously “lost” first in the Codex, and subsequently in the WTO. During the more recent period under investigation here, most attention has been gained by the transatlantic conflicts over the institutionalisation of the precautionary principle and, partly related to that, the regulation of genetically-modified (GM) food. A brief look at the former conflict will suffice to demonstrate the strengths and weaknesses of this approach to measuring international influence.82

The precautionary principle was most directly at issue in the context of Codex negotiations aiming at the formulation of guidelines for risk analysis.83 A first set of guidelines (“Working Principles”), to be applied by the various Codex committees, was agreed in 2003, just before the process of EC accession was completed.84 The text of these guidelines can hardly be considered a great success from the EC’s point of view, given its very hesitant embrace of the precautionary principle (not even mentioned explicitly as such in the guidelines), for the inclusion of which the EC and several of its member states had fought in the process (see also Poli 2004: 619-22; Veggeland and Borgen 2005: 695-7; Post 2006: 1264-5). A second, related set of risk-analysis guidelines, to be applied by Codex members “at home”, has been under consideration in the CCGP and has also created debate on the precautionary principle, the inclusion of which in the guidelines is still considered a European “key interest”.85 This latter set of guidelines thus constitutes a promising case for a “before-after” comparison, even if an assessment of the effects of EC accession is complicated by its different (domestic instead of international) scope of application. The text that was agreed at the most recent CCGP meeting (April 2007), and is now ready to be adopted by the CAC, reproduces almost verbatim the paragraph on precaution from the 2003 Codex

82 On the transatlantic conflict over GM food and how it had played out in the Codex until then see Poli (2004).
83 For the importance of risk analysis in the global regulatory framework for food trade see above, 2.1.
85 Two-year report (fn. 55), p. 10.
Working Principles, which declares “precaution” (but not the “precautionary principle”) to be “an inherent element of risk analysis”. The EC (then still an observer) and member-state negotiators tried in vein to have a stronger formulation included in the 2003 guidelines but in the meantime have apparently accepted this formulation as a good enough compromise; in any event they expressed their satisfaction with it, as well as with the draft guidelines as a whole. There is thus no indication in this case that the European position in the Codex is stronger now than it used to be before EC accession. Nor can such an increase in strength be excluded though, given that the European negotiating position has itself softened in the meantime, and the chances for a harder stance to be successful in the current setting can only be speculated about.

With a view to future research, it might be worthwhile to follow up on other long-standing conflictual issues such GM-food regulation, so as to find out to what extent outcomes are influenced by the EC’s negotiating positions at different points in time, and especially before and after its accession to the Codex. Odds are, however, that there will always be some confounding factors – such a change in negotiating position, as above – which makes a quasi-experimental before-after comparison impossible. In addition, therefore, further research could try to assess international influence with more direct reference to outcomes, i.e. standards adopted by the Codex and their relation to pre-existing European standards, going beyond individual high-profile conflicts. The Commission claims that there are “very few cases” where existing EU standards may have to be changed as a consequence of new Codex standards, and apart from aflatoxins in nuts, only one other case is explicitly mentioned. This is somewhat puzzling insofar as earlier analyses have found more examples of Codex standards which are significantly less stringent than parallel EU standards, sometimes allowing up to hundred times the amount of a particular substance in the food concerned (Eckert 1995: 381-2; Wetzig 2000: 94). Prior to the entry into force of the SPS Agreement, this would not have had to bother European policy-makers very much, but under current conditions we should expect them to work determinedly towards the minimisation of such divergences. If the Commission’s assessment of the status quo is correct, this

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86 Report of the 24th Session of the CCGP, ALINORM 07/30/33, Appendix VIII, para. 12; cf. para. 11 of the Working Principles (fn. 84).
88 It concerns benzoates in soft drinks, where the maximum limit adopted by the Codex is four times as high as the limit set in relevant EU law (Two-year report [fn. 55], p. 10). Benzoates, also known as E212, function as preservatives but can transform into carcinogenic benzene under certain circumstances.
would seem to suggest that European interests were quite successfully promoted in the Co-
dex already before the EC’s accession. In any case, the divergence or convergence of sub-
stantive standards provides a relatively objective indicator of international influence that
ought to be exploited more systematically.

5. CONCLUSIONS: TOWARDS STRATEGIC ACTORNESS IN THE EU’S EXTERNAL REGULATORY RELATIONS?

The conditions under which the EU can become a full-fledged actor on the international
scene have received considerable attention among both political scientists (Knodt and
Princen 2003; Carlsvae, Sjursen, and White 2004; Meunier 2005; Bretherton and Vogler
2006) and legal scholars (Cannizzaro 2002; Griller and Weidel 2002; Eeckhout 2004;
Cremona 2006). Much of this analysis has focused on policy areas where “actorness” is
either particularly difficult to achieve for institutional reasons, such as foreign and security
policy under the member-state dominated “second pillar” of the EU, or where it is particu-
larly highly developed, such as external trade policy. To date, the most important exception
from this rule was environmental policy, where internal policies are of course highly inte-
grated and the EU has consistently shown a high level of external activities, but external
competencies are more muddled and coordination is more ad hoc than in trade policy
(Jupille and Caporaso 1998; Golub 1999; Maier 2002; Rhinard and Kaeding 2006). In
food-safety policy, the allocation of competencies between Community and member states
is similarly complex, but the opportunity structures on the international level are different,
given the long-standing existence of a single multilateral organisation, namely the Codex
Alimentarius Commission. No state or organisation can hope to play a significant role in
multilateral food-safety policy without being represented in the Codex.

Despite the existence of such strong incentives, gaining full membership in the Codex, and
thus an important precondition of actorness in international food-safety policy, was any-
thing but easy for the EC/EU. The Commission’s initial attempt to develop the terms of
Codex membership on the model of external trade policy, with exclusive competence as-
signed to the Community across the board (apart from organisational matters), failed mis-
erably in the face of widespread member-state resistance. The price to be paid for eventu-
ally gaining their agreement was a much more complex arrangement for the allocation of
competence. The degree of internal harmonisation may be a reasonably straightforward
criterion for this purpose, but the actual process of internal coordination relies at least as
much on the continuous, item-by-item negotiations in the Council Working Party as on any principled criterion.

If it was hard for the EC/EU to become a full-fledged actor in multilateral food-safety policy, being such an actor is far from easy either. The effort that goes into the process of coordinating external negotiating positions for the Codex is considerable. In several respects, however, it appears to be paying off. Only for a very small fraction of all Codex agenda items have coordinated positions not been possible to achieve without the intervention of the Coreper. The Court of Justice has so far not been directly involved in the process, even if the parmesan dispute over Germany’s alleged violation of the PDO Regulation might eventually spill over into the EC’s behaviour in the related Codex conflict.90

In terms of international influence, there are also indications that the coordination effort is not entirely in vein. A systematic assessment of the effects of EC membership in this regard is difficult to perform and has not been accomplished here. But in addition to the anecdotal evidence of successful international negotiation reported above, there also seems to be a prevailing sense of satisfaction among member states. Initially, as we have seen, many of them held a somewhat ambivalent position, wanting to increase their common leverage in the Codex without granting the Commission additional powers. They did not quite manage to square the circle in that way, but the existing arrangements for the EC’s participation in the Codex appear to be serving them well enough. For although these arrangements are foreseen to be reviewed at the request of a member state or the Commission, no such request has been made to date.91

From a practical point of view, other questions are in any event more important now than the net effects of membership on international negotiating power. The EC’s Codex membership as such is not openly questioned any more from either inside or outside, and the attention consequently turns to the most effective way of using the existing opportunities. What can be seen from the case studies above is that this task of maximising influence under the current institutional conditions is not least a strategic one. Generally speaking, the European institutions nowadays are quite aware of the need for strategic direction in the

89 For recent analyses of the EU’s external relations in additional, previously neglected areas, see Woll (2006) on air transport and Mayer (2006) on energy policy, among others.
90 On this court case see above, at fn. 62. In the context of the EC’s membership in the FAO, a conflict over the division of competence – in this case concerning the competence to negotiate and conclude an FAO fisheries agreement – was directly taken to the Court by the Commission (Case C-25/94, Commission v. Council). Its original proposal had been changed by the Coreper and Council to the benefit of member states, but was then reinstated by the Court (Govaere, Capiau, and Vermeersch 2004: 167).
91 See Interinstitutional Arrangement (n. 40), Art. 6, for the review clause.
EU’s external relations.\textsuperscript{92} At the same time, many observers of EU external action have drawn sceptical conclusions in this respect, depicting the EC/EU as a rather passive and inflexible international negotiator.\textsuperscript{93} Other things being equal, joining an international organisation as a member in its own right should enable the EC/EU to improve its strategic capabilities, compared to a situation where only individual states enjoy membership rights in an international organisation. The case of Codex shows, however, that some of the obstacles on the way towards strategic actoriness become all the more evident as a consequence of accession, and that overcoming these obstacles requires additional efforts. The Commission has noted, in this context, the importance of going into Codex negotiations not just with a commonly agreed position but also with an idea, as precise as possible, of the limits within which this position can be adapted in order to achieve international consensus – i.e., what the fallback position is, in case the preferred option turns out not to be achievable.\textsuperscript{94} The aflatoxins conflict demonstrates the relevance of this point, insofar as the EC avoided being marginalised on the issue of maximum levels by offering a well-defined compromise position, while also credibly pointing out the limits of how far it could go in the direction of its negotiating partners. That this solution was achieved only after passing from the designated Working Party to the Coreper, however, also shows the difficulties of developing strategic capabilities in a forum which is dominated by specialised experts. At present the Codex coordination framework appears to be better at handling routine issues, where scientific and legal questions dominate, than at resolving strategic issues.

What, if anything, can be learned from the experience of Codex accession and membership for EU external relations more generally? In many policy areas the joint effects of Europeanisation, in the guise of harmonised or at least coordinated internal policies, and globalisation, in the guise of both international trade and more indirect trans-boundary effects of internal regulation, will continue to create incentives for the EC/EU as such to become more fully engaged in international organisations. In this sense, the history of EC accession to the Codex is of interest beyond the area of food-safety in itself, even if political actors were at pains during the accession negotiations to downplay any such far-reaching implications of what they were doing. Thus in a joint statement for the Council minutes, added to the Interinstitutional Arrangement regarding the preparation of Codex meetings, the Council and the Commission emphasised that:

\begin{itemize}
  \item \textsuperscript{93} See Elgström and Strömvik (2005: 118-121) for a useful summary of this view.
\end{itemize}
“This arrangement reflects the special circumstances of Community participation in the Codex Alimen-
tarius Commission and any of its subsidiary bodies and has no implications regarding other international
organisations, including those of the United Nations system.”

This makes sense as an attempt not to overburden a negotiating process which was already
conflictual and complicated enough in itself. But it will hardly prevent the case of EC
membership in the Codex from functioning as a potential model for participation in other
international organisations, even if this function may not amount to legal precedence.

Not surprisingly, this case is observed very closely in the immediate vicinity of the Codex,
i.e. in the context of other international organisations in the agricultural area, broadly con-
ceived, to which the EC has recently also acceded or is in the process of acceding. But
individual aspects of the Codex case deserve attention, and may at some point prove con-
tagious, also further afield. A trend to “upgrade” the status of the EC from observer to
full member can indeed be observed throughout the UN system (Hoffmeister and Kuijper
2006: 34). If the notion of “effective multilateralism” is to be taken seriously as a guiding
principle of the EU’s external relations, mechanisms of inter-institutional coordination will
need to be developed and improved in several areas of foreign policy, many of which are
characterised by a mix of member-state and Community competences similar to those
which characterise food-safety policy. The model of EC participation in the Codex is far
from perfect and will, no doubt, itself be further developed as experience accumulates. In
any event, it constitutes an interesting specimen of multi-level foreign policy under condi-
tions of mixed competence in a highly institutionalised international setting.

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96 A case in point is the International Union for the Protection of New Varieties of Plants (UPOV), of
which the EC became a member in July 2005; see
tion of UPOV meetings were developed in coordination with officials involved in the Codex process.
97 E.g, the Commission has submitted a recommendation to the Council for EC membership of the Interna-
98 See The European Union and the United Nations: The choice of multilateralism, Communication from
the Commission to the Council and the European Parliament, COM(2003) 526 final, 10 September 2003,
p. 4; also European Security Strategy (fn. 92), p. 9.
REFERENCES


### Annex A: Overview of the European Codex process

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<th>Council</th>
<th>Member States</th>
<th>Stakeholders</th>
</tr>
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<tbody>
<tr>
<td><strong>Codex working document</strong></td>
<td><strong>SECRETARIAT distributes doc.</strong></td>
<td><strong>SANCO CODEX receives, archives doc.</strong></td>
<td><strong>SECRETARIAT forwards MS contribution</strong></td>
<td><strong>CODEX OBSERVERS receive doc. directly</strong></td>
</tr>
<tr>
<td></td>
<td><strong>SANCO CODEX and/or RELEVANT OFFICIALS prepare draft</strong></td>
<td><strong>CONTACT POINT receives doc.</strong></td>
<td><strong>CONTACT POINT may contribute to draft EC position</strong></td>
<td><strong>NON-OBSERVERS may receive doc. via MS gov’t</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Draft EC position paper</strong></td>
<td><strong>SECRETARIAT verifies and transmits draft</strong></td>
<td><strong>CONTACT POINT receives draft position paper</strong></td>
<td><strong>May contact Commission officials informally</strong></td>
</tr>
<tr>
<td></td>
<td><strong>In case of substantial modifications</strong></td>
<td><strong>SECRETARIAT discusses draft position</strong></td>
<td><strong>Contact point sends comments directly to Council</strong></td>
<td><strong>May be involved in preparation of MS comments</strong></td>
</tr>
<tr>
<td></td>
<td><strong>SANCO CODEX and/or OFFICIALS modify draft</strong></td>
<td><strong>Working Party</strong></td>
<td><strong>In case of editorial modifications only</strong></td>
<td><strong>NON-OBSERVERS can access EC position on the web</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Final EC position paper</strong></td>
<td><strong>COMMISSION speaks for EC</strong></td>
<td><strong>SANCO CODEX has position paper translated, web-published</strong></td>
<td><strong>OBSERVERS submit own position directly to Codex Sec.</strong></td>
</tr>
<tr>
<td></td>
<td><strong>SECRETARIAT distributes position paper to non-EU Codex members</strong></td>
<td><strong>PRESIDENCY speaks for MS</strong></td>
<td><strong>COMMITTEE debates positions, decides on status of the text</strong></td>
<td><strong>NON-OBSERVERS may participate in MS delegation</strong></td>
</tr>
<tr>
<td></td>
<td><strong>COMMITTEE debates positions, decides on status of the text</strong></td>
<td><strong>MEMBER STATE DELEGATIONS support coordinated position</strong></td>
<td><strong>On issues with EC voting rights and common position</strong></td>
<td><strong>OBSERVERS may take the floor during debate</strong></td>
</tr>
<tr>
<td></td>
<td><strong>On issues with MS voting rights and common position</strong></td>
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Reproduced from an unpublished report by the author for the European Commission (Feb. 2006).
Annex B: Extract from the annotated agenda of a Codex committee meeting

CODEX COMMITTEE ON FOOD ADDITIVES AND CONTAMINANTS
Thirty-eighth Session

PROVISIONAL ANNOTATED AGENDA
Division of Competence
Between the European Community and its Member States according to Rule of procedure II paragraph 5 of the Codex Alimentarius Commission

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<th>Subject Matter</th>
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<td>CX/FAC 06/38/1</td>
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<td>Member States Vote¹</td>
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<td>2</td>
<td>Appointment of the Rapporteur</td>
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<td></td>
<td>Member States Competence</td>
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<td>3</td>
<td>Matters Referred/interest to the Committee arising from the Codex Alimentarius Commission and other Codex Committees</td>
<td>CX/FAC 06/38/2</td>
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<td>Part I: Mixed competence, European Community vote</td>
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<td>Part II: Member States competence, Member States vote</td>
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<td>4</td>
<td>Matters of Interest arising from FAO/WHO</td>
<td>CX/FAC 06/38/3</td>
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<td>4 a)</td>
<td>65th Meeting of the Joint FAO/WHO Expert Committee on Food Additives (JECFA)</td>
<td></td>
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</tbody>
</table>

¹ This is without prejudice to the substantive competence that the Community has for individual items on the agenda.

Mixed competence
Member States vote

4 b) Action Required as a Result of Changes in the Acceptable Daily Intake (ADI) Status and other Toxicological Recommendations
Mixed competence
Member States vote

FOOD ADDITIVES

5 | Endorsement and/or Revision of Maximum Levels for Food Additives and Processing Aids in Codex Standards
| Mixed competence
| European Community vote |

6 | Consideration of the Codex General Standard for Food Additives (GSFA) |

6 a) | Preamble of the General Standard for Food Additives |
| Draft revision of the Preamble of the GSFA |
| ALINORM 05/28/12, App. VII |
| Comments at Step 6 (in response to CL 2005/36-FAC) |
| CX/FAC 06/38/6 |
| CX/FAC 06/38/7 |
| Comments |
| CX/FAC 06/38/7-Add.1 |
| CRD 1 |
| Mixed competence
| European Community vote |

6 b) | Food Additives Provisions of the Codex General Standard for Food Additives |
| Working document for information and support to the discussion on the GSFA |
| CX/FAC 06/38/8 |