EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR RESEARCH

WORKING PAPER

THE NEW EUROPE:

GOVERNANCE IN A UNION

OF UP TO 30 MEMBER STATES

Constitutional Affairs Series

AFCO 101 EN

This paper is published in the following languages: DE, EN (original), FR.

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Manuscript completed in February 2002.

Paper copies can be obtained through: Publications service
Tel: 24053/20347
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http://www.europarl.eu.int/studies/default.htm

Luxembourg, European Parliament, 2002
ISBN: 92-823-1639-4

Printed in Luxembourg

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CONTENTS

Executive Summary

The need to strengthen the democratic legitimacy and the intelligibility of the European project entails that the EU has to work towards legislation and implementation which are better, simpler, more accessible and more responsive to citizens' concerns. As the European Parliament has reiterated many times, this is a *condicio sine qua non* if EU action is to be better understood, better applied and more readily accepted by European citizens. In the past few years, several factors have contributed to a renewed urgency of this agenda:

- In accordance with the strategy formulated at the Lisbon European Council, the EU's increasing economic and social integration and its intention to become more competitive require a clear and effective regulatory framework to protect the interests of the people and of businesses, by enhancing legal certainty and cutting the cost of poor regulatory work.
- With enlargement looming large, there is a need for regulatory arrangements to be made simpler and better if the *acquis* is to be fully applied in an enlarged Europe which wants to preserve its freedom of action.
- During the last decade, European regulation has moved into areas that were previously under the exclusive competence of Member States (such as environmental policy, consumer protection, social, health and work safety rules) and where national rules either did not yet exist or where the European dimension needs to be taken into account to create a level playing field.

The Commission's White Paper on European Governance attempts to integrate previous work on transparency and better regulation and to give it a new ambition. It follows a two-pronged approach: firstly, it announces a series of actions that the Commission will directly embark on, and, secondly, it makes suggestions to the other EU institutions, the national governments and private actors as to their possible contributions to an improvement of European governance. The White Paper is, in other words, both a commitment for future reform within the Commission and an attempt to lead (by giving a positive example and by co-ordination) the Union-wide debate on better governance that will take place in 2002 and feed into the next treaty revision.

New Governance as a model and a generalisation of government can be described as a method or mechanism for dealing with "a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and co-operating in the implementation of these decisions. It deals mainly with horizontal forms of interaction between actors who have conflicting objectives, but who are sufficiently independent of each other so that neither can impose a solution on the other and yet sufficiently interdependent so that both would lose if no solution were found"[1].

In the EU framework, the Commission's White Paper focuses on sub-treaty issues, but also indicates some issues where treaty revisions appear indispensable, pointing particularly to Art. 133 (representation of the EU in external trade policy) and Art. 202 (comitology).

[1] Cf. Schmitter Philippe C., *What is there to legitimise in the European Union... and how might this be accomplished?*, contribution to the EUI Symposium "Mountain or Molehill?", Critical Appraisal of the Commission White Paper on Governance, 2002.

Broadly speaking, the White Paper addresses three fields of activity:

- Consultation, accessibility and participation
- Better regulation
- Institutional matters, particularly the reform of the Council and the system of delegated legislation (comitology).

As an underlying principle, the Commission stresses the usefulness of the political goals specified in the Treaties and defends the Community method as the essential instrument to implement them. However, the White Paper also publicises new instruments such as co-regulation, contractual arrangements and the open method of co-ordination. The question of democratic legitimacy is mentioned, but not sufficiently elaborated, as the essential prerequisite for compliance, consultation and participation

Parliamentary procedures are a proven instrument for organising public debate on major political issues. The European Parliament and its committees regularly seek public and expert views through consultation and public hearings. Some Member States systematically consult at a national level on proposals tabled in the Council. Some of the propositions put forward in governance debates on how to better consult “stakeholders” in legislation appear as a duplication of what parliaments are doing.

It should be recognised that the control powers of many parliaments world-wide are dwindling. The institutional "performance” of a parliament largely depends on the quality of information it receives from the executive. Hence parliaments and governments should agree on high quality standards with respect to the information accompanying government proposals, progress reports on the implementation of laws and impact assessments.

It is believed it would be useful that the Council could expand its recent efforts to improve access to its deliberations, particularly when acting in its legislative capacity and with respect to the European Parliament, and that the Commission should implement the list of actions it has been announcing to the Parliament for quite some time now.

Modern information technology instruments are no panacea: it remains extremely important to provide access to information in a way that empowers citizens and private associations and gives them meta-knowledge on what is going on and where to retrieve salient procedural knowledge as well as facts.

Better regulation

Two essentially different philosophies of social regulation and authority are competing within the governance debate: regulation by formal rule-setting or through authority based on reputation, trust and incentives. Currently there seems to be a general consensus that the first approach is out-dated and authoritarian. Public authorities are, however, obliged to express the general interest. Thus they have a more solid basis than self-regulation, which often comes from economic players or groups whose specific interest may not coincide with the general interest in the long-term.

Binding legislation becomes necessary when equality in the treatment of users has to be achieved through uniform application of identical measures in a certain area. Codes of Conduct and other self-regulation instruments may include mechanisms for imposing sanctions, but in many

circumstances only the public authority, using regulation, has stringent enough sanctions to prevent non-conformity. Authorities also have to take into account the existing - European and national - legal and constitutional system. Member States have a particular responsibility to ascertain Europe-friendly conduct at all levels of national administration.

Most commentators agree that parliaments should focus on establishing fundamental guidelines for running, controlling and legitimising the many centres of regulatory production (e.g., agencies) in the light of the principles of democratic legality and on controlling the global and final effects of laws and government policies from the citizen's point of view (e.g., through regulatory impact assessment). These objectives should be achieved without erasing the distinctions between the legislative and executive branches.

Institutional matters and legitimacy

It is highly probable that the policies of the European Union will have to shift increasingly from the distribution of new entitlements and material advantages to stricter regulation and perhaps even stricter control of certain liberties. This makes it necessary to acquire more democratic legitimacy if these "unpopular" policies are to be implemented and enforced. Of the three central EU institutions, the Council appears to have the greatest need to reform its internal structure in this sense. It is imperative to trim down the sectoral logic of the Council's debates in favour of a more deliberative form of decision-making and to strengthen the co-ordinating and leading role of the General Affairs Council. Moreover, a clearer separation of its legislative and external policy activities needs to be established. The internal co-ordination among the Commission's Directorate Generals is also too weak to secure collegiate action.

Many institutional issues are going to be scrutinised by the Convention on the future of Europe and the subsequent Intergovernmental Conference (among them, it is to be hoped, the improvement of democratic legitimacy and new revision methods for certain parts of the future Treaty). Democratic legitimacy depends on certain key forms and procedures (such as "One man - one vote") which are unalienable and cannot be replaced by focus panels or other recent propositions. The creation of a truly European public debate on political issues is difficult but nevertheless a necessary condition for increasing the credibility of the European institutions and citizens' interest in decisions on the European level. This would be much helped by modified electoral procedures to the European Parliament and a better profile of European political parties.

Some ideas and principles aimed at improving European governance may be extracted from the relevant literature:

- European governance has to strike a balance of negotiation between States, expression of the will of the people, and the operation of strong and lasting institutions. Member States need to give higher priority to the incorporation and enforcement of European legislation.
- Governance arrangements never work alone but only in connection with community norms, state authority and market competition. Market forces must be coupled with advanced regulatory systems, a sophisticated legal architecture, and a culture supportive of the rule of law.
- Legitimacy in a modern polity is based on a balance of technical expertise and majority-based representativity.
- New regulatory processes such as co-regulation carry the risk of lacking peer group pressure, cartel building and sloppy self-regulation. The respect of legal and ethical norms by contracting parties should hence be under close control through public agencies.

- New approaches to participatory and deliberative democracy must recognise the principles and structural elements of representative democracy. Political leaders should communicate and participate in dialogue across local, regional, national and supranational levels. Members of national parliaments have a particular responsibility in this respect.
- Key events should be programmed with a view to reducing the number of subjects and of occasions for debate and to helping the public to understand the process of political opposition and compromise on the European level.
- Council meetings of a legislative nature should be opened to MEPs with a particular interest in the matters dealt with.
- The decisions taken by comitology committees and the material used for their preparation should be made easier to access, not only for the European Parliament but also for other stake-holders with a legitimate interest.
- An appropriate symmetry has to be established between exhaustive examination of legislative detail and political control of the internal procedures and leading personalities of executive and regulatory offices and agencies.
- All ongoing consultations with experts and the organised civil society concerning the preparation of legislative acts should be listed by the Commission in a well structured and regularly updated public register that is easily accessible *via* the Internet. The contents of expert advice given to the Commission should be published completely - and their authors specified. Connected information, such as the mandate given at the outset, should also be made available.

1. Introduction

1.1. Background

After a long political and academic preparation which involved a large number of officials and external experts the Commission adopted, on 25 July 2001, its White Paper on "European Governance"[2]. The communication had been announced by the President of the Commission, Romano Prodi, in February 2000 as one of the most important strategic goals during his mandate. In his speech to the European Parliament of 15 February 2000, one day after the official start of the IGC 2000, Mr Prodi presented the European Commission's strategic objectives for the period 2000-2005 and said that the White Paper he had announced - on a "new and more democratic form of partnership between the different levels of governance in Europe" - was a response to enlargement, "which obliges us to rethink all our policies in depth and with openness". The week before, Mr Prodi had named "Promoting new forms of European governance" as the first and foremost of his four strategic priorities for 2000-2005[3], asserting that there was a need to "rethink relations between the European institutions and different levels of government" and adding that there was a need to "see how to interpret concretely the subsidiarity principle".

In the course of the IGC 2000 it became evident that, whatever the results of the Nice European Council would be, not all problems connected with the enlargement of the European Union would be solved by the Treaty of Nice. This growing unease was confirmed by Declaration 23, annexed to the text of the Treaty, on the future of the Union. The declaration made it clear that the Heads of State or Government saw the need to continue a quasi-constitutional debate that had already been revived earlier by the speech delivered by the German Minister of Foreign Affairs, Joschka Fischer, at the Humboldt University, Berlin, and subsequent speeches by a large number of political leaders.

Another development had commenced earlier on: after the Commission and its President, Jacques Santer, had to step down on 15 March 1999, the Commission began to reform its internal structures, particularly as regards financial control, audit and personnel policies. This internal reform was closely followed by the European Parliament[4] and has now arrived at the stage of concrete proposals, for example for a revision of the Staff Regulations.

The White Paper on European Governance is now entangled between these two initially separate developments. Whereas the internal reform will probably remain a subject of only limited interest to the public, the Commission seems to think that the debate on the future of Europe and the question of legitimate and effective governance are so intertwined that the distinction between measures not requiring treaty changes and those that do necessitate them risks to become meaningless. The matter is further complicated by the fact that the Treaty of Nice will introduce, if and when it enters into force, some provisions that clearly alter the institutional set-up of the Union. The new Art. 190, rendering it easier to establish European Political Parties, or the provisions for enhanced co-operation are examples.

[2] 'European Governance - A White Paper', COM(2001) 428 final of 25.7.2001.
[3] The other three are: 'Creating an area of peace, freedom, democracy and security', 'Creating a new economic and social agenda' and 'Improving the quality of life'.
[4] See resolutions on Reforming the Commission, on the basis of four reports by Alain Lamassoure, Catherine Guy-Quint, Malcolm Harbour and José Javier Pomés Ruiz; OJ C228 of 13 August 2001.

The White Paper recognises this transient situation by identifying some areas where "new ways of working will be held back without corresponding changes to the EU Treaties."[5] "European governance" hence figures as a subtitle in the Commission's communication for the Laeken European Council, where it gives a first outline of its ideas on future treaty revisions.[6] The Commission makes it clear that the governance debate touches upon constitutional aspects of the European Union and that, conversely, its preparatory initiatives for the next IGC will "draw on the principles" of the White Paper on European Governance.

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This Working Document is an attempt to define the relatively recent new concept of governance, as applied to the European Union, and to examine its implications for the institutional role of the European Parliament. Its purpose is to serve as a base document for Parliament's future contributions to the governance debate opened by the Commission's communication. In keeping with the White Paper's approach, it will focus - as far as this appears possible - on the "sub-treaty" issues, i.e. consultation, the role of experts and agencies, better regulation (particularly comitology) and the reform of the Council.

The governance debate is envisaged to involve all other EU institutions and bodies, interested private and public actors, and citizens in general. A more detailed communication will probably be presented by the Commission at the end of 2002, probably in close connection with the work of the Convention preparing the 2003/4 IGC. The Spanish Presidency has announced that it will "adopt appropriate measures so that the Council may carry out an in-depth debate on the White Paper on European governance as soon as the consultation period provided for therein is over". In addition, it "undertakes to continue and to intensify" the debate on regulatory simplification, "the next stage of which should lead to the development of a practical plan of action during the first half of 2002"[7].

1.2. Governance and the Enlargement of the European Union

The two central issues of the governance project are the effectiveness and legitimacy of European policies and institutions[8]. Whilst effectiveness problems are faced by all present-day governments (and have therefore given rise to a good number of studies comparing, for instance, the institutional and procedural set-up of the United States and the European Union as well as their comparative "performance"[9]), the nature of the European Union and its particular predicaments make the problem of democratic legitimacy especially difficult to solve. In a recent historical analysis[10], the case is made that even for the American people the "default setting" towards politics and central government is turned to "distrust". The expansion in the powers of Washington after the Second World War is, according to this research, an anomaly caused by the opposition to the Soviet Union and the occasional embarrassments of political comparisons (of topics such as racism, for instance). The latter drove the American governments of the 60s and

[5] White Paper, op. cit., p. 9.
[6] Communication from the Commission on the Future of the European Union - European Governance - Renewing the Community Method; COM(2001) 727 final of 5.12.2001.
[7] More Europe - Programme of the Spanish Presidency of the EU; p. 18. The document makes explicit reference to the "favourable reception" of the Mandelkern Report and the recent Commission communication on the subject.
[8] See Commission communication COM(2001)727 of 5.12.2001, on the future of the European Union, p. 7.
[9] Most notably the work of G. Majone (for example, Regulating Europe, London - New York 1996).
[10] Brands H.W., *The Strange Death of American Liberalism*, Yale, 2001.

70s to enact the civil-rights legislation which contributed to the expansion of the federal government at the expense of states' rights.

Not being a homogenous federal state with a strong central budget, the European Union is a polity in which citizens, firms, associations and other "stakeholders", for political, historical, cultural, and linguistic reasons, have even more "distrust" or, in other words, difficulty to have spontaneous confidence in European policy making and decisions, as Schmitter and many others have demonstrated[11]. This dilemma will certainly not become smaller with the enlargement of the European Union to 25-30 Member States. The simple "problem of numbers" often described by Commissioner Michel Barnier, among others, in the run-up to the last IGC and to the Laeken European Council[12], brings with it grave structural obstacles, particularly the question whether the Union will keep the ability to change or will be paralysed in its present legal framework[13].. In this context it is regrettable that the Second Report on the revision of the treaties, which outlines suggestions for "sub-IGC" procedures to change the treaties and was presented to the Commission by the European University Institute, received much less public attention than the first one, which was a proposal to consolidate the present treaties into one document *à droit constant*[14].

In another perspective, enlargement can be interpreted as a further intrusion of quasi-foreign policy approaches into "domestic" (including EU) rule-making. Foreign policy, perhaps inevitably, tends to settle conflicts by falling back on executive prerogative and dispensing with the constitutional safeguards which are traditionally meant to constrain domestic (and, increasingly, European) legislation. This trend is corroborated by another development: increasing Europe's standing in the world is the most often cited reason for further political integration, particularly with respect to the second pillar. Obviously, this is surreptitiously opening up a new field of "foreign policy" - the EU's relationship with the rest of the world. From the viewpoint of an *Europe puissance* in the making, domestic centralisation will hence become ever more tempting.

A further development connected to enlargement concerns economic policy. The European Union has been slowly moving from negative to positive integration. Negative integration is short-hand for policies that remove obstacles to integration, particularly as regards the internal market (for example, the removal of barriers for trade and the delivery of services). Positive integration, however, forces Member States to bring into line policies with a high impact on the individual situation of their economic agents (such as the respect for the budget deficit ceilings adopted in the stability pact). The latter category can be subdivided again in co-ordination that only imposes a number of binding rules (such as in the stability pact), leaving the Member States free to act as they wish in domains that are not subject to these rules (e.g., to adopt priorities for budgetary policies as long as they don't infringe the deficit criterion), and co-ordination that obliges Member States to look for broad common policy orientations. The Euro-12 group, for example, is beginning to attempt this in the economic and social policy field; similarly, the

[11] Most recently: Schmitter Philippe C., *What is There to Legitimise in the European Union … and How Might This be Accomplished?*, Jean Monnet Working Paper 6/01 and contribution to the European University Institute symposium "The Commission White Paper on Governance", edited by Christian Joerges, Yves Mény and J.H.H.Weiler; all contributions are available under http://www.iue.it/RSC/Governance. The symposium will be referred to in the footnotes herein after as "EUI symposium". Pagination is preliminary and will change with the final publication of the book.

[12] For example, Barnier Michel, *L'urgence européenne*, Note personnelle of 17 Octobre 2001.

[13] For a detailed analysis of the effect of the increasing number of Union members on the Union's decision mechanisms see chapter 1 of Quermonne J.-L., *L'Union européenne en quête d'institutions légitimes et efficaces*; Paris 1999.

[14] Ehlermann Claus-Dieter, Mény Yves (eds.), *Reforming the Treaties Amendment Procedures*; 2nd report on the reorganisation of the EU treaties, submitted to the European Commission on 31 July 2000.

Commission has commenced to make proposals of this type using the method of open co-ordination.

As Fritz Scharpf has demonstrated, positive integration such as the co-ordination of the conditions regulating economic production (*Standortfaktoren*) will create much bigger tensions among the 15 Member States than previous steps of negative integration, because standardisation in these policy fields (and even more of policies such as the pension system or direct taxation, up to now out of reach for Community activity) would immediately affect the life plans and economic situation of most citizens. The level of conflict to be expected would be much higher than was the case with regulatory policies because in (re)distributive policies winners and losers are often easily visible and find themselves in a confrontational zero-sum game. If this is true within the present Union, it applies *a fortiori* to a Union enlarged to 25-30 members, with the candidate countries bringing in a completely different standard of living and of competitiveness. Some hard decisions, both for the population of the candidate countries and for the citizens of the 15 present Member States, might have to be made. They would obviously require a high level of trust for European law-making in the general public. In other words, to achieve compliance with possibly painful new rules, a high degree of legitimacy would be essential.

If legislative efficacy is an important, if not sufficient source for the acceptance of a political community by its members, as is asserted in particular by neofunctionalists such as Majone, technical problems of decision-making after enlargement will also have to be addressed. The Treaty of Nice did certainly not resolve them satisfactorily. Up to a few years ago, the Union was in the happy situation of being able to deliver "the goods" (increased competition, lower prices, cleaner environment etc.), thus bolstering its legitimacy by its legislative output. In a situation of increasingly demanding positive integration, leaving much less room for manoeuvre to the Member States, the input side of political legitimacy will become ever more important. Input legitimacy is usually defined as legitimacy based on particular decision procedures and possibilities for participation in the political process. It is in this context that public deliberation, consultation and active citizenship come into play. But it is also in this context that euroskeptics advance their arguments about the absence of a European *demos*, a true European public sphere and a European democracy.

One final issue: the Commission, the most important regulatory EU institution, has drawn wide-reaching conclusions from the events of spring 1999 which, to a large extent, were due to presumed and real problems of fraud and incompetence (see above). Parliament will have to observe closely whether the Commission takes full account of the increasing need for better performance audit (as opposed to financial audit). The probity of EU organs, as seen from the outside, can only be demonstrated if the discipline and rigour of performance audits are taken more seriously.

The White Paper's proposals will thus have to be scrutinised in two respects: to what extent are they apt to increase the Union's legislative effectiveness, which would further improve its output legitimacy, and to what extent do they take into account the problems of raising input legitimacy to a new level, thus contributing to a more democratic and generally accepted European Union, able to achieve high compliance with its regulations, even after enlargement.

2. Governance - definitions and interpretations

In the past ten years, conferences, reports and recommendations on governance, better regulation, improved public management and other related subjects have enormously proliferated and reached the highest political level. In March 2000 the Lisbon European Council adopted the strategic goal that the European Union should become the most competitive knowledge-based economy in the world. This was but the latest step of a long history of earlier programmes of regulatory streamlining (see chapter 4). Outside of the EU, not only the UN and its specialised organisations, but also the OECD and the OSCE are making their contributions. It is perhaps inevitable that the definitions underlying these multi-faceted activities show a rather heterogeneous character, even though all actions are centred around what critical observers have called the "functionalist" and operational aspects of legislation (e.g., necessity, proportionality, subsidiarity, transparency, accountability, accessibility and simplicity[15]).

2.1. Preliminary remarks on terminology

In English, the word "governance" often denotes, without any value judgement, the process or acts connected to the exercise of public powers (government). Used in this neutral fashion, it is often combined with specifications of particular policy fields (economic governance, local governance etc.). But this is not what the political discussion around governance has been about in the last few years. Rather, the term is used there to signal a fresh look at long-standing procedural and institutional issues from a new perspective.

More than a few MEPs have criticised the Commission in the plenary debate on the White Paper for not having used a nomenclature more accessible to non-English speakers. In Spain, in the eighteenth century, the word existed as a Gallicism, but it disappeared in subsequent centuries. Today it has reappeared as an Anglo-Saxon term in political science, but its translation into *gobernanza* has little significance for the average citizen. In Germany and Italy, the word governance is often used as such, which also enhances its Anglo-Saxon origin and liberal philosophical background. The word *Regieren* in the German title of the White Paper does not really convey this new understanding. *Gouvernance* is now more or less accepted by French speakers as the equivalent of governance in its present-day usage; hence the old 13th century usage of the word was rediscovered, i.e. the art and technique of government. But this is a recent rediscovery, at least in popular language: in a general interest dictionary of the 1950s *gouvernance* is explained as the jurisdiction in some Dutch cities - whose head was a *gouverneur* - as well as the building sheltering it[16].

It should be added that in every-day English usage governance has become a catch-all phrase for all kinds of management functions[17]. In this sense, especially if used with exhortations such as

[15] Cf. Final Report of the Mandelkern Group on Better Regulation, 13 November 2001.
[16] Petit Littré 1959, p. 999.
[17] In a recent job offer of the British Council, for instance, the field of activity of a Director, Governance and Society, was described as follows: "relationships between the state, the private sector, civil society and public action which enables social inclusion, equality and sustainable development", covering core areas such as "human rights and justice, gender equality, diversity and social inclusion, participation and democracy, management and economics, finance and corporate responsibility". In a similar vein, the Ford Foundation recently looked for a Program Officer, Governance, South Africa, whose responsibilities would comprise the development of "good governance and vibrant civil participation" as well as "local units of governance to respond to demands for service delivery, more accountable administration and the needs and expectations of the citizenry they represent".

"more" or "better", governance just conveys the intention to increase political or administrative activities in a given field, predominantly but not exclusively by public and not-for-profit actors. This modern concept of governance appears in political parlance towards the end of the 1980s when new views on the organisation of public policies and entities were introduced: good business management practices should help government organisations to increase the volume and the quality of their services. Reduction of public expenditure and openness towards the citizens (often compared to "customers") also play an important role.

In conclusion, "governance" can denote both an objective description of a given political system (e.g., when speaking of the European Union as a *sui generis* system of governance) and a catalogue of normative prescriptions of the political direction such a political system should take. Ralf Dahrendorf recently called good governance a synonym for well-intentioned "neo-social-democratic" or "third way" government[18]. In a perhaps more congenial way, good governance was defined as being about "properly screened law making and law implementation, trustworthy administration and regulation, combined with ways of seeing that people should know what is going on and whom to hold responsible"[19]. Governance also covers different conceptual levels and different normative orientations. As former MEP Tom Spencer has recently observed, government is only a "special instance of governance"[20]. Correspondingly, it could be said that legislation is a special instance of regulation. Both governance and regulation encompass legal and administrative activities that have traditionally been split up into varying degrees of significance, formality and generality, with legislation, narrowly defined (i.e. the enactment of laws), and pure administration (i.e. the execution of technical regulations) at both ends of the spectrum. One result of this is a blurring of the hierarchy of legal norms and of different spans of authority, which will be discussed below.

2.2. International interpretations of governance

The European Union is certainly the outstanding example of institutionalised supranational governance. However, transnational governance beyond the nation state is now a world-wide phenomenon. It is thus appropriate to sketch some elements of the international governance debate in order to understand how the European Commission's usage of the term was influenced before it became a central feature of the EU reform debate.

The modern-day usage of the word governance mainly originated in context with the role of international organisations in globalisation: more and more people are feeling immediately concerned by the economic and social effects of global competition. They don't accept any longer that the regulation of this competition is exclusively left to diplomats and political leaders, according to the rules of international law. The latter can be seen as a replication at the international level of a liberal theory of the state: in the international community, the state is treated as the analogue to the individual citizen within a state. Contrary to this tradition and inspired by constitutional thinking, some citizens and activists now want democratic control of the institutions that are perceived to lead globalisation (such as the WTO and the Bretton Woods institutions)[21]. These claims are beginning to have an effect: the Secretary General of the WTO,

[18] Dahrendorf Ralf, "Öffentliche Sozialwissenschaft - Nützlich? Lehrreich? Unterhaltsam?" *WZB-Mitteilungen 94*, Dezember 2001, p. 3.
[19] Vibert Frank, "Governance in the EU - From Ideology to Evidence"; *European Policy Forum Paper*, 2001.
[20] Spencer Tom, "Governance and Civil Society", *Journal of Public Affairs*; vol. 1, no. 2, p. 187.
[21] See Lamy Pascal, "Entre les institutions et la société civile : comment faire progresser la gouvernance mondiale ?" *Convictions* no 2, décembre 2000, p. 24.

Mike Moore, recently advised parliaments to become more active in the control of his organisation's activities, a rather unusual statement for the leader of an intergovernmental body[22].

In a general way, governance brings to mind the idea of opening up government to new agents outside of classic state structures ("governance without government"), in opposition to more traditional views that, for the most part, "it is within the State framework that governance, with its most important functions of securing welfare and security, is situated"[23]. National states' behaviour in international organisations is part and parcel of foreign affairs, long considered as the *domaine régalien* of the executive. Both globally and regionally, attempts to influence this behaviour thus patently clash with classic ideas about the prerogative of the State and the division of powers in most Western countries[24]. Moreover, the EU's internal policy agenda has turned towards areas traditionally kept closely by the Member States or seen as particularly sensitive for public opinion (migration, for instance).

Recent descriptions of what governance means have concentrated on five principles constituting the "new" governance agenda (effectiveness, integrity, equity, transparency and accountability). While effectiveness and equity have long been universally recognised concepts *de jure* and *de facto*, those of transparency and accountability are more recent: they were included with the aim of fighting corruption and embezzlement and to develop the respect of human rights, democracy and the rule of law. Moreover, the new governance model involves direct participation of actors that were previously not involved in governmental functions: governance is generally defined in broader terms than government. According to one recent definition, governance refers to a "set of rules, principles and procedures that come into play in regulations or overlapping activities"[25]. The UNDP regards governance as "a concept including a series of mechanisms and of processes likely to maintain the system, to make the population responsible and to ensure that the society appropriates the process"[26].

According to the Commission on Global Governance, governance is "a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest"[27].

In a description that forebodes the European Commission's use of the term, governance is pictured against this background: in the past, the State executed day-to-day administration and counterweighted particular interests. These functions required minimal contribution from the citizens. In advanced and complex modern societies, however, the State has to play new roles which go much further than these mechanical tasks. It has to intervene as a broker, as a driving

[22] Speech delivered to the Parliamentary Assembly of the Council of Europe on 23 January 2002

[23] Weiler Joseph H.H., "How to be a European Citizen - Eros and Civilisation"; *Working Paper Series in European Studies*, Spring 1998, p. 12.

[24] See, as a recent illustration, a decision of the German Constitutional Court on the rights of the *Bundestag* in the control of foreign policy (BVerfG, 2 BvE 6/99 of 22.11.2001); cf. also Helen Milner, "Regional Economic Co-operation, Global Markets and Domestic Politics: A Comparison of NAFTA and the Maastricht Treaty"; *Journal of European Public Policy*, 1995, vol.2, no.3 p. 337-360.

[25] Smouts Marie-Claude, "The Proper Use of Governance in International Relations"; *International Social Science Journal*, 1998, vol. 50, no. 155, p. 81-89.

[26] *Annual Report on Human Development 1992.*

[27] "Our Global Neighbourhood"; Report of the Commission on Global Governance, 1995; chapter I.

force and as a partner in participative planning, enabling organisational learning, co-evaluation and the necessary collaboration between economic actors and society at large[28].

Pascal Lamy, Commissioner for External Trade, has defined governance, somewhat ironically, as "ce mot curieux, commode tant qu'on ne dit pas trop ce qu'on y met, […] un ensemble de processus transactionnels par lesquels des règles collectives sont élaborées, décidées, mises en œuvre et contrôlées"[29]. EU governance was recently described by a Canadian observer as two-tiered: one side would be an "economistical" approach modelled after the priorities and norms of foreign trade markets and coalition building by economic actors, norms that can also be found in other world regions such as the North American Free Trade Association (NAFTA). The other side would be an "institutional" approach built around ideas such as identity, citizenship and appropriate behaviour, aspects that are rather unique for the European Union[30]. In fact, this description corresponds closely to the two key ideas of the political as well as the academic European governance discussion: effectiveness and legitimacy.

2.3. Theoretical aspects of governance

In recent years, governance has become a complex research current in European Integration studies and its predominant disciplines, political science and law. In terms of research strategy, governance was welcomed as a fresh perspective that transcends the traditional dichotomy of international relations (strongly related to intergovernmentalism) and comparative politics (strongly related to neofunctionalism). Although the practical and normative value of much of this voluminous academic work is not yet clear, a rough outline of the core concepts of governance research is enclosed (see ***annex***).

At the outset, governance was an attempt to identify and conceptualise the mechanisms and relationships between different actors and institutions in a given social or political field. A definition proposed recently by Philippe Schmitter captures this approach well:

> Governance is a method/mechanism for dealing with a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and co-operating in the implementation of these decisions. Its core rests on horizontal forms of interaction between actors who have conflicting objectives, but who are sufficiently independent of each other so that neither can impose a solution on the other and yet sufficiently interdependent so that both would lose if no solution were found[31].

Seen as a research strategy, governance also aims to analyse how normative criteria such as efficacy, legitimacy and their rationality in politics and policy-making can be developed. In most presentations, governance is not a political aim in itself, it rather is a tool to improve the exercise of political power. In other words, governance can thus be defined as a complex network of horizontal and (sometimes) vertical relationships and as a normative idea: to improve the functioning of contemporary democracy.

[28] Cf. Paquet Gilles, "Innovation en gouvernance au Canada"; *Optimum, La revue de gestion publique*, 1999, vol. 29, no. 2/3, p. 80-90.
[29] Lamy Pascal, op.cit., p. 26.
[30] Paquet Gilles, *La gouvernance en tant que précaution auxiliaire*; 2000, Ottawa, Presses de l'Université d'Ottawa.
[31] Schmitter Philippe C, contribution to the EUI symposium, op.cit., p. 6.

Among the large number of governance models that can be found in the literature, it is possible with some simplification, and with a particular view to EU affairs, to distinguish three types of governance:

- **Multi-level governance:** this model is most frequently used when describing the EU situation. It stresses the layered functioning of Union, national and regional bodies, but neglects the increasing difficulty of locating shared competencies according to geographical or hierarchical criteria. It is closely coupled to constitutional discussions in legal circles.
- **Networked governance:** this model is influenced by work done in economics and business administration, work that stresses the need for organisations to be "open-ended", non-hierarchical and interconnected. The model does not, however, give hints at what constitutes good or debilitating networks, thus ignoring normative questions.
- **Expertise-based governance:** this model stems from systems analysis and underlines the importance of optimal information processing, particularly specialised information, fed back to the decision taker, on the effects of previously enacted policies. The model lacks, however, convincing criteria for wanted or unwanted side-effects of decisions and tends to obstruct decisions that have to be taken in a situation of incomplete knowledge[32].

Although it is difficult to translate these condensed models into operational practice, it will become clear from what follows that each of them leads to specific conclusions on questions of an administrative or political type: whether, for example, civil servants of the *Generalist* type working in central organisations (such as the Commission) or experts in agencies should be responsible for the adoption and execution of legislative and regulatory acts. Moreover, they arrive at different suggestions as to how to establish accountability and political legitimacy.

Governance is seen by most European integration specialists as a continuous development of public standards *via* the weighting of different interests and preferences, with a view to arrive at the respect of rules (compliance) and a sense of solidarity (belongingness). In order to make such progress, account should be taken of several factors, some facilitating, some halting such an establishment of norms:

- the diversity of origin and interests of the representatives in "majoritarian" (e.g., the EP) and collegial (e.g., the Commission) institutions;
- the inequality in access to information and other means of participation between different participants in policy-making; this should be remedied by a right for legal appeal for refusal of public consultation and explanation (in public) of any policy decision, as well as its preparation;
- the respect of the principles of subsidiarity and proportionality by all bodies involved in policy-making, combined with the need for *ex post* scrutiny and feed-back information;
- the respect of the principles of precaution (any decision-making has to take account of the risks involved and try to anticipate likely and unlikely consequences) and value added (benefits should be greater than costs).

2.4. Outlook: the meaning of the new governance agenda for the EU

The international law and private sector pedigree of the new governance agenda has caused reservations among more than a few EU policy-makers. Is this fashionable innovation only

[32] See for a similar, more detailed analysis from a liberal viewpoint Vibert Frank, op.cit., annex I.

another trap of the neoliberalist school, intended to weaken the European institutions in favour of more free-market policies? Could it be a valuable instrument to prepare for enlargement, to enhance the EU's role in the world and to increase European citizens' trust in its institutions? Is the adoption of governance ideas by the Commission just symbolic nominalism or self-interested institutional defence[33]?

There is one important discrepancy between much of the governance methodology and the main features of the European construction: the European Community and, to a lesser extent, the European Union are based on the rule of law, i.e. on the respect of uniform and binding rule-making. The Court of Justice of the European Communities plays a role in the constitutional development of the European construction that cannot be overestimated. It is likely that what the EU has got in terms of democratic legitimacy is to a large extent based on this predominant influence of legal and quasi-legal mechanisms. The governance debate may carry the risk to make one forget that "law is a medium for stabilising behavioural expectations and constraining defection and free-riding, because it connects non-compliance with sanctions. *[…]* It makes agreements into rights or contracts which make them binding on all the members in the same way"[34].

On the other hand, much of the governance debate focuses on notions of complexity and multi-level networking that, at least on the higher levels of societal rule-making, seem difficult to execute. In the words of Markus Jachtenfuchs, the governance approach "almost completely ignores questions of political power and rule"[35]. How then to assure clear delineation of responsibilities, how to designate who is supposed to make certain decisions, how to take account of inequalities of access to policy-making and juridical institutions? What about the definition of the common interest and the role of non-sectoral political organisations (parties, for instance)?

If Community law has long been seen as a *tertium* between the law of (federal) states and international public law[36], the fact that, until a short time ago, governance in its new interpretation was coined and discussed primarily in international organisations and NGOs should be kept in mind in the subsequent investigation. One could say that in the new governance agenda a recent and weakly legitimated polity, the EU, is hoping to strengthen its efficacy and credibility through application of what some have called the "new kid on the block" in the theory of the modern "regulatory state", an instrument that has not yet really proven its worth and seems to have much less appeal for well-established structures such as nation states.

The following examination of the White Paper will therefore keep in mind that there are two possible readings of the new governance agenda:

It can be considered as a means, a mere up-date of the tool-kit of modern democratic societies in general, and the EU in particular, which is applied to improve the inner workings of their institutions, their effectiveness and flexibility and, if successful, their credibility.

[33] Neil Walker's comment is quite acerbic on this account: the White Paper "suggests a 'revitalisation of the Community method' which promises to revitalise one organ – the Commission itself – rather more than others." op.cit., p. 34.

[34] Eriksen Erik O., *Governance or Democracy? The White Paper on European Governance*, contribution to the EUI symposium; p. 9.

[35] Jachtenfuchs Markus, *The Governance Approach to European Integration*, op.cit., p. 258.

[36] Joerges Christian, *Ökonomisches Gesetz – Technische Realisation – Stunde der Exekutive. Rechtshistorische Anmerkungen zum Weißbuch der Kommission über Regieren in Europa*; contribution to the EUI Symposium, p. 10

- It can be seen as an end in itself, a new model of societal organisation, possibly trying to transform present traditions of democratic constitutionalism in the long term.

More pragmatically, the intentions of the European Commission, and how they were interpreted by commentators, will be assessed.

3. The White Paper on European Governance and its critics

3.1. The context: governance and regulation

Better regulation has been of great concern for the European institutions for a long time. An important step was taken with the declarations on the quality of the drafting of Community legislation, on the provisions relating to transparency, access to documents and the fight against fraud, and on the consolidation of the Treaties[37], which supplemented the protocols on the Application of the Principles of Subsidiarity and Proportionality and on the Institutions with the Prospect of Enlargement of the European Union, both annexed to the Amsterdam Treaty.

These texts initiated a series of activities on better regulation and better legislation. For example, the European Parliament adopted a resolution on the Draft Quality of Legislative Texts – Better Law Making[38], with an annexed Draft Interinstitutional Agreement on Common Guidelines for the Quality of Drafting of Community Legislation (the Interinstitutional Agreement was signed on 22 December 1998[39]). The Council had previously adopted a resolution on the Quality of Drafting of Community Legislation, on 8 June 1993, sometimes still called the Ten Commandments[40]. In the General Secretariat of the European Parliament, a Vademecum was drawn up by officials of DG1 and DG2 as well as several smaller texts such as a note on EP Amendments in the Crucible of Conciliation by the Conciliation Secretariat. The most recent expression of the three institutions' common endeavour to make better legal texts is the *Joint practical guide for persons involved in the drafting of legislative texts* produced by the three Legal Services and signed on 16 March 2000.

The Commission's manifold activities, particularly in the framework of the SLIM-Programme, need not be reproduced here. Annex B of the Final Report of the Mandelkern Group gives a useful overview[41]. It is noteworthy that the Commission has recently adopted two communications closely related to the White Paper: the communication on Simplifying and Improving the Regulatory Environment and the communication on Better Lawmaking 2001[42], with the first one being one of the many future activities announced in the White Paper.

3.2. The White Paper's main proposals

The Commission started from the wide-spread and much bemoaned observation that European citizens' lack of interest in and distrust of politics and institutions is increasing. The problem is also acknowledged at national level, but is particularly acute at the level of the European Union. Many citizens are losing confidence in a poorly understood and complex system. The Union is often seen as remote and, at the same time, too intrusive. On the other hand, people expect the Union to take the lead in responding to environmental challenges, unemployment, concerns over food safety and regional conflicts.

[37] declarations 39, 41 and 42.
[38] Report A4-0498/98, by Mrs Palacio Vallelersundi, OJ C098 of 9 April 1999, p. 496. The report's explanatory memorandum gives a brief overview of the Community's initiatives in this field, giving particular attention on those produced after the Amsterdam treaty.
[39] OJ C073 of 17 March 1999, p. 1.
[40] OJ C166 of 17 June 1993, p. 1.
[41] Final Report of the Mandelkern Group on Better Regulation, 13 November 2001.
[42] COM(2001)726 and COM(2001)728, respectively.

According to the White Paper, democratic institutions and the representatives of the people, at both national and European levels, can and should try to connect Europe with its citizens. The Commission states that it cannot make these changes on its own, nor should this White Paper be seen as a magic cure for everything. Introducing change requires effort from all the other Institutions, central government, regions, cities, and civil society[43] in the current and future Member States. The White Paper is therefore primarily addressed to them. It proposes a series of initial actions. Some of these should help the Commission to concentrate its action on clear priorities within the tasks conferred on it by the Treaty: right of initiative, execution of policy, guardian of the Treaty and international representation. The White Paper states that these will be taken forward immediately.

The Paper also launches a consultative process on the need for action by the other Institutions and Member States. By the end of 2002, the Commission states that it will report on the progress it has made and draw lessons from the White Paper consultation.

Having considered this situation for some time, the Commission identified the reform of European governance as one of its four strategic objectives in early 2000[44]. As has become clear at the Nice European Council, the Union must, on the one hand, take action to adapt governance under the existing treaties, but, on the other hand, also prepare for a broader debate on the future of Europe in view of the next Inter-Governmental Conference.

The White Paper is meant to focus on the first step of this two-tier process: it proposes to open up the policy making process to get more people and organisations involved in shaping and delivering EU policy; it makes it clear that action is also required from national and local government, EU institutions and civil society.

3.3. Recommendations concerning the Commission itself

The White Paper has so far had considerable success in attracting contributions, both to its preparatory work and to the debate opened after its publication. However, academic and political institutions prevail in these deliberations, compared to civil society and private associations. Perhaps not surprisingly, one comment that can be frequently found focuses on the institutional self-interest that may have induced the Commission to most of the proposals it made with respect to its own reform. This is a truism because no institution can claim to be free of the legitimate tendency to strengthen its institutional weight. Moreover, the neo-liberal school of thought in the governance debate which has apparently identified the Commission as one of the problems, rather than a solution to the problem, only prompts defensive counter-reactions[45].

[43] Organised civil society as defined in the Opinion of the Economic and Social Committee on the role and contribution of civil society organisations in the building of Europe, 22 September 1999, paragraph 7.1 (OJ C 329 of 17. 11. 1999, p. 339).

[44] Speech delivered by Romano Prodi to the European Parliament on 15 February 2000.

[45] One illustration can be found in Frank Vibert's otherwise instructive paper (op.cit., p. 3): "...the role of the College of Commissioners needs to be rethought to take into account the extent to which the Commission is increasingly being turned into a specialised agency itself." There is also a very sceptical description of the Commission's present situation on pp. 16/17 ("lacks in-house expertise needed", "has an institutional incentive to prefer formal EU legal measures" etc.), which finally arrives at the conclusion that it would be useful "to combine parts of the Commission and the Council secretariat - leaving the regulatory parts of the Commission as a specialised multi-purpose regulatory agency." Arguments along similar lines are presented in Ben Hall's paper "European Governance and the Future of the Commission", Centre for European Reform Working Paper, 2001.

Yet there are a few rather revealing phrases in the text. When the Commission defines the principle of the Community method, for example, it gives the impression that it is only the Commission that can define the common European interest, whereas the role and function of "democratic representation" (by the EP and the Council) remain unclear[46]. This of course raises questions and misgivings, not least in the European Parliament. But what are the concrete proposals the Commission makes for the improvement of its own functioning?

Better involvement and more openness

The Community method must be renewed by replacing as much as possible the traditional top-down approach and complementing the EU's policy tools more effectively with non-legislative instruments. The Commission intends to provide

- on line information through all decision-making stages;
- a more systematic dialogue with regional and local governments at an early stage in shaping policy;
- greater flexibility in implementing legislation to take account of regional and local conditions;
- the establishment and publication of minimum standards for consultation on EU policy.

Better policies, regulation and delivery

The Commission will:

- promote greater use of different policy tools;
- simplify existing EU law and encourage Member States to simplify the national rules which give effect to EU provisions;
- publish guidelines on collection and use of expert advice, so that it is clear what advice is given, where it is coming from, how it is used and the alternative views available.

Global governance:

The Commission will:

- improve dialogue with the governmental and non-governmental actors of third countries when developing policy proposals with an international dimension;
- propose a review of the Union's international representation in order to allow it to speak more often with a single voice;

Refocused institutions

The EU institutions and Member States must work together to set out an overall policy strategy. The Commission will:

- reinforce attempts to ensure policy coherence;
- bring forward the next IGC proposals to refocus the Commissions executive responsibilities.

The Commission asserts that the Council must reinforce its capacity to take decisions and cut through different sectoral interests, and should establish a stronger link between EU policy and national action. By assuming its political responsibility, the Council would free the European Council to establish and follow long-term strategic orientations. The Council and the European

[46] White Paper, op. cit., p. 8 (box).

Parliament should focus more on defining the essential elements of policy and controlling the way in which they are executed. The Parliament should enhance its role in feeding into the political debate the views of its electors.

Summary

An instructive précis of the Commission's intentions is provided by the White Paper itself:

> The measures proposed in this White Paper, including an enhanced dialogue with European and national associations of regional and local government, better and more open consultation of civil society, better use of expert advice, and better impact assessment will help to improve the quality of policy proposals.
>
> The link between European and global governance should lead to the Union speaking more often with a single voice. The prioritisation for dealing with complaints about breaches of Community law will maximise the impact of the Commission's work as guardian of the Treaty.
>
> The proposals to simplify Community legislation further, better regulation through a greater diversity of policy tools and their combined use, and tri-partite contractual arrangements will all improve the quality of policy execution. The increased use of regulatory agencies will ensure better execution and enforcement of policies in specific cases. It will also avoid having to assign Commission resources to too technical tasks. *[…]*
>
> Moreover, the European Parliament should enhance its control on the execution of EU policies and the implementation of the budget. This means departing from the present emphasis on detailed accounting with more policy-oriented control based on political objectives. The areas in which co-decision should apply must be reviewed in order to reinforce the role of the European Parliament[47].

3.4. Critical issues

The White Paper has created a lot of interest in think tanks and among academics, not least because of its long preparatory phase, which involved the *Action Jean Monnet* network. It gave rise to grand expectations of a new step trying to solve, in one sweep, some of the pressing problems of the efficacy and legitimacy of the European Union in the perspective of its enlargement. One commentator went indeed so far to say that the White Paper, or at least much of the preparatory work, addressed, from a legal scholarship point of view, the "central and continuing problem of the integration project"[48]. Some of the wording of the White Paper does seem to be a bit flamboyant. Eyebrows were sometimes raised when it claims, for example, to present "the outlines of a model for the Union's future political organisation"[49].

Against this background, the text was bound to disappoint: "The White Paper is rather modest. It is about instruments and methods. There is no clear vision or agenda of what to do with the basic problems of trust and legitimacy. What is the EU's mission beyond that of creating a free market? Without an understanding of the entity and its peculiar characteristics there can be no adequate diagnosis. *[…]* The definition of the situation is deficient and the problems recognised to be acted upon confined to more or less pragmatic ones"[50].

[47] p. 30.
[48] Joerges Christian, *Ökonomisches Gesetz – Technische Realisation – Stunde der Exekutive. Rechtshistorische Anmerkungen zum Weißbuch der Kommission über Regieren in Europa*, contribution to the EUI Symposium, p. 2.
[49] White Paper, p. 34; see also President Prodi's statement of 15 February 2000.
[50] Eriksen Erik O. , op.cit., p. 4.

3.4.1. Consultation, transparency and effectiveness

Many of the White Paper's proposals on consultation mechanisms are now uncontroversial, even redundant and ubiquitous. Most of them can also be found, for instance, in the report of the Mandelkern group which was drawn up almost in parallel with the White Paper as well as in much of the academic governance literature. The principal issues are, of course, twofold: how to ensure equitable access to consultation and how to manage, digest and utilise the enormous amount of often ill prepared and/or biased and interested information coming from thousands of consulted organisations and individuals. To cite just one of many similar comments: "one cannot but wonder what would happen if the Commission's invitations were in fact taken seriously by most, or even by many of the 'civil-society' actors all over Europe to whom they seem to be addressed"[51].

One commentator criticises the Commission for having "no deliberate strategy on *[…]* how best to use public 'involvement': Why should 'civil society' be involved: to improve the Commission's knowledge base? To get a better assessment of competing preferences? *[…]* To furnish support when negotiating with the Council and the European Parliament (not to forget about inter-departmental conflicts)? To strengthen legitimacy by expanding deliberation? To advance participatory democracy?"[52].

Under the heading "with better involvement comes better responsibility" one of the Commission's ideas is to establish partnership arrangements going beyond the minimum standards in selected areas, committing the Commission to additional consultation in return for more guarantees of the openness and representativity of the consulted organisations. This has not been particularly well received in the European Parliament, nor in civil society. The fear is that the Commission would risk to create privileged classes of consulted groups and try to interfere with their internal structures, thus undermining their independence. The Commission working group instructed to prepare the proposals for the consultation and participation chapter was indeed quite reticent on the idea of "accreditation schemes" for NGOs, which were seen as "too exclusive and jeopardising open access to consultation processes".

Nevertheless, it seems evident that claims to representativity, accountability and sound financial procedures should be substantiated not only in the public but also in the ***organised*** civil society such as defined in the new Art. 257 of the Nice Treaty. The Commission's requests that civil society organisations should tighten up their internal structures, provide guarantees of openness and representativity, and prove their capacity to relay information or lead debates in the Member States seem justified, provided that access to the EU institutions remains open for smaller groups and individuals. Proposals to create what has come to be called ***e***-democracy have to be examined thoroughly in this respect. The credentials of those making e-inputs are difficult to verify and they are not transparent or open; their wider legitimacy is contestable; disadvantaged individuals and groups may not attach any or much confidence to ensuing legislative outputs. Electronic means of participation may be beneficial in promoting dialogue or exchanges among virtual communities around EU issues, proposals or ideas and might be usefully expanded by EP party groups, individual MEPs (as many have done) and national parliaments.

[51] Scharpf Fritz W., *European Governance: Common Concerns vs. the Challenge of Diversity,* contribution to the EUI Symposium, p. 10; similar observations in Kohler-Koch Beate, *The Commission White Paper and the improvement of European Governance*; ibid., p. 8.
[52] Kohler-Koch Beate, op.cit., p.10.

The EU has indeed a tradition of wide consultation which was enshrined in the Protocol on the application of the principles of subsidiarity and proportionality attached to the Amsterdam treaty[53]. Thousands of industry associations, political pressure and other interest groups are present in Brussels and are in regular contact with the Commission and the European Parliament. In the White Paper the Commission estimates, for example, that around 2500 organisations and individuals have contributed to the preparatory work organised by its Forward Studies Unit and Governance Team. Despite the wide-spread feeling that EU decision making is opaque, the number of daily communications between these organisations and the EU institutions is thus impressive. Still, the importance of consultation is again emphasised not only in the White Paper itself, but in all other reports and recommendations concerning European governance or better regulation. A recent example can be found in the Mandelkern report:

> Consultation is a means of open governance, and as such early and effective consultation of interested parties by EU and national policymakers is an important requirement. This does not usurp the role of civil servants, Ministers or Parliamentarians in the policymaking process but supplements the information they have to hand. Correctly done, consultation can avoid delays in policy development due to late-breaking controversy and need not unduly hinder progress[54].

The quote may be read as an answer to preoccupations in the European Parliament - and other chambers - about certain aspects of the long list of consultative actions proposed in the Commission paper and in other texts such as the Mandelkern report. The proliferation of consultation mechanisms and consultative organisations are seen by many MEPs as being at the detriment of parliaments as the foremost place for political debate, particularly as concerns the definition of our societies' overriding general interest.

There are estimates that approximately 0,5 to 1 million "actors" (i.e., industry groups, regional and local authorities, media, SME and trade union associations, NGOs, universities, research centres) are regularly in touch with the European institutions. About 200 000 of them may already benefit from Community programmes managed by the Commission and often expect to have privileged access to future consultation and participation processes. There is a real danger of establishing a new form of corporatist regime if the European institutions, including the Parliament, focus too strongly on these "actors". Recent experience by the Commission on the feed-back to the White Paper indicates, for instance, that public, regional and local actors as well as their associations responded with numerous contributions and concrete proposals, whereas there is relative silence of the organisations of civil society, including the social partners, when compared to their degree of involvement in the preparatory phase. It is possible, of course, that this is due to a concentration of their resources on the debate on the future of Europe and on contributions to the Convention instructed to prepare the forthcoming IGC[55].

In a similar vein, these organisations often have very high expectations on what the Union's institutions should be able to do for them. There are regularly complaints from civil society groups that there is a serious shortage of methods and human resources available to manage such a diversity of inputs and to function with open networks in the European institutions. Some groups even require the support of the majority of the administrators and of the middle management staff for these new consultation management tasks. The wish to influence is fully

[53] Paragraph 9 of the protocol reads: "[T]he Commission should, except in cases of particular urgency or confidentiality, consult widely before proposing legislation […]."
[54] Final Report of the Mandelkern Group, p. ii.
[55] Cf. European Governance Newsletter no. 7, European Commission, December 2001.

legitimate but it is important to guarantee an unbiased definition of the European general interest and to organise fairly an ever growing number of consultations.

A basic feature of democratic systems is that they eschew all forms of privilege and see equality of status as an important social and political ideal. Privileged access to salient and timely information can therefore be considered to be anti-democratic. The battle fought for years by activists to get better access to the Union's documents has rightly succeeded by forcing the European institutions, in the wake of declaration no 41 annexed to the Treaty of Amsterdam, on the provisions relating to transparency, access to documents and the fight against fraud, to adopt a series of formal agreements and codes of conduct[56]. This is not least the merit of the European Parliament and the European Ombudsman, much helped by some important judgements of the Court of Justice.

However, the very scale of modern democratic societies, let alone supranational polities, makes the model of active citizenship seemingly difficult to attain. Society has become complex, political power centralised and economic decision making diffuse. Most citizens simply try to understand public issues and participate through conventional electoral events. They do not feel the obligation to get involved in public affairs, which makes representative government inevitable, in spite of new communication and information technologies. It is doubtful, for instance, whether Internet consultation boards can combat "fragmentation of information, [...] the disappearance of a coherent world view, [...] and belief in the ability to know let alone control"[57].

The modern idea of self-government thus requires a private sector which breeds self-reliance and the habit of association - rather than dependence on public initiatives. But recent media developments have resulted in unrelenting public awareness of discontents so various as to create bewilderment and passivity, not wilful involvement in public affairs. Media consumption cannot replace the experience of helping to define and make choices of public policy, thus becoming "a better judge of those who seek to lead"[58]. One important result of "better involvement" could be that it "contribute[s] to a learning process that might trigger a Europeanisation of identities and it may activate transnational intermediary organisations that will contribute to the evolution of a European public space. Involvement, not just in consultations with EU institutions but in activities of European networks, will transport the idea of a legitimate polity that is different from the state of modern times"[59].

[56] See:
- Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 of 31.05.2001, p. 43.
- Joint declaration relating to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 173 of 27.06.2001, p. 5.
- Bureau Decision on public access to European Parliament documents, OJ C 374 of 29.12.2001, p. 1.
- Council Decision 2001/840/EC of 29 November 2001 amending the Council's Rules of Procedure, OJ L 313 of 30.11.2001, p. 40.
- Commission Decision 2001/937/EC,ECSC,Euratom of 5 December 2001 amending its rules of procedure, OJ L 345 of 29.12.2001, p. 94.

[57] Weiler Joseph H.H., *How to be a European Citizen*, op.cit., p. 6; see also chapter 7 of Siedentop Larry, *Democracy in Europe*, Harmondsworth 2000.

[58] Siedentop Larry, op.cit., p. 129.

[59] Kohler-Koch Beate, op.cit., p. 13.

3.4.2. Legislation in practice: comitology, sectoral interests, and Council reform

The Commission's bold statement that, in order to make EU decision-making faster and simpler, it may be necessary to review "the need to maintain existing committees, notably regulatory and management committees" and its announcement to "bring forward at the next Intergovernmental Conference proposals to refocus executive responsibility on the Commission, while streamlining the control by Council and the European Parliament over how the Commission uses its executive powers"[60], has also been heavily disapproved of by many observers as either self-important arrogation of powers and legitimacy or, perhaps even worse, ignorance of the inherent political character of the exercise of executive powers in the modern administrative state[61]. Nevertheless, the Commission keeps advocating these ideas with great energy. For example, in its recent communication on the regulatory environment it puts forward: "with a view to making more use of less detailed directives, the Commission should, in appropriate cases, be given more executive powers. At the same time, there should be a review of the existing comitology procedures and of the arrangements whereby the legislator vets executive instruments"[62].

The European Parliament[63] has long been critical of the comitology system for reasons which can be summarised as follows:

- because the Commission is accountable to the EP, any procedure that gives executive power to the Council instead of the Commission undermines the ability of the EP to hold the EU executive accountable;
- the EP should have equal rights with the Council to review, approve and veto proposed implementation measures in those areas where it shares legislative authority with the Council[64].

Parliament has used a number of different instruments to assert itself as an equal player in the implementation of Community legislation: internal reform to enable its Committees to exert better control, blocking of legislation in co-decision, reducing the funds available for certain comitology groups in the budgetary procedure, or negotiating *modus vivendi* or interinstitutional agreements. The demands put forward by the European Parliament can be generalised in the following terms:

- redraw the boundary between executive and legislative authority in a way that executive authority is limited to implementing measures and remove certain executive powers of the Member State governments;
- give equal powers to the EP and the Member State governments in co-decision issues, if such an issue is referred back for review or if new legislation is required;

[60] White Paper, p. 31,op. cit.
[61] It should be noted that the Commission tried already in the IGC that prepared the Single European Act to obtain independent executive decision-making powers.
[62] COM(2001)726, p. 8.
[63] See in particular the report on the agreement between the European Parliament and the Commission on procedures for implementing the new Council Decision of 28 June 1999 – 'comitology' (doc. A5-0021/2000), drawn up by Frassoni Monica on behalf of the Committee on Constitutional Affairs, OJ C 339 of 29.11.2000, p. 167.
[64] taken from Hix Simon, "Parliamentary Oversight of Executive Power: what Role for the European Parliament in Comitology?" In: Thomas Christiansen/Emil Kirchner, *Committee Governance in the European Union*, Manchester and New York, 2000.

– communicate all draft instruments well in advance of their proposed adoption and give full details of the timetable, so that they can be blocked, if necessary, ***before*** they are implemented.

This raises the question whether the Parliament should pursue an active and regular control of implementation ("police patrol") or rather accept an implementation measure as being appropriate as long as it does not receive evidence to the contrary ("fire alarm"), for example through its Committee on Petitions. It is difficult to give a general answer because Parliament's approach will depend on the policy under scrutiny and on the political situation in a given Committee[65]. Quite often, Members of Parliament complain about paralysing technical discussions or endless voting sessions and propose to make the Parliament a more political place where the focus would be on high-level matters of strategic importance. This approach is obviously in contrast to piecemeal verification of what the Commission and/or the Council are doing in the Art. 202 committees. Nevertheless, even commentators which have a generally positive attitude towards comitology agree that access to the work done and decisions taken in them is far from satisfactory and certainly not equitable.

There is also a more general point: whilst every executive has a natural tendency to depart from the legislator's original intentions, a case can also be made for a certain protection of everyday law-making from shifting parliamentary majorities or special interests. An important branch of political science purports that this will result in more "pareto-efficient" legislation (i.e. legislation that ensures an optimal equilibrium of interests and goods) than "majoritarian" legislation. The model recommends, in other words, to allow civil servants "to fill in an almost blank page of law"[66].

This leaves, nevertheless, the question of political control, which is universally recognised as one of Parliament's most important tasks. The examples of national systems show that one of parliaments' strongest weapons is the principle of political responsibility of ministers. This has been partially adapted to the EU context by introducing parliamentary hearings for Commission candidates and could be extended by giving the EP the right to present a motion of censure against individual Members of the Commission. As a general strategy, it would probably be most efficient for the EP to develop *a priori* strategies to avoid the need for continuous *ex post* control of detailed technical legislation, for instance by developing strict rules for the nomination (and censure …) of executive office holders or by ensuring transparency of the legislative-executive interplay. As many of the rules for nominations are fixed in the treaties, proposals along these lines would transcend the White Paper to a certain extent. As to transparency, however, Council decision 1999/468/EC (laying down the procedures for the exercise of implementing powers conferred on the Commission) has improved Parliament's position and is considered to be a major step forward if applied *bona fide*[67]. One could thus hope that concerns such as those raised by Joseph Weiler, who called the comitology committees a hidden "netherworld", will be met. Weiler has said that instead of supranationalism "it is time to worry about infranationalism - a complex network of middle level national administrators, Community administrators and an array of private bodies with unequal and unfair access to a process with huge social and economic consequences to everyday life - in matters of public safety, health, and all other

[65] For a history of the various episodes of the EP's struggle for the control of comitology, such as the Plumb-Delors procedure, the *Modus Vivendi* or the Samland-Williamson agreement, see previous footnote.
[66] Cf. Siedentop Larry, op.cit., p. 117.
[67] Cf. for example Quermonne, op.cit., p. 117; see also Agreement 2000/600/EC between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of 28 June 1999 […], OJ L 256 of 1.10.2000, p. 19.

dimensions of socio-economic regulation"[68]. To other observers these committees and working groups are like "small Councils" where the logic of market integration is made compatible with the regulative concerns and interests, particularly those in the social and labour market sectors, of the Member States[69].

The last comment leads to a problem closely related to comitology, but reaching beyond implementation, i.e. the increasing disintegration of European policy making. The step-by-step integration which has characterised the Union's development for a long time has tended to slice policies into sectoral strands with different objectives and different tools: over time the capacity to ensure the coherence has diminished. This has become most obvious within the **Council** but also diminishes the efficacy of the Commission because of habitual infighting between different Directorates General. The current working methods of all the institutions and their impact on the relations with the Member States prevent them from showing the necessary leadership. Comitology working groups are somewhat single-mindedly determined by the sectoral interest of the relevant Commission DG and the national ministries involved.

A greater effort to ensure the consistency of what is done in different sectoral Councils is needed. The Council of Ministers, in particular the General Affairs Council composed of Ministers for Foreign Affairs, has lost its capacity to give political guidance and arbitrate between sectoral interests, particularly where this involves resolving disputes between different home departments over the position to be taken on EU proposals. A first, very easy step would entail making a visible and transparent distinction between the Council's legislative and executive functions. The Presidency Conclusions of the Göteborg European Council called again for an "effective co-ordination between different Council formations" and the recent EP resolution based on Jacques Poos' report on the reform of the Council argues along the same lines. The consensus is that progress has been slow so far[70]. Therefore, the issue figures in the programme of the Spanish presidency, even as a separate "urgent" section set aside from the one on the Convention on the future of Europe.

3.4.3. Agencies

The White Paper advocates the creation of more executive agencies, under full control by the Commission. These executive agencies bear no resemblance to the 13 EU offices and agencies, or the US agencies for that. The model has been developed as a response to the fraud problems that were caused by the lack of control of external sub-contractors and contributed to the demise of the Santer Commission[71]. Moreover, the EP's Budgets Committee criticised the so-called *bureaux d'assistance technique* (known as BATs) for years and called for a better and more transparent management structure for the execution of Community programmes. The difference between this newly developed model of executive agencies, a successor of sorts of the BATs, and the regulatory agencies playing an important role in the political science of regulation are not widely recognised.

The reasoning on the advantages of regulatory agencies has been well summarised by Simon Hix:

[68] Weiler Joseph H.H., *How to be a European Citizen*, op.cit., p. 19.
[69] For example Joerges, EUI symposium, op.cit., p. 17.
[70] Quermonne, op.cit., pp. 63 ff.
[71] See COM(2001)808.

> If regulation is made by a majoritarian institution, such as a parliament, bargaining is between rival legislative coalitions, and the outcome is inherently redistributive/zero-sum: in the interest of the majority, against the interests of the minority. However, by delegating regulatory policy to an independent institution, which is required to act in the 'public interest', outcomes will be positive-sum. And this can be supplemented by 'transparency', via media and parliamentary scrutiny and judicial review of the regulator. In other words, through pareto-efficiency and transparency 'no one controls an agency …[but] the agency is under control'[72].

The number of EU agencies has considerably increased over the past years. From a slow beginning in 1975 (European Foundation for the Improvement of Living and Working Conditions, European Centre for the Development of Vocational Training) the increase has recently accelerated (1990: European Training Foundation, European Environment Agency; 1993: European Agency for the Evaluation of Medicinal Products, European Monitoring Centre for Drugs and Drug Addiction, Office of Harmonisation for the Internal Market; 1994: Community Plant Variety Office, European Agency for Safety and Health at Work, Translation Centre for the Bodies of the EU; 1997: European Observatory on Racism and Xenophobia; 2000: European Agency for Reconstruction). Whilst most of these agencies have only advisory functions, there are some with regulatory competencies along the lines of US agencies (such as the Environmental Protection Agency or the Food and Drug Administration) which have been considered by certain observers as the model case for European Agencies. But even the advisory agencies are extremely active organisers of Europe-wide opinion-forming processes.

Several new agencies will probably soon take up their activities, once their seats have been agreed[73]. The denominations of these agencies are a further indication of the changing nature of European governance: the increasing role of safety matters, immigration, home and justice affairs becomes evident.

The role of executive or regulatory agencies has been thoroughly examined by political science, in general, and, more recently, also by European Integration specialists. Much of this work has been of a comparative nature because the US agencies have long been the subject of studies analysing how to maximise output legitimacy of political systems. Agencies that are partly independent from the legislative branch are seen as a means to balance special interests and to ensure continuity in the enforcement of legal norms. Since the 1970s, the principal reason for this has been seen in the increasing technical and scientific complexity of legislative acts, which makes it almost impossible for parliaments to exert effective control on legislative detail and the implementation of norms. Particularly the neofunctionalist school of European Integration Studies therefore defends agencies as an excellent instrument to increase the political "output" (i.e., high quality regulation) and thus the legitimacy of the European Union[74]. This is particularly important because scientific expertise which is close to policy making, despite the global character of science and technology, is still organised on a predominantly national level.

The European Parliament's attitude towards agencies has been generally positive. Again, the issue of political and budgetary control has to be appropriately addressed. Either the Commission

[72] Hix Simon, *The Study of the EU II*, op.cit., p. 51.

[73] European Food Authority, which will provisionally be seated in Brussels, Maritime Safety Agency, Eurojust, European Police College, Air Safety Agency, Observatory for Migration and Asylum, Agency for Rail Safety, Community Agency for Visa Management, and Civil Protection Agency.

[74] Cf. G. Majone, *Deregulation or Re-regulation? Regulatory Reform in Europe and the United States*, London, 1990, and, from the same author, "The European Community: An Independent Fourth Branch of Government?"; in: G. Brüggemeier (ed.), *Verfassungen für ein ziviles Europa*, Baden-Baden 1994, pp. 23 ff.

keeps its full political accountability for the agencies *vis-à-vis* the Parliament or Parliament obtains the right to get involved in nominations and other important control measures concerning the agencies. Important studies of the EU agency system have argued that more EP influence on the agencies would be an excellent way of increasing the legitimacy of the EU regulatory system. Moreover, it would be extremely important to establish as quickly as possible an excellent reputation for these bodies. As they do not dispose of the quasi-natural legitimacy of a directly elected institution, their record of correct decision-making and good practice is essential to justify their powers. Well-reputed regulatory agencies can serve as the intermediary between expert opinion and the general public. They can also be expected to act as network co-ordinators, rather than as central regulators, and hence substitute direct administration by the Commission, which is "politically inconceivable, and probably undesirable"[75], with a more decentralised mode of regulation.

There are, however, limitations to the extent to which scientific expertise can inform decision makers. Scientific judgement is often delivered not in terms of certainties but in terms of probabilities. This leaves decisions about the proportionality (relation of benefits to costs) and the necessary precautions in relation with regulatory acts non-trivial and potentially dangerous for the decision-maker, be it on the political or the regulatory level. Nevertheless, some non-elected institutions such as the European Central Bank or regulatory agencies have shown to be capable to acquire legitimacy by earning reputation through a proven track record of good decisions.

3.4.4. New regulatory instruments

The present European agenda is no longer about the further perfection of uniform rules of market integration. It is about coping with the problems and constraints that the integration of European markets has created for Member States in policy areas which so far have not been Europeanised themselves (e.g., the labour market). The territorial (and human) impact of EU policies in areas such as transport, energy or environment should be addressed. These policies should form part of a coherent *ensemble* as stated in the EU's second cohesion report; there is a need to avoid a logic which is too sector-specific. In the same way, decisions taken at regional and local levels should be coherent with a broader set of principles that would underpin a more sustainable and balanced territorial development within the Union.

Since it has proven increasingly difficult to address such issues within the framework of the Community method, new approaches have been developed by the Commission and the European Council in recent years. In its recent communication on "Simplifying and improving the regulatory environment" the Commission suggests that

> "all the possibilities offered by existing types of action should be used to meet the Treaty's objectives: regulatory action, co-ordination, financial support, binding or non-binding measures. To meet certain new requirements in specific sectors, some leeway should sometimes be given to the interested parties themselves (e.g. economic operators, social partners, other players) so as to give them the responsibility and avoid having excessively cumbersome legislation, in accordance with the above-mentioned principles and with the dictates of transparency and defence of the general interest"[76].

[75] Dehousse Renaud, "Regulation by networks in the European Community: the role of European agencies", *Journal of European Public Policy*, vol. 4, 1997, p. 246.
[76] COM(2001)726 of 5.12.2001, p. 8.

The three "binding or non-binding measures" particularly advocated in the White Paper are co-regulation, open co-ordination and contractual arrangements. All three strive to complement the traditional tool-kit with new approaches which were categorised recently as governance by consultation (e.g., social dialogue), governance by persuasion (e.g., through external expertise such as academics or agencies) and governance by distributing best practices (benchmarking)[77].

Co-regulation should not be an attempt to by-pass the legislator's prerogatives, nor to duck out of regulation. It should always be up to the legislator to decide to what extent recourse should be had to co-regulation. The practical arrangements for this should emerge from the interinstitutional dialogue. There is, for example, provision under the Treaty for agreements between social partners at European level, which can be implemented either by a binding Council act or by dint of procedures and practices proper to the social partners and the Member States (see Article 138 and 139 of the Treaty). Creating Community norms by way of such agreements pays more heed to the principles of proportionality and subsidiarity[78].

The **open method of co-ordination** should also be used on a case by case basis. It is a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans as in the case of employment and social exclusion. It relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others.

The method is generally well regarded in the doctrine. If correctly applied, it should require national governments to focus on a common problem, and to consider their own policy choices in relation to this problem and in a comparative perspective and, even more important, by exposing their performance to peer review and public scrutiny, open co-ordination should provide favourable conditions for learning through monitoring. The main problem from the Parliament's perspective is of course that it is not involved in decision-making.

However, it is interesting to note that the policies where open co-ordination is suggested as the instrument of choice (e.g., the employment guidelines of the 1998 European Council of Luxembourg) carefully avoid contentious subjects where zero-sum conflicts of the type described in chapter 1.2 could occur. The Luxembourg list comprises mainly goals to which everybody will subscribe (improving employability, developing entrepreneurship, encouraging adaptability, strengthening policies for equal opportunities). Tough problems such as the harmonisation of social security systems, seen by some as a necessary long-term corollary of the EMU, may hence be too difficult to tackle under the consensus-seeking philosophy inherent in the open method of co-ordination[79]. It can only be hoped that the method could act, over time, as a bridge to the classical Community method. If parallel policies and maybe even objectives could be realised

[77] Telo Mario, *Combiner les instruments politiques en vue d'une gestion dynamique des diversités nationales;* contribution to the EUI symposium, 2001, p. 5.

[78] The protocol to the Treaty of Amsterdam on the application of subsidiarity and proportionality sets out the guidelines on how these two principles should be applied. It justifies action on the part of the Community where the issue under consideration has transnational aspects, where action by a Member State alone or lack of Community action would conflict with the requirements of the Treaty, or where action at Community level would produce clear benefits by reason of its scale or effects. In addition, the Protocol imposes broad consultation, simple legislation and assessments of the financial/administrative impact of measures on the Community, the national governments, the local authorities, economic operators and the public at large.

[79] For two examples, one sceptical and one more optimistic, see Scharpf Fritz, *Notes towards a Theory of Multilevel Governing in Europe*, MPIfG Discussion Paper 00/5, 2000, and Mario Telo, op.cit.

across most of the Member States, on a voluntary basis, the effectiveness of European policy making would obviously be improved.

In paragraph 36 of its resolution, the EP dryly states that if the Commission assumes that co-regulation "should not be used in situations where rules need to apply in a uniform way in every Member State" then its scope of application is unlikely to be very wide[80]. Both co-regulation and the open method of co-ordination may be superior to legislation in some instances, but they have disadvantages, too. On the one hand, there is less political resistance from those who bear the costs of implementation (private actors, such as industry in the case of co-regulation, or Member States, in the case of the open method) because these actors have a greater say in shaping the policy goals and the instruments to be used. The incentives of those responsible for implementation are taken into account in that process. On the other hand, these methods offer less legal certainty and can be criticised for representing vested interests in a skewed way.

3.4.5. The White Paper and the constitutional debate

The catalogue of topics reproduced above makes it clear that a neat line of division between "non-treaty" changes and treaty revisions would become increasingly artificial. The Commission notes at the end of the White Paper that it will "actively participate in the preparation of the forthcoming European Council in Laeken, presenting its views on the political objectives which should be pursued by the European Union and on the institutional framework necessary to achieve these aims." In doing this, it intends to draw on the White Paper's principles.

At the end of the Belgian Presidency, a Convention to prepare the 2003/4 IGC was created by adoption of the "Laeken declaration". The Convention's President, Valéry Giscard d'Estaing, has already embarked on consultations with his two Vice-Presidents and with the Spanish Presidency. The Convention started its activities on 28 February 2002, thus opening the debate on necessary treaty revisions one month before the Commission will begin to evaluate the (presumably large) array of comments to its White Paper.

Whilst nothing precludes the Commission nor the Parliament, for that matter, to have a parallel discussion of these subjects, there will be a natural trend to absorb the more "constitutional" aspects of the White Paper (the comitology and agency chapters, for instance) into the Convention's debates. On the other hand, the more pragmatic and technical ideas will probably merge with - or at least inform - the ongoing internal reform of the Commission's administrative structure. This reform could, and probably should, cover a considerable part of the White Paper's more technical aspects (such as the multitude of proposals and announcements concerning the organisation of the consultation procedures).

As can be seen from the above condensation, the Commission was mainly influenced by the multi-level governance and the knowledge-based governance models[81]. In a rather elegant two-pronged strategy, it declares to be in favour of new regulatory methods and institutional

[80] Minutes of 29 November 2001, doc. PE304.289; based on the report on the Commission White Paper on European governance, drawn up by Sylvia-Yvonne Kaufmann on behalf of the Committee on Constitutional Affairs (doc. A5-0399/2001).

[81] The governance definition adopted by the White Paper is as follows: "Governance means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence."

refocusing ***and*** defends the usefulness of proven instruments. A number of critical voices, predominantly form the neoliberal school of thought, have been disturbed by the defence, in the White Paper, of the importance of the Treaties and the praise of old regulatory instruments such as the Community method. According to them, the political developments of the past 10 years, leading, most importantly, to the imminent enlargement of the Union, have changed the political situation of the EU so fundamentally as to require a completely new set-up.

However, the White Paper is quite successful in its attempt both to stress the value of the European construction as it stands and to introduce new approaches. In proposing contractual arrangements, co-regulation and open co-ordination it demonstrates that it has carefully considered the recent governance discussion. A political judgement of instruments such as tri-partite contracts will much depend on general views on the advantages and disadvantages of private law vs. public law regulation. Even if the problem of uneven application of European norms could be solved, it is far from clear that contracting is always more transparent and effective, or less complicated and cumbersome, than public regulation. The White Paper takes a rather balanced view on this. This is heartening, compared to radical *tabula rasa* and minimal government proposals such as "tear up the treaties"[82].

The White Paper also makes the case, quite convincingly, that correct implementation of Community legislation as well as fair presentation to the general public of the merits of national **and** European institutions are the responsibility of national and regional governments and public authorities and the media. Rarely before did the Commission choose to say this so frankly. Nevertheless, this aspect has not been echoed positively by the comments on the paper.

It is more problematic that the paper's ACTION POINTS are often very general and vague: "reinforce attempts to ensure policy coherence and identify long-term objectives", "develop […] a more systematic and pro-active approach to working with key networks" or "examine how to improve the involvement of local and regional actors in EU policy-making" are typical formulae describing what the Commission envisages to do in the future, formulae that are open to all sorts of expectations or reservations. In a way, the White Paper is a wish list and a rehearsal of projects that were already announced earlier.

3.5. Summary

The White Paper is a methodological paper that rarely makes references to or uses examples of specific EU policies. Comparisons with the White Paper on the Single Market and other leading Commission initiatives are therefore doomed to be disappointing. Even if the White Paper is not a "spectacular failure"[83], it is uncertain whether the governance debate will stay alive as a separate strand of discussion in the densely populated field of internal administrative reform of the institutions, better regulation and constitutional reform[84]. If there is one, the "value added" of the new governance agenda, compared to the long-standing debates just mentioned, may lie in the fact that it draws the attention more directly to the general question of political accountability

[82] Vibert Frank, *Europe simple, Europe strong*, London 2001, p. 229.
[83] Weiler Joseph H.H., *Conclusions to the Conference "Le Grand Debate - Setting the Agenda and Outlining the Options"*, Brussels, 15/16 October 2001.
[84] "[…] the White Paper need not and should not be evaluated as a definitive or even a lasting contribution to the contemporary debate on institutional reform, but merely as an episode within and contribution to an extended constitutional narrative." Walker Neil, op.cit., p. 3.

and legitimacy. More critically, the White Paper has been dubbed a Commission "endeavour to gain lost ground"[85].

In a perhaps simplifying summary, the criticism of the White Paper can be divided in four categories:

- In the words of Neil Walker, "the relationship between the general philosophical framework of the White Paper and particular institutional proposals may be plausible and persuasive, but it can never be compelling. Not only are particular objectives vague and open-ended, *[…]* they are also not necessarily cumulative or complementary. In particular, the proposals which emphasise performance (effectiveness and coherence), may sometimes be in tension with those which emphasise legitimacy (openness, participation and accountability)"[86].
- The Commission underestimates that "openness and inclusiveness will most likely give voice to competing interests, which in a heterogeneous setting like the EU will be difficult to reconcile. The most pertinent question, namely how to manage political reconciliation effectively, is not dealt with in the White Paper. Combining openness with inclusiveness may not lead to more effective policies but to block any policy output"[87]. The conception of governance by participation does not in itself encourage citizens to become more active, because the policy-making process remains highly complex – and is even made more complex by certain governance practices.
- The Commission focuses on the institutional role it wants to play in the application of new consultation tools, regulatory instruments and legislative implementation. The White Paper seeks to widen the decision-making role of the Commission in several respects: It enhances the Commission's role in the application of new tools, and insists that legislation by the Council and the Parliament should be restricted to essential features, while the particulars should be directed to the Commission. At the same time it aims to cut back the role of comitology, the Council's instrument of control over Commission implementation.
- There is no European Government to "throw out" if necessary. In stark contrast to the governments of Member States, **direct** political communication with the electorate(s) does not play an existential role for the Commission. In the EU, negotiations between the institutions and some limited groups directly affected by their actions – be they pluralist, lobbying or corporatist practices - remains the core of the "participation" logic. According to an academic, this is probably the source of both the weakness of its President and its college, compared with heads of governments, and its somewhat technocratic philosophy on European governance[88]. The Commission underestimates the challenge to convince European citizens of the appropriateness and fairness of European policies. It recognises imperfectly that "in the peculiar constitutional compact of Europe, [its] decision will take effect only if obeyed by national courts, if executed faithfully by a national public official [who] belong[s] to a national administration which claims from [him] a particularly strong form of loyalty and habit"[89].

It is very doubtful that the European Parliament could solve some of these issues simply by obtaining another increase of its powers. However, the issues raised by the critical echo to the White Paper are of direct concern for the European Parliament, which has the triple obligation to

[85] Kohler-Koch Beate, op.cit., p. 3.
[86] Walker Neil, op.cit., p. 33.
[87] Kohler-Koch Beate, op.cit., p. 7.
[88] Cf. Möllers Christoph, *Policy, Politics oder politische Theorie?*, Contribution to the EUI Symposium, 2001.
[89] Weiler Joseph H.H., *Conclusions...*, op.cit., p. 9.

participate in the legislative process, exercise political control over the executive and represent the European citizens as the only elected European institution.

4. The European Parliament in the governance debate

4.1. Parliament's initial reaction to the White Paper

Whilst many of the White Paper's suggestions are uncontested, even urgently expected by the European Parliament, there are a few subjects that touch upon the interinstitutional equilibrium and the relationships between the European institutions, the Member States and organised civil society. Parliament's foremost concern, being the only democratically elected EU organ, is to call for respect of the fundamental Treaty provisions and to highlight its essential role of co-legislator and budgetary authority. It is therefore at the Commission's side with respect to a critical assessment of *laissez-faire* and anti-regulation schemes. However, it also takes a skeptical look at Commission proposals evidently serving its own institutional interest. In the debates both in the Committee on Constitutional Affairs and in the plenary it became clear that it was predominantly the proposals on consultation, comitology/agencies and institutional reform that were of interest to the Parliament and needed more careful attention.

4.1.1. Earlier pronouncements on related issues

As was mentioned above, the Commission adopted its official text on 25 July 2001. In November 2001 the President of the Parliament announced that she had referred the White Paper to the Committee on Constitutional Affairs as the committee responsible and to all interested committees for their opinions. After the summer recess the Committee on Constitutional Affairs had already decided to prepare a succinct political reaction to the White Paper with a view to influencing the ensuing consultation as early as possible. By the same token, a more extensive document taking account of the full consultation procedure proposed by the White Paper was envisaged, which is still to come. The Committee considered the White Paper and the draft report at four meetings between September and November 2001. Seven other EP Committees tabled opinions. On 13 November 2001, the Committee adopted the draft report on the Commission White Paper on European Governance, drawn up by Sylvia-Yvonne Kaufmann[90].

In its introductory part, the draft resolution underlines that the White Paper takes up many issues that have been extensively discussed for years[91]. The titles of some of these EP resolutions give an indication of the breadth of topics covered:

- resolution based on the report drawn up by Fernand Herman, on improvements in the functioning of the institutions without modification of the treaties [92],
- resolution based on the Lööw report, on transparency and democratic control[93],
- resolution based on the Brok report, on the investiture of the President of the Commission[94], and

[90] doc. A5-0399/2001.

[91] See the considerations at the beginning of the resolution and the references to previous EP resolutions, such as resolutions of 4 September 2001, on the Commission's 17th annual report on monitoring the application of Community law (1999), of 3 July 2001, on a draft interinstitutional agreement on a more structured use of the recasting technique for legal acts, of 16 January 2001, on the communication from the Commission to the Council and the European Parliament on a review of SLIM (Simpler Legislation for the Internal Market), and of 26 October 2000, on the Commission reports to the European Council on Better lawmaking - A shared responsibility (1998) and Better lawmaking 1999 (OJ C 197, 12.7.2001, p. 433).

[92] OJ C 219 of 30.07.99, p. 369.

[93] OJ C 104 of 14.04.99, p. 14.

– resolution based on the Bourlanges report, on the decision-making process in the Council in view of enlargement[95].

These texts demonstrate Parliament's ongoing examination of "sub-treaty" questions related to the future functioning of the institutions, in view of enlargement.

In parallel to the drafting of the Kaufmann report, the Committee on Constitutional Affairs also prepared, and continues to prepare, draft resolutions on subjects closely related to European governance, in particular the resolutions on the reform of the Council, based on the report drawn up by Jacques Poos[96], on relations with the national parliaments, based on the report drawn up by Giorgio Napolitano[97], and on the delimitation of powers, based on a report being drawn up by Alain Lamassoure (adoption in the Committee planned for April 2002[98]).

4.1.2. Observations and recommendations concerning the White Paper

Against this background, the Kaufmann report welcomed the Commission's readiness to examine again the way in which the Union exercised its powers but made a number of critical observations. Firstly, the Committee restated its view that the EU's decision-making system needed to be "parliamentarised", on the ground that only regional, national and European institutions with democratic legitimacy could take accountable legislative decisions. On the question of consultation, therefore, **organised civil society**, whilst important, could not be regarded as having its own democratic legitimacy given that representatives were not elected by the people and could hence not be voted out either. Only Council and Parliament could take legislative decisions, although due account should be taken of the opinions of other bodies specified in the Treaties, such as the Economic and Social Committee and the Committee of the Regions, which kept the EU institutions in touch with economic and social actors and enabled regional and local authorities to play a greater role in EU policy.

The Committee also warned, after several of its members had criticised this part of the White Paper in the exchange of views in the Committee, that the creation of commonly-agreed **consultation standards** and practices at EU level should not be tied to any *quid pro quo* on the part of NGOs because independent and critical public opinion was essential for a dynamic democracy. But it also stressed that the demands for accountability and transparency imposed on public institutions must also be applied to private actors.

The Committee stated that there was a need to address the issue of how detailed **regulation** should be at EU level, particularly given the impending enlargement. Where "framework" directives were used these should be accompanied by adequate mechanisms for democratic control. The committee also stressed that the drafting of an "action plan for better regulation" by working parties at the Council and Commission represented a serious breach of the Community method, since Parliament was neither informed of nor involved in the work of these bodies (see below). Members therefore urged the Commission not to submit an action plan of this kind to the Laeken European Council, calling for an interinstitutional agreement on these questions. In

[94] OJ C 104 of 14.04.99, p. 37.
[95] OJ C 150 of 28.05.99, p. 276.
[96] A5-0308/2001; texts adopted, 25 October 2001, doc. PE310.371.
[97] A5-0023/2002; texts adopted, 7 February 2002, doc. PE313.865.
[98] doc. PE304.276.

reaction to this, President Prodi promised, in his speech to the EP of 2 October 2001, to create an interinstitutional working group on questions of better regulation.

The European Parliament adopted the resolution proposed by the Committee on Constitutional Affairs on 29 November 2001, taking on board the above principles outlined by the report. It thus reaffirmed its role of co-legislator and denounced the risk that certain proposals made in the White Paper could impinge on the effective exercise of its **political responsibility**. In agreement with the Commission, Parliament also reiterated its attachment to the **Community method** and to its obligation to scrutinise forthcoming proposals that would make the political process more open to civil society. On the latter point, Parliament's resolution called on the Commission to establish rules of procedure with the ESC for the consultation of relevant sectors in a judicious and efficient manner.

On the delegation of responsibility to agencies, Parliament resolution basically agreed with the Commission's approach, adding however the request to set the conditions for a **call back procedure**. Moreover, autonomous **agencies** should be used only if specific scientific or technical expertise was required and a decentralised administration seemed appropriate. However, this should not lead to a reduction in expert and judicial scrutiny by the Commission or to any dilution of the Commission's political accountability. On **co-regulation**, the EP demanded the establishment of an inter-institutional agreement which would guarantee for the Parliament its appropriate participation. In keeping with its tradition, the European Parliament recognised the importance of information and communication with citizens on the challenges that Europe faces and stressed the role of **parliamentary debate** on politically salient issues to stimulate citizens interest on European issues.

In this context, Parliament reiterated its conviction that the **Council** should hold its meetings in public when acting in a legislative capacity; in such cases, debates and votes should be made public and the results of votes and explanations of votes by Members of the Council be published[99].

Finally, in the penultimate paragraph of its resolution, Parliament declared it intended "to examine carefully as soon as they are submitted to it the numerous individual proposals and measures announced in the White Paper, such as:

- guidelines on collection and use of expert advice,
- priority attached to treatment of possible breaches of Community law,
- criteria for the creation of new regulatory agencies,
- defining minimum standards for consultation and publishing them in a code of conduct,
- developing an approach to working with key networks,
- programme to review and simplify Community legislation adopted before 2000, supported by fast track procedures,
- codifying the current administrative rules concerning the handling of complaints,
- examining how the framework for transnational co-operation of regional or local actors could be better supported at EU level,
- proposing twinning arrangements between national administrations,
- a review of the Union's international representation."

[99] As far as final votes are concerned, this information is now available on the Council's website.

4.2. Multi-level governance: the European Parliament and political control

As outlined in the introductory section above, the Commission's original idea was to start rapid reform of European Governance in advance of the next treaty revision, with a view to moving the Union closer to its citizens and to preparing it as quickly as possible for enlargement. There are, however, "sub-treaty" issues in the White Paper that profoundly influence the institutional equilibrium of the European Union.

The former President of the Italian Chamber of Deputies, Luciano Violante, summarised the problems facing governments and Parliaments in most Western countries[100]. Other parliamentarians such as Ralf Dahrendorf arrive at similar conclusions[101]. According to these views, both parliaments and governments are experiencing a phase of far-reaching change in their functions, in their mutual relations and in their contacts with society at large. The EU has been criticised more than other organisations for creating obstacles to economic efficiency and competitiveness through burdensome administrative requirements. It is therefore quite logical that not only the Commission but also Member States' governments have been studying problems of regulation for such a long time that it seems to become difficult for the authors of some reports to keep track of previous endeavours.

In reviewing these activities, the Economic and Social Committee, came to the following conclusion:

> The simplification process does not need new ideas; what it needs is the effective implementation of the ideas which have already been expounded by the Committee itself, by the Commission, by the Lisbon European Council, by the Molitor Report and by numerous other concerned bodies. While the Committee acknowledges that it is often simple to complicate matters and complicated to simplify them, it would observe that there is no point in talking about commitments if we are not prepared to implement them and it is futile to introduce new commitments when the existing ones are not being met[102].

Regarding the Commission's plea, in the White Paper, that the Economic and Social Committee and the Committee of the Regions should try to get information on relevant legislation as early as possible and, at the same time, the requests for earlier information put forward in many an opinion of these same institutions, one obtains indeed the impression that effective political will for implementation is lacking.

4.2.1. The Mandelkern report

In November 2000, Ministers of Public Administration from across the EU met in Strasbourg to discuss a range of issues of mutual interest – civil service reform, e-government, quality of public services, and better regulation. To develop further consideration of better regulation, they established a High Level Consultative Group, chaired by Dieudonné Mandelkern, and instructed it with producing a report on better regulation. The Group was made up of representatives from senior experts from all 15 Member States. Officials from the Commission's Secretariat-General,

[100] Meeting of senior officials of centres of government on "The consistency of public action: the role of the centre of government", Budapest 6-7 October 2000.
[101] See Dahrendorf Ralf, *Stirbt der Parlamentarismus?*, Lecture for the Friedrich-Naumann-Foundation of 10 February 2001.
[102] Opinion 1496/2001, p. 21.

particularly from the governance team, also participated as observers. The final report includes several references to the White Paper. However, contacts of the Mandelkern group with the European Parliament were few and far between.

The Group transmitted its Final Report in November 2001 to the Presidents of the European Parliament, European Commission and Council of Ministers as well as to national Ministers of Public Administration. The document looks at the main areas where an improvement of regulatory quality is needed and proposes an Action Plan with very tight deadlines and a new programme of simplification (SimpReg). It does not mention many earlier efforts of a related type, such as the Molitor report[103] or a Franco-German report on the inhibiting effects of EC legislation on employment ("Deregulation Now", also drawn up in 1995).

The Mandelkern report contains an analysis of good practices for ensuring quality regulation across the whole of the legislative cycle. It also enumerates specific recommendations for improving the quality of legislative instruments (at both national and Community level), though the responsibility of the Member States is not fully recognised. The quality of national and Community legislation would be improved if the Member States and the Community institutions - each acting within its own sphere - were to implement the report's recommendations. The report advises the European Parliament to take note of the actions being undertaken by the other Institutions and pay the same level of attention to matters of better regulation in its own work and internal co-ordination. Yet, the Parliament was not asked to participate actively in the preparation of the text.

Obviously, there are intersecting issues in the White Paper and the Mandelkern report. The many practical proposals contained in the report cannot be assessed here. One of the institutionally most salient topics is the report's very restrictive definition of a good application of the subsidiarity principle: "[…] checking that the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and that they can therefore be better achieved by action on the part of the European Union"[104]. This appears to go further than the definition of the Amsterdam Protocol in that it shifts the burden of proof still further towards the Union and may finally result in what Mario Telo has called "subsidiarité vers le bas"[105]. Is it possible to "check" *ex ante* that the Member States could not achieve the same effect?

Many of the reasons for the complexity of regulation are intrinsic institutional obstacles that could be remedied only by revision of the treaty, should the Member States think that to be necessary. One innovative aspect of the Mandelkern report is that Member States are explicitly taken on board, thus recognising the multi-level character of European governance and the weak position of the European Commission in material enforcement.

Among those, the obstacle most specifically affecting the complexity and the growth of EU regulation rests in what has been defined as the **political asymmetry** of the European political system. At national level there is a political mechanism - the collegiate action of government - that brings a plurality of interests inside the policy formation process. At the European level, even if the proposals have to come from the Commission (which, operating in collegiate fashion, seeks to weigh the various demands and interests), the relevant Council is composed of the

[103] COM(1995)288.
[104] p. 9.
[105] op.cit, p. 3.

sectoral ministers, who are in charge of the final decision. This asymmetry leads to a systematic tendency towards more detailed and plethoric regulation.

Correct transposition means that the national transposing legislation is in accordance with the European legislation. The freedom of national authorities to choose form and method has decreased because of the content of European legislation. Constraints on Member States result from the fact that the conditional right of individuals to invoke directives against the State in national courts has reduced the differences between directives and regulations; and that directives have become more technical and detailed.

4.2.2. Institutional aspects of comitology

In the classic hierarchy of legal norms, framework legislation sets basic principles and secondary rules are considered technical implementations of these principles. The adoption of primary **and** secondary legislation via the traditional parliamentary route has become increasingly impractical, not only in the EU but also in most national democracies. With a view to their dwindling powers, many parliaments, in both parliamentary and presidential systems, have thus struggled with the executive to retain or regain their decisive influence on legislation. In the EU context this has taken the form of long conflicts between Parliament and the Commission on how to involve the Parliament in the activities of the Commission's comitology committees implementing the Council's framework legislation, as defined in Art. 202 TEC[106].

However, contrary to many national parliaments, the legislative powers of the European Parliament have considerably increased in the past 15 years. These new powers were hard to achieve at the intergovernmental conferences leading to the respective treaty revisions and therefore left the desire within the other institutions to do what seemed possible to slow down their implementation in daily law-making. One approach in this respect has been to criticise Parliament's legislative amendments on formal grounds ("not clear", "not focussed", "not within the tradition of …" etc.). While this may have been true in some instances, the argument is also used to hide political or institutional conflicts. Consequently, paragraphs that directly concern the balance of powers between the institutions (such as those creating committees managing a given programme under Art. 202 TEC) have often been among the most contested in conciliation negotiations. The problem has not at all disappeared and continues to be raised regularly in legislative resolutions[107].

Another example from the period that directly followed the adoption of decision 1999/468/EC may clarify this. In June 1999, the Council, following up on declaration 31 annexed to the Treaty of Amsterdam and after having heard the Commission and the Parliament, adopted this decision laying down the Procedures for the Exercise of Implementing Powers Conferred on the Commission[108], which is the latest update of the rules governing comitology. It restructures and clarifies the committee categories and also fulfils some of Parliament's longstanding demands. It will be involved in the proceedings of these committees from the beginning and have the possibility to request the Commission to re-examine an implementation measure in certain

[106] For a succinct summary see Hix Simon, *Parliamentary oversight*, op.cit.
[107] For a recent example, see the report on the top level .eu Internet domain (A5-0027/2002), drawn up by Mrs Colette Flesch (codecision procedure, second reading, not yet adopted in plenary): the EP once more proposes to change the proposed committee procedure from regulatory to advisory.
[108] OJ L184 of 17 July 1999, p. 23.

circumstances (if the basic instrument was adopted under Article 251 of the Treaty and if, in Parliament's opinion, it exceeds the implementing powers provided for in this basic instrument). In the conciliation negotiations concerning the first legal acts to be decided by co-decision after the entering into force of this decision (the LEONARDO, SAVE and ALTENER programmes) the Council proposed to reproduce the applicable text of the above decision to characterise the committees to be installed in the programmes whereas Parliament insisted on a simple reference to the article of the decision. After some negotiation, including the opinions of both institutions' legal services, Council agreed to a compromise text that was very close to Parliament's original position.

In this example, two criteria of good legal drafting are at odds: to avoid references, on one side, and to be clear and concise, on the other. But most "co-decision watchers" at the time were quite convinced that at least one of Council's intentions was to try and blur the clarity that was gained in the decision of 28 June 1999 and possibly to have more leeway in future programmes. Similar, and more publicised, conflicts arose from the Report by the former President of the European Monetary Institute, Alexandre Lamfalussy, on the procedures to be followed in adopting rules on European financial markets[109]. The compromise which was found for the regulation of financial markets is considered, by the Commission at least, as a model for further steps of comitology reform and for the proposals it will make to the next IGC in this respect. The most important features of this compromise are:

- the Commission formally undertakes to give "equivalent treatment" to both Council and Parliament with regard to implementing measures; in particular, the Commission intends to take "the utmost account" of Parliament's position and resolutions with regard to implementing measures considered to exceed principles laid down in the primary legislation;
- Parliament intends to provide for a revision of the Commission's delegated powers after a four year period (sunset-clause);
- the Commission agrees to allow MEPs three months time to examine the implementing measures, albeit on the understanding that this period could be reduced for an urgent decision;
- the Commission accepts Parliament's demands for transparency and wide consultation over measures to be adopted. It accepts Parliament's wish to set up a market participants' committee under the auspices of the Regulators Committee.

Parliament would also have liked to send an observer to meetings of the new Securities Committee, but according to Commissioner Bolkestein this would not be possible for legal reasons.

Parliament sees these new arrangements as temporary. For the future, it is looking forward to a review of Art. 202 of the Treaty, at the next IGC in 2004. In his contribution to the plenary debate, President Prodi too supported a change in this Treaty article with a view to establishing an equal role for the two co-legislators (Council and Parliament) over the Commission's executive powers.

On a more general level, the hierarchy of legal norms has been the subject not only of much academic work but also of several IGCs and parliamentary reports, for example in preparation of the 1984 draft treaty drawn up by Altiero Spinelli on behalf of the Institutional Committee of the EP, which proposed a "Community law". Given the lack of coherence in the nomenclature of

[109] Final Report of the Committee of Wise Men on the 'Regulation of European Securities Markets'; Brussels 15 February 2001; see EP resolution of 5 February 2002, based on the report on 'Implementation of financial services legislation' (rapporteur: Karl von Wogau), on behalf of the Committee on Constitutional Affairs, doc. A5-0011/2002.

European norms (there are, for instance, under the same name, regulations based on the treaty and regulations executing regulations of the first kind), the European Parliament has traditionally been rather positive about a clearer distinction of European norms, but insisted on its right to control presumably "secondary" legislation if it wished to do so. At the Amsterdam IGC, the Member States seriously attempted to create such a hierarchy, following up on the mandate given in declaration 16 of the Maastricht Treaty, but no consensus could be established, precisely for reasons of the balance of powers between the Union and Member States. Defining different levels of norms usually obliges also to define the respective influence of the branches of government at each of those levels, i.e. the institutional balance[110].

Inherent in these seemingly arcane discussions is of course the issue of influence and, as Jean-Louis Quermonne has said, of the hierarchy of institutions[111]. The Commission was certainly aware of this when the White Paper, in particular the section on comitology, was drafted. It will thus have to be read against this quasi-constitutional background even if comitology rules are not enshrined in the treaties. On the other hand, any attempt to create a new category of European norm would necessitate a treaty revision and is thus beyond the scope of this paper[112]. It should be mentioned, however, that one of the questions asked in the Laeken declaration is again whether "a distinction should be introduced between legislative and executive measures".

4.2.3. The role of parliaments

"Governance solutions address the shortcomings of parliamentary ones. But the converse is also true"[113]. A recent OECD survey of the most innovative procedures recommends to “rediscover" the pair Parliament/Government as the keystone of the legitimisation of politics in contemporary democracies, based on the controllability of the procedures they adopt[114]. The OECD has traditionally maintained contacts with governments alone. Its new interest in developing a relationship with parliaments appears to confirm the need to involve both parliaments and governments in order to ensure full and democratic governance of the complexities of the modern world.

Parliaments, in particular, are weak in the *ex post* scrutiny of the effects of legislation. They are not alone anymore in representing the multi-faceted world of modern society, if they ever were. NGOs, trade unions and industry associations, pressure groups and the media give public voice to broad or narrow interests with apparently greater effectiveness than parliamentary bodies. At the same time, governments have lost their monopoly on decision-making. Non-elected public powers such as independent regulatory authorities or private powers such as large national and multinational firms, banks and financial companies seem capable of much more rapid and effective action than governments.

These new powers appear to be more effective because they can concentrate their energies on single objectives. They can use the expertise of specialists and are linked by effective international networks. They do not have to cope with the problem of reconciling majority and

[110] Cf. audition de Jean-Claude Piris, jurisconsulte du Conseil de l'Union européenne, sur l'idée d'une Constitution européenne, devant la délégation UE du Sénat français, 17 avril 2000.
[111] Quermonne Jean-Louis, op.cit., p. 105.
[112] Quermonne Jean-Louis, op.cit., p. 117.
[113] Lord Christopher, "Good governance, bringing the European Parliament back", in: *preparatory work on the Draft White Paper*, 2001.
[114] See OECD Report on Parliamentary Procedures and Relations of 22 January 2001 (PUMA/LEG(2000)2/ REV1).

opposition views, a typical feature of democratic parliaments, or juggling the demands of the various components of the majority, a typical feature of coalition governments. From the viewpoint of the controlled administration, it is increasingly the law and the courts, demanding procedural safeguards such as due process and disclosure, which exercise control rather than bureaucracies or politicians.

The most obvious effects of these developments are that in many cases politics risks being side-stepped by the economy and that national rules risk being swept away by transnational economic and financial processes.

Governments may well remain at the centre of these new decision-making processes, but they run the risk of not living up to their ultimate responsibility of developing an overall strategy. What is more, governments try to simplify decision-making by avoiding any real parliamentary debate (acting as "surrogate legislators"[115]), while parliaments often consider they should intervene in some detail in measures hitherto within the remit of the executives. The effectiveness of the Parliament-Government pair is often strained by the fact that each of them tries to do without the other. This jeopardises the primacy of politics over powers without democratic legitimisation, such as firms, interest groups and bureaucracies.

Whilst the gradual loss of legislative influence and political control experienced by the parliaments in most advanced societies is confirmed, and sometimes justified[116], by many political analysts, their role in creating a common ground for diverse political views as well as a global vision of the major strategic issues of a given body politic remains essential. To this end, both national parliaments and the EP, by virtue of their electoral mandate, must retain their capacity to carry out the critical examination, justification and monitoring of key political decisions taken by governments. These decisions have a better chance of being implemented if they pass through the mediation of parliaments because it is the mediation of Parliaments that makes it possible to overcome the resistance of those whose interests would be harmed. One obvious conclusion to this analysis is the need for the Committees of both national parliaments and the EP to get together for purposes of joint pre-legislative scrutiny as well as for scrutiny of legislation after it has been passed.

When functioning properly, parliaments offer assurance of transparency and disclosure in the consultative process between governments and the civil society, trade unions, employers' associations, and pressure groups. This parliamentary filter can be an effective tool for defining a "charter" of public citizenship for sectoral or even corporatist organisations that often operate, as Dahrendorf has remarked, as if they were taking the place of the government or parliament as the expression of the public will.

4.3. Conclusion: on the problem of legitimacy

With the treaty revisions of Maastricht and Amsterdam, the basic set-up of community legislation, including the balance of the institutional triangle, has found a certain stability. The Parliament is now on equal footing with the Council in many legislative domains; some authors even claim that this has taken place at the cost of the Commission's institutional weight. Yet all European institutions suffer from the absence of one essential feature of legitimacy on the national level: the possibility to vote the government out or to dissolve the parliament. This

[115] Cf. Hix Simon, *Parliamentary Oversight*, op.cit., p. 62.
[116] Cf. von Bogdandy Armin, *Gubernative Rechtsetzung*, 2000.

possibility is usually presented by political scientists as the strongest check of institutional power and thus an important source of input legitimacy.

According to an academic, "legitimacy converts power into authority" or, in other words, "in a legitimate polity, actors agree to obey decisions that they have not supported made by rulers whom they have not voted for"[117]. In this respect, the Commission does recognise that "the feeling persists that Community rules are 'foreign laws'"[118]. It stresses that to create the habits and attitudes which are required to make laws enforceable, Member State authorities have the responsibility to clarify that EU law is part of the national legal order and must be enforced as such. One particularly negative example of the lack of co-operation of Member States is the Convention on protection of the Community's financial interests of 26 July 1995, which has not yet been ratified by all the Member States, and therefore cannot be applied[119]. This is just one illustration of the general observation that with increasing EU intervention in policies such as health or work safety, agreement on effective European solutions is most difficult precisely for those problems about which the citizens of Member States care the most.

The structure of the implementation of EU law by reglementary and other Art. 202 committees is still less transparent for the general electorate. This is highly problematic because a rigorous enforcement of European norms is, on the one hand, essential to improve the Union's legitimacy, and on the other hand it is almost exclusively under the control of the Member States, particularly as far as material enforcement on the ground is concerned (inspections, for instance). As the Mandelkern report correctly mentions, difficulties that arise in the implementation of European legislation are often reflected in the way transposed European legislation is complied with and enforced in the Member States. More generally, the question can be asked whether Member governments will feel any obligation to ensure that legislative processes at EU level are democratic and, equally important, are portrayed to their own domestic constituencies as fair and just outcomes.

On the other hand, there are good political reasons for the close involvement of Member State officials in the comitology "netherworld". Their presence can be vital in order to ensure the legitimacy of technical legislation in sensitive sectors. In a similar vein, there are well-founded constitutional arguments for restraint of the EU institutions in direct implementation and regulation, not least because the human and financial resources that would be necessary to extend the Commission's enforcement capacities will not be made available by the Member States in the near future. Consequently, Member States have two powerful instruments at their disposal to influence the chances for EU norms to be correctly applied: firstly, they control to a large extent the small-print of technical regulations, by way of their involvement in comitology, and secondly, they also determine the resources the EU has at its disposal to enforce these rules. Both factors are, of course, crucial for the degree of output legitimacy the Union can possibly achieve.

In looking for solutions to this risky weakness, the Commission White Paper on European Governance demonstrates in several instances a preference for medium- and long-term planning and urges all institutions to favour the pursuit of strategic objectives over short-sighted political rows. As would be expected, this is interpreted by EU specialists as an expression of the excessively technocratic thinking of the Commission and as a simplistic approach to matters of democratic legitimacy. The Commission at least appears to underscore the inherently political

[117] Schmitter Philippe C.,C*ontribution to the EUI symposium,* op.cit., p. 7.
[118] White Paper, op. cit., p. 25.
[119] OJ C 316 of 27.11.1995.

character of the implementation of delegated legislative acts in modern welfare states. The White Paper may indeed underestimate the role of political positions and ideals. It seems questionable, for instance, whether "sustainable development"[120] or, to give an example not mentioned in the White Paper, a single "European social model" can really be claimed - as the Commission often tends to - to be uncontested political objectives for the entire EU, on the European, the national and the regional level, which could hence be efficiently "administered" without great conflicts. The objective to "regain confidence [*with the citizens*] before the next round of institutional reform", that is in the course of the next 2-3 years, appears quite optimistic[121].

If there is one recurrent theme in commentaries on the White Paper, both in the EP and in academic circles, it is the complaint that the Commission did not treat these problems of democratic legitimacy with sufficient profundity. The dilemma can be presented in terms of game theory: for the resolution of pure co-ordination problems, all modes of governance are effective and legitimate; for zero-sum conflicts (conflicts where one's gains are the other's losses), by contrast, only hierarchical authority can ensure a peaceful resolution, and it can do so only if it is supported by very strong legitimacy beliefs among the parties involved in the conflict[122]. In simpler words, politics is most often about making hard choices that will damage certain vested interests and hence provoke their fierce resistance.

By failing to address the substantive challenges facing the EU, the White Paper underestimates, according to some observers, the difficulty of the problems that need to be faced and over-estimates the legitimating power of the governance procedures that are proposed. Other comments denounce, in this context, the Commission's threat to withdraw its legislative proposals in the future if it feels that amendments from either the Council or the Parliament would "undermine the proposal's objective". This is almost universally criticised as the rather tenuous assumption that, of all institutions, the Commission enjoys the highest confidence with the general public[123]. In other words, "the Commission is threatening to use its Treaty-based monopoly of legislative initiatives in order to short-circuit consensus-seeking procedures and to confront the Council and the Parliament with take-it-or-leave-it propositions"[124], thereby risking a complete deadlock of the decision process.

In a similar vein, the Commission's recommendation to the Council to reduce its efforts to arrive at unanimous decisions where qualified majority would do, is sometimes condemned as overlooking the wide disparity and differences of interest among Member States. One comment is exemplary for this view: "It should be remembered that veto power or unanimity represents a constraint that induces deliberation: When parties can block outcomes actors have an incentive to find reasons convincing to all, not only to the majority. Many of the processes within different policy fields of the Union are actually conducted along such lines and this may provide some of the glue of the integration process – a process that of course is not in line with terms of efficient problem solving but a process that nevertheless has some ability in inducing legitimacy due to its slowness and inclusiveness"[125]. Other observers claim that voting by qualified majority has become a useful device for speeding up Council decisions in constellations where the divergence of policy preferences does not have high political salience in national constituencies, but not as

[120] Cf. White Paper, op.cit., p. 28.
[121] Cf. White Paper, op.cit.,p. 9.
[122] Scharpf Fritz W., op.cit., p. 4.
[123] Interestingly, the national officials who drew up the Mandelkern report do not seem to see this as a necessarily bad idea (cf. p. 58 of the report).
[124] Scharpf Fritz W., op.cit., p. 8.
[125] Eriksen Erik O., op.cit., p. 15.

an instrument for achieving consensus on a general European interest. Indeed, the Council still makes use of majority voting in only about 25% of all possible cases[126].

It has been said several times that EU legislation and regulation are a form of multi-level governance. This causes one important difficulty: successes and defeats cannot be easily attributed to particular actors within the multi-level framework. This brings with it the very temptation to arrogate successful policy measures and to attribute failures to other actors. Moreover, it makes political debates on European issues bland and opaque. It is therefore regrettable that, with only very few exceptions, the issue of European political parties is not much discussed in the academics' comments. The White Paper, for its part, does mention in the "Better Involvement" chapter that "European political parties are an important factor in European integration and contribute to European awareness and voicing the concerns of citizens"[127].

The EU logic of negotiation is characterised by a striking contrast "between the importance given to sectoral groups and interested parties and the ignorance of general actors"[128]. If there is one promising approach to contribute to the "cognitive mobilisation"[129] of European citizens, to tackle the problem of creating a European public space and to create, in the long-term, European consciousness and solidarity, it is obviously to strengthen the impact of transnational political activities and to change the character of EP election campaigns. Unfortunately, as Commissioner Michel Barnier has noted a few months ago, "certains Etats membres donnent l'impression d'organiser, en quelque sorte, l'éloignement entre l'électeur et les élus européens"[130].

A political scientist has drawn the conclusion that to make European politics as interesting as national politics, it would be necessary, for the Commission, to present clear political alternatives on European dossiers instead of the present consensus seeking behind closed doors. It would, of course, be an immense challenge for both politicians and the media to display, to every Member State public, the continuous change of influence and programmes of 3 - 4 predominant political families in 15 or even 30 Member States in a comprehensible and spirited way. In addition, the europhil-eurosceptic dimension of political choice will continue to run across traditional party lines for a long time and would hence create even more possible combinations of political viewpoints. The linear and bipolar simplicity of a national system will not come about in the near future. A first step could be, however, to try and harmonise national election dates, a problem on which the past Belgian presidency has made some ground. -

[126] Own calculations based on Council data. See also Hix Simon, *The Study of the EU II*, op. cit., p. 40.
[127] White Paper, p. 16. An instructive account of the role parties could play can be found in Philipp Steinberg, Agencies, co-regulation and comitology - and what about politics ? A critical appraisal of the Commission's White Paper on governance; contribution to the EUI symposium.
[128] Magnette Paul, op.cit., p. 4.
[129] Magnette Paul, op.cit., p. 7.
[130] "Certain Member States give the impression to increase, in a way, systematically the distance between the electorate and the MEPs.", *L'urgence européenne*, op.cit., p. 10.

Annex: The Political Theory of Governance

In preparing its White Paper on European Governance the European Commission has initiated and evaluated an impressive amount of academic and politico-administrative work. This annex is an attempt to present the main lines of thought and the recommendations proposed in the recent governance literature[131].

The annex does not intend to give an account of the often controversial debates among scholars but attempts to describe the "cognitive" landscape and to sum up the core concepts of recent contributions to this debate. As is natural, much of this debate is of internal interest only (e.g., intended to defend one view point against other models). Therefore, only some key references, which are representative of widely shared views, will be made in this chapter. A selected list of further references is attached at the end[132].

Conceptual dimensions of the Governance concept

Governance as the term is used today derives from two experiences in other parts of modern society: corporate governance in the private sector and good governance in international politics[133]. In both cases, transparency, responsibility, effectiveness, and legitimacy play an important role as political objectives and as guiding principles for research.

- **Corporate governance** concerns the understanding of the complexity, diversification and decentralisation of net-worked business activities, also with a normative aspect: business operations should be transparent and law-abiding. From an EU perspective, corporate governance concentrates on the appropriate ways and means of opening up and defining the relations between public authorities and private actors. The goal is to improve control, to facilitate decentralised operations, and to increase efficacy through mutual confidence (exchange of good practices, codes of conduct, consensual conflict regulations, etc.). Contrary to hierarchical models (the more one goes up in responsibility, the less there are actors), corporate governance seeks an effective operational style in a networked activity structure. The logic of the European banking market is a good example: ongoing Europeanisation of public policies in the banking sector was accompanied by some flexibility in the transfer from national to supranational policy-setting, keeping a considerable number of action mechanisms on the national level. Taking into account relations between actors involved in various legitimacy contexts (private, national public and European public), corporate governance can thus be seen as a concerted harmonisation practice which involves a new form of decisional legitimacy based on expertise.

- **Good governance** has been likened to a democratic construction process within, between and beyond nation-states. It tries to define a consensus that enables to institute rules which

[131] Recommendations in chapter 2.3 do therefore **not** necessarily correspond to the conclusions of this Working Paper.

[132] Three review papers are particularly useful for readers who are not turned away by a certain amount of gobbledegook: Markus Jachtenfuchs, Theoretical Perspectives on European Governance, *European Law Journal*, vol. 1, no. 2, 1995, pp. 115-133; by the same author: The Governance Approach to European Integration, *Journal of Common Market Studies*, vol. 39, no. 2, 2001, pp. 245-264; Simon Hix, The Study of the EU II: the 'New Governance' Agenda and its Rival, *Journal of European Public Policy*, vol. 5, no. 1, 1998, pp. 38-65.

[133] Cf. chapter 2.2., p. 16

will give a legitimate character to governmental effectiveness in the international public domain. At a world-wide level, it establishes minimum conditions for the creation of stable polities where politics is based on a consensual understanding of democracy. Whereas in the traditional international relations perspective (or in international public law, for that matter) only states have rights and obligations on the international level, good governance also involves recognition of individual rights. Building such a system resembles European aspirations of governance, including equal treatment of actors of different legitimacy and of unequal influence. As it is not possible to respond adequately to the multiplication of legitimate actors (NGOs, international organisations) with a simple forum of nation states, a broader and deeper multinational democratic structure is required. Fundamental rights are a valuable example for a transnational political will to protect individuals, even against their own states.

In both fields, contemporary legitimacy can be seen as being based on expertise and representativity. These two aspects are embodied in what has been called "majoritarian" institutions (e.g., Parliaments) and "non-majoritarian" or collegial institutions (e.g., the Commission or its agencies). However, a complete transfer to expertise-based rule-setting would risk to lead towards political unaccountability.

Four dimensions are used in the literature to argue why contemporary society, marked by the recognition of diversity and the contingency of different ways of life, needs a new "political" governance. (Some authors even discuss the possibility of "governance without governments".)

1. The first dimension focuses on governance and **complexity**. Modern societies are composed of interdependent components. This situation generates high degrees of differentiation and sectorialisation that governance attempts to make more systematic. Governance is supposed to allow better regulation by taking into account the plurality of those involved in constant co-operation with their different interest and preference profiles. The aim is to make them converge towards stronger cohesion. Involving ever more actors makes permanent discussion fora necessary. The structure a of democratic polity should be modified from a centralised (decision-maker ? executing actor ? interested party) towards a horizontal structure, with regular interactions between responsibility levels.

2. A second aspect concerns **networking**. To improve the effectiveness of politics and policy-making, a network of political relationships is essential to avoid simple co-operation dependent on good will. Horizontal integration does not mean political unaccountability of the relevant institutions, nor chaotic decentralisation. Horizontality according to the governance model is proposed simply because of the impossibility of political hierarchisation in modern societies. Obviously, actors occupy different places; therefore, organisation is necessary, but with a view to a more flexible structure, paying attention to citizens' expectations.

3. Thirdly, the fundamental conditions of **political autonomy** are crucial for successful political integration. If a polity is autonomous, it can ensure its democratic viability and can then concentrate on the conditions of acceptance of its own legitimacy. It is then by safeguarding diversity that governance has to test its validity. Instead of political credibility granted to institutions, the objective should be credibility granted to their procedures and their actors. The gain in institutional transparency would be obvious. Each political act should be followed by a feeling of communality, making citizens virtually regard themselves as the author of a policy. This should not be construed as demagogic representativity; rather, governance can represent a major procedural reform where control of policy development becomes more participative. In the European context, this is reflected in the subsidiarity principle.

4. The fourth dimension deals with a description of governance as a **deliberative democracy** *sensu* Habermas or Joerges, which is often pinned in a comparative perspective of governance and the classical nation state model. If the governance project wants to reach the stage of deepening effective democracy on a European scale, it has to come to grips with the fact that only the state or the nation appear to have been tried and tested systematically in theory and political practice. In a way, they appear as the first criterion for an assessment of efficacy or legitimacy. However, given that states are based on the political integration of homogenous groups in a limited territorial space and on a triadic internal structure (executive - legislative - judicial), a model which tears down this traditional structure (by sharing, for example, the legislative branch between Council and Parliament or the executive branch between Council and Commission) cannot easily be appreciated by comparing it to states. Governance in the sense of deliberative procedural democracy cannot be developed by starting with a simple catalogue of responsibilities, for example.

Governance and public participation

One objective of the new governance agenda is to strengthen the respect of citizens' self-determination in terms of civic and political (participation) rights. Many organisations of civil society have shown a rather formal understanding of European citizenship, particularly as regards its supposed capacity of superseding national citizenship. It is not easy to avoid thinking in a national framework, thus ignoring the construction of an active European public space. Giving European citizenship a political identity supplementing its national counterpart, without replacing it, requires acceptance of a European pluralism. Political identity conceived as common values open to different interpretations of a "successful" and satisfying life could in the long term lead to genuine European democratic self-determination.

The recognised and effective right of access to policy-making, sometimes called participative constitutionalism, e.g. the approach followed by the Convention instructed with the drafting of the Charter of Fundamental Rights, seems promising for the future, both for governance reform and treaty revisions. Participation means notably

- that the definition of tasks assigned to institutions be clear and debated in public; this would identify, in an unambiguous vocabulary, the citizen as source of legitimacy;
- that only by granting effective rights and obligations the gap between more and more decentralised institutions and citizens' capacity to make sense of the Union as a common political project can be filled[134].

These are important conditions to restore clarity, effectiveness and political responsibility within the EU and to maintain a feeling of equality between the political actors of a multipolar Union where sovereignty is more dispersed than in national states.

In this environment, Parliament would have to modify both its structure and its objectives: while its privileged position at the crossroads of executive institutions and the citizens, as well as its role of a catalyst in the relations with its national partner institutions, allow it to act as the focus of the European public, it has to remain pluralist with respect to the choice of its dialogue partners. The complexity of the European political landscape and the impossibility to refer to

[134] For an intriguing catalogue of practical proposals how to draw up "European Governance Arrangements" see Schmitter Philippe C., *Contribution to the EUI symposium*, op.cit., pp. 8 ff.

national models make the European Parliament an institution that is necessary to exercise unified democratic control in all European affairs[135].

The public credibility of experts and agencies

Modern business and organisation theory has placed increasing emphasis on the role of reputation. Since governance is inherently caught between demands of decentralisation and specialisation, paternalist behaviour of experts towards the civil society would be counter-productive. The influence of agencies and specialised bodies has to be earned over a certain amount of time. Without authority and reputation acquired through an established record of good decision-making and dissemination of correct specialised information the credibility of such bodies will not be sufficient to protect them from interested and biased counter-information.

An expansion of technical expertise would thus have to go along with a rebuttal of "impermeable" scientific authority. Crises such as the BSE problem show that only intense co-operation and networking can ensure that experts operate satisfactorily in the public domain. Only by applying a high level of mutual trust and professionalism as well as of team spirit can technical delegations become actors enjoying public confidence. A clear separation between political and techno-administrative responsibilities should be the foundation of legitimate transnational experts networks. In this way it should be possible to find a balance between the need for better functional and sectoral co-ordination and the different actors' general political interests, thereby defining European choices and values.

Granting a public expert mandate to existing or newly founded agencies would stabilise their *de facto* legitimacy and allow a public and continuous evaluation of their actions. Public risk management in an interdependent structure (multi-level governance) replaces ever more hierarchical decision-making (in environmental policies, for instance). If zero risk does not exist, it is important to control the political culture of risk. Scientific expertise and its specialisation are to be joined with the European public space. Generally speaking, the capacity for risk evaluation could increase citizens' awareness of modern risks.

A correct use of the governance model would involve expertise as a public discussion platform within a complex and decentralised environment. There is no way of substituting expertise by general political considerations or "rent-seeking"; rather, the public and the experts should be made reciprocally responsible. This would result in a "repolitisation" of technical choices in the framework of a communication structure where the parliamentary function no longer limits itself to strict democratic representativity, but makes its political control effective.

Governance in the framework of the European Union

The EU as a "polity in formation" is not as sovereign as a state, but it exercises certain fundamental powers. Without any doubt that the EU fulfils the three classical criteria of a stable **political entity**: there is a polity, a policy and politics. Being usually qualified as a political model *sui generis* or an “unknown political object” which does not fit easily with classical models of intergovernmentalism and supranationalism, it is not a replica of the classical model of

[135] Cf. Magnette Paul, *European Governance and Civic Participation: can the European Union be Politicised ?* Contribution to the EUI symposium, 2001.

nation-states (hierarchical structure of national and regional/local institutions, clear command chains and institutional responsibilities), even if some federalists would have it like that. Nevertheless, the question whether the EU "should be considered a separate polity at all rather than a sophisticated but ultimately derivative institutional outgrowth of state interests, by relying upon some general model of which it is but one particular instance" is a permanent one, because at present "[the EU lacks, in other words, a generalisable template and background presumption of settled political form"[136].

Member States have kept much of their autonomy by sharing only the "European" part of their sovereignty[137]. As the European *demos* does not exist, European sovereignty cannot emerge in the well-known way of nation-states; shared (functional) sovereignty seems more apt in the European context. European governance, understood as shared political culture and practice, would replace peoples' sovereignty by *de facto* sovereignty in selected fields. A constitutional pact could enshrine this new concept of **shared sovereignty**: as a fundamental act connecting citizens and political actors, it would outline an understanding of sovereignty which is not exclusively based on "people rule".

Thinking the future of the Union in a nation-state vocabulary hence leads to logical and practical problems: although they acknowledge that there is no European demos, most authors see an emergent transnational political consciousness and recommend to make this a centre of the debate on governance. Following the political systems of city and nation-state, governance could be both comprehensive and pragmatic enough to enable the resurrection of old democratic ideals such as the **active citizen**. It could also contribute to a genuine political education (formation of consciousness)[138] of the European Union and thus become the only reasonable way to avoid the sectorialisation of policies, which constitutes a major risk of citizens completely disconnecting from both member states and the Union.

Governance also seeks to determine how institutions and their practices (behaviour) could be improved to be more effective; at best, this would mean to be able to listen to citizens' direct concerns. Governance also means the continuing exercise of a widened and overhauled Community method in order to institutionalise what Joerges has called **deliberative supra-nationalism**[139]. The latter can be defined as the compliance with certain communication rules to ensure the respect of different priority structures within the same public space. A wide-ranging public debate involving different actors, specialists or outsiders is essential for the development of democratic structures of this type.

European governance is placed half-way between theoretical principles and the improvement of existing institutions, so that they can fully express their democratic potential. The EU is considered by many authors as the most interesting polity for assessing the value of governance as a viable political model. One of the reasons is that the EU system is in constant transformation, much faster than any other political entity. In EU matters, too, governance is proposed to be based on the active participation of actors who traditionally were not directly involved in political reform processes. Two lines of development are often used in the literature as guidelines or models for future governance reform: the continuous interpretation and further development

[136] Both quotes from Walker Neil, *The White Paper in Constitutional Context*, contribution to the EUI symposium.
[137] See the much-cited Court of Justice case 26/62, ECR 1963, 1, p. 23 (Van Gend en Loos).
[138] Cf. Magnette Paul, op.cit., p. 13
[139] For example, Joerges Christian, Neyer Jürgen, From "Intergovernmental Bargaining to Deliberative Political Processes: the Constitutionalisation of Comitology", *European Law Journal*, vol. 3, pp. 273-299, 1997.

of European law by the Court of Justice of the European Communities and the definition and implementation of subsidiarity and proportionality in applying European law.

Law is a procedural safeguard of stability in a legitimate democracy. Based on teleological considerations concerning the future of the Community, the **Court of Justice** of the European Communities systematically developed a way to structure decentralisation by strong judicial co-operation with national courts, legal control and mutual recognition of national practices. At each integration level, democratic control by different actors was thus possible. The Court has advanced integration by the political way in which it has interpreted the treaties and 'constitutionalised' them; ECJ's rulings have come to be seen as building blocks of a European constitution[140]. This basic structure can, however, be too rigid when impartiality of the third party is embodied not only in one institution (the judge), but in continuous interaction between several actors, as some governance schemes pretend. Without public recognition of these constant interactions as well as of those involved in them, conflict would become permanent. Since avoiding conflicts is impossible, it is necessary to structure and legitimate them. The political legitimacy of a number of actors working on a policy proposal that would affect fundamental rights, for instance, could only be established by making the interests of all protagonists as transparent as possible.

The flexibility of the governance model needs hence to be counterbalanced by procedural and hierarchical stability. The only way to carry out a constant public dialogue in an effective manner is to articulate clearly various spheres of responsibility, at the European level and at *infra*-European levels. In a normative perspective, **subsidiarity** appears as the embodiment of a common European good, implemented through shared rules and responsibilities. A simple catalogue of shared and exclusive responsibilities, as is demanded in the framework of the debate on the future of Europe, would only "reproduce national frustrations at European level"[141]. Seen in this light, governance in the EU is a balancing act, functioning between the needs of efficient problem-solving on a high institutional level, and the imperative of assuring the legitimacy of these decisions by formulating them on a lower institutional level[142].

To avoid making subsidiarity simply an element of political routine, application of the principle of **proportionality**, seen from a governance perspective, would have the task to adjust policy-making and assign the appropriate political priority of different policy-setting measures. In this perspective, proportionality appears like the procedural cement of a general political consensus on the *acquis communautaire*. It should ensure, on the one hand, closeness to those concerned by policy measures, so that the latter are adopted in a way that makes their "absorption" easy; on the other hand, it should assure a high level of specifically European interest for the political impact of the acts in preparation. In understanding proportionality this way, one could avoid illegitimate European majoritarianism as well as the negative effects of forced or surreptitious centralisation. Application of the proportionality and subsidiarity principles should open the way to a collective learning experience in policy execution, not least in the application of new methods such as the open method of co-ordination.

The architecture of **comitology** symbolises in a way the complex framework of contemporary European democracy. Understood as the most important instrument for the implementation of executive acts, it contributes to defining the compromise between different European political

[140] Weiler Joseph H.H., "The Reformation of European Constitutionalism", *Journal of Common Market Studies*, vol. 35, p. 97, 1997.
[141] MEP Andrew Duff at a hearing on governance which the European Commission organised on 19 March 2001.
[142] Jachtenfuchs Markus, *Theoretical Perspectives* … , op.cit., p. 46

interests. Comitology could be transformed in the future from a hidden negotiating process to a public procedure, transforming the technocratic solution of a particular problem to an interactive and public interplay of different actors. More political legitimacy could be gained through a stronger involvement of "new" agents in the comitology process.

The **Commission** would also have to adopt greater transparency. It should act as a common platform, allocating as clearly as possible the political weights and interests connected to its proposals, for which it would have to incorporate the civil society in a widened partnership (e.g., in the form of a renewed co-operation with the Economic and Social Committee). It would thus become publicly responsible for the objectives generated collectively and recognised as a result of public deliberations.

Parliament could be instructed to improve the efficacy of the Union by creating monitoring resources in the regulation of politics. This could strengthen the definition of a European public space, allow broader consultation and maintain institutionalised relations with national and even regional Parliaments. This form of public political debate and control could take the form of regular conferences, thus contributing to civic education for the European idea.

Decision-making by unanimity such as in the **Council** acting as legislator is seen as incompatible with the flexibility and functional political integration advocated by the new governance concepts. But since nation-states remain a determining factor of integration, special "over-qualified" majorities could take account of the plurality of interests and values inherent in the European polity, particularly in areas where essential issues for both governments and citizens are at stake. Such a special majority be complemented by a vote of constructive abstention. That would allow to prepare a new postnational identity, shared sovereignty and, above all, deliberative multi-level democracy.

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Abbreviations

EC	European Community
ECB	European Central Bank
EMU	Economic and Monetary Union
EP	European Parliament
EU	European Union
IGC	Intergovernmental Conference
NAFTA	North American Free Trade Association
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation for Security and Co-operation in Europe
SLIM	Simpler Legislation for the Internal Market
TEU	Treaty on the European Union
TEC	Treaty establishing the European Community
UNDP	United Nations Development Programme
WTO	World Trade Organisation