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White Paper on Governance:
A 'Tool-Kit' for closing the
legitimacy gap of EU policy-
making?

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The European Commission's White Paper on Governance: A 'Tool-Kit' for closing the legitimacy gap of EU policymaking?*

Introduction

Reflecting on European Governance and its problems is in fashion these days. Given that the European Commission has a double function as a European executive in the “heart of the Union”¹ and as a promoter of new ideas and concepts it is not surprising that the Commission recently contributed to the intense academic and political debate over this problem.² Romano Prodi himself announced at the outset of his new 2000-2005 Commission its purpose of “promoting new forms of European governance”³ as one of the key strategic objectives. Obviously, given the scandals of the previous Santer Commission, this goal setting was motivated by, and was a necessary reaction to, growing concerns for the legitimacy of the Un-

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1 Nugent, Neill: *At the Heart of the Union*. Studies of the European Commission, New York 1997.

2 Commission of the European Communities: *European Governance. A White Paper*. COM (2001) 428 final. Brussels: CEC.

3 Prodi, Romano: *Shaping the New Europe*, Speech to the European Parliament, 15 February 2000.

ion's framework of governance. Besides Neil Kinnock's institutional reform programme, which is concentrated on the Commission's internal problems⁴, the provisional result of these broader inter-institutional reflections on governance is the publication of the White Paper.

Unfortunately, for many reasons, the White Paper's contribution towards understanding and towards closing the legitimacy gap of European governance is not very helpful. In this paper I try to figure out the shortcomings and probably unintentional negative implications of many proposals the Commission made on the subject. It can be demonstrated that the Commission's good intention to reinforce its role in European policy-making, both in preparing policy actions and implementing them, could do serious damage to the fragile institutional set-up of the Union. Moreover, it is likely that adopting its governance proposals could lead to an even deeper legitimacy crisis in the future than the EU is already suffering today.

I will develop my argument in three steps. First, I will give an overview on the multifarious aspects of European governance and its legitimacy problems in the shadow of the imminent enlargement. Against this background, it is easier to evaluate the usefulness of the Commission proposals culminating in the advice to "revitalise the Community method" (p. 29). Secondly, I will introduce the Commission's approach, its problem perception and its proposed solutions. In a third step I will highlight some analytical shortcomings and overlooked negative implications of the proposals made by the Commission.

1. *The main challenge of European governance: a multidimensional legitimacy problem*

The political system of the European Union is a strange beast which is difficult to explore and to explain.⁵ Its varying modes of governance and its

4 Commission of the European Communities: Reforming the Commission, Brussels, 5th May 2000, COM (2000) 200.

5 See Risse-Kappen, Thomas: Exploring the nature of the beast: international relations theory and comparative policy analysis meet the European Union, in: Journal of Common Market Studies 34 (1996), pp. 53-80.

complex mixture of different policy-making styles, instruments and institutions, prevent a clear definition of the Union as a classical international organisation or a kind of federal state. To a far greater extent than ordinary international organisations, it has evolved from a horizontal system of interstate-cooperation into a vertical and multi-layered policy-making body without becoming the kind of federal state which we are familiar with. With his intention to express that the Union is something “in-between” William Wallace emphasised the already advanced but yet incomplete character of its governance structure by categorising it as “more than a regime but less than a federation”⁶. In this ongoing debate⁷ academics often speak of a totally unique system, a political system “sui generis”. In order to highlight the main characteristics of the Union governance it is useful to identify its main sources of legitimacy. In doing so, the multidimensional legitimacy problem becomes obvious. The critical question then, is whether the White Paper on European governance is able to meet this challenge effectively, giving a useful in-depth analysis and presenting practical proposals to solve the identified problems.

The European Union has developed into a new type of political system which lacks many of the features we usually associate with democratic governance. Admittedly, the White Paper offers a very clear explanation which should clarify that Union governance is nevertheless legitimate: “The Union is built on the rule of law; it can draw on the Charter of Fundamental Rights, and it has a double democratic mandate through a Parliament representing EU citizens and a Council representing the elected governments of the Member States.” (p. 7). But this explanation is far from sufficient. Whereas in the past, the European Community relied on indirect legitimacy based on its Member States and their complete control of Euro-

6 Wallace, William: Less than a federation – more than a regime: the Community as a political system, in: Wallace, Helen/Wallace, William (ed.): Policy-making in the European Communities, 2nd edition, Chichester 1983, pp. 403-422.

7 A useful overview on the subject is given by Jachtenfuchs, Markus: The Governance Approach to European Integration, Paper for Presentation at the XVIIth IPSA Congress, Quebec, 1-5 August 2000 and Hix, Simon: The Study of the European Union II. The „New Governance“ Agenda and its Rival, in: Journal of European Public Policy 5 (1998), pp. 38-65.

pean policy-making⁸, the uneven denationalisation of European integration indicates that the sovereign state cannot remain the sole focus of normative reflection. Since the Single European Act (SEA) and the Treaty on European Union (TEU), the forced transfer of political decisions and allocations from the national to the European level has weakened democratic influence and control at the national level without the compensating establishment of equally strong democratic institutions and processes at the European level. Notwithstanding the fact that its powers were significantly strengthened within the last treaty amendments, the European Parliament still plays only a subordinate role in European policy-making. Even after Amsterdam and Nice, the powers of the Parliament in the legislative process remain limited. Although the last IGCs have brought about some progress in strengthening the role of the Parliament, it is often not the location for crucial decisions, most obviously in the field of agricultural policy. It might be said that this is a pity as the Parliament is the only directly elected and therefore publicly accountable EU institution. Following a simple logic, therefore, it might be useful to give greater powers to the Parliament in order to strengthen the input-legitimation of European governance.⁹

But the unique Union governance system draws its legitimacy from other sources too. Traditionally, a very important source of legitimacy is the technocratic and utilitarian justification of European governance, the Union's general efficiency and effectiveness in dealing with political problems. Governance in the Union could be seen as 'government for the people' – it is legitimate and even democratic in so far as the output of the political system corresponds fully to the collective preferences of its citizens.¹⁰ The Union, after all, enjoys utilitarian support mainly through the economic welfare which it facilitates. Undoubtedly, the success of the European enterprise, and therefore its justification, depends on its ability to

8 See for this state-centred view especially the liberal-intergovernmentalist approach of Moravcsik, Andrew: *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, London 1999.

9 See the detailed refutation of this argument in Höreth, Marcus: *No way out for the beast. The unsolved legitimacy problem of European governance*, in: *Journal of European Public Policy* 2 (1999), pp. 249-268.

10 See Dahl, Robert A.: *On Democracy*, New Haven/London 1998.

achieve tangible results for the participating countries and their populations. As long as the efficiency and effectiveness of European policy-making leads to more noticeable benefits than costs, the utilitarian support of large parts of the European population is unlikely to be questioned. Against this background, the European Commission plays a very important role. Control of the legislative agenda gives the Commission the power to set priorities for the Community, for it possesses powers normally reserved for elected institutions. The Commission is also able to produce legislation and to supervise its implementation relatively independently of Member State interests or popular pressure. In order to fulfil these assignments, an intricate set-up of multi-level administrative interpenetration co-ordinated by the Commission has emerged which is responsible for the often-criticised bureaucratisation of 'Brussels'.¹¹ The drawback of this institutional arrangement is that the Commission is identified as an opaque technocratic body which lacks democratic accountability and control.

As the direct democratic legitimation of European policy-making is limited, the indirect democratic legitimation of Union politics through the Council of Ministers and the COREPER remains very important. The Council, representing the executive branch in the Member States, continues to enjoy primacy in the Community legislative process. For this reason, governance in the Union is still predominantly the result of net empowerment of the executives of the Member States without meaningful parliamentary control at the European level. On the other hand, the democratic and formal legitimacy of the European Union still stems indirectly from the Member States which are signatories to the European treaties. The constitutionalisation of Europe was approved by the national parliaments of all the Member States. It is indisputably the case that, in a formal sense, the existing structures and processes of European governance rest on the approval of these democratically elected non-European institutions. To the extent that European governance is the result of interstate bargaining, it is indispensable, therefore, that national governments acting in the European arena

11 Wessels, Wolfgang: An ever closer fusion? A dynamic macropolitical view on integration processes, in: *Journal of Common Market Studies* 35 (1997), pp.267-299, p. 281.

are democratically controlled by, and held accountable to, their national constituencies and parliaments. As the German Constitutional Court points out, it is first and foremost the national peoples of the Member States who must provide the democratic legitimation for Union governance. In this peculiar federation of states (“Staatenverbund”) formed by the European Union, democratic legitimation necessarily comes about through the feedback of the actions of the European institutions into the parliaments of the Member States.¹² But this view definitely suffers from some serious shortcomings. Supranational institutions obtained more and more power and independence in order to complete the single market project. Together with the growth of majority rather than unanimous voting in the Council, this development leads to a decline of the Member State’s ability to control every step in European policy-making. Therefore, the state is also a declining source of political legitimation in the European multilevel system.¹³ Nevertheless, the Member States are the communities to which the collective identities of individuals are still primarily oriented and which possess the social prerequisites for stable democracy. Therefore the political order at the European level must protect these communities, and the Member States, their ministers as well as their civil servants and experts, should furthermore play a decisive role in the multi-level game of European policy-making.

To sum up, apart from the defined legitimacy problems, described in ideal-typical terms, governance in the European polity is legitimated by three different sources of legitimacy. These – nevertheless intertwined - sources could be used as the criteria to evaluate the quality of the White Paper’s remedies:

- *Output legitimacy*: Efficiency and effectiveness of European problem-solving ability and capability; government *for the people*.

12 Bundesverfassungsgericht: Urteil zum Maastricht-Vertrag, Entscheidungen des Bundesverfassungsgerichts 89 (1994), pp. 155-213.

13 Matlár, Janne Haaland: New forms of governance in Europe? The decline of the state as the source of political legitimation, in: *Cooperation and Conflict* 30 (1995), pp. 99-123.

- *Input legitimacy*: Direct democratic legitimation of European politics through the elected European Parliament; transparency; citizen participation and consultation, government *by the people*.
- *"Borrowed" legitimacy through Member States*: Indirect democratic legitimation of European politics through intact Member States and their legitimated authorities (Member State governments, national parliaments, civil servants, nominated experts); government *of the people*.

2. The Commission's approach

2.1. Defined problems

Among the problems defined in the White Paper the following are the most important:

- Despite the view of the Commission European that integration is a great success many Europeans "feel alienated" (p. 7) from the Union's work: "Many people are losing confidence in a poorly understood and complex system to deliver the policies that they want" (p. 3). The decreasing turnout to the elections for the European Parliament (p. 7) reflects a perception of European policy as being either ineffective or excessively detailed and intrusive.
- The relatively weak legitimacy of European policy-making is mainly a result of manifold "credit claiming" and "scape-goating". In the words of the White Paper: "Where the Union does act effectively, it rarely gets proper credit for its action" (p. 29). On the other side it is also a perceived problem that "Brussels is too easily blamed by Member States for difficult decisions that they themselves have agreed or even requested" (p. 29).
- The less the European institutions are willing to concentrate on their core tasks, the more the successful "Community method" is in serious danger: "One of the biggest sources of concern is the tendency of Member States when implementing Community directives to add new costly procedures or to make legislation more complex" (p. 23). This is the

the result of “the reluctance of Council and European Parliament to leave more room for policy execution to the Commission” (p. 18). Therefore, “legislation often includes an unnecessary level of detail” (p. 18).

2.2. *Proposed solutions*

Apart from the programmatic but somewhat unsystematic declaration of the “principles of good governance” (namely openness, participation, accountability, effectiveness and coherence) that are “important for establishing more democratic governance” and “apply to all levels of government” (p. 10), regarding the above defined problems of European governance, the required changes to present practices are the following:

- In order to relieve the legislative tasks of Council and Parliament these institutions should limit their involvement in “primary” European legislation to the definition of “essential elements” (p. 31, p. 6). They should therefore “leave the executive (...) to fill in the technical detail via implementing ‘secondary’ rules” (p. 20) without being bothered by national representatives in management or regulatory ‘Comitology’ procedures (p. 31). These remedies would lead to a more efficient decision-making and a more effective legislation and implementation.
- Under these above described circumstances the Commission could promote more openness and transparency by providing more information about all stages of European decision-making. Moreover, the participation of “civil society” should be enhanced in order to “connect Europe with its citizen” (p. 3). The practical proposals made are to offer more “online information on preparation of policy through all stages of decision-making” (p. 4), “stronger interaction with regional and local governments and civil society” (p. 4), a “more systematic dialogue with representatives of regional and local governments (p. 4, 13)”, “greater flexibility into how Community legislation can be implemented” and the establishment of “partnership arrangements” (p. 4). In the words of the White Paper “providing more information and more effective com-

munication are a pre-condition for generating a sense of belonging in Europe” (p. 11).

Taken together we can identify two main targets of the White Paper's proposals. The first one is to strengthen the democratic character of European policymaking, its input-dimension, by providing more participation, transparency and consultation. The second one to enhance the problem-solving capacity and ability of European governance thereby strengthening the output dimension of Union legitimacy.

3. Overlooked negative implications of the proposals

3.1. Strengthening democratic governance? Civil society actors in European policymaking

Participation and “civil society” are often used keywords in the White Paper. It is clearly the intention of the White Paper to strengthen the input dimension of European governance by enhancing the “inclusiveness of citizenship”¹⁴. Throughout the whole text the authors promise more participation and consultation, more communication and wider involvement of civil society actors. The paper stresses that “the quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in the institutions which deliver policies” (p. 10). Against this background, it is not surprising that the stronger involvement of civil society actors in European policymaking (p. 14) is a declared target of governance reform. This represents a very noticeable shift from an output to an input-oriented argumentation within the Commission. While only two years ago the Commission's president Romano Prodi followed a purely output logic in stressing that “at the end of the day” citizens are not interested in “who solves these problems, but the fact that they are being solved”, the White Paper emphasises that the European governance legitimacy “depends on involvement and partici-

14 Boyce, Brigitte: The democratic deficit of the European Community, in: Parliamentary Affairs 46 (1993, pp. 458-478, p. 459, see also Bellamy, Richard/Warleigh, Alex (eds.): Citizenship and Governance in the European Union, London 2001.

pation” (p.11) because “the Union has moved from a diplomatic to a democratic process” (p. 30).

But the trouble with this well-meaning statement begins as soon as it comes to a definition of “civil society” and its “organisations”. The magic word “civil society” alone doesn’t explain or even legitimate anything. With the rhetoric of “civil society” the Commission tries to convince the reader of the White Paper that the reform proposals regarding participation and consultation would concern all citizens, but the few more detailed explanations remain rather obscure. The only qualification given by the White Paper, in the context of the proposed co-regulation with private actors, is that participating civil society organisations “must be representative, accountable and capable of following open procedures in formulating and applying agreed rules” (p. 21).

Apart from that explanation, the White Paper, gave no exact definition of what civil society is, what it could be or should be. The authors only give some examples of concrete organisations and associations such as trade unions, NGOs, professional associations, churches and charities, grass-roots organisations and so on (p. 15). The authors emphasise that the White Paper is “primarily addressed” to the civil society actors (p. 9), moreover they stress that “civil society itself must follow the principles of good governance which include accountability and openness” (p. 15). But this is rather irritating, as “civil society” should be seen predominantly as an arena for voluntary action and for open and free public debate following its own rules of deliberation. Their actors should not be seen primarily as helpful co-governing agents for political and administrative purposes, co-opted and domesticated by ruling authorities.¹⁵ Moreover, it is not easy to see how the White Paper interprets “accountability” in this context. In democratic theory accountability means the decision makers can be held responsible by the citizenry and that it is possible to dismiss incompetent rulers. What, then, is exactly meant by the authors of the White Paper when using the principle of accountability in the realm of “civil society”?

15 See Eriksen, Erik O.: Governance or Democracy? The White Paper on European Governance, in: Joerges, Christian/Meny, Yves/Weiler, Joseph H.H. (eds.): Symposium: Responses to the European Commission’s White Paper on Governance, European University Institute 2001, p. 5.

However, what is needed in the authors' view "is a reinforced culture of consultation and dialogue" (p. 16) including "network-led initiatives" which "could make a more effective contribution to EU policies" (p. 18). In order to achieve this result privileged partnership arrangements involving "additional consultations" with civil society organisations should be established. Almost everyone is included and is invited to be an important part of European governance provided that he or she is "organised". At first sight, reading through these somewhat unsatisfying passages of the text, one is reminded of the slogan "Mehr Demokratie wagen"(to dare more democracy) of the socialdemocratic German Ex-Chancellor Willy Brandt, here only translated in neofunctional terms. To be sure, it is good will that has motivated the authors to write these lines but it's not well thought out and offers a rather "limited conception of participation"¹⁶. The proposals are designed to stimulate the involvement of active citizens and groups in some precise procedures, rather than to enhance the general level of public participation. However, when measured against our criteria of legitimate European governance many doubts arise.

First, even when we take into account the concept's limitation to mainly consultation¹⁷, what would happen if everyone takes these invitations to participate seriously? More and more participation in the pre-decision phase, "additional" consultation, a stronger involvement of "networks" that extend beyond and across hierarchies and that are characterised by a loose coupling of their constituent elements¹⁸, will generate even more potential "veto"-players in the multilevel game and would probably make the decision-making even more time-consuming and cumbersome. Greater in-

16 Magnette, Paul: European Governance and Civic Participation: Can the European Union be politicised?, in: Joerges, Christian/Meny, Yves/Weiler, Joseph H.H. (eds.): Symposium: Responses to the European Commission's White Paper on Governance, European University Institute 2001, p. 3.

17 The exception is the so-called „social dialogue“ which gives social partners the right to produce norms and co-regulation.

18 See for a more optimistic assessment to „network governance“ Benz, Arthur: Entflechtung als Folge von Verflechtung. Theoretische Überlegungen zur Entwicklung des europäischen Mehrebenensystems, in: Grande, Edgar/Jachtenfuchs, Markus (Hrsg.): Wie problemlösungsfähig ist die EU? Regieren im europäischen Mehrebenensystem, Baden-Baden 2000, pp. 141-163.

volvement of civil society actors in decision-making and control, based on the principle of participation, could be gained probably only at the expense of efficiency in the key areas of authoritative decision-making processes, and hence of problem-solving capability.

Secondly, seen from a democratic point of view, the input logic of the participation proposal is not entirely convincing since it includes only “networks”, “organisations” and “associations” but not the individual unorganised citizen. Therefore, it is more a kind of a modern neofunctional and even postparliamentarian version¹⁹ of the famous Gettysburg address, in which “the people” is replaced by “organisations”. Moreover, given the tone of the White Paper, the reader may have the impression that participation is not a fundamental democratic right of citizens, or to be precise, citizen’s organisations, but a kind of favour provided by the generous Commission. The subjects being invited for consultation and participation are not equipped with the rights and powers to sanction the rulers. The White Paper’s appeal to the citizen and civil society is only half-hearted as, strictly speaking, “citizenship entails not only to be ruled but also to rule in turn”²⁰. The proposed “partnership arrangements” with civil society actors of all kind in most cases are not intended to lead to binding agreements which we are familiar in corporatist arrangements between state and private actors in some of the Member States. It is just the continuation of existing Community method practices with some improvements for organised groups, “stakeholders” and “interested parties” (p. 14). As these functional actors should be encouraged “throughout the policy chain” (p. 10), a “code of conduct” should be adopted to determine who, how, when and on what to consult. None of these proposals would break with classic Community

19 See Anderson, Svein/Burns, Tom, *The European Union and the Erosion of Parliamentary Democracy: A study of Post-parliamentary Governance*, in: Andersen, Svein S./Eliassen, Kjell A. (Hrsg.): *The European Union: How Democratic is It?*, London 1999, pp. 227-251, p. 227: „Although parliamentary institutions are the core of Western political systems, they are undergoing systematic erosion. Modern governance is increasingly divided into semiautonomous, specialised segments or sectors; that is, it is multipolar with the interpenetration of state agencies and agents of civil society.“

20 Eriksen, *Governance or Democracy?*, *ibid.*, p. 5.

methods and its underpinning philosophy used by the Commission. It is a typical top-down expert-driven approach as participation and consultation can only be initiated and controlled by the institutions, should lead to an enhanced governance capability, are limited to consultation and mainly directed to sectoral “functional” actors. Here, the underlying philosophy is heavily influenced by the Governance Task Force in the Forward Studies Unit which emphasised in their preparation study for the White Paper that “(...) in terms of procedural rationality, the opinions of the people are not an obstacle to the effectiveness of a decision: they are an essential ingredient, and it would in fact be costly to ignore them or to fail to contribute actively to their formation.”²¹ Of course, at first sight, seen from a rather output oriented perspective, it makes sense to fulfil the criterion of “procedural rationality” by including experts in the decision making process as much as possible. But it's very exaggerated and dishonest to speak of the empowerment of “people” in this context. Far-reaching and innovative proposals, such as the idea, supported by the European Parliament²², to grant the citizen a genuine right to be consulted, were not even discussed in the White Paper. Under these circumstances, the “civil society” is likely to remain a euphemistic label for a rather elitist participation and consultation practice, limited to those citizens and groups who benefit from enough intellectual and financial resources to influence EU politics and policies.²³

Thirdly, it is remarkable that democratically legitimated national and sub-national governments, national parties and national civil servants are not included in the comprehensive list of potential participants and partners for “additional consultation” in the preparation phase of the Commission's legislative initiatives. Certainly, the electoral authorisation of ministers at the

21 ‘Cahiers’ of the Forward Studies Unit, European Commission: Governance in the European Union, edited by Olivier De Schutter, Notis Lebessis and John Paterson, Luxembourg 2001, p. 19.

22 European Parliament: The participation of citizens and social actors in the EU institutional system, Rapporteur P. Herzog, adopted on 29 October 1996, DOC PE A4-03338/96.

23 Kohler-Koch, Beate: Organised Interests in European Integration: The Evolution of a New Type of Governance?, in: Wallace, Helen (ed.): Participation and Policymaking in the European Union, Oxford 1997, pp. 42-68.

national level, and their accountability to their national parliaments alone do not suffice to provide for democratic legitimacy at the EU level. But instead of also trying to strengthen the relations with these elected and therefore democratically legitimated governmental authorities the Commission wants more intense partnership relations with non-governmental organisations which, as “actors most concerned”, should take responsibility for the preparation and enforcement of rules i.e. in the framework of “co-regulations” but also in “binding legislative action”. In the implementation phase, however, Member State governments should of course still be held responsible for the correct implementation of rules. They also should play a role in selective “target-based tripartite contracts” involving the Commission, Member States and a regional or local authority. In these contracts the Commission defines the terms, conditions and particular objectives, the local/regional/subnational authority implements them (p. 13), and national governments, finally, “would play a key role in setting up such contracts” (p. 13) and would be held responsible for the correct implementation. Evidently, this is not a very comfortable situation for Member State governments since they would not only be degraded to simple “agents” of the Commission, on its part playing the role of the “principal”, but moreover, lose significant influence in relation to their regional and local governments.²⁴

3.2. More efficiency and effectiveness through changing the rules of the multi-level game? The future interaction of European institutions, Member States and subnational authorities

It is one of the main concerns of the White Paper that greater efforts to speed up the legislative process have to be made. Therefore, the White Paper seeks to widen the decision-making role of the Commission through enhancing its role in the application of new tools and insisting that the role of the Council and Parliament be restricted to essential features when legislating, whilst the details should be directed to the Commission. Consensual

24 See also the more optimistic scenario in Schmitter, Philippe C.: What is there to legitimize in the European Union...and how might this be accomplished?, Jean Monnet Working Paper, European University Institute, Florence 2001.

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decision-making is criticised as time-consuming and cumbersome. Therefore, when legally possible, “Council should vote as soon as a qualified majority seems possible rather than pursuing discussions in the search for unanimity” (p. 22). One of the key problems of European governance, as it is seen by the Commission's White Paper, is the “reluctance of Council and European Parliament to leave room for policy execution to the Commission” (p. 18). This means “that legislation often includes an unnecessary level of detail” that is “damaging effectiveness” (p. 18).

The Commission's approach to solve the resulting decision making and implementation problems is manifold. Besides the general observation that better legislation and more effective implementation needs more “confidence in expert advice” (p. 19) and a “combining of different policy instruments for better results” (p. 20), the most important proposal is that “whichever form of legislative instrument is chosen, more use should be made of ‘primary’ legislation limited to essential elements (...), leaving the executive to fill in the technical detail via implementing ‘secondary’ rules” (p. 20). While “Council and European Parliament should limit primary legislation to essential elements” (p. 23), the Commission “must refocus on its core missions” (p. 8, 9) which is to “initiate and execute policy” (p. 29, 34) and to be the “Guardian of the Treaty and international representation of the Community” (p. 30). Additionally, “Member States should refrain from a disproportionate level of detail or complex administrative requirements when implementing Community legislation” (p. 23). Finally, a more frequent use of co-regulation is preferred by the Commission (p. 21) and, in following Majone's famous but also very problematic plea for the European “regulatory state”²⁵, new regulatory agencies at EU level should be established (p. 24) which “reinforce the effectiveness and visibility of EU law” (p. 33) (...) “where a single public interest predominates and the tasks to be carried out require technical expertise” (p. 24).

25 Majone, Giandomenico: *Regulating Europe*, London – New York 1996; see also the critical analysis in Höreth, Marcus: *Die Europäische Union im Legitimationstrilemma. Zur Rechtfertigung des Regierens jenseits der Staatlichkeit*, Baden-Baden 1999, p. 285-293 and Jachtenfuchs, *The Governance Approach*, *ibid.*, p. 7-9.

What are the consequences of adopting these far reaching proposals? The main motive behind the Commission's suggestions is "paranoid defence"²⁶, the revitalisation and "reinvigoration" of the community method (p. 29, 34) which was, still is, and will be in future, in the Commission's opinion, the guarantee of European integration's success. But the Commission's White Paper principally also questions the necessity of the so-called "comitology" which is, ironically, not only a significant part of the success story of the Community method but also the nucleus of a developing new deliberative form of democratic legitimation.²⁷ In the view of the White Paper, however, the execution of European policy is the exclusive task of the Commission that wishes to be less hampered by Comitology procedures while "Council and European Parliament as the legislature have to monitor and control the actions of the Commission against the principles and political guidelines in the legislation" (p. 31).

At first sight, efficiency and effectiveness of European policy-making could indeed be enhanced if Parliament and Council restrict their involvement in legislation to the definition of essential principles and if the Commission, while executing, defines "technical details" without being encumbered by Comitology procedures. This is especially the case when decisions are made under the majority rule. But this "lean" Community method which tends to weaken Member States' influence in shaping and executing European policy could only be an adequate decision-making procedure as long as the subject in question is not one of high political salience for ma-

26 Armstrong, Kenneth A.: *Civil Society and the White Paper – Bridging or Jumping the Gaps?*, Jean Monnet Working Paper, European University Institute, Florence 2001.

27 See Joerges, Christian/Neyer, Jürgen: *From Intergovernmental Bargaining to Deliberative Political Processes*, in: *European Law Journal* 3 (1997), pp. 273-299; see also Eriksen, Erik (ed.): *Democracy in the European Union – Integration through Deliberation*, London 2000; Schmalz-Bruns, Rainer: *Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaats*, in: *Zeitschrift für Internationale Beziehungen* 6 (1999), pp. 185-244; the broader concept of „deliberative democracy“ is explained in Habermas, Jürgen: *The Postnational Constellation: Philosophical Essays*, chapter 4, Cambridge 2001.

tional constituencies.²⁸ If this is the case, legitimate majority rule presupposes a strong European collective identity which is not realised in the present Union. Therefore, European policy, especially in areas which are highly controversial between the Member States, must still be the result of an intergovernmental consensus. For the same reason, it is dubious to exhort the Council to forego the search for unanimity and to pursue qualified majority voting wherever possible to speed-up the legislative process. This advice ignores the complex nature of interstate compromise and minority protection which reflects the existing basis of and limits to trust and solidarity within the emergent Euro-polity.

Against this background, it is highly questionable to propose a strategy which tends to strengthen the role of the Commission at the expense of the Member States and their generally consensus-seeking approach to European policymaking. As a crucial element of the zero-sum-constellation among the different sources of legitimacy²⁹ this would be the inevitable consequence when following the advice of the White Paper to restrict the legislative role of Parliament and Council to a definition of essential principles, while leaving the decision on technical details, which indeed could be highly controversial at the end,³⁰ to the discretion of the Commission. Thus even the current time-consuming practices during the preparatory phase are better than adopting the Commission's new strategy. "Given the diversity of economic conditions, political cultures, institutional structures, policy legacies and public attention among Member States, it seems inevitable that many policy choices below the level of 'essential principles' will have high political salience and might be totally unacceptable in one country or another. At present, these pitfalls are avoided by the search for consensual solutions that avoid incompatibilities with specific national constraints in elaborate intergovernmental negotiations that take place in the preparatory phase before a Council decision as well as in the implementa-

28 See also Scharpf, Fritz: European Governance: Common Concern vs. The Challenge of Diversity, MPIfG Working Paper 01/6, September 2001, p. 2 ff.

29 See in detail Höreth, Die Europäische Union im Legitimationstrilemma, *ibid.*

30 See for examples Scharpf, European Governance, *ipd.*, p. 5.

tion phase.”³¹ It is exactly the main function of the Committee of Permanent Representatives (COREPER) to solve potential conflicts among Member States before they reach the Council. This function could be seriously damaged if the Commission kept its promise to “withdraw proposals where inter-institutional bargaining undermines (...) the proposal’s objectives” (p. 22).

Regarding the implementation of Council decisions it is understandable that the Commission wishes to have a powerful say when further specifications are needed before directives can be applied. In practice the Commission already perform this function together with Comitology committees in which regulations proposed by the Commission are discussed by civil servants and experts nominated by Member State governments. Theoretically, “management committees” and “regulatory committees” have the authorisation to disagree with a Commission’s proposal and to appeal to the Council for a final decision. Of course this option (in practice almost never used) weakens the position of the Commission but it’s counterproductive to demand the abolition of these committees (p. 31) as their existence effectively forces the Commission to search for consensual solutions in the implementation phase as well. Therefore, this complex consensus-seeking implementation procedure – legally confirmed by the European Court of Justice³² - is worth preserving, as it is one of the most important prerequisites for compliance in the Member States in the end.³³

31 Scharpf, European Governance, *ibid.*, p. 6.

32 Ehlermann, Claus Dieter: Institutionelle Probleme im Bereich der Durchführung des abgeleiteten Gemeinschaftsrechts, in: *Europarecht* 6 (1971), pp. 250-261.

33 See in detail Falke, Josef: *Komitologie – Entwicklung, Rechtsgrundlagen und erste empirische Annäherung*, in: Joerges, Christian/Falke, Josef (Hrsg.): *Das Ausschußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, Baden-Baden 2000, pp. 43-160.

Of course one might agree with the Commission's proposals to make European decision-making more efficient and implementation more effective at first sight. Current practices are often annoying because not only are they time-consuming and cumbersome but also they water down initially reasonable proposals from the Commission. Moreover, when being discussed in the Comitology committees, proposals are often overloaded with administrative details satisfying specific national demands. In the end, the Commission is incorrectly blamed for over-detailed and complex regulations which in reality are caused by specific concerns of the Member States and their administrations. Nevertheless, seen from a broader interinstitutional perspective it is not useful to change this uncomfortable situation of the Commission by redefining the rules of the multilevel game of European decision making and –implementing so as to replace consensus-seeking mechanisms with unilateral powers of the Commission.

Apart from that, it is normatively unacceptable that the Commission wants to use the threat to withdraw initiatives when they are in danger of being changed by intergovernmental negotiations. This is for two reasons. First, this confrontation strategy is surely not normatively compatible with the “principles of good governance” which are favoured and praised by the authors in the first pages of the White Paper. Secondly, if the Commission frequently uses this threat, the Council could react in a same unproductive manner, by simply rejecting Commission initiatives which do not respond exactly to the demands of the Member States, demands that would otherwise be met in consensus-seeking negotiations. To put it in Fritz Scharpf's words: “(...) in a decision system with multiple veto positions, confrontation strategies can in principle be played by all parties – and if they are played by all, gridlock is the most likely outcome. By the same token, it is hard to see how the Commission could force Member States to accept the abolition of the Comitology system and to leave legislative choices in the ‘implementation’ stage entirely to its own discretion.”³⁴

To conclude, measured against the above-defined evaluation criteria of legitimate European governance, the Commission's proposals to enhance ef-

34 Scharpf, *European Governance*, *ibid.*, p. 7.

iciency and effectiveness of European policymaking are doomed to fail. The fundamental change of current practices in European policymaking and implementing, would hardly make European legislating more efficient and effective (output legitimacy). Secondly, it is hard to see how the input legitimacy of European governance could be strengthened as the proposals don't give the European Parliament more significant influence in policy shaping during the implementation phase. Thirdly, measured against the criterion of "borrowed" legitimacy of European policies through Member States and their legitimated authorities, the White Paper proposals would evidently weaken the indirect democratic legitimation of European policies that is derived from the agreement of democratically elected Member State governments.

4. Conclusion: Rethinking the multidimensional requirements for legitimate EU governance

The authors of the White Paper are right when warning the reader at the outset that they do not and cannot be expected to "provide a magic cure for everything". But it is not only unfortunate that the Commission's White Paper has overlooked many challenges of European governance.³⁵ It is also annoying that it gives the wrong answers to actually identified challenges and pays only lip service to the legitimacy problems of the Union. Moreover, some details in the White Paper are simply untrue: It is simply wrong to stress that the EU's powers "are given by its citizens" (p. 8). The European Union's institutions are exercising powers which either were delegated by the governments of Member States or were usurped by the Commission and the European Court of Justice through far-reaching interpretations of Treaty provisions.³⁶ And how can the contradiction be explained that, on the one hand, citizens give their powers to the European Union, while, on the other hand, the same people are blamed for their ignorance as

35 This is the main argument in Scharpf, *European Governance*, ipd., p. 13.

36 See Höreth, Marcus: *Stille Revolution im Namen des Rechts? Zur Rolle des Europäischen Gerichtshofes im Prozess der europäischen Integration*, ZEI Discussion Paper, C, 78, Bonn 2000.

they do not even “know the difference between the institutions” (p. 8)? Here again, in reducing the legitimacy gap of European governance to a rather technical information problem and a simple lack of knowledge, the Commission's approach is primarily a technocratic one camouflaged in would-be democratic terms. The truth behind such fine words as “democracy”, “transparency” and “participation” is that the White Paper reflects a rather technocratic attitude on how to solve the governance problems.

Even more annoying is the fact that the Commission's White Paper reveals a lack of understanding of the pre-conditions of successful governance in the multi-layered system of the European Union. Of course, given the fact that the Commission wants to regain lost ground which they lost in relation to Parliament and Council, especially in the running of the new co-decision procedure that was established by the Amsterdam Treaty (TEU Article 251), and surely wants to reassert its important role in the system of inter-institutional decision-making, most proposals in the White Paper are readily understood³⁷. Many suggestions of the White Paper may be interpreted as attempts to regain power in the interinstitutional decision making process: the avoidance of over-detailed legislation and the use of other policy tools, the strategic use of the right to withdraw legislative proposals, the restriction and even partial abolition of comitology, and, last but not least, the use of regulatory agencies under the control of the Commission. Nevertheless, as we have seen above, on normative grounds it is not reasonable to make proposals which will reduce the role of Member States in policymaking and implementation by seeking to bypass them wherever possible.

It is, then, puzzling how self-centred the White Paper's view on European governance is. When reading the paper one may sometimes have the impression that the Commission is fighting a pointless zero-sum-battle against the Member States – officially in the name of the venerable “Community method” but unofficially in order to jealously preserve its own vested inter-

37 Hérítier, Adrienne: *The White Paper on European Governance: A Response to Shifting Weights in Interinstitutional Decision-Making*, in: Joerges, Christian/Meny, Yves/Weiler, Joseph H.H. (eds.): *Symposium: Responses to the European Commission's White Paper on Governance*, European University Institute, Florence 2001.

ests. But legitimate multilevel governance in Europe requires that at all levels, authorities and institutions involved find solutions to problems and constraints; especially those that the Single Market Project itself caused for Member States in policy areas which have not been Europeanised.³⁸ If the European Union wants to be part of a solution “it can only be so in an enabling role which must support and strengthen, rather than undermine, the political legitimacy, institutional integrity and problem-solving capacity of Member States.”³⁹ Against this background, the concept of “autonomy-compatible co-ordination”⁴⁰ combined with patterns of differentiated integration, “closer cooperation” and “open coordination” is a useful “preservationist”⁴¹ strategy for European governance which is not systematically discussed by the authors of the White Paper. As long as the European governance system lacks a sufficient collective identity and intermediary structures which effectively integrate different political, economic and social interests into the European Polity, it will also lack the quality of ‘government by the people’. Therefore, it is indisputably the case that legitimate governance in Europe depends to a large degree on strong and intact Member States, where we still find these criteria fulfilled. Against this background, it is counterproductive to weaken the sources of legitimacy stemming indirectly from the involvement of Member States in European policymaking processes; which seems to be one of the main objectives of the White Paper. Not only the administrative resources but especially the legitimacy basis of the Commission are much too weak to do without this “borrowed” legitimacy of Member States both in the preparation phase and in the implementation phase of European policymaking. In brief, consensus-seeking modes of governance may be costly and cumbersome at first

38 See in detail Scharpf, Fritz: *Governing in Europe: Effective and Democratic?*, Oxford 1999.

39 Scharpf, *European Governance*, *ibid.*, p. 9; See in detail Höreth, *Die Europäische Union im Legitimationstrilemma*, *ibid.*, pp. 307-322.

40 Scharpf, Fritz: *Community and autonomy: multi-level policy-making in the European Union*, in: *Journal of European Public Policy* 1 (1994), pp. 219-241.

41 Gustavsson, Sverker: *Double asymmetry as normative challenge*, in: Follesdal, Andreas/Koslowski, Peter (eds.): *Democracy and the European Union*, Berlin and Heidelberg 1998, pp. 108-131, p. 115.

sight, but they lend legitimacy to policymaking in fragmented systems of decision-making which lack a collective identity.

Legitimate European governance is a two-sided coin: What is urgently needed for a more legitimate governance in Europe is both more national respect for the Commission's worthy contributions to European solutions and also more European respect for the autonomy of Member States and their idiosyncratic preferences, policies and institutions. It is of course difficult to combine respect for the autonomy of Member States on the one hand with a sense of the need for European level regulation on the other hand. But within the present institutional structures and procedures of the Community and its fragile triangle of legitimacy, it makes sense to develop careful strategies of differentiated integration and "closer cooperation" which increase the European capacity for problem-solving even in policy areas of high divergent national interests without ignoring the need of the Member States for autonomous solutions. Possible instruments could include the more frequent use of so-called „framework directives“ that leave the formulation of more specific regulations and the implementation to Member States instead of Commission and Comitology procedures. This is also proposed in general by the White Paper. It could effectively work when being combined with "open methods of co-ordination" in which Member States after legislating "essential elements" at the European level have to make clear what they intend to do at home. This new policy tool facilitates further co-operation and the exchange of "best practice" in view of common targets. Of course, open methods of co-ordination could be monitored through the Commission (see p. 22) that "should be closely involved and play a coordinating role" (p. 22) and, moreover should be evaluated by peer review. Last but not least, if necessary, the Council could make additional legislation in reaction to implementation problems, special deficiencies or, in the worst case, "beggar-my-neighbour"- behaviour of individual Member States.

Under the shadow of the ongoing enlargement process, it should be welcomed that the Commission's White Paper makes proposals heading in this direction. It is to be expected that both new tools, "co-regulation" and the "open method of co-ordination", lead to less resistance from those who

bear the costs of implementation, may that be private actors in the case of co-regulation or Member States in the case of the open method; because in the context of these new tools, “actors most concerned” have a say in shaping the policy goals and the instruments to be used. To be sure, these new policy tools may also have their disadvantages as these instruments offer less legal certainty.⁴² But no argument can explain why the relatively flexible mechanism of open coordination should be limited to policy areas in which legislative action under the Community method is not possible, as the White Paper demands (p. 22). To quote Fritz Scharpf again: “(...) Member States would not need to march in step to the bark of the Commission’s drill sergeant to demonstrate that they are good Europeans. Instead, they could respond to the specific problems they are facing with solutions that are compatible within their existing institutional framework. At the same time, however, national policy choices would be disciplined by the challenge to achieve jointly defined targets and by the institutionalised need to consider their impact on other Member States. In short, in developing the open method of coordination, the Union may have discovered a constructive approach to dealing with the growing pressure for European solutions under conditions of politically salient diversity.”⁴³ To be sure, it is difficult to realise these proposals in practice – but it is of course better to concentrate on such problems and their solutions than to hold either ‘Brussels’ or the ‘Member States’ to be exclusively responsible for the veritable legitimacy crisis of European governance. Obviously we need both strong European *and* national institutions to solve the problem of how Europe should be governed in the future.

42 See Hérítier, Adrienne: *New Modes of Governance in Europea: Policy-Making without Legislating?*, in: Hérítier, Adrienne (ed.): *Common Goods: Reinventing European and International Governance*, Lanham 2001 (forthcoming).

43 Scharpf, *European Governance*, *ibid.*, p. 13; see also Walker, Neil: *The White Paper in Constitutional Context*, in: Joreges, Christian/Meny, Yves/Weiler, Joseph H.H. (eds.): *Symposium: Responses to the European Commission’s White Paper on Governance*, European University Institute (RSC), Florence 2001, p. 34.

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