

GUEST EDITORIAL: THE COMMISSION'S WHITE PAPER ON GOVERNANCE IN THE EU – A SYMPTOM OF CRISIS?

In his speech of 15 February 2000 delivered at Strasbourg to the European Parliament,¹ President Prodi announced far-reaching and ambitious reforms of European governance. It was a message spoken in a new vocabulary, with a fresh reform agenda and a novel working method. He proposed an original division of labour between political actors and civil society, and a more democratic form of partnership between layers of governance in Europe. It was a package of innovation launched strategically into a legally undefined space that is located somewhere between administrative² and constitutional reform.³

The rhetoric of the speech was followed up by the Commission. A “Governance Team”, composed of Commission officials under the leadership of Jérôme Vignon, the former director of the Forward Studies Unit, was entrusted with elaborating the reform agenda.⁴ It cooperated with eminent academics and experts. A website disseminated the work to the outside world.⁵ Ancillary research and an assortment of seminars were funded. One particularly noteworthy result was the production and generously wide distribution of a remarkable series of essays on core issues of the governance debate.⁶ Reformers and sympathising outside observers, eager to ditch the image of technocratic, bureaucratic “Brussels”, welcomed these activities and efforts as a modernization strategy, which would help to cure the evils afflicting the administrative and institutional reform of the EU.

But these self-same events were also bound to nurture doubt and scepticism, both within the European institutions and in the outside world. Was this then

1. europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/41101AGED&lg=EN.

2. Cf. Reforming the Commission – A White Paper, COM(2000) 200 final of 1 March 2000; cf. europa.eu.int/comm/reform/index_en.htm.

3. Which was set in motion by the EU Charter of Fundamental Rights, solemnly proclaimed at Nice on 7 Dec. 2000 (O.J. 2000, C 346/1 of 18 Dec. 2000), followed by the Laeken Conference of 14–15 Dec. 2001 with its concluding declaration on the future of the Union and the setting up of a constitutional convention, which took up its work in March 2002 (europeanconvention.eu.int/plen_sess.asp?lang=EN).

4. Enhancing democracy in the European Union. Working Programme, SEC (200) 1547, 7 final of 11.10.2000; europa.eu.int/comm/governance/work/en.pdf.

5. europa.eu.int/comm/governance/index_en.htm.

6. De Schutter, Lebessis and Paterson (Eds.), *Governance in the European Union*, Luxembourg, 2001.

merely a re-active project, that was doomed to fail, since it was incapable of grappling with the complexities of Commission machinery, it rode roughshod over established European checks and balances, and, above all, it deviated from a less ambitious but successful EU tradition of patient, problem-oriented and targeted, piecemeal change?

In its final version,⁷ however, one must sadly note that the White Paper is a no-win text. Reformists will be left dejected by its cautious respect for conventional wisdom. But there is no corollary reason for satisfaction amongst sceptic traditionalists either; they will also find the paper ambivalent. Instead, such dissatisfaction on both sides may be a symptom of crisis, indicating that the difficulties Europe faces in enhancing its legitimacy have been overwhelming. In a somewhat abstract formulation:⁸ Europe's legitimacy problem in fact necessitated a dual analytical *and* normative effort. On the analytical and empirical side, reform necessitates an adequate understanding of EU governance structures and practices, i.e. of the *functioning* of the European Polity. Its second dimension concerns the simultaneously indispensable elaboration of normative yardsticks and criteria explaining to European citizens why this unprecedented Polity *deserves* recognition and what type of institutional reforms the Union should undergo.

Reformers, when resorting to the language of governance, have focused on the analytical side and have resorted to the toolkits of political science. They have failed, however, properly to explain how their rhetoric might be normatively compatible with Europe's commitment to law-mediated legitimacy, i.e. the rule of law and constitutionalized governance. Their adversaries, in contrast, failed both analytically and empirically. Their diagnoses of Europe's legitimacy problem are inaccurate, their governance recipes, framed in orthodox legal categories, can no longer work within the multi-level and poly-centric polity that Europe has, in reality, become. To be sure, much of the modernization rhetoric of the Working Programme is still present in the document the Commission has adopted.⁹ But that language has had only a marginal impact upon the institutional responses advocated by the Commission. There are reasons for the apparent rupture in the White Paper process that outside

7. European Governance. A White Paper, COM(2001) 428 final of 25 July 2001, O.J. 2001, C 287/5; europa.eu.int/comm/governance/index_en.htm.

8. The premises of this thesis would require a much more lengthy explanation than an editorial allows for. Suffice it therefore to refer loosely to the work of Habermas, in particular two recent publications: "Der demokratische Rechtsstaat – eine paradoxe Verbindung widersprüchlicher Prinzipien?" ("Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", *Political Theory* 29, 766–781); and "Braucht Europa eine Verfassung?" ("So, why does Europe need a Constitution?"), www.iue.it/RSC/EU/Reform02/uk.pdf, both in J. Habermas, *Zeit der Übergänge*, Frankfurt a.M. 2001, pp. 133–154; pp. 104–129.

9. And much more so, to be sure, in the reports of the Working Groups which are by now available at the Commission's governance website (*supra* note 5).

observers can only speculate about. And it would be inadequate and unfair to blame its many authors. And yet, the White Paper has become a contradictory product. This is still harsh criticism and of course, such strictures deserve brief but careful support.

The problem begins with the concept of governance itself. The Commission furnishes us with an all-encompassing and consequently vague definition.¹⁰ This presentation glosses over the very *problématique* of governance, not merely because of its analytical vagueness; it also neglects the need to “charter” governance, i.e. to frame it in line with the idea of a law-mediated (“constitutionalized”) legitimacy. This is not to reject the notion of “governance”. As Philippe Schmitter argues,¹¹ the “oversell and vagueness” of that concept notwithstanding, it usefully designates “a distinctive method/mechanism for resolving conflicts and solving problems that reflects some profound characteristics of the exercise of authority that are emerging in almost all contemporary societies and economies”. It is a virtue of the concept that it captures actor configurations and problem-solving activities, which have emerged as responses to functional exigencies. Modern governance depends on, and similarly builds on, expert knowledge and the management capacities of enterprises and organizations. It cannot confine itself to law production and law application operating with the binary code of legal and illegal events and practices. It cannot be organized hierarchically.

Especially in the whole field of regulatory policies, we have been witnessing extra-legal developments and institutional innovations which, on the one hand, have widened the discrepancies between the EU’s activities and its formal legal structures. “Governance” is a concept that helps us to discover and to explain such tensions between function and form. The Commission’s Working Programme was about to become a platform for constructive debate. The White Paper that we received is an impatient document. It provides us with seemingly easy answers. This it can only do because it refuses to take the thorny legitimacy challenge posed by transnational governance seriously. Instead, or so we are assured by the White Paper’s very self-confident Executive Summary, Europe is doing well both in terms of its achievements and its democratic legitimacy. Is it really a paradox, as the Commission notes, that

10. “‘Governance’ will be taken to encompass rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards accountability, clarity, transparency, coherence, efficiency and effectiveness”, White Paper, *supra* note 7, p. 8, footnote 1. This definition has been taken over from the Commission’s earlier Working Programme, *supra* note 4, at p. 4.

11. Schmitter, “What is there to legitimize in the European Union... and how might this be accomplished?”, in Joerges, Mény and Weiler (Eds.), Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, Jean Monnet Working Paper No. 6/01, p. 79 et seq. at p. 83 et seq. (the text is also available at www.iue.it/RSC/Governance and www.jeanmonnetprogram.org/papers/01/010601.html).

people “increasingly distrust institutions and politics or are simply not interested in them”?¹² “Good Governance” is the new generic response to this form of malaise. Five principles – *openness, participation, accountability, effectiveness and coherence*¹³ – should be brought to bear ever more comprehensively. But how? These principles are far too unspecific to provide us with orientation in the search for legitimacy for transnational governance. One important field where the White Paper becomes specific is regulatory policy. What the White Paper advocates here is a strengthening of the “Community method” in a so far unknown rigidity. Primary legislation by Council and European Parliament should be limited to laying down “essential elements, while providing greater scope for implementing measures to complete the technical details of those proposals”.¹⁴ The implementation process should be wrenched from the grasp of the Member States, as at present exercised in regulatory and management committees. Instead, the Commission itself is to become Europe’s central executive power. While the management of the Common Market under the comitology regime remained dependent on the administrative resources that the Member States have provided, new “regulatory agencies” are to be created which would strengthen the Community level. These “agencies” should, however, not be granted the type of autonomy that notion might suggest. Rather, they would operate under a clearly defined mandate and not be empowered to “arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments”.¹⁵ Not only comitology, that much despised and nevertheless flourishing species of EU governance law-making, is threatened with extinction. The Commission’s White Paper also signals resistance to the siren songs of the Open Method of Coordination, launched in Lisbon and since then attracting ever more favourable attention.¹⁶ The Commission’s institutional preferences all point to a strengthening of its own institutional role. In the debate on comitology, this role has long been supported by the European Parliament.¹⁷ But it is probably nevertheless a politically highly unrealistic, analytically quite weak and normatively unsound option. The White Paper’s “reform” strategy would institutionalize an executive machinery that could not be effectively controlled by the legislature or the judiciary. It is a common experience of all democracies in the field of regulatory policy and risk regulation that legislatures must

12. White Paper, *supra* note 7, Executive Summary, first paragraph (p. 3).

13. Italics in the original (at p. 10).

14. White Paper, *supra* note 7, at p. 23; cf. p. 31.

15. White Paper, *supra* note 7 at p. 24.

16. White Paper, e.g. at pp. 21, 31.

17. Reaffirmed by the European Parliament’s Committee on Constitutional Affairs in its Report on the Commission White Paper on European Governance (Rapporteur Sylvia-Yvonne Kaufman), COM(2001) 428 – C5-0454/2001 – 2001/2181(COS)] final of 15 Nov. 2001.

resort to “general clauses” and cannot exercise detailed control over delegated decision-making powers. It is extremely difficult in the Community context to compensate for this lack of legislative supervision through judicial control. The White Paper strategy would hence represent a technocratic rather than a democratic mode of governance.

To whom should one address this critique? To the advocates of reform who may have overlooked the complexities of their project? To the College of Commissioners presented with an unfinished project and confronted with the Nice process and its follow-up? The deficiencies in the project may have been a cause for indignation and a legalistic response that now looks set to stifle innovation.

In his Foreword to the White Paper, President Prodi deplores “the democratic malaise that the Union is suffering”.¹⁸ This White Paper is not the cure. It must not be allowed to be the final word on European governance. Its abject failure should encourage new interdisciplinary efforts to overcome the schisms between analyses of the functioning of the European Union and the concern of lawyers for the rule of law and law-mediated legitimacy.

Christian Joerges*

18. White Paper, *supra* note 7, 3.

* Professor of European Economic Law, European University Institute, Florence.