

Symposium:
Responses to the European Commission's
White Paper on Governance

Adrienne Héritier:

*The White Paper on European Governance:
A Response to Shifting Weights in Interinstitutional Decision-Making*

Christian Joerges, Yves Meny & J.H.H.Weiler (eds.)
2001

European University Institute



The Robert Schuman Centre for Advanced Studies



&

Harvard Law School



The Jean Monnet Program

The White Paper on European Governance: A Response to Shifting Weights in Interinstitutional Decision-Making

Adrienne Héritier*, Bonn

1 Introduction

The multiple proposals put forward in the Commission's White Paper on Governance testify to a variety of concerns regarding policy-making in the European Union: a lack of policy effectiveness, poor implementation, the aloofness of the political decision-making process from citizens and the lack of democratic legitimation. These are doubtlessly genuine matters of concern, for which the White Paper proposes multiple remedies. Among these remedies are calls for more consultation and transparency, calls for more and better expertise and calls for applying new policy tools and for enhancing the Community method, that is, the clear allocation of decision-making responsibilities to the Council, EP and the Commission respectively. So, comments could focus on any one of these aspects and the viability of proposals addressed to them. From the variety of these possibilities, I choose to focus on one aspect from the diverse mixture of recommended remedies. I claim that this aspect reveals a certain pattern in the response of the Commission. This pattern reflects a Commission attempt to assert and reposition itself in the system of interinstitutional decision-making and, indeed, to regain lost ground. Why lost ground? I will argue that under the new co-decision procedure that was established by the Amsterdam Treaty (TEU Article 251) there has been a subtle shift in the weights of interinstitutional decision-making in favour of bilateral relationships between the Council and the Parliament, sidelining the Commission. Many of the proposals in the White Paper may be read as attempts to counteract this development. More specifically, the attempts of the Council and EP to come to "early agreements" under the new co-decision-procedure and to conclude legislation at first reading led to a plethora of ad-hoc informal meetings between Council and EP members, without including Commission members.

* Max-Planck-Projectgroup on Common Goods, Bonn, October 2, 2001.

In order to make up for lost ground, the Commission proposes a variety of measures, including the use of “new tools of policy-making”, which are not predicated on legislation, such as co-regulation with private actors and the new method of open co-ordination. To the extent that the path of legislation is chosen, the Commission intends to use its right to legislative initiative more strategically so as not to lose leverage in the decision-making process. It also proposes that the role of the Council and European Parliament in legislation should be drastically limited: they should set the essential features of policy-making, that is framework legislation, while the regulation of all details should be left to the Commission. And even more: in fleshing out the legislative framework decisions, the Commission would wish to be less hampered by comitology. Additionally, according to the White paper, executive regulatory activities should be delegated to new regulatory and executive agencies, the latter being controlled by the Commission.

2 Losing ground under the new co-decision procedure

The co-decision procedure introduced under the Treaty of the European Union in 1993 (Article 189b) provides that the EP delivers its opinion on the Commission proposal before the Council adopts a common position. In a second reading the EP can then amend the common position of the Council. In case the Council does not approve all the amendments of the EP, a Conciliation Committee is convened. It is comprised of 15 members of the Council and the EP, respectively, and has six weeks to draw up a ‘joint text’. If it fails to reach an agreement, the Council could confirm its common position, and the EP could reject the act with an absolute majority. This need for a consensus gave rise to numerous informal meetings called trilogues – where previously there had literally been no contact whatsoever. These trilogues, originally only applied in the conciliation phase proper, became, in the course of time, common practice in earlier stages of the interinstitutional decision-making process. The main reason is that, under the Amsterdam Treaty, co-decision matters were extended from 15 areas to 38 (or 15 to 31 treaty articles) and a formal possibility for concluding the decision-making process at first reading was introduced, as long as a qualified majority in the Council agrees with the EP’s amendments, the *de facto* modified Commission proposal. Additionally, by introducing time limits in all phases of the decision-making process, the Amsterdam Treaty created a further need, namely of changing the operational approaches. At present, in

about 20% of the cases a conclusion is achieved on the first reading; a conclusion is achieved on the second reading in about 50% of the cases; the rest of the cases go into conciliation (Interview Commission September 2001).

After realizing that it would not be able to handle the workload of potential conciliation in all these new areas, as defined in the Amsterdam Treaty, in particular, the Council pressed for a multiplication of informal meetings with members of the EP, chairpersons, co-chairpersons, rapporteur and co-rapporteurs to develop “early agreements” and to conclude the decision-making process on the first reading. Given that there are legislative tasks subject to deadlines and given the limited resources of Coreper 1, which now has to deal with a vast range of co-decision matters, the Council is keen to seek early agreements so that the cumbersome and time-consuming conciliation procedure can be avoided. This is reinforced by the fact that the Presidency of the Council has strong motives to come to early agreements, because such agreements allow the Presidency to set the agenda within its presidential term.

In order to prepare the grounds for such early agreements, numerous informal meetings are called at short notice in an ad-hoc manner. This often by-passes the Commission (Interview Commission Sept. 2001). Members of Coreper 1 are most eager to meet with the rapporteurs, co-rapporteurs and the committee chairperson of the EP on a “one to one basis” (Interview EP March 2000), and not as eager to meet with the Commission (Interview EP March 2001). The Commission’s role as an intermediary and honest broker, presenting compromise proposals, is still important. Some DGs are skilful in putting forward compromise proposals. Yet others are less skilful at it (Interview EP, March 2001). The EP no longer uniquely depends on the Commission; instead it maintains multiple direct contacts with the Council (Farrell and Héritier 2001). It is not that “somebody seriously tries to exclude the Commission from these events” (Interview EP, March 2001). However, the sheer proliferation of informal meetings which emerge on a de-central basis in the EP lead to “an absolute maze”. As one interviewee noted, “We have got 50 proposals at the same time” (Interview EP March 2001). They are not centrally co-ordinated, and even central figures in the EP do not know about all the meetings which are going on.

This puts the Commission in a bind. It finds it difficult to fit into this network, and “...it complains that it is not involved in things” (Interview EP, March 2001). It deplores the

decentral and ad-hoc nature of these meetings (Interview Commission Sept. 2001). It particularly blames the Council for “highjacking” “their” proposals, which are the basis of discussions, and “running off and trying to negotiate behind our back or reluctantly informing us – at short notice before a meeting is on” (Interview Commission Sept. 2001). The Commission emphasizes that it is “its” proposal which is being amended and that the rules of the legislative game provide that, unless the Commission agrees with any of the amendments proposed, unanimity is required in the Council.¹ “[The] Council would like to forget that. We don’t let them, but we have to run after them all the time like a schoolmaster reminding them” (Interview Commission, Sept. 2001). Thus, the possibility of concluding at a first reading has made it more difficult for the Commission “...to keep up with everything and to ensure that we are in the loop, to protect the Commission’s prerogatives with its right of initiative, its possibility to influence the vote in Council, its defence of its own original proposal” (Interview Commission September 2001). On the one hand, the Commission does not want to, nor can it, oppose “the very friendly contacts between Council and Parliament...”; on the other hand, “the balance is shifting a little bit away from us. Parliament is going through a kind of a phase, in which they are so amazed at the possibility of having direct contact with the Council that they’ve forgotten their own friends in the Commission over this” (Interview Commission Sept. 2001).

3 Proposals to regain ground:

In view of these increasing bilateral informal negotiations between the Council and the EP, it is not surprising that in the White Paper the Commission stresses a variety of measures which tend to enhance the role of the Commission in policy-making. It directly addresses “early agreements”, briefly stating that they serve to speed up the legislative process: “...In appropriate cases, the Council and the European Parliament should attempt to agree to proposals in one rather than two readings with the assistance of the Commission (emphasis added). This may reduce the time needed to adopt legislation by 6 to 9 months” (White Paper 2001:22).

¹ The Council has to find a qualified majority in favour of the Commission’s modified proposal in order to finish after a first reading since the general legal principle in Article 250 (1) of the TEU says that the Council can only adopt legislation by a qualified majority if the Commission supports it.

An additional range of proposals in the White Paper may be interpreted as an attempt to regain clout in the interinstitutional decision-making process: the avoidance of legislation in the first place and the resort to other policy tools; the strategic use of the right to withdraw legislative proposals; the restriction of legislation to essential features and the restriction of comitology; the use of regulatory and executive agencies.

The White Paper proposes several policy tools outside or alongside legislation, arguing that they would render policy-making more effective. One tool engages in co-regulation in order to prepare implementing measures of framework legislation. “Coregulation combines binding legislative and regulatory action with actions taken by actors most concerned, drawing on their practical expertise” (White Paper 2001:21). The White Paper, however, formulates certain conditions under which co-regulation should be used. It offers “a framework of overall objectives, basic rights enforcement and appeal mechanisms and conditions for monitoring compliance” (White Paper 2001:21). Co-regulation should only be applied if it does not make sense to apply uniform rules across member states. Further participating organisations should be “representative, accountable and capable of following open procedures in formulating and applying agreed rules” (White Paper 2001:21).

An additional new policy tool proposed is the “open method of co-ordination”, inviting co-operation and the exchange of best practice in view of common targets, on the basis of national action plans. However, the Commission stresses that it should not be used if legislative action under the Community method is possible. When such legislative action is not possible “the Commission should be closely involved and play a coordinating role” (White Paper 2001:22). It also emphasises that there should be regular reporting to the EP.

Both tools, co-regulation and the open method of co-ordination, have features that may lend them a political and instrumental capacity superior to legislation, but they have disadvantages, too (see Héritier 2001). There is less political resistance from those who bear the costs of implementation – that is, from private actors, such as industry in the case of co-regulation, or member states in the case of the open method – because in the context in which the new tools have developed, these actors have a say in shaping the policy goals and the instruments to be used. The instrumental capacity may be higher because, given that the implementors are part of the policy formation process, the incentives of those responsible for implementation are

taken into account in that process. At the same time, this instrument offers less legal certainty and is criticized for representing interested one-sidedly. What matters here, however, is that the Commission, in its own proposal, repeatedly emphasizes the institutional role it wants to play in the application of these tools.

To the extent that legislation is chosen to shape policies, the Commission, at the substantive level, stresses that it is important to choose “the right form of regulatory act” (White Paper 2001:20); at the procedural level it stresses that it wants to use its own right of withdrawal more strategically in order avoid losing clout in shaping “their proposals”. In regard to the first level, it proposes two things: to use more regulations and more framework legislation (White Paper 2001:5). Regulations should be invoked in order to achieve the completion of the internal market. The increased use of regulations would help avoid the “delays associated with [the] transposition of directives into national legislation” (White Paper 2001:20). If this proposal were followed in fleshing out the details of European legislation, it would clearly reduce the influence of national governments and parliaments.

The second measure is to use more framework directives that offer greater flexibility in implementation. “Whichever form of legislative instrument is chosen, more use should be made of ‘primary’ legislation limited to essential elements (basic rights and obligations, conditions to implement them) leaving the executive to fill in the technical details via implementing ‘secondary rules’.” (White Paper 2001:20). Here the Commission claims the role of specifying essential primary legislation, thereby significantly widening its own role.

This is directly linked to the role of member states in implementing existing legislation: “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” (White Paper 2001:23). Instead, the Commission proposes establishing implementation networks based on “target-based, tripartite contracts”. As they have emphasized, “Such contracts would be between Member States, regions and localities designated by them for that purpose, and the Commission (emphasis added). Central government would play a key role in setting up such contracts and would remain responsible for their implementation....The contract should include contracts for monitoring” (White Paper 2001:13). So here again the Commission is clearly carving out a new role for itself in all areas of implementation, a role which hitherto has been reduced to selected policy areas.

In the context of legislation, the Commission also proposes that its right of initiative and right to withdraw proposals should be used in a more strategic and targeted manner. In particular, proposals should be withdrawn “where interinstitutional bargaining undermines the Treaty principles of subsidiarity and proportionality or the proposal’s objectives” and where the Council and the European Parliament do not stick to the essential elements of legislation and are “overloading or over-complicating proposals” (White Paper 2001:22).

The new division of labour in legislation envisaged by the Commission is underlined by its proposal to reform the work of comitology, leaving only essential aspects of policy-making to the Council and the EP, on the one hand, while leaving all the details to the executive (that is the Commission), on the other. The White Paper proposes abolishing regulatory and management committees. The reconsideration of the present committee system “should lead to modifying Treaty Article 202 which permits the Council alone to impose [a] certain requirement on the way the Commission exercises its executive role” (White Paper 2001:31). Here the Commission seeks an alliance with the EP, who – under its enhanced role in legislation under the auspices of the new co-decision procedure – claims a similar role in controlling the execution of legislation to that presently exercised by the Council.

Another measure proposed in the White Paper is meant to increase policy effectiveness: namely, the establishment of additional regulatory agencies beyond the 12 that now exist. These new agencies should operate within a clearly defined framework, defined by the legislature. They should not be granted decision-making power in general regulatory measures, but solely in individual decisions “where a single public interest predominates and the tasks to be carried out require particular technical expertise (e.g. air safety)” (White Paper 2001: 24); but agencies, according to the Commission, “cannot be given responsibilities for which the Treaty has conferred a direct power of decision on the Commission” (White Paper 2001:24).

Additionally, the Commission has proposed a communication and a regulation laying down the framework for the work of ‘executive’ agencies under the Commission’s control. “This means using external executive agencies rather than Commission resources [for] management tasks [related to] spending programmes” (White Paper 2001:30).

In brief, it is clear that the White Paper seeks to widen the decision-making role of the Commission: 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.

Bibliographical Notes

Adrienne Héritier and Henry Farrell. *Formal and Informal Institutions under Codecision: Continuous Institution Building in Europe*, Manuscript Bonn, 2001.

Adrienne Héritier. *New Modes of Governance in Europe: Policy-Making without Legislating?* In Common Goods: Reinventing European and International Governance, ed. A. Héritier. Lanham: Rowman & Littlefield, 2001.