

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

**Christian Joerges:**

*“Economic order” – “Technical realization” – “the hour of the executive”:  
some legal historical observations on the  
Commission White Paper on European governance*

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**“Economic order” – “Technical realization” – “the hour of the executive”:  
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## **1 Introduction**

The White Paper project that the Commission launched with a view to developing prospects for democratically reformed “European Governance”<sup>1</sup> nourished hopes and met with reservations. The sceptics called the practical utility of the whole undertaking into question. They saw their views confirmed when, on 26 February 2001, the Treaty of Nice produced a result that made follow-up conferences not just seem inevitable, but absolutely necessary. In fact, if the ratification process had taken its expected course, then what immediately came to be called the “post-Nice process” would have immediately dominated the European political agenda, leaving scarcely any room for the White Paper. Now that the Irish referendum has unleashed its own confusion, the White Paper, finally published on 25 July 2001,<sup>2</sup> may once again reckon on greater attention. Its authors, too, evidently see it this way: the Irish “no” to this Treaty is seen as an expression of dissatisfaction with politics and institutions (p 9)<sup>3</sup> – something already dubbed disenchantment with politics [*Politikverdrossenheit*<sup>4</sup>]; the phenomenon does not affect Europe alone. Additional reasons seem to militate for such an interpretation of the Irish failure of the Nice Treaty. Do the abstention and rejection by the Irish not once again confirm the notion that European politics has slipped past the intergovernmental mode of IGCs and has to seek new patterns and further expressions? Is it not the Commission’s task here to take new initiatives to overcome the stagnation and tackle the resulting dangers to the integration project? Was Romano Prodi, then, well advised to give such high priority to programmatic renewal of the practices of European governance? Is it even appropriate to bring in historical references and recall Prussia’s position in the early nineteenth

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\* Contribution to the White Paper conference of the Arbeitskreises Europäische Integration, 18-19 October 2001 in Berlin.

<sup>1</sup> Cf., especially, the Commission’s Working Programme on “Enhancing democracy in the European Union”, SEC (200) 1547, 7 final 11 October 2000; <http://europa.eu.int/comm/governance/work/en.pdf>; the website <http://europa.eu.int/comm/governance/index/en.htm> documented the ongoing work. It should by now contain the concluding reports of the 12 Working Groups which have supported the Commission’s Governance Team. – These documents will have their impact on future debate and policy processes. The analysis submitted here, however, focuses on the document that the Commission has adopted. It does not seek to do justice to the preparatory efforts and the reports of the working groups.

<sup>2</sup> COM(2001) 428.

<sup>3</sup> Page numbers in the text refer to the White Paper.

<sup>4</sup> Typing the German term into the Google search-engine gives 5690 hits within 17 seconds.

century, when brilliant, energetic reformers sought, through a “constitution of government”, to smooth the path towards an overall constitution?<sup>5</sup>

Measured against such historic examples, the final text of the White Paper looks rather modest. The introductory statements to the White Paper, already mentioned, sometimes read like a piece of marketing. And if many Europeans feel, as stated a little later, “alienated from the Union’s work” (p 7), this may be ground for concern, but is hardly an analytically adequately precise starting point for institutional or programmatic reforms.

All this seems to prove the sceptics right. Yet, it is also true that the preliminary and accompanying work,<sup>6</sup> perhaps more than the rather all too complacent sounding White Paper itself,<sup>7</sup> do, at any rate, discuss in depth some extremely interesting questions of European politics and of the Governance project, and, indeed, do take up, at least from a legal viewpoint, the persisting core problem of the integration project as such and of the approach to it. For the keyword – indeed, buzzword – “governance” is a response to the emergence and growth of the genuinely transnational governance structures which arose when the Member States of the European Community agreed, back in 1958, to maintain more than purely intergovernmental relationships with each other, and set up more than an international organization – and these governance structures were bound to arise if autonomous actors were to find the way to a form of co-operation intended to reach common solutions to common transnational problems on a lasting basis. Undoubtedly, since 1963 at the latest, Europe has become familiar with the judicial view that its Treaties are not to be understood as mere intergovernmental agreements, and that the European powers are not to be legitimised in purely in terms of international law.<sup>8</sup> But, at least since the 1987 Single European Act, the European Union has also grown beyond the Community that the ECJ was contemplating in 1963 when it found that the Member States had limited their sovereign rights, “albeit in limited fields”, thereby bringing into being a new legal system the legal subjects of which are not solely the Member States but also individuals. “Governance”, the key term in the White Paper, is, at any rate, a positive appellation for this otherwise always purely negatively couched *aliud* and the metaphor of “good governance” is a way – not purely metaphorical in the Commission’s mind – of presenting the peculiar indeterminate state that the

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<sup>5</sup> See R. Koselleck, *Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung*, Stuttgart 1975, 163 ff.; G.-Ch. von Unruh, *Die Veränderungen der Preußischen Staatsverfassung durch Sozial- und Verwaltungsreformen*, in: K.G.A. Jeserich/H.Pohl/G.-Ch. von Unruh (eds.), *Deutsche Verwaltungsgeschichte, Band II (Vom Reichsdeputationshauptschluß bis zur Auflösung des Deutschen Bundes)*, Stuttgart: Deutsche Verlags-Anstalt 1983, 399-470.

<sup>6</sup> See n. 2.

<sup>7</sup> See n. 2.

<sup>8</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, ECR [1963] 1 at 23 f.

Union has got into since the view has come to prevail that the “constitutional charter” it has no longer suffice,<sup>9</sup> without it being clear what kind of a constitution ought to replace that charter.

These statements are to be clarified in the next section (2), in a reconstructive procedure recalling the legal justifications for legitimate transnational governance from the formative state of the European Economic Community, and reaching back in order to reconstruct them to the period of the Weimar Republic. This recourse to German traditions will look one-sided. Yet, a historically-oriented reconstruction is not conceivable in a manner which is not “one-sided”. All legal systems organised as nation states cannot but define the preconditions for internationally functioning co-operation for themselves. Only gradually are they able subsequently to discover whether and to what extent they will have to move to a transnational perception of transnational problems. In terms of European supremacy over national legal system: what sort of common governance may and/or should states (themselves democratically constituted, and, indeed, declaring this form of government to be fundamentally untouchable as Article 79 (3) of the Basic Law does) accept or strive for?

It is no coincidence that specifically the Basic Law has endorsed both principles, an absolute commitment to democracy *and*, in Article 24, the principle of “open statehood”[*offene Staatlichkeit*].<sup>10</sup> It is equally no coincidence that, specifically in Germany, traditions which promised to resolve the obvious tensions between both principles were in fact available. All this militates very emphatically in favour of proceeding “one-sidedly” in reconstructing legal justifications for the legitimacy of transnational European governance; it is in the very reconstruction of the different starting points of the Member States in the integration project that its later achievements can be made apparent – among them the gradual development of transnational governance structures. The White Paper’s programme seeks to arouse awareness of this process, take it further and, at the same time, make it democratically acceptable. Anyone aware of the difficulty of this process and the conceptual problems it entails will have problems with the style in which the White Paper deals with them. However, to raise objections (see Section 4 below) is not to assert that there are any ready-made recipes available.

## **2 Legal justifications for transnational governance structures: a retrospective survey of German traditions**

The opinion so widespread today that Europe is not a state but needs a constitution is a recent one, at least to the extent that the concept of constitution includes that of democratic legitimation – a criterion that the White Paper, too, adopts in referring to the Union’s “double democratic mandate” (p 7) in order then to present the “principles of good governance” as democratic, rule of law principles that ought to apply more at all levels of government (p 10).

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<sup>9</sup> As a further historical aside, these issues have been ventured in private international law for more than a century; it received its classical formulation by Bartin and Kahn and found its truly transnational solution in Ernst Rabel’s concept of an international characterization; the boundaries between legal disciplines are, unfortunately, dense.

<sup>10</sup> Cf. M Zuleeg in R. Wassermann (ed.), *Reihe Alternativkommentare. Kommentar zum Grundgesetz*, Neuwied-Darmstadt 1984, Vol. 1, Art 24 Abs. 1 paras. 3 ff.

The legitimisation problem often called the “democracy deficit” has, however, concerned legal science more or less from the outset. It has merely responded to it in different terms than are, broadly speaking, usual in the current debate: it has – albeit frequently in the doctrinal cryptography of jurisprudence and without bothering to translate the legal vocabulary into the categories and approaches of other disciplines or public discourse – pleaded for an institutionalisation of rationality criteria [*Institutionalisierung von Rationalitätskriterien*]<sup>11</sup> able to justify transnational “governance” which may not meet the criteria of constitutional states organised as nation states, but is, nonetheless, compatible with them. “Europe has given itself a constitution that had to institutionalise a legitimacy pattern departing fundamentally from that of nation state democracy” – there are justifications for this answer in the German legal tradition that can be traced back historically at least into the Weimar Republic. German European law was able to take up from them when, very early and in a conceptual stringency hardly to be expected in a legal system with a less problematic past, it responded to the question of how Europe could be possible as a “sovereignty association” [*Herrschaftsverband*]<sup>12</sup> standing above the law of the Member States. These justifications were not uniform – and are illuminating because of their very differences. Three of them appear in the title of this essay; two of them – *ordo*-liberalism and functionalism – have become important brand-names in German European-law thinking; a third discredited itself – something one also ought to know, and not forget.

## 2.1 *Ordo*-liberalism: the unity of national and European economic rationality

In the contexts of his studies on the history of private law, Knut Wolfgang Nörr<sup>13</sup> picked out two concepts in (German) economic legal history. Both have to do, in more current parlance, with German varieties of capitalism: Nörr calls one the “organised economy”, the other variant is the “social market economy”. Nörr sees the “organised economy” as a hereditary flaw from the Weimar Republic, though its predecessors are, admittedly, to be found in the age of “organised capitalism” in the nineteenth century. The second version, “social market economy”, represents the better tradition for Nörr. Its theoretical core is known as *ordo*-liberalism. This conception was developed in political economy particularly by Walter Eucken, Alexander Rüstow, Wilhelm Röpke together with lawyer Franz Böhm in the late twenties – in the face of the economical and constitutional crisis of the Weimar Republic, which was practically at its acme. This was the context for the emergence of the *ordo*-liberal demand for a “strong” state, which was to impose,

<sup>11</sup> On this term, see M.R. Lepsius, Max Weber und das Programm einer Institutionenpolitik, *Berliner Journal für Soziologie* 5 (1995), 327 ff.

<sup>12</sup> On this again Weberian term, cf., M.R. Lepsius, Die Europäische Union als Herrschaftsverband eigener Prägung, in: Ch. Joerges/Y. Mény/J.H.H. Weiler (eds.) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, Europäisches Hochschulinstitut, Florenz/Harvard Law School, 2000, 203 ff. (<http://www.iue.it/RSC/symposium/> and <http://www.jeanmonnetprogram.org/papers/papers00.html>).

<sup>13</sup> *Die Republik der Wirtschaft. Teil I: Von der Besatzungszeit bis zur Großen Koalition*, 1999, 5 ff.; cf. earlier K.W. Nörr, *Zwischen den Mühlsteinen. Eine Privatrechtsgeschichte der Weimarer*

without political inhibitions, an *ordo* intrinsic to economic life and, admittedly, in need of protection.<sup>14</sup> Even before the National Socialists' seizure of power, Hermann Heller criticised *ordo*-liberal liberalism as "authoritarian" variety.<sup>15</sup> This characterization was directed against the *ordo*-liberal critique of a concept and practice of pluralism where the clash of interests determines the content of national politics. The *ordo*-liberal quest for a strong authority over is not, however, to be equated with the "strong state" Carl Schmitt had, in one sense, identified and, in another sense, called for in his famous 1932,<sup>16</sup> which National Socialism soon went on to stage. Schmitt's strong state claimed the political primacy of politics over the economy – and, to the promoters of this idea, the quest for a rule-bound order of the economy was unacceptable.

It was this very core idea that lent *ordo*-liberalism significance in the formative stage first of the Federal Republic and then of the European Economic Community. Domestically, the economic constitution was set alongside the political constitution, so as to protect the market economy against discretionary political encroachments.<sup>17</sup> The *ordo*-liberal theory of economic governance at the same time answered the question of the legitimacy of European "governance": it conceived of the freedoms guaranteed in the EEC Treaty, of the opening of the national economies, the rules against discrimination and the commitments of competition policy, as a set of interdependent principles which established a market economy system based upon the rule of law.<sup>18</sup> And the very fact that Europe had been set in motion as a purely economic community lent the *ordo*-liberal argument plausibility: interpreting the economy related provisions of the Treaty as a coherent set of principles and rules guaranteeing economic freedoms embedded in an *ordo* of transnational and meta-positivist validity conferred on the Community a legitimacy of its own, independent of the institutions of the democratic constitutional state, from which imperative requirements on the *Gestalt* of this Community could, at the same time, be derived.

## 2.2 The disjunction between the "organised economy" and European technocracy

The *ordo*-liberal theory has a twofold factual and normative status. Its statements about the regulatory pattern of the economy refer to economic processes, institutional conceptions, and

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Republik, Tübingen 1988; idem, *Die Leiden des Privatrechts. Kartelle in Deutschland von der Holzstoffkartellentscheidung bis zum Gesetz gegen Wettbewerbsbeschränkungen*, Tübingen 1994.

<sup>14</sup> Cf. Ph. Manow, *Modell Deutschland as an interdenominational compromise*, Minda De Ginzburg Centre for European Studies. Working Paper, <https://www.cc.columbia.edu/sec/dlc/ciao/wps/man01> and more recently: *Ordoliberalismus als ökonomische Ordnungstheologie*, *Leviathan* 2001, 179 ff.

<sup>15</sup> H. Heller, *Autoritärer Liberalismus*, *Die Neue Rundschau* 44 (1933), 289 ff.

<sup>16</sup> *Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern* (A strong state and a healthy economy. A lecture before economic leaders, held on 23 November 1932), published, for example, in *Volk und Reich* 1933, 81 ff.

<sup>17</sup> As a representative example that indicates the tone, see F. Böhm, *Wirtschaftsordnung und Staatsverfassung*, Tübingen 1950.

<sup>18</sup> For a systematic and detailed account, see W. Mussler, *Die Wirtschaftsverfassung der Europäischen Gemeinschaft im Wandel. Von Rom nach Maastricht*, Baden-Baden 1998, 58 ff.

economic policy programmes; its promises of prosperity are meant empirically, but conditioned upon the actual establishment of the institutional framework that *ordo*-liberalism postulates. Such a construct can scarcely be embarrassed by practical experience; since political practice will always act according to its own logic and never perfectly comply with *ordo*-liberal quests, the theorist will always have reason to blame the political system and can never be falsified. Yet, the relationship between theory and practice is not quite so unambiguous. German politics is a case in point. It has continually displayed officious respect for the guiding ideas, conceptions and institutionalisations in the *ordo*-liberal sense; on the other hand, it has equally displayed complacency when continuing to practice the “organised economy” tradition.<sup>19</sup> Such political opportunism could point out that *ordo*-liberalism was by now the prevailing view in constitutional law and administrative law, which defended the freedom of the democratically accredited legislator to pursue the economic policies which seemed to fit majoritarian preferences best. Nörr accordingly calls the Bonn Republic’s “double path in economic policy and economic governance... a basic phenomenon in the history of [its] emergence”; and “for the economic system that was to characterise the new state, we have even to speak of two stage productions, two presentations of the same play, that took no notice of each other”.<sup>20</sup> The Federal Constitutional Court’s refusal to attribute to the Basic Law any legally-binding coverage of the economy<sup>21</sup> confirms most emphatically this according to Nörr.<sup>22</sup>

The institutionalisation of both patterns, of *ordo*-inspired economic law on the one hand, and discretionary economic policy on the other, cannot be reconciled theoretically; in practical terms, however, this “antithesis and contradiction”,<sup>23</sup> proved to be perfectly sustainable, as the successful economic history of the young Federal Republic .

But with the project for European integration, a new constellation arose. *Ordo*-liberalism could easily accept and even support the new supremacy claims of Community law, because its theory of an *economic* constitution sought specifically to withdraw the meta-positivist *ordo* of the economy from the clutches of the parliamentary majority, – at any rate if, and, so far as, Community law was understood to institutionalise a “system of undistorted constitution”. By contrast, the discrepancies between the principles of parliamentary democracy and the community’s not so legitimated powers constituted a problem for the “second tradition”: its commitment to parliamentary democracy seemed irreconcilable with supranational governance; this tension necessitated the search for an alternative legitimation for, and restriction of, European supremacy claims. An alternative was indeed found. And, as with *ordo*-liberalism, its origins reached back into the period of the Weimar Republic. Faced with technical development and scientification, which were even then perceived as being headlong, an overwhelmingly

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<sup>19</sup> Cf., for example, W. Abelshauser, *Die Langen Fünfziger Jahre. Wirtschaft und Gesellschaft in Deutschland 1949-1966*, Düsseldorf 1987, 21 ff.

<sup>20</sup> *Die Republik der Wirtschaft* (n. 9), 84.

<sup>21</sup> *Entscheidungen des Bundesverfassungsgerichts* Vol. 7, 377 (1958) – „Investitionshilfe“.

<sup>22</sup> *Ibid.*, 103ff.

<sup>23</sup> *Ibid.*, 84.

conservative cultural criticism arose in Germany,<sup>24</sup> while in the US and elsewhere the “technocrats” perceived and welcomed these new phenomena much more pragmatically and optimistically.<sup>25</sup> In the sixties, these early debates and ideas went through a renaissance. The most prominent position was articulated in German constitutional law by Ernst Forsthoff in his *Der Staat der Industriegesellschaft* (The State of industrial society), where he diagnosed factually powerful governance structures which had *de facto* substituted the type of governance formally established by the constitution but were “existentially” [*existentiell*] inferior to the real existing order.<sup>26</sup> Alongside the long established sphere of *Daseinsvorsorge* and *soziale Realisation* (“social realisation”; the guaranteeing of elementary social welfare requirements), a term which Forsthoff had taken over from Karl Jaspers in 1938, equally important constraints of a *technische Realisation* (“technical realisation”) came to bear, which as an accompanying essay explained, compelled free State public to identify itself partially with technology and to subject social life to the necessities inherent in the technical process.<sup>27</sup> In this sphere “technical knowledge” prevails and is administered by an “inner circle”, which is to take the “technically correct decisions”.<sup>28</sup> Similarly, Helmut Schelsky stated: “political norms and laws are accompanied by the technical necessities of scientific and technical civilization... which cannot be taken as political decisions, nor seen as ideological or philosophical norms”.<sup>29</sup>

The so-called technocracy debate, the context for these statements, paid very little attention to the European Community. But it nevertheless nurtured public awareness for the emergence of technocratic governance – and grounds for its justification.<sup>30</sup> In Hans Peter Ipsen’s theory of the European Communities as *Zweckverbände funktioneller Integration* (“special purpose associations of functional integration”) it found a version that procured institutional anchorage for technocratic rationality in the EEC, the sphere of whose application was, however, to be confined to “questions of knowledge”, with genuinely “political” questions to be left to

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<sup>24</sup> Cf. N. Stehr, *Arbeit, Eigentum und Wissen. Zur Theorie von Wissensgesellschaften*, Frankfurt a.M. 1994, 278 ff.; J.P. McCormick, *Carl Schmitt’s Critique of Liberalism. Against Politics as Technology*, Cambridge, MA 1997, 31 ff, 83 ff.

<sup>25</sup> C. Radaelli, *Technocracy in the EU*, Essex/New York 1999, 23 ff.

<sup>26</sup> E. Forsthoff, *Der Staat der Industriegesellschaft. Dargestellt am Beispiel der Bundesrepublik Deutschland*, 2. unveränderte Auflage 1971; cf. the interpretation of V. Neumann, *Der harte Weg zum sanften Ziel. Ernst Forsthoffs Rechts- und Staatstheorie als Paradigma konservativer Technikkritik*, in A. Roßnagel (ed.), *Recht und Technik im Spannungsfeld der Kernenergiekontroverse*, 1984, 88 ff.

<sup>27</sup> *Technischer Prozess und politische Ordnung*, *Studium Generale* 22 (1969), 849 ff., 852.

<sup>28</sup> *Der Staat der Industriegesellschaft*, n. 21, 84.

<sup>29</sup> *Der Mensch in der wissenschaftlichen Zivilisation* (1961) in idem, *Auf der Suche nach Wirklichkeit*, Düsseldorf 1965, 442 ff., 453; cf. I. Maus, *Bürgerliche Rechtstheorie und Faschismus. Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitts*, München 1976, 23 ff.; N. Stehr, n. 19, 422 ff.

<sup>30</sup> Cf. M. Kaufmann, *Europäische Integration und Demokratieprinzip*, Baden-Baden 1997, 300 ff.; cf. M. Bach, *Die Bürokratisierung Europas. Verwaltungseliten, Experten und politische Legitimation in Europa*, Opladen 1999, 46 ff.



democratically legitimated decision-makers.<sup>31</sup> In his purpose association theory, Ipsen rejected both further reaching notions of federal integration and the early interpretations of the Community as a mere international organisation. For him, Community law was a *tertium* between (federal) national law and international law, constituted through its “technical tasks” and adequately legitimated by problem-solving potential.

### 2.3 The “hour of the executive”

It is not just for the sake of completeness that a third alternative, although, admittedly, fundamentally discredited, should be recalled. It, too, comes out of the laboratory of Weimar. In systematic terms, it was a critique of both the institutionalisation of economic rationality as contemplated by *ordo*-liberalism and of the institutionalisation of technocratic rationality, which the American technocrats and their (few) allies in Germany had advocated. Spearheading this twofold critique was Carl Schmitt. A “healthy economy” he had proclaimed in a famous speech in 1932<sup>32</sup> required a “strong state”. This strong state was not the *ordo*-liberal state committed to notions of an economic order. Carl Schmitt insisted on the primacy of politics over a subordinate, “self-administering” economy – shortly afterwards, he was to call this the *Führerverfassung*. He combined his advocacy of the “strong state” in which politics would assert its priority over the economy with a polemic against all technocratic promises and endeavours to resolve “all questions by technical and economic reason, in accordance with allegedly purely objective, purely technical and purely economic viewpoints”.<sup>33</sup>

Both alternatives, against which Schmitt directed his critique, are concerned with exempting specific dimensions or domains of the polity from the reign of majoritarian parliamentary governance, be it because of its inherently technical character, or be it because of the perceived permeability of political processes by well-organised interests. What is left when, like Carl Schmitt, one rejects both alternatives and, at the same time, requires the possibility of the return to politics legitimated in parliamentary terms to be illusory? In a comparative law study in 1936, Schmitt examined this question in some depth.<sup>34</sup> His answer: “legislative delegations” enabling “simplified” decision-making procedures had imposed themselves everywhere; the “sharp contrast between legislature and executive” was outdated, and all attempts to limit

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<sup>31</sup> Cf. H.P. Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen 1972, 1045; Ipsen always kept to these distinctions: cf. *Zur Exekutiv-Rechtsetzung in der EG*, in P. Badura/R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens. Festschrift für Peter Lerche*, München 1993, 425 ff.

<sup>32</sup> N. 15.

<sup>33</sup> *Ibid.*, 73.

<sup>34</sup> C. Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6 (1936), 252 ff.

<sup>30</sup> *Idem*, at 266 (emphasis in the original).

delegation in an adequately defined fashion were condemned to failure; the hour for a “suspension of the separation between legislature and executive” had come.<sup>35</sup>

### 3 “Good Governance” according to the Commission White Paper

We cannot derive any ready-made answers to new problem situations from historical retrospectives. But through them we can understand which problems they were originally meant to respond to, learn something about their later impact, and ascertain whether we are really operating with new concepts, merely rewriting old answers, or making up for past omissions. In general, all of these are true simultaneously – and this is the case for the White Paper, too. The following observations on the *White Paper on ‘European Governance’* will concentrate almost exclusively upon the institutionalisation of regulatory policy in the internal market. This is not the White Paper’s only theme, but an extraordinarily important one. It is a theme that has been of central importance since the EEC’s foundation, and dominates the everyday business of integration policy. The governance White Paper really does open up new horizons for this policy. But it also moves along old pathways, and up old blind alleys.<sup>36</sup>

#### 3.1 Governance as key concept

The term governance that the White Paper uses, as the key concept for the next phase of integration policy, is undoubtedly a fashionable word with glittering connotations. But the term is not shapeless,<sup>37</sup> and is, in fact, suited to marking integration policy developments and problem situations. The adoption of the governance concept by the White Paper takes account of the experiences and learning processes during and after the ‘completion’ of the internal market, particularly, the irrefutable insight that the internal market programme required pro-active co-operation in increasingly wide areas, that the dynamics of market integration necessitated the

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<sup>35</sup> Ibid., at 266 (emphasis in the original).

<sup>36</sup> It should be emphasized once more (cf. note 1 supra) that this analysis deals only with the final text of the White Paper. It neither refers to the many documents produced during its preparation nor to the concluding reports of the 12 Working Groups. This is not just out of convenience. The apparent readiness to strive for new perspectives, which was apparent in the whole presentation of the White Paper project and throughout its elaboration, is still clearly visible in these reports. But the text finally adopted came as a surprise to those who followed the working process, and certainly also to those who had undertaken major research efforts. Comitology is a case in point; cf. European Institute for Public Administration, Committees in the EU system, [http://eipa-nl.com/public/public\\_publications/current-books/WorkingPapers/ResearchPapers/chap\\_5.pdf](http://eipa-nl.com/public/public_publications/current-books/WorkingPapers/ResearchPapers/chap_5.pdf).

<sup>37</sup> Ph. Steinberg, Governance-Modelle in der Politikwissenschaft und Möglichkeiten Ihrer verfassungsrechtlichen Umsetzung, WHI Working Paper 6/99 – [www.rewi.hu-berlin.de/WHI/](http://www.rewi.hu-berlin.de/WHI/). – The political science literature is by now enormous; for a particularly illuminating analysis of the origins of the term, cf. Ph.C. Schmitter, What is there to legitimise in the European Union... and how might this be accomplished?, Institut für Höhere Studien (IHS), Reihe Politikwissenschaft, Heft 75, Wien 2001, accessible also at <http://www.iue.it/RSC/Governance/> and <http://www.jeanmonnetprogram.org/papers/01/010601.html>.

management not only of the complex economic implications but, increasingly, also of the social dimensions of European market-building. The governance concept refers to both activities *and* actor configurations. ‘Governance’ is to be equated neither with the actions of governments and administrations, nor with law-making activities, nor the law implementing activities of authorities and courts. It is all this ‘too’. But it is a specific feature of modern regulatory policy that it builds, to a large degree, on knowledge available not within the administrative machinery but in society, that it is likewise dependent upon the management capacities of enterprises and non-governmental organisations. Regulatory policy can neither be reduced to the execution of the will of the sovereign by that sovereign’s administrative bodies, nor can it be delegated *ab ovo* and *in toto* to non-governmental actors. The complexity of modern governance structures is a response to problem situations of society and of the political systems.

So far so good. Jérôme Vignon<sup>38</sup> is, moreover, right to bring these developments into connection with the characteristics of knowledge in the ‘knowledge society’. This knowledge can, indeed, no longer be understood as ‘given’ and accessible by the mechanisms of elected representation or by the concentration of specialist expertise; it is more adequately characterised as being ‘constructed’ and renewed in a process of collective learning that draws support from social pluralism’. Does Vignon also wish to suggest that the changes in the knowledge of the ‘knowledge society’ and the associated reorganisation of decision-making processes do not indicate challenges but are already accomplishing a ‘profound mutation of democracy in the nations of Europe and elsewhere’?<sup>39</sup> This sort of equivocation is certainly not intended, and would be refuted by the proceedings and reports of the ‘democratising expertise’ working group.<sup>40</sup> Everywhere, regulatory policy is dependent upon expert knowledge. But this knowledge is always fragmentary and frequently controversial. Experts must themselves pursue practical and normative discourses, and cannot supply the bodies dependent on their advice with objective truths. The organisation of regulatory policy has to take account of the fact that the political and administrative systems do not have the knowledge and control resources that need to be mobilised to solve the problems. Even within the nation states, as Wolfgang Schluchter observed as long ago as 1972,<sup>41</sup> the administration has to admit that its ‘official authority’ is dependent on ‘technical authority’ which they cannot derive from its confidence to implement norms. Accordingly, official and technical authorities must engage in new linkages; governance structures in which both private actors and ‘civil society’ participate in the ‘carrying out of public tasks’ have to emerge. ‘Governance’, instead of government and administration: this is the outcome – but also the problem.

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<sup>38</sup> Governance and Collective Adventure, in O. De Schutter/N. Lebessis/J. Paterson, (eds.), Governance in the European Union, (Office for Official Publications, Luxembourg, 2001), 3.

<sup>39</sup> Ibid.

<sup>40</sup> Report of the Working Group “Democratising Expertise” (Group 1 b), accessible at [http://europa.eu.int/comm/governance/index\\_en.htm](http://europa.eu.int/comm/governance/index_en.htm).

<sup>41</sup> W. Schluchter, Aspekte bürokratischer Herrschaft: Studien zur Interpretation der fortschreitenden Industriegesellschaft (1972; reprint Frankfurt, 1985), 145-176.

### 3.2 Executive agencies?

The result and the problem have specifically European dimensions with which the White Paper deals, and a history which, in so doing, it continues and rewrites. German *ordo*-liberalism and its vision of ordered freedom has left little traces in the Governance White Paper.<sup>42</sup> By contrast, the tradition of the organised economy and of functionalism seem to operate all the stronger – though, admittedly, even this is true only in a foreground sense.

Ipsen, the founding father of technocratic governance through the European (at the time: Economic) Community, had assigned the Community with tasks which he understood to be merely technical, and whose solution required “knowledge” while not being dependent on political preferences – he conceived, so to speak, of the Commission as a whole as an “executive agency”. Ipsen’s assignment of “technical tasks” to the European bureaucracy is *not* identical with the institutional programme that, according to Majone, has to accompany the development of the internal market.<sup>43</sup> Ipsen conceived of his “purposive associations of functional integration” [*Zweckverbände funktioneller Integration*] decades earlier than Majone did in his conceptualisation of the European Community as a “regulatory state”. The internal market policy, the interplay of de-regulation and re-regulation, that Majone analyses did not exist then – nor did the analytical tools of social choice theories that Majone uses. Certainly, both authors deal with tasks for which expert knowledge is indispensable, and both share the view that technically correct performance of the tasks requires the European institutions to be walled off from political influences. But Majone’s regulatory state stands upon foundations which are more Anglo-Saxon than German: Majone’s model is a “fourth branch of government”, in which independent agencies are supervised by a judiciary which examines the transparency and fairness of the decision-making procedure and the compliance with the agency’s legislative mandate, and not the substantive accuracy of decisions based on expert knowledge.<sup>44</sup> Majone seeks to adapt this model to the EU context. Here, the non-majority institutions of Europe and the majority institutions of the Member States are to complement each other. The EU is primarily to look after regulatory policy, whereas the welfare state, and distributional questions are to be decided at national level since it is only there that they can be legitimated through democratic majorities.

The institutional programme sketched out in the White Paper fits these ideas terminologically in many respects. The Commission opts for new EU agencies entrusted with autonomous powers on the basis of a clearly defined mandate. Agency autonomy remains restricted to individual decisions which neither involve “political discretion” nor “complex

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<sup>42</sup> None other than competition policy is to remain in the Commission’s domain: “Agencies cannot be given responsibilities for which the Treaty has conferred a direct power of decision on the Commission (for example, in the area of competition policy)” (p. 31/24?). This statement fits the Commission’s concentration on itself that stamps the White Paper as a whole, but does not fit the institutional ideals of *ordo*-liberalism.

<sup>43</sup> G. Majone, *Regulating Europe*, London-New York 1996, 284-300

<sup>44</sup> G. Majone, *The European Community. An “Independent Fourth Branch of Government?”*, in G. Brügemeier, (ed.), *Verfassungen für ein ziviles Europa*, Baden-Baden 1994, 23 ff.

economic assessments” (p 24).<sup>45</sup> Such powers remain the province of the Commission, which, thanks to the new agencies, will be able to focus more on its “core tasks”. “Executive agencies” is the name given to the new entities, elaborated in detail in the draft Directive of 24 April 2001.<sup>46</sup> The term signals what the text substantiates in great detail. The Commission perceives itself at the top of the “administration” of the internal market, as though it were carrying out the will of a European sovereign, as if, to put it in the plastic language of American administrative law, it were acting as a mere “transmission belt”<sup>47</sup> in a “unitary polity”. In this administrative apparatus, the executive agency is but a sort of assistant to the Commission;<sup>48</sup> despite their administrative autonomy, executive agencies are subject to strict control by the Commission, which, on the one hand, appoints the director and the members of the steering committee for the agency, and, on the other, lays down the content of the work programme.

The practice of the existing agencies system is more complex, unsatisfactory for anyone concerned about the fit between legal categories and regulatory functions to be performed, but, nevertheless, probably better.<sup>49</sup> So far, the agencies fit neither the American models nor Majone’s concepts – they have neither “regulatory” powers in the legal sense, nor do they let themselves be treated by the Commission as mere assistant institutions.<sup>50</sup> The agency system, as practiced so far, is, in legal structure, close to the committee system; *de facto*, agencies are more clearly visible, better accessible and, in the “execution” of their mandate, more autonomous than the comitology committees. The “European food authority”,<sup>51</sup> definitively set in motion in Nice, will certainly not fit the executive agency model. The new authority, says Recital 40 of the amended Commission

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<sup>45</sup> These are the formula used in the age old Meroni judgments, Case 9/56, Meroni & Co. Industrie Metallurgiche S.p.A. v High Authority of the ECSC [1958] ECR 133, Case 10/56, Meroni & Co. Industrie Metallurgiche S.p.A. v. High Authority of the ECSC [1958] ECR 157. It is amazing and illuminating how strongly this doctrine survives the erosion of its premises. Especially, the distinction between expert knowledge on the one hand and political discretion on the other, on which it is based and on which it institutionalised is much too simplistic in all fields of regulation. Cf. more systematically, Harm Schepel and Ellen Vos, ‘Delegation’ and the European Polity: The Law’s Problems with the Role of Standardisation Organisations in European Legislation, in: Joseph H.H. Weiler/Margareta Wind (eds.), When High Courts Clash: National Resistance to European Supremacy – Rethinking European Constitutionalism, Cambridge: Cambridge University Press (forthcoming 2000; available as EUI Working Paper in Law 9/99 and at [http://www.iue.it/PUB/law\\_fm.html/pdf-file](http://www.iue.it/PUB/law_fm.html/pdf-file)).

<sup>46</sup> COM(2000) 788, OJ C 120, 140-145.

<sup>47</sup> R. Stewart, The Reformation of American Administrative Law, Harv. L. Rev. 88 (1975), 1671ff., 1674 ff.

<sup>48</sup> Section 3.19 of the explanatory memorandum: “an instrument assisting the Commission in discharging its management missions”.

<sup>49</sup> For an up to date survey, see G. Majone/M. Everson, Institutional reform: independent agencies, oversight, co-ordination and procedural control, in O. De Schutter *et al.* (eds.), n. 32 *supra*, 129 ff.-168; E. Vos, Reforming the European Commission, n. 41 *supra*.

<sup>50</sup> COM(2001) 475; the Commission’s announcements are promising: “Today, the DG Health and Consumer Protection website publishes new pages on the European Food Authority providing an overview of the ongoing legislative process for establishing the Authority, an update on its future mission and the scope of its activities, tasks and organisational matters, as well as information on the ongoing work of the Interim Scientific Advisory Forum”, see [http://europa.eu.int/comm/food/fs/efa/index\\_en.html](http://europa.eu.int/comm/food/fs/efa/index_en.html).

<sup>51</sup> COM(2001) 475 final.

proposal, is to secure the “trust of the community organs, the public and sectors affected”. Were it to become an executive agency under strict Commission control, it could hardly achieve this objective.<sup>52</sup> It will be instructive to observe the further development of this institution, first in the Official Journal and then in practice.

### 3.3 Critique of comitology

It is not the new agencies but the long established committee system that is practically the most significant institutionalisation of the internal market. Committees not only have the so-called “implementation” of community law framework regulations in their hands (“comitology”), but also act more comprehensively as venues for political processes and as co-ordinating bodies between supranational and national, governmental and social actors. And both, agencies and committees, are embedded in, and supervised by, semi-official and private policy networks.<sup>53</sup>

Functional and formal differences between agencies and committees are important, but, in a sense, different from what the legal language suggests. The European agencies do not decide autonomously on market access by enterprises or the licensing of their products; instead, they collect information, and inform policy – they act as technocratic supplier firms to policy. Their semi-official status obviously opens them up to private/social interests and strengthens a technocratic, apolitical, autonomy-oriented self-perception. Neither their allocation to Commission departments nor their representation of national actors on the agency bodies seems to have changed anything here.

By contrast, the committees are supposed to act as principals and agents for not just the implementation of technocratic requirements but also the political and normative aspects of the completion and administration of the internal market. They often appear as “mini councils”, venues where the logic of market integration has to be made compatible with social regulatory concerns and interests in the Member States. Less visible, but no less important than the split between agencies and committees, are the differences in the nature and intensity with which European institutions interact with the public, secure professional expertise and explore the interest definitions of private actors. This no longer has much in common with the way that traditional bureaucracies have defined their relationship with the public. It is particularly these agencies that have no formal decision-making powers (and accordingly look so weak legally) that prove to be highly active organisers of Europe-wide opinion-forming processes.

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<sup>52</sup> Cf. the analysis by Buonanno/Maloney/Keefer, *Politics versus Science in the Making of a New Regulatory Regime in Europe*, *European Integration online Papers (EIoP)*, Vol. 5 (2001) N° 12, <http://eiop.or.at/eiop/texte/2001-012a.htm>.

<sup>53</sup> See Ch. Joerges/J.Falke (eds.), *Das Ausschußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, Baden-Baden 2000; Ch. Joerges/E. Vos (eds.), *EU Committees. Social Regulation. Law and Politics*, Oxford 1999.

Agencies, committees, public and private networks – they are all institutional products not planned “like that”, that, nonetheless, prove “essential”. They represent what Joseph Weiler has branded the “underworld” of the internal market.<sup>54</sup> And the White Paper, too, takes its distance from these hybrids: what is to be aimed at is a simple legislative procedure where Parliament and Council act as legislature, and the Commission is entrusted with “implementing” Community law. Accordingly, “the need to maintain existing committees, notably regulatory and management committees, will be put into question. [...] a review of existing committees would/will have been undertaken and their continued existence assessed. This assessment should take account of the need for expert advice for the implementation of EU policies” (p 31). Quite. Those advocating executive agencies under the *aegis* of the Commission cannot tolerate comitology. The White Paper is consistent in this respect.<sup>55</sup> But is it also reasonable?

#### 4      **Objections**

Back to the beginning. The legitimacy of transnational governance powers deriving neither from national constitutional law nor from some *a priori* super ordinate polity is, as asserted at the outset, the core and enduring problem of European law. The integration concepts of *ordo*-liberalism and functionalism as developed in the German tradition, so the second argument went, identified this primordial problem properly. The rationality criteria they wanted to institutionalise at European level are, however, not (at any rate: not any longer) adequate. Accordingly, the White Paper’s demand to advance from legal and economic rationality to European governance is, in principle, justified.

But what about the legitimacy of the type of governance outlined in the White Paper? The proposals on regulatory policy, on which these comments were focused, insinuate a type of transnational polity that does not exist. They presuppose that Europe be hierarchically ordered, have a common sovereign whose will a transnational administration is empowered to implement. Undoubtedly, this description contains nothing of what the White Paper says about participation, communication, the role of civil society and the “five principles of good governance”. From a systematic viewpoint, these principles have a fundamental role. They are supposed to domesticate the “regulatory surplus” that traditional conceptualisation of transnational governance was unable to cope with; they are to do so by supplementing the “double democratic mandate” on which European governance rests by a third one. This alternative, it is submitted, is inconclusive. If

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<sup>54</sup> In an interview in DIE ZEIT, no. 44, 22 October 1998.

<sup>55</sup> It is, in fact, surprising that the so-called open co-ordination method is presented in such friendly terms in the White Paper (p. 28 f). This method is a response to the “multi-level nature of the migration phenomenon, multiplicity of places involved and the responsibility of Member States for the transposition of Community policy”, as number 9 of the explanations in the Commission communication on the “open co-ordination mechanism for Community migration policy” [Com (2001) 387] confirms. This is persuasive, but does not change the fact that the open co-ordination method in no way fits the “communicative method” which the White Paper (p. 10ff) wishes to strengthen.

account is taken of the questions that European legislation is already leaving up to the implementation process, and of the fact that the White Paper advocates further slimming down of legislative frameworks (p 24ff), then it becomes clear, first of all, that the topics that the Commission and its executive agencies will have to address are extremely important economically, and highly sensitive politically. What entitles actors from civil society and the expert communities referred to in the White Paper to assume such a far-reaching mandate? Nowhere are questions of interest-representation discussed systematically. Are the actors simply to appoint themselves? Is the Commission to monitor these appointments? Delegation of law-making powers is a necessity, which all constitutional states have had to face. The responses within constitutional states vary and may often be unconvincing.<sup>56</sup> Community law cannot simply imitate national models. But, it must look for functional equivalents.

All this compels us to recall the committee system despised by the White Paper. The, up to now, seemingly irresistible rise of the committee system has factual as well as normative reasons. In comparison with regulatory agencies that follow the American pattern or the type of executive agencies that the White Paper advocates, comitology has the enormous advantage that it structures regulatory policy pluralistically even in its “implementing stage”. This type of implementation remains sensitive towards social and cultural differences in the “internal market”. It ensures that national bureaucracies are confronted with the concerns, experiences and positions of their neighbouring states. It constrains the decision-making discretion that the White Paper wishes to allot to the Commission; it does not completely rule out diversity in regulatory policy, and it ensures that new events and insights can lead to its revision. All the same, *rebus sic stantibus*, the committee system has weaknesses that seem to mirror those in the White Paper’s programme: while the White Paper invites the whole world to participate but does not indicate who will really be allowed access, the access routes to the comitology networks seem far too narrow from the outset. It is still, however, conceivable that, in the decentralised communicative contexts to which the comitology actors are committed, the still primarily nationally organised publics can bring in their interests, concerns and arguments, and that these publics can take note of these and the comitology contribute to interweaving them. Instead of complaining of this plurality, one should ask what opportunities might lie in the coming together of plural publics – and how these opportunities can be institutionally stabilised so as to establish “transnational deliberative fora” which would become the basis of legitimate transnational governance, a normative construct

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<sup>56</sup> Cf. the contributions by G. Haibach, E. Picard, A. Tomkins, A. Türk in M. Andenas/A. Türk (eds.), *Delegated Legislation and the Role of Committees in the EU*, (Den Haag-London-Boston 2000), 53 ff. On the example of Article 80 of the Basic Law and the historical basis of that provision, cf. Ch. Möllers, *Das parlamentarische Gesetz als demokratische Entscheidungsform — Ein Beitrag zur Institutionenwahrnehmung in der Weimarer Republik*, in Ch. Gusy (ed.), *Demokratisches Denken in der Weimarer Republik*, (Baden-Baden 2000), 415 ff.



with which all levels of governance – the nation-state, the EU, WTO – can, and should, be confronted, but to which the EU comes closest.<sup>57</sup>

In an analysis of comitology in the foodstuffs sector,<sup>58</sup> Jürgen Neyer and I have used the term “deliberative supranationalism” – not “deliberative democracy” – for a twofold process: on the one hand, for the “restraints” imposed upon the “internal” decision-making processes in constitutional states resulting from the guarantee of European rights, from commitments to take account of “foreign” interests, and from the binding of these nation states by transnational principles and duties to justify their policies. We have called this supranationalism “deliberative” because it bases its validity claims not simply on a hierarchy of sources of law but from constitutional ties of politics.<sup>59</sup> The second dimension of this deliberative supranationalism is an unavoidable consequence of the interdependency arising from the effects just mentioned. We have argued that governance in such polities cannot claim the same type of democratic mandate as constitutional states; it will, instead, have to invoke the quality of its opinion-forming and decision-making; and it will have to respect irresolvable differences.<sup>60</sup> In this context and in this sense, I have also repeatedly talked of “good governance”,<sup>61</sup> particularly, because the term “Verwaltung” (administration) does not contain that (inter-) governative element that is essential to the management of the internal market, because the formula of “good” governance at least expresses a normative claim intended to raise governance in the internal market above mere strategic negotiation – though, admittedly, without claiming to decipher the metaphor of good governance conclusively, and/or Ambrogio Lorenzetti’s famous picture.

Is this conclusion all to gloomy? Those Prussian reformers who, with the help of administrative reforms, wished to meet the demands for a genuine constitution and/or prove it superfluous, were unable to tranquillize their contemporaries, and, instead, paved the way to the revolution of 1848. Prussia’s reformers did not have that on their banners, yet it was a good thing for Germany, as we know today.

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<sup>57</sup> Ch. Joerges, Law, Science and the Management of Risks to Health at the National, European and International Level: Stories on Baby Dummies, Mad Cows and Hormones in Beef’, (2001) 7 Columbia Journal of European Law, 1 ff., at 16 f. See, also, the sociological studies by Eder, Herrschaftskritik und die Suche nach ihrem Träger. Zu einigen Vermutungen über den europäischen Demos. Oder: Wie ist eine heterodoxer sozialwissenschaftlicher Diskurs möglich?, Typescript Berlin 1999.; Eder, Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issuespezifischen Kommunikationsgemeinschaft’, (2000) Berliner Journal für Soziologie, 167 ff. and on the broader constitutional context recently J. Habermas, So, why does Europe need a constitution, [http://www.iue.it/RSC/EU/Reform02\(uk\).pdf](http://www.iue.it/RSC/EU/Reform02(uk).pdf).

<sup>58</sup> Ch. Joerges/J. Neyer, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, European Law Journal 3 (1997), 273 ff.

<sup>59</sup> Cf., for an elaboration, Das Recht im Prozeß der Konstitutionalisierung Europas, EUI Working papers Law No. 6/2001, 46 ff.

<sup>60</sup> Cf., also, Ch. Joerges/I.-J. Sand, Constitutionalism and Transnational Governance, n. 35 supra.

<sup>61</sup> N. 45 supra.