_____

Christian Joerges, Yves Mény, J. H. H. Weiler (eds)

Jean Monnet Working Paper No. 6/01

Mountain or Molehill ?:
A Critical Appraisal of the Commission White Paper on Governance

With contributions by

F. W. Scharpf • M. Telò • P. Magnette • N. Walker • C. Möllers • E. O. Eriksen
A. Héritier • P. Schmitter • D. Trubek / J. Mosher • K. A. Armstrong • C. Joerges • D. Curtin
J. Shaw • P. Steinberg • B. Kohler-Koch • M. Wind • N. MacCormick • J. H. H. Weiler

Inge Burgess, Chris Engert
(assoc. eds)

_____

Editors
Christian Joerges
Yves Mény
J. H. H. Weiler
Assoc. eds.
Inge Burgess, Chris Engert

Mountain or Molehill?
A critical appraisal of the Commission White Paper on Governance

AGENCIES, CO-REGULATION AND COMITOLOGY - AND WHAT ABOUT POLITICS?
A critical appraisal of the Commission's White Paper on Governance

Philipp Steinberg[*]

1. The need to politicise the Community Method

A member of the European Parliament is reported to have said on the occasion of the presentation of the Commission's White Paper on Governance,[1] that, given the result, he regretted that trees had had to die to produce it. This seems to go too far. The White Paper has initiated a necessary process of discussion. If one has to assess the quality of the White Paper, it is natural, however, that, rather than to stress the positive aspects of the outcome, the problematic or negative points are highlighted. Consequently, the following analysis will put emphasis on the "critical" aspects, but nonetheless tries to present a constructive and coherent analysis that might serve as a starting point for further reflections upon the subject.

Even at first glance, the White Paper presents itself as an exceedingly technocratic piece of work written for an expert of Community law and organisation, but not for the Union citizen. The very technical language in itself is enough to deter the ordinary reader. Yet, it is, indeed, a technocratic achievement which presents an elaborate analysis of the present situation and working of the community. It does not, however, devote any space to developing concepts to overcome the widely recognised legitimacy problems of the Union. A possible way to alleviate this legitimacy crisis and indeed create a real European discourse could lie in the politicisation of the Union. This would lead, even within the present framework of the treaties, to a better involvement of the Union-Citizens, who are, as the White Paper rightly points out, at the centre of the European project. The central thesis of this paper is, therefore, the allegation that the White Paper does not recognise the need to politicise the Union. The lack of politicisation is at least as important for the analysis of the Union's problems as the widely bemoaned "democratic deficit".

In order to develop this argument, the way civil society is portrayed in the White Paper is analysed first (II). Then, the paper will highlight the omission of political parties as a part of civil society (III). It will go on to propose a new discourse-oriented approach to the Community Method, examining some of the White Paper's propositions in the light of their contribution to this aim (IV). This will be presented as a central precondition for multi-level constitutionalism, a model able to offer a good analytical tool to conceptualise the Union and its Member States (V).

---

[1] Com (2001) 428 final.

2. Governance through civil society?

Governance is a term that is difficult to translate into German. But it is not only a language problem that renders understanding difficult. In other languages, too, there is considerable disagreement about the way how to interpret the fashionable catchphrase of governance.[2] However, there seems to be agreement that civil society has to be involved more deeply in the process of decision-taking, at least in the form of consultations. This is the approach of the Commission, too. The integration and involvement of civil society is at the core of the White Paper (p.19). Upon closer examination, however, one realises that, in spite of the affirmations to fulfil the aspirations of the "Citizens" and "Europeans" (p.9), to link Europe better with the Citizens (p.3), to ask the question of how the Community uses the competencies derived from the European citizens (p.10), the concrete propositions yet again concern only the involvement of organised interest groups. Churches and religious communities, non-governmental organisations, trade unions and employer's organisations are explicitly mentioned (p.19). For the rest, a statement defining civil society by the Economic and Social Council[3] is referred to - probably because of the conceptual difficulties of developing a concept of how to govern with the entire civil society. Confronted with this approach, one cannot ignore the danger that only the educated, active, and conscious are included in this concept of governance - the élite, those already now participating as organised, financially and conceptually powerful lobbying groups.[4] This expresses a criticism often levelled at the governance concept: in spite of the alleged dynamics of the theory, in reality, the status quo would be theoretically legitimised and perpetuated. Hidden problems are not put on the agenda – not only are the underprivileged and uneducated not heard, they are left out.[5] Because of this and because of the growing individualisation and dominance of economic criteria taken as the only reference point in society, the German political scientist *Franz Walter* calls the ",,ambitious promise of a Citizens' society a beautiful fairy tale" which is not able to meet the expectations that it has created in today's hedonistic society.[6]

On the other hand, the Commission does not believe in "governance without government",[7] to take up the popular formula created by *James Rosenau*. She envisages only *consulting* the actors of

---

[2] An attempt to categorise the different approaches was carried out earlier on, cf., Philipp Steinberg, Governance-Modelle in der Politikwissenschaft und Möglichkeiten ihrer verfassungsrechtlichen Umsetzung, WHI-Paper 6/99, http://www.rewi.hu-berlin.de/WHI/deutsch/papers/whipapers699/index.htm. For an analysis of political science concepts and concepts influenced by the Theory of International Relations, see Barbara Holland-Cunz, Perspektiven der Verhandlungsdemokratie – Governance-Prozesse aus frauenpolitischer Sicht, in: Leggewie/Münch, Politik im 21. Jahrhundert, 2001, 281 (283 ff.). For a French interpretation, see Marie Claude-Smouts, Du bon usage de la gouvernance en relations internationales, (1998) RISS 155, 84; see Anthony Arnull, What is governance?, (2001) ELR 26, 411 for the attempt at a British answer.

[3] JO C 329, 17. 11. 1999.

[4] Beate Kohler-Koch, Organized Interests in European Integration; The Evolution of a New Type of Governance? in H. Wallace et A. R. Young, Participation und Policy-.Making in the European Union, 1997, 42; Hans Joas, Ungleichheit in der Bürgergesellschaft, Aus Politik und Zeitgeschichte June 2001, 15. Also see, however, James N. Rosenau, Changing Capacities of Citizenship, 1945 – 1995, in: Issues in Global Governance, 1995, 1; Skadi Krause/Herfried Münkler, Der aktive Bürger – Eine Gestalt der politischen Theorie im Wandel, in: Leggewie/Münch (op. cit. note 2), 299 propose a differentiated approach.

[5] Renate Mayntz, Politische Steuerung: Aufstieg, Niedergang und Transformation einer Theorie, in: Mayntz/Scharpf, Soziale Dynamik und politische Steuerung, 1995, 263 (at 272); see, for the regime-theory, Susan Strange, Cave! hic dragones; a critique of regime analysis, in: Stephen Krasner, International Regimes, 1983, S. 337 (338).

[6] Franz Walter, Die Bürgergesellschaft – eine süße Utopie, Berliner Republik 4/2001, 44 (at 47).

[7] James N. Rosenau; Ernst-Otto Czempiel, Governance without government?, 1992.

civil society; only in the very narrowly defined area of co-regulation is she prepared to delegate regulatory competencies to the actors of civil society. In her opinion, it remains the Commission's task and privilege to decide what to do with the opinions given by civil society. But how is Civil Society conceptualised?

3. The lack of political parties as actors of civil society

As pointed out, the Commission tries to govern together with *organised* civil society in the form of interest groups. One is tempted to ask if this lives up to the self-imposed concept of involving the individual citizen? On the other hand, what are the alternatives? It seems hardly possible to involve 300 million Europeans. Thus, concentration of interests with the help of collective entities is certainly necessary. However, if one is ready to accept this, and one further conceptualises the EU concept of the "state" as an organisation to provide the framework for the democratic self-steering of an emerging European society legitimised by the (European) citizen[8] - which is rightly suggested in the White Paper (p.10)[9] - an important omission strikes the critical reader. Throughout the whole White Paper, political (European) parties are not even mentioned once.

This is comprehensible if one constructs the citizens- or civil society as a structural replacement of traditional governing structures *including* political parties. Indeed, this seems to be the intention of some of the governance theories. The legitimacy crises of political parties throughout Europe might add to it.[10] Another possible approach to understanding this omission would be to share the eminent German public law Professor *Leibholz's* concept of political parties as not belonging to civil society, but to the "Parteienstaat", and thus to the public sphere.[11] However, even in this case, (European) political parties should have been mentioned in some form by the White Paper, at least as part of the public sphere/community. Even if one, correctly in my view, considers the rigid differentiation between "state" and "society" as outdated,[12] political parties should have been mentioned as an association of individuals who would then be representatives of a public order permeating all aspects of life.

By not integrating (European) political parties, the White Paper jeopardises the possibility of addressing the legitimacy problem of the Union. One way to do this would be to foster politicisation of the Union.13 Political parties could do a great deal to help this happen.

---

[8] Ingolf Pernice, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), 149 (at 164); Ibid., Kompetenzabgrenzung im Europäischen Verfassungsverbund, JZ (2000), 866 (at 871); Jo Shaw, Postnational constitutionalism in the European Union, Journal of European Public Policy, (1999), 579, (at 587).

[9] Disagreeing Fritz Scharpf, European Governance: Common concerns vs. the challenge of diversity, http://www.jeanmonnetprogram.org/papers/01/010701.html, 7, who argues that "the powers that the Union is able to exercise were either delegated by the governments of the Member States or were usurped by the Commission and the Court ...".

[10] Franz Walter, (op. cit. note 6), 45.

[11] G. Leibholz, Verfassungsrechtliche Stellung und innere Ordnung der Parteien, 38. DJT (1950) C 9.

[12] Horst Ehmke, Wirtschaft und Verfassung, (1961), 5; Horst Ehmke, Staat, und Gesellschaft als verfassungstheoretisches Problem, in: Festgabe für R. Smend, (1962), 24. Stephan Wernicke, Die Privatwirkung im Europäischen Gemeinschaftsrecht, (2002) (forthcoming), Chapter 7 esp. at V. 2).

[13] Cf., J. H. H. Weiler, To be a European Citizen: Eros and civilisation, in: The Constitution of Europe, (1999), p 324 (at 329.). Paul Magnette, Can the European Union be politicised?, http://www.jeanmonnetprogram.org/papers/01/010901.html , especially at 6.

This is not the place to negate the frequently diagnosed crises of political parties.14 Nonetheless, political parties still remain indispensable for the practical realisation of democracy, especially political opinion-building of the citizens and, as a correlation, for the transportation of the citizen's will to the representatives of society.15 This is recognised at European level by Article 191 EC. However, like Article 21 of the German Basic Law, it does not contain a functional attribution of a certain task to political parties. Instead, European Parties are a pre-requisite to fill the democratic principle with life – as laid down in Article 6 § 1 TUE.16 However, political parties can only fulfil their function as a transmission vehicle between citizens and representatives, as a powerful political entity capable of influencing politics, of giving a face to politics if there is a community-wide public debate taking place among the European citizens. Public debate, on the other hand, is generated and facilitated if there is polarisation within the political discourse.17 And who is best suited to provoke polarisation if not political parties? In other words, if the Commission involved political parties more, this would alleviate the democracy deficit, which, in reality, is a deficit of politicisation of the Union.

In order to follow this line of argument, one has, however, to accept a few assumptions.

- Simplification and polarisation should not be considered as problematical, as is often argued in literature.18

- Secondly, sometimes,19 governance is conceptualised as a denominator for self-referential (sub-) systems that can neither be influenced nor regulated through public decisions, nor given priorities. Clearly, the Commission did not adopt this theory. On the contrary, involvement of Civil Society is integrated only in the form of non-binding consultations. Even the plans for co-regulation in certain areas are very cautious. Co-regulation - a process through which "concerned parties" agree upon the best solution for regulation in their respective fields - is only to happen in areas in which the rule found is not to be applied uniformly in all Member States. In addition, such a mechanism is excluded in –"highly political" areas (p.28). It remains unclear, however, why environmental problems are not highly political - amongst NGO's, there is suspicion that this area has been chosen in order to dilute environmental standards. Still, this cautious approach clearly shows that the Commission has not, in contrast to

---

14 Cf., for ex. Hans Herbert von Arnim, Vom schönen Schein der Demokratie, (2000), 144.

15 Rainer Stentzel, Der normative Gehalt des Art. 138 a EGV – Rechtlicher Rahmen eines europäischen Parteiensystems?, EuR (1997), 174 (at 179); Dimitris Tsatsos/Gerold Deinzer, Keine Europäische Integration ohne Europäische Politische Parteien, in: ibid., Europäische Politische Parteien, (1998), p. 13 (at 21). For a dissenting opinion, see Marc Reichel, Das demokratische Offenheitsprinzip und seine Anwendung im Recht der Parteien, (1996), p. 32.

16 Rainer Stentzel, (op. cit. note 15) p. 180; cf., Dieter Grimm, Politische Parteien, in: Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, 2. ed. (1995), p. 599 (at 616.); Martin Morlok, Europa vor der Wahl: Rechtlicher Status und politische Rolle der Parteien im Entscheidungsprozeß der EU, http://www.rewi.hu-berlin.de/WHI/ deutsch/ fce/ fce4 99/index.htm, para. 39.

17 Paul Magnette (op. cit. note 13), 6 . Nona Mayer; Pascal Perrineau, Les comportements politiques, 1992.

18 Karl-Albrecht Schachtschneider, Res publica res populi, (1994), 662.

19 Niklas Luhmann, Politische Steuerung: ein Diskussionsbeitrag, PVS 30 (1989), 4 (at 7); James Rosenau, Governance, order and change in world politics, in: ibid.;Ernst-Otto Czempiel, Governance without government: order and change in world politics, 5; cf. Kenis/Schneider, Verteilte Kontrolle, Institutionelle Steuerung in modernen Gesellschaften, in: ibid., Organisation und Netzwerk, Institutionelle Steuerung in Wirtschaft und Politik, (1996) p. 9 (at 18). Karl-Heinz Ladeur, Towards a Legal Theory of Supranationality - The Viability of the Network Concept, (1997) ELR 3, 33.

certain scholars, given up the idea of democratic self-steering of complex societies.[20] It does not pay enough attention, however, to the problem of how the connection of highly political questions to the citizens is to happen.

- Thirdly, directly aimed at the White Book, it is necessary to change the community method itself. Today, the Commission places great emphasis on consensus even before a decision is taken. In order to achieve politicisation, this has to be changed - possible alternatives have to be discussed. publicly and discursively. Only then should a decision be taken.

- It is true that the propositions contained in the White Paper imply a more intensive discourse with the identified actors of civil society. It remains unclear, however, why this is considered to be a new approach - even today, consultations are held before the adaptation of a proposition; the Social and Economic Council (Art. 257 EC) has to be heard frequently. It would be a new approach to strengthen the emerging European political party system[21] by actively involving them as early as in the process of "brainstorming". This would create a public forum for parties to develop a political profile. This might - and should - lead to the breaking up of the existing situation of competition between the European *institutions* – the Parliament, the Council, and the Commission - to the benefit of a competition of *ideas*. Ideas can be conveyed much more easily than institutional constellations with their self-interested bias to the citizen. Since citizens will be stimulated by these ideas, they will actively participate in their development. A "gain-gain" situation emerges.

This would alleviate today's all too prominent educational approach of many "European enthusiasts" towards European integration. This approach is characterised by the permanent need to *explain* the benefits of "Europe" to the citizens. If a more political Union is created, a Union of competing political concepts, the citizen will, of necessity, realise the importance of Europe.

Today's "educational approach" leads to an inter-institutional consensus, eager only to present the positive aspects of European initiatives. Consensus before the adoption of a decision, however, asphyxiates public discourse and thus excludes the Union citizen.[22] To give a concrete example, the controversy concerning the envisaged "take-over directive" has been widely-reported by national media. Despite this, it has, above all, been presented less as a *political* problem than as a power-struggle between the Parliament and the Council because Germany eventually changed its position.[23] The White Paper, too, adopts this approach by portraying the function of community organs as unitary, functional entities. This functional approach cannot meet today's challenges of an increasingly complex and multi-dimensional Europe.

It is true that the White Paper encourages the European Parliament to initiate "public debates about the future of the European Union" (p.39). This is to be supported. However, the European

---

[20] Jürgen Habermas, Jenseits des Nationalstaats? Bemerkungen zu Folgeproblemen der wirtschaftlichen Globalisierung, in: Beck, Politik der Globalisierung, (1998), p. 67 (at 83).

[21] For a definition of European Political parties. Martin Morlok, (op. cit. note 16), para. 54.

[22] Paul Magnette, (op. cit. note 13), 7; Martin Morlok (op. cit. note 16), para. 28, 42.

[23] This is reflected as well by the statements of the Commission, see Commissioner Fritz Bolkestein, EU-Nachrichten Nr. 25 (2001), 1.

Parliament already discusses the future of the Union in many debates – which is, unfortunately, not widely recognised by the public. This shows the need to engage in the proposed direction.

4. The need to initiate political discourse, the role of Political Parties and the White Paper's contribution

In this section, the special role of political parties for European discourse will be highlighted first(1). Then, this paper will examine some of the White Paper's propositions in the light of the need to initiate a European political discourse (2).

4.1 Discourse and Political Parties

As has already been pointed out, the Commission should not only discuss options and propositions with actors of Civil Society as mentioned in the White Paper, but also and especially with emerging European political parties. These parties will soon have a sound legal basis established by a statute on European Political Parties.[24] One might ask: Why political parties? What is so specific about them in comparison with, for example, non-governmental organisations?

Political parties do not only pursue a one-dimensional goal, but they have to integrate many, sometimes divergent, political objectives. They are better adapted to articulate societal anxieties, wishes and aspirations. This is not to say that other actors are less important - on the contrary, they are necessary to direct public opinion towards certain pressing issues. However, political parties have to present an integrational programme to the people on the occasion of elections. On this basis, an electoral decision is made, notwithstanding the fact that this possibility is still limited to the Union's level, partly because of Article 190 EC. Also, because of this article, it is still largely national politics which influence the voters' decisions. Nonetheless, political parties at European level have the possibility of influencing politics -if they start to develop a corresponding attitude. This can be achieved specifically through party representatives within the European Parliament because of their ability to adopt legally-binding acts[25] and through a political discussion fuelled by them. In doing this, they create the European public sphere necessary for a functioning European discourse. And it is this European discourse that is necessary to overcome the Union's legitimacy problems. However, this discourse in unlikely to happen without a Europe-wide political consciousness.

4.2 Some of the White Paper's propositions and their contributions to political discourse

Having shown the need for a political Union with a more central role for European Parties, some concrete aspects of the White Paper will now be examined in the light of this proposition.

---

[24] Cf., the information of the Commission – Ergänzender Beitrag der Kommission zur Regierungskonferenz über die institutionellen Reformen – Statut der europäischen Parteien COM (2000)/0444.

[25] Rainer Stentzel (op. cit. note 15), p. 176.

a Politicisation: the need to strengthen the majoritarian approach

The White Paper proposes extend majority-voting in the Council (p.38). This proposition has to be maintained, in spite of critical opinions both from output-orientated scholars and from practitioners.[26] It is argued that smaller states might be overruled and that the need to obtain consensus would be a specific advantage of the community method, creating a less political, more issue-orientated working of the Council. Legitimate majority-rule, in particular, would presuppose a strong European collective identity, vigorous Europe-wide public debates, and the manifest political accountability of European governors. This sounds convincing. But the argument foresees that majority-voting could lead to a more vigorous Europe-wide public debate. The line of argument developed above also applies here: dissent fosters controversy, and controversy strengthens discourse. But the introduction of more majority-voting requires treaty amendments, and this cannot fall within the scope of the Commission's approach to reform governance without treaty modifications (see the introduction of the White Book p.3). However, because of the Commission's approach, which is accepted as a paradigm here, this will not be examined here. Therefore, until such a treaty modification, visualisation of council debates can only be attained by close control of and by co-operation with national parliaments and the Council,[27] trying to induce public discourse in that manner.

b The role of the open method of co-ordination for politicisation of the Union

There has been a lot of controversy about the open method of co-ordination.[28] This method is a soft form of policy-co-ordination in order to attain certain self-imposed goals without prescribing any compulsory measures that have to be adopted. Its instruments are benchmarking, exchange of information in order to establish "best-practise" and guidelines specifying which points are considered to be especially important for the agreed goals.[29] All this happens at intergovernmental level, and is thus regarded with caution by both the European Parliament[30] and the German Länder. The main areas where the open method is already used today is economic politics - in order to achieve economic convergence in particular - and employment policy. At the Luxembourg European Council 1997, a co-ordinated employment strategy was agreed upon,[31] and this so-called Luxembourg process was eventually complemented at the Cologne European Council[32] by a macro-economic co-ordination approach, in order to attain a "macro-economic policy mixture" which includes financial politics, wages, fiscal policy and general economic policy.

---

[26] See, for example, the critical appraisal of Fritz Scharpf (op. cit. note 9) at 7: "For the time being, however, Europe cannot operate as a majoritarian democracy, and European policy must be consensual if it is to be legitimate".

[27] For a development of this argument, see Ingolf Pernice, The Role of National Parliaments in the European Union, at 4 of the manuscript (forthcoming).

[28] For a careful and comprehensive (positive) appraisal, see Dermot Hodson/Imelda Maher, The Open Method as a new mode of governance: The case of soft economic policy co-ordination, in: Wallace, The Changing Politics of the European Union, special edition of the Journal of Common Market Studies, November 2001 (forthcoming).

[29] Communication on Strengthening Economic Policy Co-ordination with the Euro area COM 2001 82 (final).

[30] See the report on the White Book on European Governance of 3. 10. 2001, Committee on Constitutional Questions, (Sylvia-Yvonne Kaufmann), COM (2001) 428 - C5-INC 01/COS, para 16.

[31] OJ C 30, 28. 1. 1998, 1. For further details, see Bundesministerium für Arbeit-und Sozialordnung, (ed.), Leben und Arbeiten in Europa - Dokumentation Europäische Union und Sozialpolitik, Berlin (2000), esp. at 19.

[32] Bundesministerium für Arbeit und Sozialordnung, (op. cit. note 31) at 48 - 49. For a report on first experiences see Arne Heise, Der Kölner Prozess – Theoretische Grundlagen und erste Erfahrungen mit dem EU-Makrodialog, integration 2001, 390.

The White Paper adopts a cautiously positive, but somewhat contradictory, approach. On the one hand, it is argued that the open method of co-ordination should not be used when "legislative action under the Community method" is possible, while. on the other, it is argued that it should be used to assess if "legislative or programme-based action" is necessary. According to the rule of limited empowerment, the competencies, in general economic and social policy scarcely present, would have to be created first. Indeed, the formula could be understood in such a way that the open-method of co-ordination should be used to evaluate if community competencies are actually necessary.

Has the open-method of co-ordination provoked a politicisation of the concerned areas? The answer is a cautious "yes". While it is true that the European Parliament, in particular, is largely left out in both the Luxembourg and the Cologne processes, it has, nonetheless, focused public attention on the areas of social and economic policy. In the long run, experiences made within the framework of the open-method of co-ordination might lead to the creation of new competence provisions in these areas.[33]

The open-method might be used in other areas without community competencies. It could also be used to supervise the implementation of community-legislation "in the shadow of the ECJ".[34] This would have the advantage of provoking a politicisation through linkage of the open-method of co-ordination directly with the Member States, since some representatives of the latter, the social partners, possibly even NGO's, would be present within the supervising "co-ordination bodies". This concept even seems to be particularly attractive in the light of the theory of governance.

To counter widespread concern, it has to be stressed that the open-method of co-ordination does not, in itself, lead to an extension of community competencies. It may only lead to the realisation that positive integration is necessary.[35]

This brief examination shows that the open-method of co-ordination can be considered as a useful complement of community policy, particularly because it promotes politicisation. Thus, instead of leading to an institution-orientated approach to addressing politics, it tends to lead to an issue-orientated approach.

c No replacement of comitology without compensation

The Commission's White Paper on Governance proposes considerable alterations to both comitology[36] - the way secondary legislation is executed by the Commission and Member States - by abolishing management- and to regulatory committees (p.40). This seems to meet popular demand to get rid of this incomprehensible system of committees and expert systems of doubtful utility and near-complete intransparency.[37] However, the White Paper does not provide for any structural replacement of even the indirect links of the execution of community politics with the Member States.[38] Instead,

---

[33] Dermot Hodson/Imelda Maher, (op. cit. note 28).
[34] Fritz Scharpf, (op. cit note 9), 9.
[35] Dermot Hodson/Imelda Maher, (op. cit. note 28).
[36] Council decision of 28. June 1999 concerning the modalities for the execution of comitology, OJ 1999 L 184, p. 23.
[37] Christoph Sobotta, Transparenz in den Rechtsetzungsverfahren der Europäischen Union, (2001), 236.
[38] Fritz Scharpf, (op. cit. note 9), 6. For a positive evaluation of comitology, see Christian Joerges, "Good Governance" Through Comitology?, in: ibid/Vos, EU Committees: Social Regulation, Law and Politics, (1999), 311 (at 318).

all powers have to/will be vested in the Commission. This will lead to an even more consensual, smoother execution of politics. However, this does not correspond to the approach argued for in this paper, as it will lead to an increase in the technocratic appearance of EU politics.

This is not to argue that comitology is not desirable in the way it is carried out today. However, there needs to be a structural equivalent. At the very least, there has to be increased public debate to make public control – which has been possible since the Amsterdam Treaty - more likely and effective.[39] The White Paper does not address this question.

d Regulatory agencies and politicisation

The Commission's White Paper also deals with the establishment of further regulatory agencies. Currently, three[40] out of the twelve agencies[41] have regulatory powers, *i.e.,* the power to take autonomous decisions in a clearly defined area. The other nine agencies can be categorised as "observatories" (monitoring model), agencies which promote social dialogue at European level (co-operation model) and agencies operating as sub-contractors to the European public service (executive model).[42]

The European agencies are autonomous Community bodies of a public nature, not established by the Treaties, but created as a result of acts of secondary legislation adopted by the Council. They have their own legal personality and were established with the idea of fulfilling tasks of a technical or scientific nature, or performing a specific management task provided for in their terms of reference. The emergence of European agencies is a recent phenomenon. The 12 agencies currently in existence

---

[39] Critical, however, of the practical possibility of control through European Parliament and the public is Christoph Sobotta, Transparenz in den Rechtsetzungsverfahren der Europäischen Union, (2001), 236.

[40] The Office for Harmonisation (Alicante, Spain), the Community Plant Variety Office (Angers, France) and the European Agency for the Evaluation of Medicinal Products (London, UK). All perform quasi-regulatory functions (publication of trademarks, authorisations to release products into commercial circulation) and provide services to sectors of industry for which they charge fees which represent their own financial resources.

[41] In chronological order of establishment, the European agencies are as follows:
1) European Centre for the Development of Vocational Training (CEDEFOP), Articles 151 and 308, Regulation No 337/75 of 10.2.75.
2) European Foundation for the Improvement of Living and Working Conditions, Article 308, Regulation No 1365/75 of 26.5.75.
3) European Environment Agency (EEA), Article 175, Regulation No 1210/90 of 7.5.90.
4) European Training Foundation, Article 308, Regulation No 1360/90 of 7.5.90.
5) European Monitoring Centre for Drugs and Drug Addiction, Article 308, Regulation No 302/93of 8.2.93.
6) European Agency for the Evaluation of Medicinal Products (EMEA), Article 308, Regulation No 2309/93 of 22.7.93.
7) Office for Harmonisation in the Internal Market (OHIM), Article 308, Regulation No 40/94 of 20.12.93.
8) European Agency for Health and Safety at Work, Article 308, Regulation No 2062/94 of 18.7.94.
9) Community Plant Variety Office (CPVO), Article 308, Regulation No 2100/94 of 27.7.94.
10) Translation Centre for Bodies of the European Union, Article 308, Regulation No 2965/94 of 28.11.94.
11) European Monitoring Centre for Racism and Xenophobia, Articles 284 and 308, Regulation No 1035/97 of 2.6.97.12) European Agency for Reconstruction, Article 308, Regulation No 2454/99 of 15.11.99.

[42] The following description is based on Xénophon A. Yataganas, Delegation of Regulatory Authority in the European Union The Relevance of the American Model, Harvard Jean Monnet Working Paper 03/01, http://www.jeanmonnetprogram.org /papers/01/010301.rtf

were set up in two waves. The two first-generation agencies were established in 1975 (in the field of social affairs), followed by the second generation at the beginning of the 1990s, in connection with the completion of the internal market. The European agencies are small Community co-ordinating structures, located in ten different Member States. They have a total staff of just over 1,000 and receive approximately ¬100 million in subsidies from the general budget of the EU. They were created with the following objectives: management autonomy, flexibility, involvement of the Member States, and closer attention to citizens' concerns.

Although the European agencies are very different in terms of both size and purpose, as a general rule they present a common basic structure and similar operational instruments.

All European agencies function on the following basis:

- a limited mandate, which is laid down by the establishing regulations, and consists of tasks of a technical, scientific or management nature;

- an administrative or management board, the majority of whose members are representatives of the Member States, which lays down the general guidelines and adopts the work programmes according to its terms of reference, available resources and political priorities;

- an executive director elected by the administrative/management board, and responsible for the entire programme of activities and the proper management of the agency, who may be assisted by an office comprising members of this board and/or a budgetary committee,

- one or more advisory committees (mostly scientific); and

- all European agencies have the following provisions in common: staff regulations, inclusion of subsidies in the procedure for the general EU budget, principle of annuality of the budget, own rules of procedure and financial regulations based on standard models and supervision by the Commission's financial controller.

The Commission thus has no formal relations or possibility of control over the agencies, but exercises its powers primarily through its representatives on the boards, who are usually senior officials from the relevant Commission departments. However, the fact still remains that the regulatory agencies are politically independent entities.

Recently, the Commission has proposed to create three further agencies: a Food Safety Agency,[43] a European Aviation Safety Authority (EASA)[44] and a European Maritime Safety Agency.[45] The White Paper on Governance mentions the establishment of all three, claiming that only the EASA is to have clear regulatory competencies.

---

[43] White Paper on Food Safety presented by the Commission, COM (1999) 719 final of 12.1.2000 leading to the Proposal for a regulation of the Parliament and the Council laying down the general principles and requirements of food law, establishing the European Food Authority and laying down procedures in matters of food safety. COM (2000) 716 of 8 November 2000.

[44] COM (2000) 144 final of 13 March 2000.

[45] Proposal of 6 December 2000, COM (2000) 802 final

The very careful approach of the White Paper towards agencies (at least in the section devoted to them) in general, and regulatory agencies in particular, clearly reflects the Commission's reticence with regard to the establishment of further agencies. This reflects the *Meroni* doctrine.[46] In this Case, as interpreted by the Legal Service of the Commission, the Court ruled that the Treaty only permits for the establishment of regulatory agencies in clearly defined areas that are neither 'highly political' nor expressly attributed to the Commission. This is precisely the attitude of the White Paper (Section. 3. 2., p. 31).

So, why dwell on the question of agencies here? The reason is twofold. One the one hand, the White Paper itself is, upon closer examination, rather ambiguous about agencies. It starts off praising their ability to use "highly technical sectorial expert knowledge" and it highlights the greater visibility agencies can provide for both the concerned sectors and the public. On the other hand, as pointed out, it is extremely cautious towards the establishment of new agencies. This attitude certainly reflects internal power struggles and it is not yet clear who will prevail in the long run.

Second, there are important voices in the literature which argue in favour of the more extensive use of agencies. Three currents can be identified here.

aa A certain interpretation of System Theory

The first belongs to the proponents of an approach influenced by a certain interpretation of System Theory, which argues in favour of a shift in focus to "random, procedural, heterarchical thinking", and away from "the classical conceptions of the unity of an actor". This approach presupposes a different type of public 'network-adapted' regulation, which is better suited to stimulating the productivity of networks which generate private knowledge.[47] In order to generate the decisive resources of today's 'knowledge society', the EU and the nation states have to generate the conditions for the effective collection and management of information. To this end, agencies are certainly well-suited.

bb The Regulatory State

The second current can be associated with *Majone's* idea of the regulatory state. This theory argues that regulation is primarily concerned with increasing micro-economic efficiency. This implies that non-majoritarian regulatory instruments should not be used to achieve redistibutional or other social policy goals.[48] In order to preserve democratic accountability, clear statutory and institutional objectives have to be defined, transparency has to be guaranteed and expertise is to be assured by the then necessary regulation through agencies.

---

[46] ECJ Rep 1958 p. 11 -. Meroni / High Authority. See, also, JUR (2000) 30465 of 10 July 2000.

[47] Cf., Karl—Heinz Ladeur, Towards a Legal Theory of Supranationality - The Viability of the Network Concept, (1997) ELR 3, 33, at 48.

[48] A good summary of his ideas can be found in Giandomenico Majone, Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe, EUI Working Paper SPS Nr. 3 (1994), esp. at 4, 25. See, also, ibid., Regulating Europe, 1996.

cc Structural Argumentation

A third, though clearly *Majone*-influenced, approach argues that regulation through agencies is the logical result of the limited empowerment rule (Art. 5 EC) of the EC.[49] According to this theory, the fundamental point about the attribution of powers in European law is that, unlike other federal systems, this is not done by area of action (competition, environment, etc.), or by decision-making bodies (legislative, executive), but cumulatively, in the sense that the Treaty simultaneously determines the field of activity, the competent institution and the form and procedure of decision-making. It is thus a system of specific and limited empowerment, which would significantly reduce the scope for rule-making by the Community and would block the road to a transition into a federal system, which could have been achieved by general empowerment. Thus, the Member States would retain absolute control over the process of integration. This principle of powers conferred by means of limited empowerment leads to a system of overall distribution of Community power which is characterised by an interdependence of institutions invested with distinct and carefully defined functions. It would be more of a blueprint for institutional balance, than a system of separation of powers. If this were to be so, nothing would prevent us from establishing regulatory agencies, if only the institutional balance was guaranteed.

dd Output legitimacy alone is not sufficient

These theories cannot be discussed in detail here; thus, a few remarks centred upon the implications of these theories for the politicisation of the "Community Method" must suffice.

As has been argued elsewhere,[50] the interpretation of governance inspired by System Theory with its total elimination of power relations within the governance framework and, as a consequence, between the different systems, leaves out an important aspect which – in spite of all the transformations - is still present in modern society. Even more important in the context examined here is its inability to provide a viable tool to overcome the legitimacy-crisis of the EU, which is still nearly universally accepted. It does not even consider the need to politicise the Union.

Majone's theory of the regulatory state might provide for a sound theoretical framework. Indeed, he devotes considerable space to the democratic – and thus political - control of agencies, in spite of his concern mainly with outcome legitimacy. This is to be done, as outlined above, among other safeguards, by "procedures ... transparent and known to all concerned parties". Given the considerable number of agencies which are hardly known or not known at all by the public, it remains unclear how this is to be achieved. He sees the danger of both the Commission and the (regulatory) agencies being influenced too much by lobbying groups. His conclusion that the Commission would be less vulnerable to lobbying groups than national authorities is questionable. Indeed, there is strong evidence against this.[51] A European Union regulated by agencies would certainly be less political. There would be less European discourse, but more technocratic administration . There would be no development towards a European *demos*. It would be a less political Union.

---

[49] Xénophon A. Yataganas, (op. cit. note 42) at 22.
[50] Philipp Steinberg, (op. cit. note 2), 17.
[51] See the polemic, but thoroughly researched report of Johann-Günther König, Alle Macht den Konzernen, (1999), esp. at 221.

Yatagana's conclusion that the principle of limited empowerment would entail an institutional control system rather than one that is controlled by a separation of powers, is not self-evident. Even if one does accept this conclusion, one has to ask if this implies the elimination of the political element. As argued here, the contrary is the case.

As a conclusion to this section, the Commission's reluctant stance on the establishment of further regulatory agencies as expressed in the White Book is to be maintained. In certain "highly technical" areas, regulatory agencies might be helpful (the aviation authority falls within this category). Still, the primary focus has to lie on the maintenance of the political responsibility of the Commission. It is all too easy to eliminate discourse by reference to the "expert-character" of the problems involved.[52]

4.3 Why the Commission?

- It is frequently argued that the politicisation approach through political parties is not the task of the Commission. This is certainly partly correct. Without more effort from the involved actors, especially political parties, the Commission will have to fulfil a Herculean task. On the other hand, there are two important arguments why it is indeed the Commission's task to involve political parties:

- As long as the Commission is vested with the exclusive right of initiative, parliamentary parties cannot achieve public acknowledgement by presenting bills in parliament, which is an important way to generate publicity. In the Member States, too, the profile of political parties is attained not through amendments to existing legislative propositions, but by initiating new legislature. Furthermore, party members are better motivated if they have the possibility of deciding upon modifications for planned bills, even though the possibility of them being put into practice is extremely remote.

- The White Paper gives the impression that the Commission was more concerned with the preservation of proper power than with governance.[53] The genuine task of the Commission is "to act for the benefit of the Community" (Art. 213 § 2 EC). Even though the term is extremely vague - the development of a functional political system trying to remedy the Community's legitimacy crisis and adapted to the specialities of the Community multi-level system is to the benefit of the Community.

---

[52] Rightly critical concerning governance through expert systems and the subsequent problems of functional coordination Jürgen Habermas, Faktizität und Geltung, 2. ed.(1992), 426; this constellation, frequently occurring in environmental law, is analysed by Rudolf Steinberg, Der ökologische Verfassungsstaat, (1998), at 387 als „Ersetzung der rechtsstaatlich-demokratischen Verfassung durch die Technostrukur" (Replacement of the democratic constitution by the techno-structure). Critical as well the draft report about the Commissions White Book on Governance, 3. 10. 2001, Constitutional Committee of the European Parliament (Sylvia-Yvonne Kaufmann), COM (2001) 428 - C5-INC 01/COS, para. 8.

[53] Fritz Scharpf, (op. cit. note 9), 7: "The Heroic Commission" ?; Christian Joerges, "Ökonomisches Gesetz" – "Technische Realisation" – "Stunde der Exekutive": Rechtshistorische Anmerkungen zum Weißbuch der Kommission, http://jeanmonnetprogramm.org/papers/011701.html, 10: "Die Stunde der Exekutive", aimed at historic experiences of transnational governance.

5. European Governance through politicised networks

To summarise this brief *tour d'horizon* of the White Paper: although the authors tackle each problem in a pragmatic manner, there is not one specific governance concept present in its pages. They definitely do not follow an ",,ideal" conception of governance consisting of the concept of independent, equally influential actors governing without government. However, the Commission does realise that some kind of public regulation is necessary. Parastatal systems of negotiation with connection neither to the parliamentary system *nor* a European public create legitimacy problems.[54] From a theoretical perspective, the paper can be identified more with the policy-network theories[55] than with the classical governance approach coming from the theory of international relations.

The Commission does not realise, however, that as long as it has the exclusive right of initiative, it has to play an important role in the process of politicisation of the Union by an inclusion of political parties. If it does not fulfil this task, it is bound to foster technocratic governance instead of acting for the benefit of the community (Art. 213 § 2 EC). Political parties are a vehicle for generating a European discourse through politicisation. This will help to create a European public, which is an essential precondition for functional multi-level governance.[56]. Then, there need not be a European "Volk" (people) conceptualised in its classical, state-centred understanding[57] but a public of Union citizens, which remains a precondition for whatever kind of constitution. The latter will be more than a dead concept and function only if, to use the vocabulary of *Jürgen Habermas,* "the democratic process initiated by the constitution exists in reality"[58]. From this, it follows that politicisation which generates a European public is a condition for a functioning European multi-level constitutional system[59] – and thus for the post-Nice process and the future of European governance.

---

[54] Jürgen Habermas, (op. cit. note 52), 427.

[55] Renate Mayntz, Politische Steuerung: Aufstieg, Niedergang und Transformation einer Theorie, in: Ibid; Scharpf, Soziale Dynamik und politische Steuerung, (1995), 263; Ibid., Policy-Netzwerke und die Logik von Verhandlungssystemen, in: Kenis/Schneider, (op. cit. note 19), 471. Rainer Pitschas, Europäische Integration als Netzwerkkoordination komplexer Staatsaufgaben, Staatswissenschaften und Staatspraxis (1994), 503 (at 531)

[56] For an analysis of this concept cf. Gunnar Folke Schuppert, Demokratische Legitimation jenseits des Nationalstaates. Einige Bemerkungen zum Legitimationsproblem der Europäischen Union, in: Heyde/Schaber, Demokratisches Regieren in Europa ? Zur Legitimation einer europäischen Rechtsordnung, (2000), 65, (at 76).; Cf., Udo Di Fabio, Eine europäische Charta, JZ (2000), 737 (at 739).

[57] The Lack of a "people" and a common language is for Dieter Grimm, JZ (1995), 581 (at 587) Braucht Europa eine Verfassung? an indispensable prerequisite for a European Constitution.

[58] Jürgen Habermas, Die postnationale Konstellation und die Zukunft der Demokratie, in: ibid., Die postnationale Konstellation, (1998), 91 (at 154): "Verfassung wird erst dann funktionieren, wenn es den durch sie ... angebahnten demokratischen Prozess tatsächlich geben wird."

[59] Cf., Pernice,(op. cit. note 8), 164 ; ibid., Die Dritte Gewalt im europäischen Verfassungsverbund, (1996) EuR, 27; ibid/Franz Mayer, De la constitution composée de l'Europe, (2000) RTD (eur.), 631 = WHI-Paper 1/01, http://www.rewi.hu-berlin.de/WHI/papers/whipapers101/paper101.pdf.