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

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THE COMMISSION AS EURO-SCEPTIC: A TASK ORIENTED COMMISSION FOR A PROJECT-BASED UNION

A Comment on the First Version of the White Paper

J.H.H Weiler

On 10 March 2001, the Commission “Governance Team” submitted its draft *Memorandum to the Commission: Approaches to European Governance*, the so-called Options Paper which preceded the final White Paper. A copy of this document is attached to this comment. It represented the culmination of extensive and complex inter-departmental work within the Commission¹ (See Annex 1 to the Memorandum) and wide-ranging consultation outside. (See Annex 2 to the Memorandum).

As is well known, the College of Commissioners rejected the Draft for a variety of conflicting reasons, and the eventual White Paper is different from the Draft in many respects.

The interest in the Draft Memorandum lies, in my view, in that it represented the thinking of the Governance Team within the Commission, and that it was not directly adulterated by input from the College of Commissioners. I regard it as potentially an important anthropological exhibit. Formally, it only speaks for its authors, possibly its principal author, Jérôme Vignon. But the extraordinary inter-departmental consultation of which it was summation makes it, in my view, of considerable, and unique, probative value in constituting an expression and reflection of an important strand in the Institutional self-understanding of European Governance, and the role and legitimacy of the Commission therein.

This comment was originally prepared as input to the Governance Team, which was submitted shortly after the preparation of the Draft Memorandum. The focus of the comment, then and now, was on “legitimacy” aspects of the Draft. As I noted at the time, any review of the the Draft was hampered by the fact that it did not yet spell out the actual proposals and that it only indicated certain approaches. (Little did we know then that the eventual White Paper would be even less robust and more anodyne). The ability to make a difference to the perception and reality of legitimacy depends mostly on detailed proposals. But, in retrospect, the absence of operational details (and, indeed, of any real “options”) turned out to be a blessing in disguise, since it really forced the drafters to focus on what was conceptual, thus giving us, observers, a unique window to that kind of conceptual thinking. Some comments remain pertinent to the eventual White Paper. However, I make no attempt to identify these, since my interest is in the world view of officialdom.

The implicit legitimating strategy of the White Paper Draft consists of an interesting contrast. Its surface strand is the articulation of new governance technologies – notably in the central part of

¹ One of the ‘tragic’ dimensions of the final version of the White Paper is the huge discrepancy between the rich and high quality work performed by the various internal Reporters and Working Groups and the anodyne, plastic quality of the official White Paper as well as its predecessor, the Draft Memorandum. The texts of the 12 working groups are available http://europa.eu.int/comm/governance/areas/index_en.htm and repay careful study.

the Draft, especially proposals 7-15 – which would recognise and involve new actors and participants in Union governance, and which would redefine and reinvent procedures for both the legislative and executive functions of governance. Some of the most consequential and far-reaching innovations are hinted at in these proposals.

From a legitimacy perspective, the underlying assumption of this strand is that if you:

- a. listen to more players;
- b. listen better to more players;
- c. streamline more effectively and clarify executive responsibilities by delegating and decentralising both decisional and enforcement tasks,

governance will be both more effective and responsive, more readily available for scrutiny by Parliament(s) and hence both more acceptable and legitimate.

At a deeper level, the legitimacy strategy manifest in the draft hearkens back to “... *the original philosophy of the Community method*”, albeit as part of modernisation project. Note – it is not simply about modernising the original philosophy, but about “*reviving*” it – implying that, somehow along the way, the original philosophy was lost. Finding it and reviving it is central to addressing the legitimacy project. The “modernisation” of the original philosophy will consist in more assertive provision of information about key Union projects; a clearer chain of decision-making and a more inclusive network of voices which are to be part of the decisional process.

The underlying legitimating idea here is best encapsulated in the following text:

“The refocusing of the Commission’s tasks proposed here takes on board the vision of a Union concentrating on the realisation of a few major projects with widespread appeal. It is by rallying support for such projects rather than seeking to replace national allegiances by a wider collective identity that we will encourage the people of the Union – in existing Member States and applicant countries alike – to see themselves as Europeans. Taking this line of thinking a step further, the political purpose of the Union is not to supplant the existing states with a new super-state, but to establish a system of shared legislative powers in order to carry through common projects.” (Draft Memorandum 2.4.; see annex)

The thinking is clear: concentration on “a few major projects” will bring clarity – the lack of which is identified as one which is key to public confusion and disenchantment. The major projects that the Union selects must have “widespread appeal” which, in turn, will “rally support”, which, in its turn, will encourage people to see themselves as Europeans rather than by seeking to replace national allegiances by a wider European collective identity. Not a new super-State but a system to carry through common projects.

In similar manner, the principal strategy of restoring Commission legitimacy hearkens to its glorious past. It would consist of a “... *a return to the original notion of a task-oriented administration...*” which, evidently, had been lost along the way. What is wanted is a Commission that is selective about what it does. The implicit model that is being rejected is a Commission with plenary governance functions: a Commission–government. The Commission is about governance, not government.

The Union is not a state, and the Commission is not a government – instead, it is a mere functional “system of sharing or legislative powers to carry through common projects.” It is hard to

recall, even in the most Euro-sceptic British or Danish literature, a more functionalist and impoverished conception and self-understanding of Europe.

The nostalgic harping back to the past which is evident in the rhetoric of the Draft is also the source of the biggest flaw in its legitimacy strategy: the false dichotomy which is set up in the understanding of Europe. The early functionalist and neo-functionalist theories also suggested a project-based Community with an efficient task-oriented Community. They predicted and hoped that it would result in a shift of allegiance and a replacement of national identity (the famous “spillover”). The “modernised” version presented by the Draft *rightly* abandons the notions of allegiance and all that. But then, amazingly, the alternative presented is the same old functionalism simply stripped of the early fanciful “spillover” notions. The European construct is presented as a two-way choice between *either* a statal vision in which European legitimacy has to rest on a nation-like collective identity which would replace Member State national identities and allegiances, *or* a rather bare pragmatic functionalism.

In its opening paragraphs, the Draft calls for a clarification and an “[u]nderstanding [of] what Europe is all about.” When you strip away the verbiage what is the answer given? Europe is about (appealing) projects. And what is the Commission about? An efficient and task-oriented instrument for the realisation of these projects.

One should reject this ‘either-or’ picture. It is possible to reject as undesirable and unfeasible a statal conception of Europe and a national conception of both European identity and allegiance without going to the other extreme functionalist and reductionist approach presented here.

I can understand the temptation of packaging Europe as consisting of some well-defined “appealing” projects, and the Commission as simply a friendly, attentive and responsive body concerned with the task of effectively realising these projects. It can produce some important and immediate political capital. Who, after all, can object to appealing projects and such a minimalist conception of the Commission?

But it comes with some notable longer term dangers and costs. And, in part, it also leads to some naïve positions which will not be taken seriously by large constituencies. Let me explain further.

There have always been two principal strands in the European debate which has taken place from time to time (and, in some national quarters, endlessly). In some Member States, the debate has mostly followed functionalist premises: whether or not Europe serves the national interest. “What’s-in-it-for-us?” Where this has been the premise of the debate (and it is not necessary to mention Member States by name) the legitimacy of the very European construct has remained contingent, subject to a continuous assessment and re-assessment of the “appeal” of Europe and the extent that it continued to serve interests. Under this conception, a failure of the Commission, such as the Santer Commission, calls into question the very legitimacy of Europe itself. Europe, under this form of discourse, is analogous to a politician in power whose policies and efficiency in implementing these policies are subject to contingent acceptance and rejection. Europe becomes a continuous experiment that is not fully integrated into the political culture, in the same way that some German historians claimed that, in Post-War Germany, democracy itself was treated as a contingent proposition, the approval of which was dependent on its success. This position is the hall-mark of classical Euro-Scepticism.

The other strand, which is the one that has (inadvertently) been sacrificed in the Draft, does not regard Europe only in functionalist terms. Under this strand, Europe is not, for sure, considered as a proto-state or a would-be state. Nor is European identity conceived with a vocabulary associated with national identity and allegiance. Europe is much more than project-oriented. It is process-oriented and, above all, it is a Community of Values, the principal one of which is a historical commitment to a different, more civil, process of inter-statal intercourse, to a different, more civil, method of drawing boundaries between states and nations, to a different, more civil, way of managing certain domains of the public sphere. To be European, under this conception, is a commitment to “doing things” (hence process) in a different, European, way – *whatever the current major appealing project happens to be*. To be European is, essentially, about the *way* we do things, rather than *what* we do.

Under the first approach, if the projects become unappealing, the legitimacy of the very European construct is immediately called into question. (And the European policy-maker has to scurry to find new “appealing” projects to attract support.) Under the second approach, there can be flows and ebbs in the appeal of the European agenda, but the Union is as integral to the political culture of Europeans in the same way that the democratic and republican institutions of the state are integral to that same political culture. To be a democrat in Europe is also to be a European. We have Europe not only because of *what* it does, but also because of *how* it does, in the same way that we have a national parliament not only because of what it does but because of how it does it. Under this conception, the failure of a Commission is just that and no more. Europe, under this form of discourse, is not analogous to a politician who is subject to contingent acceptance or rejection, but to the very institutions of democracy.

It is ironic that, despite some ineffective words about the “hidden treasure”, the Draft so clearly leans in the direction of contingent and functional legitimacy undermining that self-same “hidden treasure” that it purports to protect. Indeed, in the Draft, the box which describes the “Community Method” is one of its weakest parts: it is technocratic and fails to capture the values behind the method.

The second cost of the approach taken, and it, too, in my view, is a result of the hearkening back to “... *the original philosophy of the Community method*” and “... *a return to the original notion of a task-oriented administration...*” is the steadfast refusal to acknowledge that a major part of the legitimacy problem of Europe is rooted not only in a democracy deficit (of representation and accountability) but, to use the felicitous phrase of Dehousse, in its political deficit.

To be sure, in bold letters, the Draft acknowledges the importance of **political mediation** which has to be “**restored** [again, that glorious past which has to be restored] **to its rightful place** – namely, the European Parliament. The draft is about “clarifying executive functions.” The hope is that adopting a new set of governance techniques, such as impact studies and other “impartial” tools, would “serve to justify, in the eyes of the Council or the Member States, delegating all executive responsibility to the Commission and, in turn, would enable the European Parliament to perform its political watchdog function.”

This, again, belies an extreme functionalist approach, whereby the exercise of executive power is conceived as both non-political and technocratic, based on efficiency considerations guided by the use of impact studies and impartial evaluations. And, to the extent that political choices are involved, these can be taken or approved of by a watchdog function of parliament.

All I can say is that this is breathtaking in its naiveté. In the modern administrative state, the exercise of executive functions is often and necessarily highly political and the ability of parliaments to monitor and mediate these politics effectively is very limited. If the Commission, under the vision of the Draft, wishes to have all executive responsibility delegated to it, it will not be able to continue with the fiction of ideological and political neutrality. And if the Draft wants to be taken seriously as a blueprint for such a vision of Commission executive responsibility, it will have to demonstrate a much more sophisticated awareness of the nature of the administrative state and its executive power.

There is, in this connection, a second – less naïve and more idealistic – belief which is to be found in the huge emphasis on integrating the new players into the discourse as a way of restoring legitimacy. The underlying idea here seems to be the vulgar version of the Habermassian notion of deliberative discourse: Bring in all the parties and conduct with them a substantive deliberation mediated by a politically disinterested and impartial Commission and the results will not only be qualitatively meritorious but also politically legitimate. The inclusion of more players into the circles of decision making is laudable and should be strongly advocated. But here too one should not draw too rosy a picture. Should this happen (and the sad story of the Commission-NGO experience in the last couple of years on certain environmental issues serves as a sharp example) one can expect that the authority of the Commission to be called much more into question and its feeble political base to become much more evident. Secondly, underlying this part of the Draft lurks another, darker, danger of functionalism: A system with strong crypto-corporatist elements coupled with the worst dangers of consociational models, notably the exclusion of those interests which are not privileged as “actors” and “players.” The Draft seems unaware or unwilling to confront these issues.

Thirdly, the extreme functionalism undermines the Draft’s approach to the legitimacy dimension of division of competences. It is absolutely correct to reject, as the Draft does, the “list of powers” approach to this problem. For two reasons. First, as comparative analyses of federalism demonstrates, in nearly all cases, lists do not work. The legal language that can resist an interpreter bent on transgressing federal boundaries has not been invented. And even if it did work, a list, as the Draft rightly argues, would hamper the exercise of legitimate Union activities. But, in my view, the Draft is wrong to think that this festering problem, which, in the hands of many constitutional courts and other high courts of the Member States, has already seriously damaged the very constitutional *acquis* of the Union, will go away by simply coming up with yet another way of packaging both “subsidiarity” and the new wonder kid “proportionality.” We are in the realm of symbolic politics. The Union and its Institutions (including the Court of Justice) simply do not enjoy the confidence of the public or the confidence of central state institutions, such as national parliaments and, critically, national courts, to police and interpret *any* formula of the division or sharing of powers effectively. If the Union does not come up with an *institutional solution*, rather than the functional solution proposed by the Draft, Member State institutions will arrogate this task to themselves with the backing of their highest courts, which will bring grave results to the constitutional coherence of the Union, especially of an enlarged Union. It is understood that the Draft is limited to proposals within the framework of the existing Treaties. But, in this area, the Draft actually looks to the future 2004 IGC and indicates a solution which, in my view, is very problematic.

A final comment relates to the uneasy relationship between the White Paper and the IGC Agenda. Although the strict separation between the two has been abandoned, there are only some very thin allusions to the IGC agenda in the Draft, and there is no clear picture of how these proposals would fit in with the broader constitutional agenda.

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I continue to believe that this is a strategic mistake, which is so big that it would, in my eyes, even be worth *postponing* the White Paper; if, let us say, the White Paper were presented in September, it could situate itself more effectively within the broader IGC debate. This does not mean that the Commission would have to integrate the White Paper into its eventual IGC input nor even reveal its hand on the IGC too early. It would mean that time should be taken so that the White Paper could more clearly indicate where certain issues would have to be taken over by the ICG discourse and how the Commission sees it situated in the context of that emerging discussion. The reasons for this are two: as conceived at present, there is the first danger of promising too much – think of the grandiose sub-title: ‘For Democratic Governance’ – without the ability to deliver. This paper really does not address the issue of ‘Democracy’ fully. And secondly, there is the danger of appearing to resolve certain problems and thus undermining the IGC agenda debate.