

TAKING GOVERNANCE SERIOUSLY

Response to the Commission White Paper on European Governance by the LSE Study Group on European Administrative Law*

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1. Government, Governance and Good Governance

The popular but imprecise term “governance”, which the Commission has chosen as the title of its White Paper¹ has, according to political scientist Robert Rhodes², at least six usages. On the one hand, these include a reference to the methodology of government in the post-modern, minimal state, and cover the concept of “good governance” and the efficiency targets of new public management. Another set of meanings is concerned with systems analysis, socio-cybernetic systems and self-organising networks. The Commission, however, seems to be using the term in none of these senses. It is defined only in a footnote (p.8) as meaning “rules processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence”. Governance does not necessarily involve all or any of these goods. The Commission has, in other words, incorporated its own agenda into its definition.³

The point is important in identifying the core purposes of this ambiguous document. Published in Brussels in July 2001, its preparation ran alongside the Nice IGC and parallels the treaty amendments intended for introduction, or actually introduced at Nice. It ought therefore to be capable of being read as a blueprint for the government of a European Union of 25 or so Member States. For these purposes, the most appropriate starting point would have been “processes and behaviour”. There is a great need for an effective analysis of EU administration in terms of a set of self-organising networks. Occupying a place at the centre of EU governance, the role of

¹ European Commission, *European Governance: A White Paper* COM (2001) 428 (“WPG”).

² R. Rhodes, “The New Governance: Governing Without Government” (1996) 44 *Political Studies* 652.

the Commission as the co-ordinator of policy networks, its regulatory functions⁴, and its functions as organiser of a vast administrative system, which depends heavily for implementation on networks of national administrations, should have been considered.⁵ The failure to do this is the more surprising, in that the Commission is also engaged on an important programme of internal reforms, the aftermath of two devastating reports by the Committee of Independent Experts for the European Parliament⁶, which revealed the Commission as weak and poorly managed. Together with revelations of large-scale fraud on the Community budget, these reports probably did more to shake the faith of citizens in European governance than any other occurrence. Confidence in an enlarged role for the Commission cannot be expected without assurances of good internal management. Yet there is no mention here of the follow-up or the progress (if any) made towards reform. With one or two exceptions, “Good governance” and the efficiency targets of new public management have simply slipped off the agenda, or at least out of sight⁷.

2. The “Community Method” and Institutional Architecture

The WPG does not on its face suggest a radical shift in the constitutional architecture of the EU. On the contrary, in putting a strong emphasis on the future shape of the

³ Contrast the discussion in “Enhancing democracy in the European Union”, Work Programme, SEC (2000) 1547/7 final, p.3. And see for comment D. Wincott, “The Commission and the Reform of Governance in the European Union” (2001) 39 *Journal of Common Market Studies* 897.

⁴ G. Majone, “The rise of the regulatory state in Europe” (1994) 17 *West European Politics* 77.

⁵ L. Metcalfe, “Reforming the Commission: Will Organizational Efficiency produce Effective Governance?” (2000) 38 *Journal of Common Market Studies* 817 and “The European Commission as a network organisation” (1996) 26 *Publius: The Journal of Federalism* 43.

⁶ Committee of Independent Experts, *First Report on Allegations regarding fraud, mismanagement and nepotism in the European Commission* (March 1999); id, *Second Report on Reform of the Commission - analysis of current practice and proposals for tackling mismanagement, irregularities and fraud* (September 1999).

⁷ The programme is outlined in European Commission, *Reforming the Commission*, COM 200 (2000), updated from time to time by internal working papers published on the Internet.

institutional architecture in Europe and the balance of power between different (institutional) actors, it makes two quite conservative assumptions concerning "Community method" and "general interest". (Though whether its definition of Community method is entirely orthodox is a moot point.) On these the Commission bases its analysis and then goes on to consider the probable impact of the proposals on the future of the EU rule-making process and different legislative instruments.

The WPG first argues that it is important to revitalise the Community method, such that each of the institutions concentrates on its (original) core tasks (pp. 29-31). The Commission's proper role in this framework is said to be to initiate and execute policies while, *inter alia*, the Council and the European Parliament (EP) decide on legislation. Within the scope of its remit, the Commission should ensure the "general interest" in the Community (p. 8). The latter assumption poses particular problems. The Commission refers to a diffuse concept of "general interest" of which it is (exclusively?) the guardian.⁸ The core functions conferred by TEC Article 211 on the Commission are the powers

- to initiate legislation,
- to push important policy issues,
- to exercise delegated legislative powers and
- to act as the central administration of the EU.⁹

⁸ See B. Kohler-Koch, *The Commission White Paper and the Improvement of European Governance* Harvard Jean Monnet Working Paper No. 6/01 (2001), 3. Available at www.jeanmonnetprogram.org

⁹ For an overview see P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials* (OUP, 1998) 53-55. And see further on the Commission's public advocacy role, R. Rawlings "Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement" 6 *European Law Journal* (2000) 4.

In practice, the Commission has been playing a very strong role and, as one could say, it has even become the central player and "motor of integration". Nevertheless, it is questionable whether the aforementioned activities imply a "general interest" guarded by the Commission. In the view of theoretical analysts, EU policy making is rather seen as being driven by conflicting interests and their dialectic reconciliation.¹⁰ A different way to put this is that the Community method is directed essentially towards consensus government. Whether consensus is equivalent to the "general interest" or amounts merely to a minimum agenda on which agreement can be secured, is a point of controversy, especially when related to central EU policies, such as agriculture and fisheries. Furthermore, political scientists have shown that EU institutions, in particular the supranational ones, are likely to be influenced 1) by self-interest, involving the expansion of their own power or of EU powers and competencies more generally; and 2) the desire to emancipate themselves from their principals, i.e., the Member States.¹¹ With these theoretical insights in mind, it is questionable to assume the pursuit of a diffuse "general interest" by the Commission – even if one generally takes a positive attitude towards the Commission's work. Indeed, the Commission's self-proclaimed assumption of its role in the protection and application of the "general interest" has led one commentator to describe it as the "benevolent dictator" in European governance.¹² An insight which makes it perfectly possible to relate public disenchantment with the governance of the EU to the Commission's equation of "general interest" with its own, essentially integrationist view of the EU. The point is stronger, because, unlike the governments of the Member States, the Commission is not directly elected.

¹⁰ See for example Kohler-Koch, above, at 4.

¹¹ Especially Neofunctionalists and Institutionalists make this point. For a general overview see B. Rosamond, *Theories of European integration* (MacMillan, 2000).

The Commission suggests, *inter alia*, a more (technically) effective and flexible legislative process and greater discretion¹³ for the administration of existing legislation. In line with its assumption that it is the complexity of the existing system which fuels disenchantment, the Commission regards the current situation as involving too much detailed legislation. That is, the Council and EP keep control over an unnecessary level of detail (p. 18) leaving the Commission too little space for policy execution. Additionally, there exist long delays in the adaptation and implementation of EU legislation within the Member States which then add more complex legislation or costly procedures at the national level (pp. 20, 23). The WPG proposes different solutions:

- Legislative instruments:

In the future, Member States should make greater use of "primary legislation" limited to essential elements. This would leave enough space for the Commission to fill the so-called "technical details" (where necessary with the help of expert advice) (pp. 20, 23). Improvements could also be reached by a greater use of co-regulation – i.e. legislation that creates a general framework which is then implemented by various actors through legal and non-legal instruments – framework directives and regulations. A more extensive use of Council regulations should be considered whenever uniform application of EU rules and legal certainty across Europe is desirable and long delays in

¹² F. Scharpf, *European Governance: Common Concerns vs. the Challenge of Diversity* Harvard Jean Monnet Working Paper No. 6/01 (2001), 7.

implementing the European rules are to be prevented (p. 20). In general, the Commission aims at simpler and more efficient legal instruments that would (in the Commission's view) avoid many current problems – delays, complex legislation and costly procedures on the national level.

- Policy making:

The Commission views the current rule and policy-making process as being too slow and cumbersome. In order to speed it up (particularly at the Council and EP level!), the WPG argues strongly in favour of an expansion of majority voting in the Council and the use of only one (instead of two) readings when legislation is adopted in the Council and the EP (p. 22). Concerning its own competencies, the Commission wants to be given the power to withdraw legislative proposals whenever their original intention seems to be undermined by inter-institutional bargaining in the Council and the EP (p. 22). Consequently, the current system of regulatory and management committees ("Comitology procedure") should be revised and eventually abolished (p.31). This adjustment would free the Commission from the influence and control exercised via Member States' officials. In exchange, another kind of participation is encouraged by the WPG. Various (non-) governmental actors are to be included in the decision-making process, for example in co-regulatory procedures which focus on the "actors most concerned" (p. 21) or, generally, in a wide consultation and participation of "interested parties" (p. 15) throughout the policy-making process. The Commission has already

¹³ In our understanding discretion is "the power of choice" in administrative decision-making as opposed to arbitrariness: see C. Harlow and R. Rawlings, *Law and Administration* (2nd edn.

experimented with such procedures in the fields of technical standard-setting and social policy regulation.

But these seemingly innocuous proposals would inevitably lead to a shift in the institutional balance and the exercise of power within the EU. They would shift power inexorably towards the executive (Commission), at the expense of other democratically accountable actors. This shift would also have a serious centralising effect, by substituting the power of the EU executive for the influence of the Member States' executives and experts as represented in the Comitology. One of the central functions of the Comitology is to indicate the extent to which EU legislation is likely to be compatible with national policy and legislation, hence easily capable of being absorbed and implemented at national level. Far from simplifying and speeding up the EU legislative process, these proposals are likely to make it harder to implement.

The following proposals reveal the Commission's technocratic view of the legislative, i.e. democratic, process in Europe:

- Majority voting in the Council (extension of "decisional supranationalism"¹⁴). This represents a significant departure from the consensual Community method of policy-making.
- "Technical" policy choices left to the Commission to deal with under the guise of policy-making, a rule-making method which has proved difficult and controversial in the national context¹⁵.

Butterworths, 1997) 96.

¹⁴ J. Weiler, "The Community System: the Dual Character of Supranationalism" (1981) *Yearbook of European Law* 1.

- An executive freed from constraints and supervision imposed by the Comitology procedures.

Democratic decision-making is generally based on the reconciliation of conflicting interests, but the European democratic process departs from this democratic model because it lacks a collective identity, real European debates and the direct accountability to the electorate of the governors¹⁶. These deficiencies generate great dangers if, following the WPG proposals, European governance was based on an essentially majoritarian rule-making and technocratic implementation. The centralised overriding of sensitive national preferences (potentially in the name of the aforementioned "Community interest") may pose a threat to the legitimacy of the Union¹⁷. Governance in the EU is the exercise of power and therefore requires to be legitimated¹⁸. The situation is in fact made more delicate by the decision at the Nice IGC to maintain the existing size of the Commission. This will in time mean that the Commission is not representative in the sense of being elected or in the sense of possessing one member per Member State.¹⁹

The WPG tries to deal with the question of legitimacy by addressing issues of transparency and participation. Shapiro, using a comparative approach with American administrative law, points out that where "tensions between technocratic administrative regulation and pluralist democracy" exist, the institutionalisation of

¹⁵ M. Shapiro, "The Problems of Independent Agencies in the United States and European Union" (1997) 4 *Journal of European Public Policy* 276.

¹⁶ Scharpf, above, at 5.

¹⁷ Ibid.

¹⁸ Kohler-Koch, above, at 4.

¹⁹ For the argument that this will not prove acceptable to public opinion see J. Temple Lang and E. Gallagher, "What sort of European Commission does the EU need?" (European Policy Centre, 2002) www.theepc.be/challenge/

transparency and participation seems to be necessary²⁰. Nevertheless, the concern expressed in the WPG for the strengthening of legitimacy is not enough to compensate for the envisaged decrease in involvement of democratically legitimised and accountable actors and their deliberative function in the policy- and law-making processes. If the proposal in the WPG was to be followed and the legislative process speeded up, the Commission would be responsible for implementing the framework legislation. At this stage the Commission would, according to the WPG, enter into consultation with various actors (e.g. "civil society") about the content of the technical details. Thus the abolition of the Comitology would threaten the formal involvement of legitimate "key players"²¹ (Member States) and, instead, favour unaccountable and scarcely representative NGOs and lobbyists, as discussed below. While not wishing to downplay the input of non-governmental actors in the European decision-making process, the great discretion which the Commission would then enjoy of taking – or not taking – into account certain partial and influential views must be emphasised²². In this case, the executive would not be politically accountable like (and vis-à-vis) other institutional actors, even in areas that may have huge impact on national constituencies²³. The Commission also argues for a right of withdrawal if the intent of its original legislative proposal is watered down in the negotiations of Council and EP. In this case the Commission could put heavy pressure on the Member States – or more generally on the democratic process – to adhere to the original text. A

²⁰ M. Shapiro, "The Institutionalization of European Administrative Space," in A. Stone Sweet, W. Sandholtz, and N. Fligstein (eds.), *The Institutionalization of Europe* (OUP, 2001), 111.

²¹ Kohler-Koch, above, at 7.

²² For a discussion of unequal representation of interests and the representativity of organizations see Ibid. p. 5. S. Mazey and J. Richardson, in a more detailed study of Commission – interest group relationships, "Institutionalizing Promiscuity: Commission-Interest Group Relations in the EU," in A. Stone Sweet, W. Sandholtz, and N. Fligstein (eds.), *The Institutionalization of Europe* (OUP, 2001), state that "openness does not guarantee equity".

²³ To illustrate this point, Scharpf uses the (fictional) example of recent efforts to reform national pension schemes where so called "technical details" can have great (political and economic) impact.

withdrawal would lead to a significant delay in the legislative process and ultimately run counter to the Commission's intent of speeding up Community rule making.

As regards the Commission's future role, the question of accountability²⁴ has not been adequately addressed. The proposals in the WPG would shift (political and rule-making) power to the Commission without increasing its accountability towards the public and the Member States. In addition, practical difficulties concerning democratic *ex post* revision of "technical" Commission decisions - the problem of the so-called "joint-decision trap"²⁵ - would increase. Our sense is that the Commission wants to act as a pivot in the European decision-making chain and therefore apply the Community Method at the expense of the other institutions. Consequently, an executive body would control the legislative input as well as the output (by threatening to withdraw legislative proposals), decide to whom it should lend its ear, and, finally, have a broad discretion in the implementation of "technical rules". This would always be a problematic, elitist and bureaucratic style of governance. It would perhaps pose less of a problem were the Commission a fully accountable government instead of merely an expert bureaucracy.

Again, the WPG missed out on one great opportunity to reach out to citizens on a domestic level with the open method of co-ordination (OMC). This procedure offers flexibility and choice to Member States in implementing EU policy and provides for

This leads various interest groups, parties and lobbyists to engage in a fierce battle over the outcome. See Scharpf, above, at 5.

²⁴ As discussed in section 9 below. Accountability in this context may be understood as "answerability of that institution to the public, either through the Parliament or through some more direct means of public participation": P. Craig, *Administrative Law* (4th edn. Sweet & Maxwell, 1999) 97. The Commission, it will be seen, adopts a very different definition, to the effect that each Institution must explain and take responsibility for what it does.

²⁵ Which is familiar in the case of ECJ judgements: see F. Scharpf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration," (1998) 66 *Public Administration* 239.

civic participation at a national level - an affirmation of the important subsidiarity principle - rather than on a transnational front. This can only add legitimacy to the decision making. Yet the WPG fails to explore the use of OMC in regard to civil involvement.

3. Participation and Democracy

The opening assertion of the WPG, that “many people are losing confidence in a poorly understood and complex system to deliver the policies that they want” (p.3), suggests a rather different and less utilitarian agenda. Little concrete evidence is provided for the assertion, other than mention of falling participation in elections, etc., a phenomenon for which no very convincing explanation has ever been forthcoming. The obvious response may be distrust, though whether this is cause and effect is surely unproven. In our view, other governmental deficiencies, including the Commission’s poor managerial performance, or the lack of accountability at European level, may be of equal importance in weakening popular confidence in government. Again, people may simply fear the move to globalisation which Europe represents, or dislike “big government”. We do not know. Yet of the values set out in the WPG (at p. 10), the Commission has prioritised the values of transparency and participation, and downplayed the value of accountability. As we shall argue, accountability in its traditional, constitutional senses receives perfunctory treatment in the WPG. We shall also argue that, in terms of modern professional techniques, the WPG is deficient. The Commission has taken the line of many other democratic governments concerned by the perceived gap between rulers and ruled, of analysing the problem in terms of a communications gap. But the gap once identified, little

attempt is made to plug it by reference to modern studies of communications systems. Instead, the WPG falls back on the loose democratic rhetoric of transparency and participation.

Magnette points to two factors that explain the weakness of civic participation at the European level ²⁶. First, people are encouraged to participate in a political system when it has institutional clarity. Clarity is missing in the EU because it is a multi-tier system of governance operating on national (and sub-national), supranational and international levels. This point is in fact stressed by the Commission in its WPG and has also been the subject of many declarations by the European Council. One conclusion might be that the EU is forced to operate in such a complex manner because it is not a completed federation of States. But this cannot be on the agenda of the WPG because the Commission has committed itself to work within existing parameters, and change here would entail Treaty change. Moves in the direction of federalism, in any event hotly controversial, will therefore have to be left to the recently convoked Constitutional Convention and ensuing IGC.²⁷ Secondly, according to Eriksen, it is the deficiency in popular sovereignty which is the real issue for citizens ²⁸. To address this problem would require politicisation of the EU institutions, including the de-neutralisation of the Commission as “Guardian of the Treaty”. Without an elected, democratic government, the EU lacks the polarity of a party system. Party systems appeal to citizens, as they simplify electoral choices. A party

²⁶ P. Magnette, *European Governance and Civic Participation: Can the European Union be Politicised?* Harvard Jean Monnet Working Paper No.6/01 (2001).

²⁷ The so-called ‘Future of Europe’ debate, as sign-posted in the Laeken Declaration: *The Future of the European Union*, SN 273/01.

²⁸ E. Eriksen, *Democratic or Technocratic Governance?* Harvard Jean Monnet Working Paper No.6/01 (2001).

system would also align European politics with traditional domestic politics ²⁹. This again is not a political possibility at present, so that the WPG has to fall back on affirmation of the “Community method”. The WPG initially seems to grasp this problem but then disappoints in its diagnosis and prescription. It ends up merely aggravating the feelings of doubt with an irrelevant and misplaced solution.

Thus the Commission acknowledges that the EU is experiencing problems and is concerned with the possible lack of legitimacy. But the problems with trust are blamed, not on structural arrangements, which are outside the present remit, nor on organisational deficiencies, which are inside, but with which it seems unprepared to deal. Rather, the blame is put on superficial causes such as Member States’ lack of communication, the ignorance of the Euro-citizen and the failure to attribute credit to the EU for jobs well done. In short, a communications failure - the scapegoat for all modern governments - is to blame.

4. Participation, Communication and Information

It is frequently asserted that both improvements in the quality of government decisions and in their democratic legitimacy will result from increased consultation with “civil society”. This is by no means always the case. In 1969, Arnstein,³⁰ discussing the concept of citizen participation in the land use planning process, concluded that there was “a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the

²⁹ See for exposition, S. Hix, *The Political System of the European Union* (Macmillan, 1999).

³⁰ S. Arnstein, “A Ladder of Citizen Participation” (1969) 35 *Journal of the American Institute of Planners* 216.

process”. Most consultation exercises and procedures designated for participation were shams. Arnstein identified eight rungs on the ladder of citizen participation:

8. Citizen control
7. Delegated power
6. Partnership
5. Placation
4. Consultation
3. Informing
2. Therapy
1. Manipulation

For Arnstein, the bottom two rungs of this ladder represent levels of “non-participation that have been contrived by some to substitute for genuine participation. Their real objective is not to enable people to participate... but to enable power-holders to ‘educate’ or ‘cure’ the participants.” It has to be said that the proposals of the WPG reek of manipulation and therapy, more especially in the proposals put forward for the stimulation and regulation of the organisations of civil society (CSOs). Of rungs 3 and 4, Arnstein warns

When they are proffered by power-holders as the total extent of participation, citizens may indeed hear and be heard. But under these conditions they lack the power to ensure that their voices will be *heeded* by the powerful. When participation is restricted to these levels, there is no follow-through, no ‘muscle’, hence no assurance of changing the status quo.

Here Arnstein is voicing a warning about a major deficiency of participatory democracy as a method of government. Citizens can only participate in a meaningful way if they possess sufficient authority to impose their will on the executive. This is an understanding which underlies every modern system of representative democracy. In undercutting representative systems, power may be diffused so widely that no control can be exercised over the body charged with implementation, which is left with almost unlimited discretion. It is thus able greatly to increase its power, while purporting to diffuse it. This is the central danger inherent in the WPG's proposals on wider participation, which will now be considered in the framework of Arnstein's analysis.

5. Techniques of Communication and Consultation

The promise of the WPG that it “starts a process responding to the disenchantment of many of the Unions' citizens” (p.32) is indicative of a document crammed with lofty objectives and ambitious strategies, heavy on rhetoric but very light on concrete proposals, suitable benchmarks and practical solutions. This is especially so concerning the need for involvement and inclusion of the Euro-citizen. Yet it was the citizen's isolation from the Euro-polity and his and her distrust of the Union institutions that originally prompted the WPG. The gap between the governing and the governed, carved by the infamous “democratic deficit”, the inaccessibility of the EU institutions and the powerlessness of the Euro-citizen in such a system of elites, now threatens the legitimacy of the EU.

The WPG acknowledges that genuine communication with the general public is essential in terms of raising the level of participation. However, the measures proposed do not appear very promising. In what follows, communication is to be understood as a kind of unilateral consciousness-raising (Arnstein's levels 1-3) rather than as a genuine discussion with contributions from both sides, for which the term "participation" will be reserved.

Passivity and indifference, particularly as regards complex political procedures, caused by factors such as media overload and the fact that politics increasingly have to compete with other attractions, are sociological facts that cannot be denied. If people feel no incentive to become involved in EU affairs, introducing new participatory elements without complementary communication strategies will not be successful. Thus, better involvement is about much more than enabling people to participate - it is about stimulating them to do so.

As a preliminary, admittedly provocative question one may ask what kind of communication the White Paper is actually aiming at or whether it is aiming at communication with citizens at all. It is true that the White Paper as well as the 2001 Commission Communication on communication³¹ identifies mechanisms that enable citizens to participate in EU Affairs (such as various Internet platforms, databases etc) but do they really envisage European citizens becoming involved in European affairs? Is not the Commission seeking to obtain greater legitimacy by offering the citizen access, i.e. the possibility to participate, without any serious intention of raising participation to the meaningful level envisaged by Arnstein?

³¹ European Commission, *Communication on a new framework for co-operation on the information and communication policy of the European Union* COM (2001) 354.

Let us look more closely. The WPG addresses at least some of the key questions in the area of communication and proposes various measures that point in the right direction:

- It accepts the need not only for information but also for active and effective communication with the general public. For too long the Commission's strategy aiming at the involvement of citizens was a purely information-based approach, effectively assuming that an informed citizen would automatically participate in European Affairs.
- Information and communication are seen in the WPG as "strategic tools of governance". New information and communication technologies are seen as an important way to address citizens.
- It is accepted that the EU must learn to "sell" its successes, a major failing in the past. Member States blaming "Brussels" for decisions for which they themselves are responsible is seen contributing to the negative view of the EU in public opinion.

Nevertheless the communication policy proposed by the Commission still favours strategies that appear elitist, too bureaucratic and insufficiently professional. The WPG pays little heed to new public management techniques and modern ways of political communication. In fact, a recent survey on the perceptions of European

citizens of the Union, the OPTEM report,³² suggests that the EU's communication strategies will need considerable amendment if better involvement of European citizens is to be anything more than a matter of lip service. The main findings are:

- The form and tone of the communication is essential. People in the survey complained about boring and technocratic information and asked for tangible information as well as lively presentations. (Interestingly they were not opposed to the idea of mixing information with communication, an approach strongly rejected by the Commission, despite being part of almost all modern political communication campaigns).
- Faces and visible leadership are important - people want to identify with somebody, which seems virtually impossible in the present bureaucracy, a point which relates back to the absence in the EU of elected, accountable government.
- The role of the media as the main communication basis is crucial (the almost complete absence of the EU from the PR-sphere is thus all the more striking).
- The EU's focus on "faceless" communication tools, such as the Internet, IT-databases, virtual discussion fora etc. was generally seen as too elitist, reaching only a minority, albeit a substantial minority. It should therefore not be considered appropriate for a large-scale communication strategy.

³² *Perceptions of the European Union*, Study by OPTEM for the European Commission (June 2001).

- Simplification is necessary. Easy-to-understand messages combined with audio-visual elements have greater potential than say complex, written brochures.

Enhanced training of EU personnel in communication techniques is clearly essential. The communication activities of the EU are currently seen to fall well below the standard of the Member States.³³ There is also a case for limiting the number of communication projects with a view to concentrating on comprehensive and effective projects, rather than atomising available funds by financing large numbers of small, unprofessional and uncoordinated initiatives. At the risk of repetition, it should be recognised that IT is not a magic cure, and that concrete communications strategies need be developed to help expand the range of those currently participating. Warm words are not enough. In the words of the Commission's own working group, a "human face needs to be put on Europe".³⁴

What then of consultation and "civil society"? As indicated, the WPG aims at making government more responsive to popular opinion, more transparent, simpler and more effective. For that purpose, the Commission commits itself to a set of values of good governance which include openness and participation. Thus, it proposes opening up the policy-making process "to get more people and organisations involved in shaping and delivering EU policy." In the Commission's view, it is the starting condition for more effective and relevant policies that "democratic institutions and the representatives of the people, at both the national and European level, can and must try to connect Europe with its citizens". That is, with the aim of enhancing the

legitimacy of the EU. For that purpose, the Commission presents various proposals, one of which is about implementing the principle of participation through better involvement of “civil society”.

To this end, the Commission asserts that a “reinforced culture of consultation and dialogue” is needed. National parliaments will also be part of this culture. Once again, however, the WPG fails to specify anything about the nature of the consultation. For example, it remains unclear whether national parliaments and civil society are to be consulted in the same way or whether their voices would be afforded similar weight in Commission decision-making. Again, the process appears to be aimed only at ensuring that those who are consulted have an opportunity to express a view. This could be seen (in Arnstein’s terminology) as “informing” or “placation”. Indeed, it is difficult to see how many diffuse groups truly can be consulted.

It should be emphasised that national parliaments represent a form of democratic legitimacy that could and ought to be exploited by their greater involvement in setting the Union’s priorities³⁵. Rights of initiative like those in Articles 22, 34(2) and 40(2) TEU and Article 67(1) EC which currently belong to Member States could be given to national parliaments to stop these initiatives being exercised by governments without parliamentary approval. This would help to combat the top-down approach and serve as a counter balance to the European Council and the unelected Commission.

Parliaments can claim to represent the whole electorate. They are democratically legitimate. This is not the case with CSOs, which can only reflect the interests of their

³³ Report of the White Paper Working Group Nr.1 (June 2001).

³⁴ Ibid.

members or supporters, and are representative only of a fragment of society. The Commission does not indicate whether and how it will respect these differences in a future consultation process. For example, the view might be taken that interest groups will only be consulted in decisions in their area of expertise or in which they and their members have a “special interest”. National parliaments, on the other hand, should be consulted as a matter of routine, as the Treaties and Declarations attached thereto, emphasise³⁶.

In fact, it is hard to see how criteria could be developed to reflect the different scopes of representativity that back up the different claims. It is notable that similar problems are already beginning to emerge in the context of the novel lawmaking procedures introduced as part of the Social Chapter, or in the context of technical standard-setting by sectors of manufacturing industry.³⁷

6. Defining and Structuring “Civil Society”

In answer to the questions how the term “civil society” can be defined and who qualifies as “civil society”, and subject to what conditions, the WPG is content to name some actors in a footnote. That is, trade unions and employers’ associations, non-governmental organisations (NGOs), professional associations, charities, grassroots organisations and organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities (p.14). It is not said whether this is an exhaustive list nor whether it is based on abstract criteria.

³⁵ See Editorial “What is Governance?” (2001) 26 *European Law Review* 411.

³⁶ Notably TEC Protocol No 8, inserted by the Treaty of Amsterdam.

The stated objective here is to “create a transnational ‘space’ where citizens from different countries can discuss what they perceive as being the important challenges for the Union” (p11). The suggestion is that civil society groups should be offered “a structured channel for feedback, criticism and protest.” As regards involvement in the policy-making process, the Commission promises to review its existing consultation processes, develop minimum standards and publish a Code of Conduct on the same (p17). These standards “should improve the representativity of civil society organisations and structure their debate with the Institutions”. The idea is one of give and take.

The Commission is prepared to commit itself to further consultations in return for a commitment of NGOs and CSOs "to tighten up their internal structures, furnish guarantees of openness and representativity and prove their capacity to relay information or lead debates in the Member States.” (p.17). In other words, the internal structures of these organisations are to reflect principles of good governance such as openness and accountability. For civil society to fulfil the task the Commission would like it to fulfil, namely to bring Europe closer to the citizen and so combat the problem of “democratic deficit”, it should thus address the issue of its own internal democracy. In this perspective, little will be achieved if decision-making in these organisations is left in the hands of key officers with very little, if any, supporter input.³⁸

³⁷ Article 138 TEC. For explanation, see S. Fredman, “Social Law in the European Union: The Impact of the Lawmaking Process” in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union* (Kluwer, 1998).

In short, the Commission deduces that “with better involvement comes greater responsibility” (p. 15). Yet the WPG fails to address the problems which may face NGOs in meeting the new, bureaucratic criteria. Take the issue of financing and funding. In principle, NGOs should rely on private sources of funding, so that they can take a critical stance towards the EU and the Member States. However smaller NGOs in particular often have difficulties with maintaining independence, their lack of resources and low supporter numbers pushing them to undertake project work on a contract basis, with funding provided by official sources ³⁹. The Commission itself has played a considerable part in developing an EU network of NGOs through funding and apparently will continue to do this. In the context of the WPG, this will necessarily undercut the representativity of civil society, giving the Commission an undue influence over the policy-making and rule-making process. The danger is greater because “European civil society” is as yet very tenuous. Since most of the agencies concerned are organised only on a national level, European civil society exists only in a sense of a compilation of national organisations, associations, churches etc.⁴⁰

The Commission’s answer to such problems is singularly unconvincing. The main proposal is the establishment of an online database of CSOs “active at the European level”. This, it is stated, “should act as a catalyst to improve their internal organisation.” It is, however, immediately apparent that the Commission has moved to this position without articulating:

³⁸ See A. Warleigh, “‘Europeanizing’ Civil Society: NGOs as Agents of Political Socialization”, (2001)

³⁹ *Journal of Common Market Studies* 619, 623.

³⁹ *Ibid.* at 630.

- the meaning of “accountability” or “openness” in the context of civil society organizations;
- the mechanics whereby inclusion on an online database will serve as a “catalyst” for improving either accountability or openness;
- how information about good governance amongst CSOs will be used by the Commission, to reduce, or increase, the influence of a CSO upon the European policy-making process.

In contrast, institutions such as the IMF, which have been attempting to engage with CSOs over the last decade, have conducted far more penetrating discussions of this subject. A paper published for the IMF⁴¹ raises the following questions:

- Which CSOs should be engaged, in the light of their great diversity?
- What questions must be addressed?
- What are the limits of such engagement?

The authors conclude: “The IMF is responsible to governments, which are, in most cases, accountable to their populations through reasonably well-defined democratic processes. In contrast, the constituencies and representativeness of many CSOs are often unclear.” Precisely the same could be said about the European Commission.

Difficulties that the IMF has encountered with CSOs include:

⁴⁰ For a helpful overview of this whole subject, see J. Greenwood, *Representing Interests in the European Union* (Macmillan, 1997).

⁴¹ T. Dawson and G Bhatt, *The IMF and CSOs: Striking a Balance*, (IMF: 2001).

- Lack of understanding of policies and programmes, and the dissemination of inaccurate information about them, even when clarification is offered;
- Single-issue groups which will lobby only for a fixed set of outcomes, without considering trade-offs in terms of policy or wider interests;
- Criticism without the suggestion of practical alternatives;
- Issues regarding NGO transparency, democracy and accountability. Many groups for example do not publish annual financial accounts or exhibit opaque forms of decision-making;
- Limited legitimacy over geographical or national areas.

Positive suggestions include selecting partners by criteria such as the extent of operations at grassroots level or adherence to minimum standards of performance and integrity monitored largely through self-regulation. But this of course demands mechanisms⁴² to achieve transparency (and agreement on what that means) and further systems of peer review. In other words, civil society will have to play a part in choosing the bodies that are to represent it. This is, however, to re-invent the wheel. Such, precisely, is the function of elections in mature democracies.

The theme can be pursued in various ways. It is relatively easy to examine a CSO's performance and integrity as part of a process leading to the award of a contract or grant. It is not so easy to do so as part of a consultation or participation exercise, since "policing" of contributors may be regarded as illegitimate and may stifle contributions. Yet, to the extent that CSOs argue that their views should have impact

⁴² Such as the development of score cards which survey issues of ethics and performance: see further, M. Edwards and J. Gaventa (eds.), *Global Citizen Action* (Earthscan, 2001).

because they represent the views of a “membership”, it is necessary to be able critically to evaluate such claims.⁴³

Again, “accountability” is a word that may have many meanings in different contexts. NGOs, for example, are responsible downward - to their staff or beneficiaries or (possibly) members; sideways – to trustees or boards of directors; and upward – to funding organizations. The needs of these different types of accountability will differ, and it is difficult to imagine agreement on some common code or set of obligations that will be meaningful: that is, sufficient to inform the Commission about an organisation’s claim to be representative.

Admittedly, loose organisations may be vulnerable to the “tyranny of structurelessness” where informal or loosely structured organisational processes enable strong leaders to command undue influence over the organisation and avoid the scrutiny of members⁴⁴. A truly mature movement with multiple voices may, on the other hand, be more diverse but also diffuse. Then again, all groups do not raise these issues to the same degree: trade unions, for example, may have a better claim to legitimacy where their structure is democratic and they have a due-paying membership. The WPG scarcely takes note of such distinctions.

In this the Commission echoes a surprising passage in the Nice Declaration No. 23 on the future of the Union. Calling for a “deeper and wider debate” on the future of the EU,

⁴³ See the criteria set out at *ibid*, where the authors state that “the critical determinants of NGO legitimacy in speaking for the poor include: Demonstration (whether the agency can show that its activities have made a positive difference to the poor); Local knowledge; Representation (whether the organisation has members or functions according to participatory decision-making procedures); Partnerships (if the groups cannot claim representation directly, can it do so indirectly, through its

the Declaration talks of “co-operation” with the European Parliament, but otherwise of “wide-ranging discussions with all the interested parties”, including representatives of national parliaments and “all those reflecting public opinion”. This formulation is highly significant, both in the gradation of rank from the EP to national parliaments, in the omission of regional parliaments and assemblies and in the lumping together of representative and non-representative bodies.

The exclusion of political actors from the civil society to be consulted heightens the Euro-citizen’s perception of democratic deficit because these are the chosen regional and/or national representatives. It is true that national and regional parliaments have a certain, albeit limited, involvement in EU policy making at another level but their involvement here is important for the Euro-citizen who may feel no allegiances to the “organised” NGOs and interest groups being consulted. This raises the question of whether the NGOs and associations already in operation are really representative of civil society at all. Often they have a very narrow base of active membership pushing their own agenda yet are “supported” by a broad base membership. None of the organisations of civil society can really offer the democratic legitimacy of elected members of local, regional or national parliament. In its response to the WPG, the Committee on Constitutional Affairs of the European Parliament ⁴⁵ has rightly stressed this point, maintaining that this has limited the role of such organised civil society to non-decisional consultation (Arnstein’s lowest levels).

partnerships?); Values base, and whether an organisation is accurate in its research and objective in its analysis.

⁴⁴ J. Smith in K Stiles (ed.), *Global Institutions and Local Empowerment* (2000).

⁴⁵ S.Y. Kaufman, *Report on the White Paper on European Governance, European Parliament, Constitutional Affairs Committee*, Doc. A5-0399/2001 Final (PE 304.289).

The Commission focuses on organised civil society, which arguably is doing relatively well for itself if one looks at the amount of non-governmental organisations (NGOs), lobby groups and pressure associations now thronging Brussels. The EC Treaty already requires the Commission to consult management and labour in preparing proposals, in particular in the social policy field. Magette⁴⁶ regrets this focus on such sectoral groups, as it will only stimulate involvement of already active groups. Scharpf⁴⁷ finds it ironic that with the Commission's concern with involving everyone from NGOs to local churches it fails to include democratically elected parliamentary representatives. In a similar vein, Armstrong⁴⁸ asks why regional assemblies and parliaments are seen as mutually exclusive concepts to civil society. The WPG does not offer any answers or any consultation for the non-aligned Euro-citizen, not yet infected with the disease of organisation and association. As the UK House of Commons' Select Committee on Public Administration has observed in a report covering much of the same ground⁴⁹:

Sometimes participation procedures may attract greater involvement from organised interests with distinctive or strongly held views out of line with those of voters as a whole. Participation procedures can also attract much less involvement than mainstream elections, raising issues about the representativeness of the views expressed.

⁴⁶ Ibid.

⁴⁷ F. Scharpf, "European Governance", above.

⁴⁸ K. Armstrong, *Civil Society and the White Paper – Bridging or Jumping the Gaps?* Harvard Jean Monnet Working Paper No. 16/01 (2001).

⁴⁹ Sixth Report of the House of Commons Public Administration Select Committee, *Innovations in Citizen Participation in Government*, HC 373 (2000/1), 2.

One idea which the Commission has apparently not considered is the introduction of a European “legislative ballot”, as suggested by Joseph Weiler ⁵⁰. This would connect the elections to the European Parliament with proposals for legislative initiatives to be voted on by the citizens. If it were required as a condition that a certain number of signatures had to be collected in a certain number of Member States, this would encourage the creation of a European dimension of civil society because it would mobilise political forces on a transnational basis. Moreover, it would give the citizen the opportunity to directly influence EU the agenda of decision-making. The idea would have twofold benefits, both working in favour of a closer link between the EU and the citizen and fostering the creation of European civil society. Is it perhaps too far up the rungs of Arnstein’s ladder for the authors of the White Paper?

7. Rights and Participation

The WPG was published not long after the Convention charged with preparing a charter of rights had reported and agreed a final text, adopted at Nice in December 2000. Since this was not declared to be binding, it is not - or not directly - justiciable. Thus citizens do not have at their disposal the normal machinery for individual participation in the enforcement of legal governance through the machinery of the legal system. Currently, the Charter has standing as something between a “hard law” and a “soft law” measure. This does not mean that it is without force as an instrument of “good governance”. For many commentators and political actors, it will sooner or later take its place as a key component of a European Constitution and, even if this never transpires, it should play a leading role in the reform of governance. In the view

⁵⁰ J. Weiler, “The European Union belongs to its Citizens: Three Immodest Proposals” (1997) 22 *European Law Review* 150.

of the European Parliament, the Charter could play a significant role in legitimisation, a primary objective for the Commission. The Charter sets out the fundamental values of the European Union, hence of EU governance, in a way meant to be transparent and accessible to the citizen. This is an important element in building a new political society.

Perhaps more important, one chapter of the Charter deals directly with good governance in the sense of good administration and transparency. According to the European Ombudsman (EO), “The Charter is the first in the world to include a right to good administration as a fundamental right in a human rights declaration.” This is set out in Article 41, which defines the right of every person “to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions of the Union”. This terse statement is further spelled out in the Code of Good Administrative Behaviour promulgated by the EO.

Yet neither Charter nor Code figures in the White Paper. It is an omission criticised in the Kaufman Report of the European Parliament which regrets that “although the White Paper mainly deals with matters falling under good administration, the Commission has not been able to take a position on the European Parliament’s and the European Ombudsman’s initiative on good administration”.⁵¹

The point deserves a special emphasis. The creation of the office of European Ombudsman by the Treaty of Maastricht was chosen as the primary way to enhance the concept of European citizenship. It is strange therefore to find no reference either

⁵¹ Kaufman Report, above, 23.

to the office or to the work of the office on good administration and transparency in a document purporting to deal with governance. So also the failure even to mention the right to good administration underlines the point made earlier that the Commission's interpretation of the term "governance" is one-sided. If the authors of the WPG are really determined to close the gap between governors and governed, they would do well to remember the question of citizens' individual rights and interests. It will so often be these which engage persons in the "processes of governance". They may do more for the inclusion of the European peoples in the European administrative space than will notional rights of participation through CSOs.

8. The Regional Dimension

Special emphasis is placed in the WPG on the regional dimension, both in terms of "better involvement" and "greater flexibility". Rightly, the Commission points to various factors that have led to a more important role for the regions in the Community, from the growth of so-called meso- government inside the Member States to expansion of the Union's activities bringing it closer to the sub-state level (p. 12).⁵² So also, one obvious way of achieving a more open and familiar Union is through regional and local levels of government, given the closer relationship that exists between these authorities and citizens. Different but related is the argument for pluralism in the legal and political construction; and further for cultural diversity,

⁵² There is a vast literature, but see especially L. Sharpe (ed.), *The Rise of Meso Government in Europe* (Sage, 1992); and G. Marks, "An Actor-Centred Approach to Multi-Level Governance" (1996) 6 *Regional and Federal Studies* 20. See also now, M. Keating, and J. McGarry (eds.), *Minority Nationalism and the Changing International Order* (OUP, 2001).

which is valuable in its own right and a basic strength of the European enterprise.⁵³ A case, that is, of subsidiarity writ large.

It is then all the more striking that the WPG contributes little by way of concrete proposals in respect of the regions. One (partial) explanation is the EU Treaties, since the evident lack of ‘fit’ between the classical conception of the EU as ‘a constitutional order of states’⁵⁴ and the rise of regions across Europe severely constrains the Commission’s options.⁵⁵ At the same time, the WPG glosses over the very considerable sensitivities in this area, which are not confined to fashionable views of ‘hollowing out of the state’, or even (absurdly) of a ‘Europe of the regions’,⁵⁶ but which raise awkward issues of fragmentation, and at worst of ethnic nationalism. It should hardly need saying that the regional dimension to EU governance is not only a technocratic issue.

Elsewhere the Commission has coined the slogan: ‘innovate regionally, compete globally’.⁵⁷ Here as elsewhere, however, the WPG fails to engage in any serious theoretical way with the simultaneous forces of integration and fragmentation in Europe. A different but related point, it has been said that ‘globalisation, which in one sense erodes territorial distinctiveness, in other ways enhances the importance of

⁵³ C. Harlow, *Voices of Difference in a Plural Community* Harvard Jean Monnet Working Paper 3/2000 (2000).

⁵⁴ A. Dashwood, “The Limits of European Community Powers” (1996) 21 *European Law Review* 113.

⁵⁵ See in this regard, N. MacCormick, *A Comment on the Governance Paper*, Harvard Jean Monnet Working Paper No. 06/01 (2001); and for an overview, J. Kottman, “Europe and the regions: sub-national entity representation at Community level” (2001) 26 *European Law Review* 159.

⁵⁶ R. Rhodes, “The Hollowing Out of the State: The Changing Nature of the Public Service in Britain” (1994) 65 *Political Quarterly* 138; and A. Adonis and S. Jones, *Subsidiarity and the Community’s Constitutional Future* (Nuffield, 1991).

⁵⁷ European Commission, *Regional Innovation in Europe* (October 2001).

territory and gives impetus to the construction of territorial societies'.⁵⁸ The various ways in which regions seek to respond, not least in terms of new paradigms of interdependence across hierarchical structures of government, is an essential building block for proper analysis of their role but yet is lacking in the WPG.⁵⁹

Attention is drawn once again to the proposed Code of Practice on Consultation. Of course the idea has much to commend it, not least in terms of disseminating good practice. In terms, however, of 'reaching out to citizens through regional and local democracy' (p.12), the WPG leaves the question of applying such a code wholly vague. One would be interested to read, for example, guidelines on how the Commission intends to take into account all the voices of the rapidly burgeoning number of regional governments and assemblies in the EU. That is, in addition to the need to be responsive to sectoral or functional contexts, by which is meant not one but several variant administrative procedures.⁶⁰ Again, it would be interesting to see some basic orientation on local and regional categories in code form. Or are the measures included in the White Paper equally addressed to any regional or local structure, regardless of its form or characteristics?

Then there are the 'target-based, tripartite contracts', which are suggested as a better means for implementing certain EU policies. "Such contracts should be between Member States, regions and localities designated by them for that purpose, and the Commission. Central government would play a key role in setting up such contracts

⁵⁸ M. Keating and H. Elcock, "Introduction: Devolution and the UK State" 8(1) *Regional and Federal Studies* 1, 5.

⁵⁹ See further, R. Rawlings, "Law, territory and integration: a view from the Atlantic shore" (2001) 67 *International Review of Administrative Sciences* 479; also C. Jeffery, "Sub-National Mobilization and European Integration: Does it Make Any Difference?" (2000) 38 *Journal of Common Market Studies* 1.

and would remain responsible for their implementation” (p.13). It might be argued that current practice in relation to the Structural Funds already illustrates this general mould.⁶¹

Dealt with in a single paragraph of the WPG, this proposal wears all the characteristics of a half-formed or non-mature idea. It thus raises more questions than answers. What, it may be asked, of legal control - or the lack of it?⁶² How far is it intended that the idea might be stretched, outside that is the more obvious areas such as environmental protection? What of the internal constitutional balance between regions and the central authorities (mediated differently in the various Member States)? Entirely predictably, the suspicion is also raised that the Commission is here seeking a new role for itself in areas of implementation.⁶³

To pursue the point, the proposal is an intriguing idea, in the proper sense of that phrase. In turn, from the viewpoint of the WPG consultation, it bears a hollow ring, effectively undermining the seriousness of the participation. For the future, however, one important lesson can be learned; namely the need in any such Code of Consultation for minimum requirements relating to the clear articulation and explanation by the Commission of policy proposals.

Much ink has been spilt on the defects of the Committee of the Regions (CoR), not least in terms of its lack of institutional status and democratic legitimacy, and more

⁶⁰ C. Harlow, “Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot” (1996) 2 *European Law Journal* 3; and M. Shapiro “Codification of Administrative Law: the US and the Union” (1996) 2 *European Law Journal* 26.

⁶¹ Council Regulation 1260/1999.

⁶² Reference may here be made to the lack of privileged standing for the regions: Article 230 TEC.

especially the absence of a common notion of the ‘region’.⁶⁴ The WPG would nonetheless accord CoR significant additional functions, for example that it should play a more proactive role in preparing exploratory reports in advance of Commission proposals (p. 14). A more fruitful approach would be to recognise the inherent limitations of CoR as a vehicle for regional representation and involvement in the Community and then to concentrate on expanding its support or back-up role for the many and various regional networks. In fact, the continuing rise of regional associations can in part be attributed to the perceived weaknesses of CoR.

This alternative approach would see CoR acting as a reference point for the regional networks participating in Community affairs, providing advice and challenging them to more innovative and useful contributions. CoR could also exercise a monitoring role, making sure that dialogue was held regularly and that regional proposals were properly taken into account.⁶⁵ The approach would further involve the Commission in developing in proactive fashion the idea of a ‘systematic dialogue with European and national associations of regional and local government’ that is mentioned tantalisingly in the WPG (p. 13). One way forward would be to utilise the many regional offices in Brussels as a more regular and structured channel for consultation.

9. Accountability: The Forgotten Value

It has recently been asserted that accountability is both a “core attribute of democratic rule” and one which “seems both to be expected of the EU by the public, and to

⁶³ A. Héritier, *The White Paper on European Governance: A Response to Shifting Weights in Inter-Institutional Decision-Making* Harvard Jean Monnet Working Paper No. 06/01(2001).

⁶⁴ See generally, P. Le Gales and C. Lequesne (eds.), *Regions in Europe* (Routledge, 1998).

follow from the logic of its own mission statements”⁶⁶. The evidence for this assertion comes from the response to a standard *Eurobarometer* question, asking whether there should be a European government responsible to a European Parliament. The question received a favourable response. But such loaded questions are difficult to interpret. This one couples as indissoluble two questions which might, if presented separately, receive very different answers. It also fails to distinguish two very different forms of accountability. Again, let us consider the fact that the European Parliament’s *Eurobarometer* popularity rating improved by 8% in the year when the Santer Commission resigned. We might deduce that Europe and its institutions have a generally low visibility rating - we already know from *Eurobarometer* surveys⁶⁷ that one in five Europeans has little or no knowledge of the EU institutions. Alternatively, we might deduce that the public accountability of the EU political system is a matter of general concern. This is, however, a deduction which the Commission has been generally loath to make.

Although the WPG lists accountability as a value of democratic government (p.10), the term acquires a novel meaning. The Commission states:

Roles in legislative and executive processes need to be clearer. Each of the EU institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member

⁶⁵ These ideas are partly inspired by the Sixth Report of the House of Commons Public Administration Select Committee, above.

⁶⁶ C. Lord and D. Beetham, “Legitimizing the EU” (2001) 39 *Journal of Common Market Studies* 443, 446.

⁶⁷ “Should the European Union be Redesigned?”, Philip Morris Institute for Public Policy Research Publication (January 1999), 59

States and all those involved in developing and implementing EU policy at whatever level.

There is little relation here to the types of accountability recognised within the national, democratic systems of government as practised in the Member States. Instead the term has borrowed some nuances from the participatory theme which infuses the WPG. The public dimension of NPM accountability is often conceived in terms of "stakeholders"⁶⁸. (Internal stakeholders comprise staff and management; external stakeholders comprise sections of the public, such as taxpayers or customers.) "Outwards" accountability - or in more traditional terminology, public accountability - may then be seen as owed to the public at large and conceived in terms of a "responsive" public service. The Commission seems to be following the OECD in using responsiveness and accountability as synonymous terms.⁶⁹ Arguably, however, there is here a contradiction in terms. Participatory governance not only undercuts traditional, retrospective notions of accountability, replacing these with consultation rights, which may, as we have argued, be purely notional, but it may also undercut the role and authority of legislatures in exacting political responsibility. In the WPG, retrospective accountability is replaced by the notion of participation. Thus participatory and consensual government involves a blurring of the notions of responsibility and accountability in the traditional senses of these terms. But participation in policy and rule-making is no substitute for accountability properly so called.

⁶⁸ See D. Farnham and S. Horton, "Public Managers and Private Managers: Towards a Professional Synthesis?" in D. Farnham et al, *New Public Managers in Europe* (MacMillan 1996).

⁶⁹ OECD, *Administration as service: the public as client* (OECD, 1987).

Amongst the forms of accountability with which European civil society is likely to be familiar are

- democratic accountability, in the sense used by political scientists, i.e., direct accountability to the electorate through elections;
- the accountability or responsibility of officials, both elected and unelected, to a representative parliamentary assembly;
- managerial or hierarchical accountability of a bureaucracy to its superiors;
- financial accountability through audit institutions.

In the context of European governance, all of these are contested and controversial. The question of democratic elections has already been touched on and, since it would require Treaty amendment, falls outside the scope both of the WPG and this response. The role of national parliaments and the European Parliament in the accountability process is capital. Both require strengthening by every means at the disposal of the Council and the EU institutions. With the transfer of functions to European level, an accountability gap of serious dimensions has opened up. Although particularly grave in the case of Second and Third Pillar functions, where collaborative governance is the pattern and there is policy-making without either responsibility or accountability, every competence is capable of being transferred without adequate arrangements being made for accountability⁷⁰. The scanty evidence from national referendums read together with the celebrated “Maastricht” judgement of the German Constitutional

⁷⁰ J. Lodge, “The European Parliament”, in S. Andersen and K. Eliassen, *The European Union: How Democratic Is It?* (Sage, 1996).

Court ⁷¹ suggests that it is the systemic loss of control over governmental action, rather than the complexity of European government, which alarms the electorate.

It is therefore most unfortunate that accountability in the traditional sense in which it is deeply engrained in representative government receives no sustained treatment in the WPG. It must be of central importance to the governance of a transnational entity which by its own admission in the Preamble to the Treaties is based on the concept of democratic government. The virtual omission from the WPG of the arrangements for representative government is all the more surprising in that the Commission is meant to have been working on better relations with, and arrangements for input from, national parliaments since Protocol No 8 was inserted in the Treaties at Amsterdam.

The Commission's proposals on internal reform pursuant on the two reports of the Independent Experts to the European Parliament ⁷², resulting in the resignation of the Santer Commission, were published as two, joined White Papers on reform ⁷³. These reforms, "concerned with modernising and improving the workings of the administration", were stated in the Commission's Communication to the Nice IGC ⁷⁴ to be both essential and "under way". The proposals were strictly pragmatic and practical, aimed on the one hand at streamlining the Commission's work practices and on the other at inculcating the sense of responsibility for clearly defined units of work that had been found lacking by the Independent Experts. The papers deal in considerable detail with internal reform of the Commission, based on recognition that the Commission is the "motor of European integration". They are mainly devoted to a

⁷¹ Bundesverfassungsgericht, 2nd chamber (Senat) Cases BvR 2134/92 and 2 BvR 2159/92 (12 October 1993) BVerfGE 89, 155.

⁷² Committee of Independent Experts, above.

⁷³ European Commission, *Reforming the Commission*, 2Vols (COM (2000) 200 final/2 (April 2000). Available at http://europa.eu.int/comm/off/white/reform/index_en.htm

thorough overhaul of staff policy, audit and financial management inside the Commission. They adopt the model of “new public management”, based on a set of defined objectives, performance indicators and action plans. To carry out its tasks efficiently, the Commission needs to reconsider “the working practices, conventions and obligations that have accumulated over decades [and] now inhibit the Commission’s effectiveness”. President Prodi later announced that his Commission would focus on the “core functions” of policy-making, political initiative and law enforcement, an approach which would imply “building new forms of partnership between the different levels of governance in Europe”; in other words, hiving-off managerial and operational functions.

There are traces of this approach throughout the WPG, and it no doubt underlies the emphasis on revitalising the Community method and the need for the institutions to concentrate on their core tasks. It is, of course, not without difficulty, since the co-ordination of networks and control of cross-border finance are the very areas in which management and accountability were shown by the Independent Experts’ investigation to be weakest⁷⁵. It is therefore noteworthy, and a point of concern that the WPG has so little to contribute on this key issue.

Similar criticism must be directed at the WPG for lack of attention paid to the question of financial accountability through audit. The European Court of Auditors (ECA) was elevated to the rank of the institution with the Maastricht Treaty; it carries out the audit and assists the Parliament and the Council to grant discharge to the Commission, which is being held accountable for the implementation of the

⁷⁴ European Commission, *Communication from the Commission to the Intergovernmental Conference on the reform of the institutions to make a success of enlargement* COM (2000) 34 (January 2000).

⁷⁵ L. Metcalfe, “The European Commission” above.

community budget⁷⁶. Consequently, one would expect to see in the WPG a revisiting of the scope and purpose of the activities of the European Court of Auditors and its relationship to the other institutions, as also the interface with the national level.

Perhaps because the Commission is the body being held accountable during the discharge procedure, the tone of Commission-Court of Auditors relations was hostile at the beginning⁷⁷. Harden, White and Donnelly explain that:

value for money audit can be unpopular. Assessing effectiveness means asking whether policy objectives are being achieved. Economy and efficiency also depend on the existence of clearly defined and coherent objectives. If the objectives of a policy are vague, self –contradictory or unidentifiable, a value for money examination can hardly avoid pointing this out. Those with political responsibility for policy matters are unlikely to welcome such criticism⁷⁸.

Yet a joint and co-operative approach between the Institutions with a view to good financial management in the EU is an essential ingredient of “good governance”. Notably something that does not require Treaty amendment, the relationship between the ECA and the Council of Ministers needs to be improved and prioritised, with a view to heightened political interest.⁷⁹ Again, while generally speaking the Parliament operates to uphold the findings of the Court and seeks undertakings that institutions will abide by its recommendations for the future⁸⁰, there is evident tension between

⁷⁶ See now Articles 7, 246-248 and 276 of EC Treaty.

⁷⁷ See O.J.1981, C 344/8, para.21; O.J.1983, C 287/1 (the Stuttgart Report); and for discussion, see D. O’Keeffe, “The Court of Auditors in Institutional Dynamics of European integration”, in D. Curtin and T. Heukels (eds.), *Essays in honour of Henry G. Schermers*, Vol. II, (Martinns Nijhoff, 1994).

⁷⁸ I. Harden, F. White and K. Donnelly, “The Court of Auditors and financial control of accountability in the European Community”, (1995) *European Public Law* 575.

⁷⁹ *The European Court of Auditors: the Case for Reform*: Twelfth Report of the House of Lords Select Committee on the European Union, HL 63 (2000-2001), at 12.

⁸⁰ O’Keeffe, above, 183-184.

the budgetary control committee of the Parliament (responsible for the discharge procedure) and the ECA⁸¹. Another relationship therefore needs revisiting.⁸²

In short, the relationship of the ECA with its external environment, European and national, should be strengthened and possibly redefined if the Commission is keen to promote good governance. Behind the scenes, some reforms are already in operation through the SEM internal audit project and other internal management programmes. A new staff policy emphasising training, career mobility, appraisal and professionalism has been introduced, its aims and objectives expressed in a vocabulary redolent of managerialism⁸³. If this were to succeed, it could, in conjunction with the much needed overhaul of the Staff Regulations, reported to be under way, do something to change the Commission culture towards the professional management skills needed for the supervision of an extended EU. Much more, however, remains to be done.

Citizens like to be well governed and everything points to the fact that they are more concerned with micro- than macro-governance. (By macro-governance, is meant the vague and inchoate structural analysis which, in this WPG, serves as a substitute for an action plan). It is, as suggested earlier, scandals involving corruption and misappropriation of public funds which have raised the profile of European governance, presenting a highly negative image. Financial accountability assumes great importance in the eyes of the European public, many of whom are, after all, taxpayers. Once again, greater attention should have been paid to principles of good administration, financial probity and good governance.

⁸¹ Twelfth Report of the House of Lords Select Committee, above, at 10.

⁸² See further, D. Skiadas, "The ECA and the European Investment Bank: an uneasy relationship" (1999) 8 *European Public Law* 215.

Conclusion

The general concern of the LSE Group has been that the WPG is very one-sided. It has proceeded at the level of macro-governance, presenting a bundle of vague and inchoate suggestions, without proper analysis of the way in which these may impact on the existing structure of the EU. For reasons best known to those who drafted it, the WPG adopts an unusually limited definition of governance in terms of the “rules processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence”. Another way to put this might be that the WPG concerns itself with governance rather than government. It then proceeds to narrow its own definition, by omitting to deal adequately with the key elements of openness and accountability which had specifically been included. In so doing, the Commission departs seriously from the notion of “good governance” which is seen as central to descriptions of the term, to focus narrowly and exclusively on a novel structure of “involvement”.

This approach opens the Commission to criticism on several heads. First and foremost, while emphasising the need to underline and strengthen the “Community method”, the Commission in practice departs from it. Again, while urging the institutions to focus on their core tasks, the Commission envisages a greatly expanded role for itself at the heart of the EU system of governance. Crucially, it fails to provide convincing evidence that it is capable of carrying out the new, and often profoundly

⁸³ Press Release (28 February 2001) “Commission proposes a new staff policy from recruitment to retirement”.

undemocratic, functions it would see bestowed on itself. It thus undercuts its own requirement of “effectiveness”. The Commission has also failed sufficiently to define what it means by “participation”. Its promises are lavish but, when the details are examined, it offers in terms of Arnstein’s ladder access only to the bottom rungs. In terms of regionalism, its ideas are again generous. In practice, however, the suggestions are ill thought out and may turn out to be impracticable and ineffective. Finally, the proposals are not truly democratic in terms of the democratic systems of government to which the peoples of Europe are accustomed. Not only are practical proposals to enhance the representative institutions of Europe, and encourage the participation of the peoples of Europe through traditional representative machinery, lacking, but some of the key proposals in respect of civil society organisations and regional representation are capable of undercutting more orthodox representative machinery.

The communications of our own group, and of many others who have responded to the WPG and on which we have drawn, contain powerful criticisms of the many deficiencies of the WPG as it stands. They also contain positive suggestions for filling significant gaps. It is for the Commission to take these various proposals back to the drawing board before engaging in a second, and more meaningful, consultation. In so doing, the Commission will show not only that it takes seriously its own proposals for wide and generous consultation in policy-making, but also - and more important - that it takes European governance seriously.

