2004:1u

Josefin Almer and Matilda Rotkirch

European Governance

– An Overview of the Commission's Agenda for Reform

Sieps
Swedish Institute for European Policy Studies

Josefin Almer and Matilda Rotkirch

European Governance

– An Overview of the Commission's Agenda for Reform

Sieps 2004:1u
October/2004

Publisher: Swedish Institute for European Policy Studies.

The report is available at
www.sieps.se

The report can also be ordered from
info@sieps.se

Cover: Svensk Information AB

Print: EO-print AB

Stockholm, October 2004

ISBN 91-85129-61-5
ISSN 1651-8071

PREFACE

Sieps, the Swedish Institute for European Policy Studies, conducts and promotes research, evaluations, analyses and studies of European policy issues, with a focus primarily in the areas of political science, law and economics.

This report gives an overview of the Commission's agenda for European governance reform as set out in the White Paper of Governance that was adopted by the Commission in 2001, focusing on how the Commission envisages its own role in the EU decision-making process. Furthermore, it describes how a number of follow-up documents adopted by the Commission have essentially given effect to the initial recommendations and proposals set out in the White Paper. The aim has been to clarify how the governance reform has taken a concrete shape at the different stages in the decision-making process since the launch of the White Paper.

One of the missions of the Institute is to act as a bridge between academics and policy-makers and one of the primary aims of these reports is to build this bridge. Furthermore, in a broader sense the reports shall contribute to increased interest in current issues in European integration as well as increased debate on the future of Europe.

Tomas Dahlman
Director
Sieps

ABOUT THE AUTHORS

Josefin Almer is assistant researcher at Sieps and doctoral candidate at the Stockholm University Faculty of Law. She has a degree in Law from the University of Stockholm.

Matilda Rotkirch is assistant researcher at Sieps and has a degree in Law from the University of Lund. She has previously worked in the Commission Legal Service and the European Parliament.

LIST OF CONTENTS

ABBREVIATIONS 8

1 BACKGROUND 9

2 QUESTION AND OUTLINE 13

3 THE WHITE PAPER ON EUROPEAN GOVERNANCE

3.1 Introduction 16
3.2 Initiating Phase 18
3.3 Implementing Phase 19
3.4 Monitoring Phase 20
3.5 Follow-up Documents of the White Paper 21

4 PHASE ONE – THE GOVERNANCE REFORM AND SHAPING OF POLICY

4.1 The Commission's Decision to Initiate Policy-making 24
4.1.1 The Right of Initiative 24
4.1.2 Systematising Impact Assessment 26
4.2 A More Proactive Role for the Institutionalised Advisory Bodies 28
4.3 Involvement of the Civil Society at Large – The Open Consultation Process 30
4.3.1 Introduction 30
4.3.2 Establishment of Databases 33
4.3.3 Minimum Standards for Consultation 34
4.3.4 Consultation of Civil Society in the Constitutional Treaty 36
4.4 Involvement of Target Groups – The Focused Consultation Process 37
4.5 The Use of Expert Advice 39
4.6 The Role of Regional and Local Government 41
4.7 The Use of Key Networks 44
4.8 Conclusion 45

5 PHASE TWO – THE GOVERNANCE REFORM AND IMPLEMENTATION OF POLICY

5.1 Introduction 48
5.2 Reforming Comitology 48
5.2.1 Introduction 48
5.2.2 Proposal for Amending the Current Comitology Decision 50
5.2.3 Amendment of Article 202 of the EC Treaty 53
5.3 Involvement of Regional and Local Government through Tripartite Contracts....54
5.4 The Use of Regulatory Agencies 56
5.5 Involvement of the Sectors Concerned....59
5.6 Conclusion....61

6 PHASE THREE – THE GOVERNANCE REFORM AND MONITORING OF POLICY

6.1 Introduction 66
6.2 Improvements in the Prevention of Infringements 67
6.3 Effective Management of Controls and Action against Infringements 68

7 GOVERNANCE REFORM IN PRACTICE

7.1 Introduction 71
7.2 The Proposal in the Lamfalussy report....72
7.3 The Market Abuse Directive 76
7.3.1 Level One – Initiation and Adoption 76
7.3.2 Level Two – Implementation....77
7.3.3 The Commission Adopts a First Set of Implementing Measures 79
7.3.4 Level Three – Transposition....81
7.3.5 Conclusion....81

8 REACTIONS TO THE COMMISSION'S AGENDA FOR REFORM OF EUROPEAN GOVERNANCE

8.1 Introduction 83
8.2 Consultation of the Civil Society..... 84
8.3 Involvement of Regional and Local Government in Decision-making..... 88
8.4 The Commission's View on Reforming Comitology... 92
8.5 The Operating Framework for Regulatory Agencies... 97

9 CONCLUSIONS.....101

ANNEX I
A CHRONOLOGICAL OVERVIEW OF THE DOCUMENTS RELATED TO THE WHITE PAPER.....106

ANNEX II
A SUBSTANCE-MATTER OVERVIEW OF THE DOCUMENTS RELATED TO THE WHITE PAPER.....109

LIST OF MATERIALS.....112

ABBREVIATIONS

CBO	Community Based Organisation
CESR	Committee of European Securities Regulators
CONECCS	Consultation of the European Commission and Civil Society
CoR	Committee of the Regions
DG	Directorate General
EC	European Community
ECOFIN	Council for Economic and Financial Affairs
EESC	Economic and Social Committee
EMI	European Monetary Institute
ESC	European Securities Committee
EU	European Union
IGC	Intergovernmental Conference
IPM	Interactive Policy Making
NGO	Non Governmental Organisation
OMC	Open Method of Co-ordination

EUROPEAN GOVERNANCE – AN OVERVIEW OF THE COMMISSION'S AGENDA FOR REFORM*

"The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation."[1]

1 BACKGROUND

When the Commission led by Romano Prodi took office in 2000, it set out four strategic objectives for the five years ahead. One of them was the promotion of new and better forms of governance in order to achieve a more efficient and democratic decision-making process at the European level.[2] As a first step in this process, a White Paper on European Governance (hereinafter referred to as the White Paper) was adopted.[3] The White Paper contained a series of recommendations and proposals on how to enhance democracy in the European Union (EU) and increase the legitimacy of the institutions. The aim of this study is to give an overview on how the Commission has realised the agenda presented in the White Paper, but before doing that the White Paper should be put in its context.

At the entry of the new millennium, the EU was facing several challenges. Ten new Member States were about to join the Union; the biggest enlargement in the history of the EU. The enlargement put focus on some of the challenges that the EU has been facing for several years, such as the so called

* The authors would like to thank Carl Fredrik Bergström and Pieter Bouwen for helpful comments and suggestions.

[1] See COM (2001) 428, *infra* note 3, p. 10.

[2] See Commission Communication of 9 February 2000 on Strategic Objectives 2000–2005 "Shaping the New Europe", COM (2000) 154. The other three strategic objectives presented were: "Stabilizing the European Continent and Boosting Europe's Voice in the World", "A New Economic and Social Agenda", and "A Better Quality of Life for All".

[3] See the Commission's White Paper of 25 July 2001 on European Governance, COM (2001) 428.

democratic deficit and the legitimacy of the EU institutions. Moreover, the enlargement made it necessary to amend the decision-making procedure of the Union itself in order to make it workable with 25 Member States around the table.

These challenges were addressed by an Intergovernmental Conference (IGC) that was convened on 14 February 2000.[4] At the Nice European Council on 9 December 2000 the work of the IGC was concluded, the outcome being the so called Treaty of Nice.[5] In a Declaration attached to the Treaty of Nice the Heads of State and Government stated that the Treaty had completed the changes necessary for accession of new Member States but it was also recognised that there was still a need for further amendments of the treaties in order to address the issues of "…democratic legitimacy and transparency of the Union and its institutions in order to bring the Union closer to its citizens…".[6] The Heads of State and Government therefore called for "…a wider and deeper debate on the future of the Union..".[7] One year later, the Laeken European Council adopted the Declaration on the Future of the EU describing the EU as "standing at a crossroads, a defining moment in its existence" where it "needs to become more democratic, more transparent and more efficient".[8] It entrusted a Convention with the task to prepare proposals for reform. The findings of the convention, together with the outcome of national debates, would provide a starting point for the discussions in the next IGC.[9] The work of the European Convention on the Future of EU resulted in the adoption of a draft Constitutional Treaty on

---

[4] See, for example, the Nice-IGC website, www.europa.eu.int/comm/archives/-igc2000/geninfo/index_ en.htm.

[5] See Treaty of Nice (OJ 2001 C 80/1).

[6] See Declaration No 23 on the Future of the Union attached to the Treaty of Nice, paragraph 6.

[7] See Declaration on the Future of the Union, *supra* note 6, paragraph 3.

[8] See Laeken Declaration on the future of the European Union, annexed to Presidency Conclusions, European Council meeting in Laeken, 14–15 December 2001, pp. 19–24.

[9] See Laeken Declaration on the future of the European Union, *supra* note 8, p. 25.

10 July 2003.[10] The draft Constitutional Treaty was the basis for the discussions in the IGC that was convened on 4 October 2003.[11] On 18 June 2004 the Heads of State and Government agreed on a text for a Treaty establishing a Constitution for Europe.[12] The Treaty text approved by the IGC is to a large extent the same as the text adopted by the Convention. The new Constitutional Treaty will enter into force after it has been ratified by all Member States in accordance with their respective constitutional requirements.[13]

The debate on a democratic deficit within the EU system does indeed concern all EU institutions. But this issue was especially relevant for the Commission in 1999 as Jacques Santer and his fellow commissioners resigned following the accusations of fraud, nepotism and mismanagement. At this point, the public confidence in the Commission reached an all-time low. As the new Prodi Commission took office in 2000, the restoration of the Commission's power and prestige was therefore a top priority. It felt a pressing need to address the immediate implementation of the issues of effective, accountable and legitimate governing arrangements under the existing treaties, bearing in mind that it will take several years before a new treaty addressing these issues possibly enters into force.[14] In the view of the Commission much could and should therefore be done before a new treaty was in place to change the Union's working ways. In early 2000, the Commission therefore decided to launch the reform of European

---

[10] See Draft Treaty establishing a Constitution for Europe (OJ 2003 C 169/1).

[11] See, for example, the IGC website, http://ue.eu.int/cms3_fo/showPage.ASP?id=251&lang=en.

[12] See 2003/2004 IGC – Provisional consolidated version of the Treaty establishing a Constitution for Europe, CIG 87/04, Brussels 6 August 2004.

[13] See Article 48 of the EU Treaty. In several Member States referendums will be held on the new Treaty. If and when the Constitutional Treaty will enter into force is therefore still uncertain.

[14] See Hall, B., European governance and the future of the Commission, *Centre for European Reform Working Paper,* (2002), pp. 2–3.

governance as one of its strategic objectives in the five years to come and this decision resulted in the adoption of the White Paper.[15] In the years following the adoption of the White Paper the Commission has launched several initiatives in order to fulfil the agenda before the approaching end of the term.[16] A new Commission will take office in November 2004. It is therefore interesting at this point to look closer at what the previous one set out to do and what it has achieved in this respect.

Table 1 The Debate on the Future of Europe – Some Important Dates

9 February 2000 The Commission launches the reform on European Governance as one of its strategic objectives.
14 February 2000 The Intergovernmental Conference (IGC) initiated.
9 December 2000 The IGC concluded at the Nice European Council.
25 July 2001 The Commission adopts the White Paper on European Governance.
15 December 2001 The Laeken European Council adopts the Declaration on the Future of the EU.
28 February 2002 The European Convention on the Future of the EU starts its work.
10 July 2003 The European Convention signs its draft Constitutional Treaty.
4 October 2003 The IGC launched.
18 July 2004 The IGC is concluded by the agreement on the Treaty establishing a Constitution for Europe.

[15] See COM (2000) 154, *supra* note 2. The Commission also initiated an internal reform in order to prepare itself for managing a larger and more diverse Union. Commissioner Neil Kinnock was appointed to oversee this modernisation of the Commission's services.

[16] See Annex I for a chronological list and Annex II for a substance matter list of the Commission's communications on governance.

2 QUESTION AND OUTLINE

The objective of this study is to give an overview of how the Commission has realised the agenda set out in the White Paper. Focus will be set on the recommendations and proposals designed to improve overall transparency and quality of the decision-making process. Above all, this study will describe how the Commission envisages the involvement of different actors, such as the involvement of civil society, at the various stages of the decision-making process. In addition some reactions to the Commission agenda will be accounted for.

It should be emphasised that questions of governance were discussed, rather extensively, within the Convention on the Future of EU. The way in which the Convention and, more importantly, the IGC sought to deal with such questions in the new Treaty is therefore of the utmost interest.[17] The Commission was very active in the debate of the Convention and delivered several communications to the Convention. Although the proposals made in the White Paper and to the Convention sometimes overlap, the process of improving governance as addressed in the White Paper must be distinguished from the greater task of drafting a new European Constitution. This study will therefore only shortly account for these possible forthcoming constitutional changes.

Furthermore, this study is limited to what we call the decision-making process and the Commission's recommendations and proposals regarding the same. The White Paper also contains many other proposals, such as proposals on how to improve international representation of the community, but these proposals will not be accounted for in this study.

The Commission agenda set out in the White Paper has been realised through the adoption of several documents in the year following the publication of the White Paper. This study tries to look at all these subsequent documents in the context of

[17] The Commission also drew on the principles made in the White Paper in its contributions to the Convention.

seeing whether and how the Commission has achieved what it set out to do in 2000. The documents this study is based on make use of a variety of concepts and definitions and the language is not always coherent. There is therefore a need to clarify how we define some of the most frequently used concepts in this study.

As mentioned, this study will be limited to what we here call the decision-making process (policy-making will be used as a synonym).[18] By this concept, we mean the process from the initiation stage to the final adoption of an act and the implementation and execution of that act. In general, decision-making in areas coming under the EC Treaty follows the Community method. It currently applies to issues related to the 'first pillar' that contain largely economic, social and environmental matters, including international affairs such as trade.[19] There are several variations of this method. But the "pure" Community method envisages a system whereby the Commission alone makes legislative proposals and the Council and the European Parliament adopt legislation according to the so called co-decision procedure.[20] When adopting an act the Council votes by qualified majority. Execution of legislation is entrusted to national authorities and, to some extent, to the Commission. The Commission is responsible for ensuring that this is done successfully. The system is reinforced by the Court of Justice which guarantees uniform interpretation and, indeed respect for the rule of law.[21] This system does not apply to the second and third pillars, Common Foreign and Security Policy and Justice and Home Affairs, where the right of initiative is mostly shared by all Member States and the Commission, and unanimity mostly applies as a decision rule.

[18] Both concepts are here used in a wider sense than law-making since the Commission also adopts measures that are not law-making.

[19] See, for example, Contribution from Mr Barnier and Mr Vitorino to the Convention on 3 September 2002 on the Community method, CONV 231/02.

[20] See Article 251 EC Treaty.

[21] See Articles 211 and 220 EC Treaty.

In this study the decision-making process is divided into three phases, the initiation phase, the implementing phase and the monitoring phase. Since the focus of the study is on the Commission, these three phases follow the Commission's role in the decision-making process according to the Community method. By the initiation phase we mean when the Commission initiates decision – or law-making. Implementation will be used in a rather wide sense and also include execution. By the monitoring phase we mean the phase of the decision-making process where the Commission monitors the application of the legislation in the Member States, *i.e.* functions as what is usually referred to as the guardian of the treaty.

The study begins by a short introduction of the adoption of the White Paper and its proposals (Part 3). It will then give an account of how the Commission envisages the governance reform at the initiating phase (Part 4), the implementing phase (Part 5), and the monitoring phase (Part 6) of the decision-making process. After that an example will be given of a governance reform in practice (Part 7). The study will then take a short look at some reactions to the Commission's White Paper agenda for reform (Part 8). Finally, some conclusions will be drawn on the possible implications of the realisation of the Commission's agenda for reform in the light of the reactions it has received (Part 9).

3 THE WHITE PAPER ON EUROPEAN GOVERNANCE

3.1 Introduction

According to the Commission, ever since the adoption of the Treaty on European Union in 1993[22] the democratic challenge has "involved a mismatch between a general sympathy of citizens towards European ideals and a nagging mistrust of the institutions".[23] The Commission therefore wanted to deliver an adequate response to the citizens' ability to relate to the Union and have a say in the development of shared rules.[24] In February 2000, the President of the Commission, Romano Prodi, announced that the Commission was going to present a White Paper on European governance.[25] The drafting of the document was organised under six work areas and twelve working groups.[26] Each working group conducted external consultations and presented a report.[27] The findings resulted in a set of recommendations and proposals in the White Paper

---

[22] See Treaty on European Union (OJ 1992 C 191/1).

[23] See Commission Working Document of 11 October 2000 on Enhancing democracy in the European Union 2000, SEC (2000) 1547/7 final, p. 5.

[24] See SEC (2000) 1547/7, *supra* note 23, p. 5.

[25] See Speech by Romano Prodi in the European Parliament on 15 February 2000.

[26] The six work areas were: I: European public space and European scientific references; II: Participation of civil society, Evaluation and Better regulation; III: Decentralisation through agencies and Vertical Decentralisation; IV: Convergence of national policies, Trans-European networks and Multi-level governance; V: EU and world governance; and VI: Future of EU policies. See the Commission's website on Governance, www.europa.eu.int/comm/governance/index_en.htm.

[27] In addition, two studies on the application of Community law by Member States and on how and what the European citizens perceive and expect from the EU were also conducted. The result of these twelve working groups was presented in a document called Preparatory Work for the White Paper that can be found at the Commission's website on Governance, www.europa.eu.int/comm/governance/index_en.htm. However, they do not reflect the official position of the Commission. See also Commission Report on the consultations conducted for the preparation of the White Paper on democratic European governance, SG/8533/01, (June 2001).

that was finally approved by the Commission on 25 July 2001.[28]

The White Paper defines governance as "the rules, processes and practices that affect how powers are exercised at the European level".[29] It forwards a set of recommendations and proposals focusing on the role of the EU institutions, improving the involvement in shaping and implementing EU policy and achieving better regulation. According to the White Paper, the reform is to be implemented immediately within the existing treaties. As will be explained below (see *infra* part 5.2), it may be questioned if all proposals fall within that definition.[30]

Five principles underpin the proposals: openness, participation, accountability, effectiveness and coherence. The proposals intend to lead in the direction of a reinvigoration of the Community method. The Commission describes how it wants to refocus its role on the Treaty tasks of initiating, implementing and monitoring EU-policy.[31] Many of the promoted ideas are in no respect new inventions and have been presented by the Commission at various times before.[32] However, the White Paper also contains some innovative elements. To give a brief overview of the content of the White Paper with regard to better decision-making, the proposals will be presented here under the three tasks that the Commission is focusing on in its governance reform.

---

[28] See COM (2001) 428, *supra* note 3. The Commission primarily addresses the White Paper to the other European Institutions, present and future Member States, regional and local authorities, and civil society.

[29] See COM (2001) 428, *supra* note 3, p. 8.

[30] Some of the initiatives proposed in the Commission's White Paper have been taken forward in the preparation of treaty amendments within the Convention on the Future of EU.

[31] See COM (2001) 428, *supra* note 3, pp. 15, 17, 18, 30 and 33–34.

[32] See, for example, proposals regarding reform of the comitology system, Bergström, C.F., *Comitology – Delegation of Powers in the European Union and the Committee System,* (Stockholm University 2003).

3.2 Initiating Phase

In the White Paper, the Commission explains how it wants to use its right of initiative in a more targeted way and focus on identifying long-term objectives. In its view, an open and structured consultation of the civil society and experts will allow it to consider much more critically than before the demands from the other institutions for new political initiatives. It will also enhance the accountability and public confidence in the way expert advice is used in the decision-making process. In this respect the White Paper put forward several proposals, the most important ones being the adoption of "minimum standards" for consultation and the establishment of a database with details of civil society organisations active at EU level. The aim is to make the procedure more effective and accountable, both for those consulted and those doing the consulting. Another important proposal is the initiative to publish guidelines on collection and use of expert advice. Furthermore, the Commission states its intention to develop a more systematic approach to working with so called key networks and develop more extensive partnership arrangements where it is committed to additional consultations going further than the minimum standards. Additionally, the Commission threatens to make use of its formal right to withdraw proposals where inter-institutional bargaining undermines the Treaty principles of subsidiarity and proportionality.[33]

The White Paper does not focus on a special role for the representatives from the regional and local level at the policy initiation phase as much as it does on a role for civil society in general. According to the Commission, the principal responsibility for involving the regions in the European decision-making process remains with national administrations. Still, it thinks that a complementary response to the national responsibility is needed at the EU level when developing policy proposals with a strong territorial impact.

[33] See COM (2001) 428, *supra* note 3, pp. 15, 17, 19, 22 and 32–34.

The White Paper therefore expresses the will to organise a systematic dialogue with regional and local governments. It also presents a new idea to involve the regional and local level through testing so called tripartite contracts. These are contracts between a Member State, its regions and localities, and the Commission. Central government would play a key role in setting them up and would remain responsible for their implementation. In addition to this, the White Paper wants the Committee of the Regions to play a more proactive role in examining policy and organising the exchange of best practice on how regional and local authorities are involved in the preparatory phase of European decision-making at national level.[34]

3.3 Implementing Phase

The White Paper contains several proposals aimed at improving the quality of policy implementation. They are presented in a frame within which the Commission makes its intentions clear throughout the document: it wants the Council and the European Parliament to focus more on political direction, leaving implementation to itself, the executive. According to the Commission, more use should be made of legislation that is limited to rules laying down essential elements, leaving the executive to fill in all details via implementing rules. The Commission wants a review of the conditions under which it adopts implementing measures in order to make decision-making simpler, faster, easier to understand and, at the same time, improve accountability. In short, the Commission would like to get rid of the comitology system (see *infra* part 5.2) except for the advisory committees when carrying out its executive role. Instead it recommends legislation to define the conditions and limits for the Commission in this respect and have the Council and the European Parliament monitor and control the actions of the Commission. This is not possible

[34] See COM (2001) 428, *supra* note 3, pp. 13–14.

within existing treaties.[35] The White Paper therefore states that the Commission will bring forward the issue at the next IGC. It did so with great success within the work of the Convention on the future of the EU (see *infra* part 5.2.3).[36]

The White Paper also brings up the need to simplify Community legislation. In order to do so, the Commission wants to launch a high-profile programme to review and simplify Community legislation adopted before 2000. Furthermore, it promotes greater use of different policy tools such as regulations, framework directives, guidelines, recommendations and co-regulatory mechanisms.[37] The Commission also promotes the idea of creating further autonomous EU regulatory agencies with the power to take individual decisions in the application of regulatory measures. It argues that the use of such agencies would improve the way rules are applied and enforced across the Union and reinforce the effectiveness and visibility of Community legislation in the eyes of both business and the public. The White Paper sets out conditions for the creation of regulatory agencies. The Commission also states its intention to propose clear framework legislation within which these agencies should operate.[38]

3.4 Monitoring Phase

One of the Commission's essential tasks is to monitor closely the application of Community legislation at the national level. The White Paper puts forward proposals aiming at improving the preconditions for infringement actions. One is to codify and publish the administrative measures in force concerning the processing of complaints about breaches of Community

[35] Article 202 EC Treaty only permits the Council alone to impose certain requirements concerning the way the Commission exercises its executive role.

[36] See COM (2001) 428, *supra* note 3, pp. 20 and 31-34.

[37] The conditions under which the Commission will consider the use of co-regulation are set out at p. 21 of the White Paper. See COM (2001) 428, *supra* note 3, pp. 21 and 23.

[38] See COM (2001) 428, *supra* note 3, p. 24.

law. Another is to establish the criteria that will be used in prioritising the investigation of possible breaches of Community law. The White Paper describes the priority attached to treatment of possible breaches of Community law. Finally, the Commission wants to continue to pursue an active dialogue with the Member States on enforcement, infringement action, application, and in this respect proposes twinning arrangements between national administrators to share best practice in implementing application measures, and promote the awareness of Community law among national courts and lawyers.[39]

3.5 Follow-up Documents of the White Paper

Following the launch of the White Paper, the Commission organised a public consultation which was closed on 31 March 2002.[40] After considering the outcome of the consultation, focus was put on realising the agenda set out in the White Paper.

In June 2002, the Commission adopted the first set of communications under the headline "a modernisation plan for clearer and better European legislation". These mainly focused on better consultation and accountability.[41] A second series of documents focusing on improving the decision-making within

---

[39] See COM (2001) 428, *supra* note 3, pp. 25–26.

[40] Contributions on the public debate can be found on the Commission's website on Governance, www.europa.eu.int/comm/governance/index_en.htm. The Commission also published a working summary of the public response available at www.europa.eu.int/comm/governance/docs/comm_results_en.pdf.

[41] See Commission Communication of 5 June 2002, "European Governance: Better lawmaking", COM (2002) 275 final; Commission Communication of 5 June 2002 on Impact assessment, COM (2002) 276 final; Commission Communication of 5 June 2002, Consultation document: "Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 277 final; and Commission Communication of 5 June 2002, Action plan: "Simplifying and improving the regulatory environment", COM (2002) 278 final.

existing treaties were adopted in December 2002. This set of documents contained a code of conduct for the Commission to use when it consults.[42] The other measures concerned tripartite contracts agreements, the use of experts, regulatory agencies, reform of comitology and better monitoring of the application of Community law.[43] A Report on European Governance describing the progress achieved that far was also adopted.[44]

At this time, some of the ideas presented in the White Paper and the following documents were also promoted by the Commission within the debates that took place in the Convention on the future of the EU. In this respect, the Commission adopted two Communications in 2002: "A project for the future of the European Union" in May and "For the European Union, Peace, Freedom, Solidarity" in December.[45] In addition

[42] See Commission Communication of 11 December 2002, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 704 final.

[43] See Commission Communication of 11 December 2002, "A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities", COM (2002) 709 final; Commission Communication of 11 December 2002 on the collection and use of expertise by the Commission: principles and guidelines, "Improving the knowledge base for better policies", COM (2002) 713 final; Commission Communication of 11 December 2002, "The operating framework for the European Regulatory Agencies", COM (2002) 718 final; Proposal of 11 December 2002 for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2002) 719 final; and Commission Communication of 11 December 2002, "Better monitoring of the application of Community law", COM (2002) 725 final.

[44] See Commission Report of 11 December 2002 on European Governance, COM (2002) 705 final.

[45] See Commission Communication of 22 May 2002 to the European Convention on the Future of the EU, "A project for the European Union", COM (2002) 247 final; and the Commission's second proposal to the Convention on the Future of the EU, Commission Communication of 11 December 2002 to the European Convention on the Future of the EU on the institutional architecture, "For the European Union, Peace, Freedom, Solidarity", COM (2002) 728 final/2.

to these, Prodi commissioned a draft for a fully-fledged Constitution (the Penelope project).[46] However, it was never adopted by the College of Commissioners and is therefore not an official Commission document. Instead, it was labelled a discussion paper.

The Commission continued to pursue its governance reform in 2003. To this end, it launched a major initiative to simplify and streamline EU legislation and adopted a Communication on how a Dialogue with regional and local associations should be organised.[47]

Through these numerous documents adopted after the White Paper, the Commission is realising its agenda for reform of European Governance. Many of the documents restate the basic ideas presented in the White Paper and it may therefore be difficult to get a comprehensible picture of the role envisaged for the Commission and other actors in the decision-making process. The following three chapters will try to clarify what the Commission has done so far with regard to the initiating phase, the implementing phase and the monitoring phase.

---

[46] See Commission's Feasibility Study: Contribution to a preliminary draft Constitution of the European Union of 5 December 2002, working document available at www.europa.eu.int/futurum/documents/offtext/const051202_en.pdf.

[47] See Commission Communication of 11 February 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Updating and simplifying the Community acquis", COM (2003) 71 final; and Commission Communication of 19 December 2003, "Dialogue with associations of regional and local authorities on the formulation of European Union policy", COM (2003) 811 final.

4 PHASE ONE: THE GOVERNANCE REFORM AND SHAPING OF POLICY

4.1 The Commission's Decision to Initiate Policy-making

4.1.1 The Right of Initiative

The Commission's intention set out in the White Paper to involve non-institutional players in the decision-making process has led to the adoption of several subsequent documents envisaging bottom-up involvement through a number of processes and players. But before describing them in more detail, we will look closer at how the Commission envisages its own role when initiating policy proposals.

Throughout the White Paper the Commission underlines the importance of the Community method, the need to reinforce and apply it correctly and to extend it to certain areas where it does not yet apply. A key component of this method is the Commission's exclusive right of initiative.[48] Some signs show that the Commission has felt threatened in this capacity by the European Parliament, the Council of Ministers and the European Council. It has, for example, complained that its right to propose legislation has been infringed by certain compromises concluded between the European Parliament and the Council during the conciliation procedure.[49] Another

---

[48] See CONV 231/02, *supra* note 19.

[49] One example of such a statement is found in the so called *Compound feeding stuffs* dossier, Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC (OJ 2002 L 63/23). Another example is found in the *Two and three-wheel motor vehicles* dossier where the Commission felt that the degree of obligation on the Commission to submit proposals set out in the text was too restrictive. It therefore made a statement that – always on the grounds of its right to propose legislation - it was for the Commission to determine the timetable for submission and the substance of the proposals. See European Parliament Activity Report of 1 August 2001-31 July 2002 of the delegations to the Conciliation Committee, PE 287.614, pp. 19–21.

development that may affect the Commission's right of initiative is the more frequent use of the open method of coordination (OMC) by the Member States. This method is a soft form of policy co-ordination in order to achieve convergence between certain national policies. When used, it lacks formal sanctions for Member States who fail to develop plans to implement the EU objectives and guidelines. This feature of the OMC has raised fears that it will have little or no impact and a more frequent use of it could be a potential threat to greater use of the Community method.[50] According to the Commission, the OMC should therefore only be used as a flexible measure when legislative action under the Community method is not possible. Furthermore, the Commission stresses that it should be closely involved in the process and play a co-ordinating role when OMC is used. In its communications to the Convention on the Future of the EU, the Commission suggested that a new treaty should establish its right of initiative as the general rule and guarantee that the OMC is applied in consistency with the Community method.[51]

In the White Paper, the Commission also expresses its intention to use its right of initiative in a more targeted way and focus strongly on identifying long-term objectives. This approach is closely connected with its decision to withdraw a

[50] The EC Treaty entails two coordination mechanisms in employment and economic policy. In addition, the Lisbon European Council authorised the extension of this method to a broad range of other policy domains, such as information society and enterprise policy. This instrument is sometimes referred to as a "soft-law" instrument compared to the Community method. See *e.g.* Scott, J. and Trubek, D.M., Mind the Gap: Law and New Approaches to Governance in the European Union (2002), *European Law Journal* Vol 8, pp. 1–18. The Commission has tabled a report in which it expresses its recommendations on this subject, see COM (2002) 705, *supra* note 44.

[51] See COM (2002) 247, *supra* note 45; COM (2002) 728 final/2, *supra* note 45, p. 8; and COM (2001) 428, *supra* note 3, p. 22.

whole raft of dossiers on which no progress has been made.[52] Furthermore, the Commission has taken steps to add, where appropriate, a review clause, or even a revision clause, to its legislative proposals so that legislation can be updated and adjusted regularly.[53] Finally, the Commission wants to improve its role in taking decisions to initiate policy by assessing the impact of its initiatives.

4.1.2 Systematising Impact Assessment

In June 2002, the Commission adopted a Communication on impact assessment as part of its so-called Better Regulation Package. This initiative draws on at least a decade of experience of assessment of what impacts a proposal might have, for example, on business in a specific sector or on environmental and gender effects. By integrating these elements, the Commission introduces one system, replacing all the existing separate impact assessment mechanisms. It will be used for all major legislative and policy initiatives provided that they have a potential economic, social and/or environmental impact and/or require some regulatory measure for their implementation.[54]

When comparing the new system with the previous separate mechanisms, several differences can be noted. For example, it refers to a broad range of stakeholders instead of being targeted at one category of them, such as the business community. The results produced will also be easier to transfer across different Directorate Generals as the new approach is based on a single template.[55] The process is

[52] On the basis of its Communication Withdrawal of Commission proposals which are no longer topical the Commission decided to withdraw 108 pending legislative and non-legislative proposals, see Commission Communication of 21 December 2001, "Withdrawal of Commission proposals which are no longer topical", COM (2001) 763 final/2.

[53] See COM (2002) 278, *supra* note 41, p. 8.

[54] See COM (2002) 276, *supra* note 41.

[55] See Radaelli, M. C., *Impact Assessment in the European Union: innovations, Quality and Good regulatory Governance,* Conference background Report, European Commission Conference, (Brussels, 3 December 2003).

intended to systematically analyse the likely impacts of intervention by public authorities. It assesses the problem at stake, the objective pursued and identifies the likely positive and negative impacts of proposed policy action.[56]

It is the Directorate General in charge of the proposal in question that decides whether an impact assessment is needed and how broad and deep this analysis should be. The assessment procedure is divided into two stages. The first one, *a preliminary assessment,* gives an overview of the problem identified, possible options and sectors affected.[57] The Commission will then decide in its Annual Policy Strategy decision and/or Work Programme which proposals will require an *extended impact assessment.* The lead Directorate General is responsible for this process and is free to organise the assessment exercise. It must, however, inform, consult and co-ordinate with other interested Directorate Generals. Additionally, it must consult interested parties appropriately in accordance with the principles set out in the minimum standards on consultation and collection and use of expertise accounted for below (see *infra* part 4.3.3 and 4.5).[58] The main results of this consultation should be summarised in the impact assessment report that will be attached to the proposal in question when it is submitted to the Commission for final adoption. After adoption by the Commission, the extended assessment will be sent to the other institutions along with the proposals and also be available on the Internet.

The new impact assessment procedure has been in place since the beginning of 2003. All proposals included in the Commission's yearly Work Programme have gone under the pre-

[56] See COM (2002) 276, *supra* note 41, p. 5.

[57] The preliminary assessment will result in a short statement focusing on certain key factors such as identification of the issue and desired outcome and identification of the main policy options available to achieve the objective.

[58] See Impact Assessment in the Commission: Internal Guidelines on the New Impact Assessment Procedure Developed for the Commission Services.

liminary impact assessment. Of these proposals, 43 were selected for in-depth extended assessment of which half are completed. Another 46 proposals are planned to undergo the extended assessment in 2004.[59]

4.2 A More Proactive Role for the Institutionalised Advisory Bodies

The obvious actors to be involved in the decision-making process are of course the advisory bodies set out in the EC Treaty, the Economic and Social Committee (EESC) and the Committee of the Regions (CoR). They have been given an important role in the decision-making process as intermediaries between the EU institutions and civil society organisations or regional and local authorities.[60]

The EESC was founded in 1957 under the Treaty of Rome. It represents employers, trade unions, farmers, consumers and the other interest groups that collectively make up "organised civil society" by presenting their views and defending their interests in policy discussions before decisions are taken on economic and social policy. The Commission's dialogue with the EESC is distinct to its social dialogue with management and labour. The Commission is required by the Treaty establishing the European Community (the EC Treaty) to consult these groups when preparing proposals in the social policy field. Under certain conditions, management, labour and social partners can even reach binding agreements that are

---

[59] See Speech by Heinz Zourek, Deputy Director General Enterprise DG, Conference on Impact Assessment, Brussels, 3 December 2003. See, for example, the extended impact assessment done on the new Chemicals policy in Commission staff working paper, 29 October 2003, SEC (2003) 1171/3. Some have also been completed by the services on a voluntary basis under a so-called *proportionate approach* as regards the level of details.

[60] Normally, these Committees must be consulted by the Council or by the Commission. The European Parliament may also consult them.
In addition, the committees can issue an opinion on their own initiative.
See Articles 262 and 265 of the EC Treaty.

subsequently turned into Community law. A Member State may also entrust management and labour, at their joint request, with the implementation of directives adopted. Trade unions and employers' organisations therefore have a particular role in the shaping of social policy.[61]

The CoR is a more recently established body. It was only set up in 1994 under the Treaty on European Union (the EU Treaty). Through its representatives of regional and local authorities, the Committee intends to give these authorities a say in European Union decision-making process. It has to be consulted on matters that concern local and regional government, such as regional policy, the environment, education and transport.[62]

In several of the communications that followed the White Paper, the Commission makes it clear that it would like both the EESC and the CoR to play a more proactive role, for example by organising consultations on behalf of the Commission.[63] Additionally, the CoR will have an important role when the Commission organises a more systematic dialogue with local-governments associations (see *infra* part 4.6).

Although the EESC and the CoR have a central role in the consultation process, they are not capable of covering all issues and often deliver their opinions very late in the process. In order to bring the European Union closer to its citizens, a direct contact with civil society is also crucial. The Commission has therefore found it essential to improve the direct consultation of civil society and regional and local government.

---

[61] See Articles 137-139 EC Treaty.

[62] See Articles 137-139 EC Treaty. See also COM (2002) 704, *supra* note 42, p. 8.

[63] In 2001 protocols on cooperation between the Commission and the EESC and the CoR respectively were adopted that provide for these Committees to organise consultations on behalf of the Commission.

4.3 Involvement of the Civil Society at Large – The Open Consultation Process

4.3.1 Introduction

The EC Treaty does not include any general provision that obliges the EU institutions to consult representatives of the civil society prior to making decisions. The Protocol on the application of the principle of subsidiarity and proportionality does state that the Commission should "consult widely" before proposing legislation and, wherever appropriate, publish consultation documents, except in cases of particular urgency or confidentiality. Although there are no other formal treaty rules on consultation, the EU institutions have a long tradition of direct contacts with interested parties. In particular the Commission often conducts consultations with interested parties through instruments, such as Green and White Papers, communications, advisory committees, business test panels and ad hoc consultations.[64] But importantly, a general approach on how to undertake such consultations has not existed. Instead, consultation has been based on a variety of traditions and each of the Directorate Generals has had its own mechanisms and methods for consulting its respective sectoral interest groups.

The integration and involvement of civil society was at the core of the White Paper. But before describing how the Commission wants to improve the involvement of civil society in the decision-making process, it is important to understand what this concept stands for. There is no legal or commonly accepted definition of what civil society means. According to the Commission, it can nevertheless be used as shorthand for referring to a range of organisations which include everything from the labour-market players and organisations representing social and economic players (for instance, consumer organisations) to NGOs (non-governmental organisations which bring people together in a common cause, such as environmental organisations), CBOs (community-based organisations, *e.g.* youth organisations and family associations) and religious

[64] See COM (2001) 428, *supra* note 3, pp. 15–16.

communities.[65] Individual citizens concerned, academics, technical experts and interested parties in third countries are also part of civil society.

In order to improve the consultation of civil society actors in the shaping of policies, the Commission wanted to introduce general principles and minimum standards for consultation of interested parties by the Commission. But before adopting such a document, it consulted the civil society on a draft version of it. This draft version made a distinction between open and focused consultation processes. By the term *open consultation procedures* the Commission meant the broad public consultation processes where all interested parties and individuals are able to provide the Commission with input. The term *focused consultation procedures,* on the other hand, was used for situations where the Commission identified the most appropriate consultation channels, for example by clearly defining the target group(s) of a consultation process.[66] The Commission was criticised for making this distinction. Many of those who commented on the draft version wondered whether access to consultations should be limited and how the quality of submissions by interested parties would be assessed. In its final version, the Commission therefore no longer used the terms open and focused consultation procedures although it still made that distinction. Still, this study will continue to use the terms open and focused consultation.[67]

With regard to improving the *open consultation procedure,* the Commission wanted to broaden the existing consultation process. Some ideas expressed in the White Paper to achieve that were to make the system of consultation more effective and accountable by establishing a database with details of civil society organisations active at European level and create a

[65] See COM (2002) 704, *supra* note 42, p. 6. The Commission refers to the Opinion of the Economic and Social Committee of 17 November 1999 on the role and contribution of civil society organisations in the building of Europe (OJ 1999 C 329/30), p. 30.
[66] See COM (2002) 277, *supra* note 41, pp. 7–8.
[67] See COM (2002) 704, *supra* note 42, p. 11.

"culture of consultation" through a code of conduct that sets minimum standards indicating whom should be consulted and how it should be done. According to the Commission, these both goals have now been achieved and will be described below (see *infra* part 4.3.3).[68]

In order for these processes to function, a more open and transparent communication between European public-sectors (institutions, Member States, etc.) and Europe's citizens in general is needed. Some important steps in this respect have already been taken previous to the launch of the White Paper agenda. One way of making the institutions more open was the adoption by the European Parliament and Council Regulation regarding public access to documents that came into force in December 2001.[69] Another way through which the Commission has promoted openness is by its information and communication strategies[70] and by continuing to develop services such as *Eur-Lex* (a database containing legal and juridical texts from all the institutions with the aim to provide the passage of a text from proposal to adoption), *Futurum* (an inter-institutional website with information about the debate on the future of the European Union in general and the process of drafting the European Constitution in particular) and *Governance* (a website with information on the governance reform).[71] The Commission has also adopted a communication

---

[68] See COM (2001) 428, *supra* note 3, pp. 15 and 17.

[69] See European Parliament and Council Regulation 1049/2001/EC of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145/43). Since January 2002, the Commission has also made its minutes of meetings available on the Internet.

[70] See Commission Communication of 28 June 2001 on a new framework for cooperation on the information and communication policy of the European Union, COM (2001) 354; and Commission Communication of 2 July 2002 on an Information and Communication Strategy, COM (2002) 350 final.

[71] See Eur-Lex, www.europa.eu.int/eur-lex/en/index.html; Futurum, www.europa.eu.int/futurum; the European Convention, http://european-convention.eu.int; and the Commission's website on Governance, www.europa.eu.int/comm/governance/index_en.htm.

on Interactive Policy Making (IPM) which aims to improve governance by using the Internet for collecting and analysing reactions in the marketplace for use in the European Union's policy-making process.[72] This initiative has resulted in the web portal *Your-Voice-in-Europe*, a single access point used for all consultations.[73]

4.3.2 Establishment of Databases

Since June 2002, the database called *Consultation, the European Commission and Civil Society* (CONECCS) has been fully operational. The Commission set it up in order for the general public and civil society organisations to see what organisations are involved in consultations. The database also gives the Commission itself a possibility to identify civil society organisations that might be consulted. It is divided in two sections; one section contains a list of non-profit making civil society organisations organised at European level and one section a list of the Commission's formal and other structured civil society consultation bodies (see *infra* part 4.4).[74]

---

[72] See Commission Communication of 3 April 2001 on Interactive Policy Making, COM (2001) 1014. IPM forms part of the "e-Commission" initiative and is linked to the Commission's governance and the better regulation initiatives.

[73] See Your-Voice-in-Europe, www.europa.eu.int/yourvoice. Other examples of important websites in this respect are Europe Direct; PreLex; Citizens Signpost Service; Solvit; Dialogue with Citizens, Dialogue with Business; and CONECCS, (data on formal and structured consultative bodies), *infra* note 74.

[74] See CONECCS, www.europa.eu.int/comm/civil_society/coneccs/index_en.htm. The directory of the non-profit making civil society organisations is established on a voluntary basis and is only intended for information. Civil society organisations can register on the database themselves if they meet some basic conditions set up by the Commission. But it is important to note that the inclusion in the directory does not constitute any recognition on the part of the Commission. In January 2004 there were 696 civil society organisations and 126 consultative bodies registered in the database.

Another internet-based initiative to improve the consultation process is the establishment of the single access point for consultation called Your-Voice-in-Europe described above. It lists all open public consultations, presents any forthcoming policy initiatives and provides information on how to participate. It is designed to receive and store reactions to new initiatives.[75]

4.3.3 Minimum Standards for Consultation

General principles and minimum standards for consulting non-institutional interested parties were adopted in December 2002 and have been applied by the Commission since January 2003.[76] The minimum standards define consultation as a process through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission. Under this definition both specific consultation frameworks already provided for in the treaties, consultation requirements under international agreements and decisions taken in a formal process of consulting Member States comitology procedure are excluded. The minimum standards apply when the Commission consults on major policy initiatives, particularly in the context of legislative proposals.

---

[75] See COM (2001) 1014, *supra* note 72; and COM (2002) 704, *supra* note 42, p. 7.

[76] See COM (2002) 704, *supra* note 42, p. 11. Naturally, civil society had a possibility to give its view on the Commission document before its adoption. In this respect, the Commission first published a consultation document with a draft proposal, Consultation document of 5 June 2002, see COM (2002) 277, *supra* note 41. When the public consultation on the draft proposal was closed on 31 July 2002 the Commission had received 88 contributions. In general, the contributions welcomed the proposed guidelines. The most common concern was the duration of the minimum consultation period and whether the guidelines should be legally binding or not. Many contributions commented on the Commission's distinction between open and focused consultation processes. Some argued that only representative European organisations should be consulted, while others felt that no interested or affected party should be excluded.

It is important to notice that the principles and standards set out in the document are not legally binding. That is because the Commission did not want a clear dividing line drawn between consultations launched on its own initiative prior to the adoption of a proposal, and the subsequent formalised and compulsory decision-making process according to the treaties. It also wanted to avoid a situation where a proposal is challenged in the Court for not having gone through a proper consultation process.[77] But the Commission has adopted certain measures in order to reassure those who fear that a non-legally binding document will have no real effect.[78]

When the Commission first started drafting the minimum consultation standards, many thought that its main goal simply was to expand the circle of the Brussels insiders in the process.[79] However, the final version goes much further than that. The aim is to ensure that all relevant parties are properly consulted on a proposed measure, not just those whom the government staff can identify in advance as interested parties. The Commission emphasises that national, regional and minority views also are important to take into account.[80]

According to the general principles consultation processes run by the Commission should be transparent. The Commission must therefore be clear on what issues are being developed, what mechanisms are being used to consult, who is being consulted and why and what has influenced decisions in the formulation of policy proposals. On the other hand, the Commission is asking the organisations to make it apparent which interests they represent and how inclusive that representation

---

[77] See COM (2002) 704, *supra* note 42, p. 10.

[78] One measure is to put in place a series of implementation measures in order to ensure proper application and monitoring across all departments. Another is to establish a Commission intranet website that will provide Commission staff with practical guidance, including examples of best practice, see COM (2002) 704, *supra* note 42, p. 13.

[79] See Shub R., Let's all talk' plan could bring Brussels outsiders into the EU fold, *European Voice*, (4–10 July 2002).

[80] See COM (2002) 704, *supra* note 42, p. 12.

is.[81] The Commission will acknowledge receiving the contributions and the results of open public consultations will be displayed on websites linked to the single access point on the Internet. The Commission states that contributions will be analysed carefully to see whether, and to what extent, the views expressed can be accommodated in the policy proposals.[82] Civil society will also have a role to play in the impact assessment procedure (see *supra* 4.1.2).

4.3.4 Consultation of Civil Society in the Constitutional Treaty

The political will to emphasize the citizen's possibility to interact with the EU institutions was also expressed within the work of the Convention on the future of the EU. The IGC followed the Conventions proposals in this respect. The Constitutional Treaty explicitly states that the Commission "shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent".[83] It also gives the civil society in general a more direct role by spelling out the principle of democratic equality which means that all citizens shall receive equal attention from the Union's institutions. In addition, the EU institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action.[84] According to the Constitutional Treaty the EESC and the CoR will continue to assist the Commission and the European Parliament as the Union's advisory bodies.[85]

---

[81] See COM (2002) 704, *supra* note 42, p. 17.
[82] See COM (2002) 704, *supra* note 42, p. 21.
[83] See Article I-47.3 of the Constitutional Treaty.
[84] See Articles I-45 and I-47 of the Constitutional Treaty. Article I-47.4 regarding the citizen's initiative and Article I-48 regarding the social partners and autonomous social dialogue may also be noted in this context.
[85] See Article I-32 of the Constitutional Treaty.

4.4 Involvement of Target Groups – The Focused Consultation Process

In addition to consulting civil society in general, the Commission also defines target groups and actively seek input from relevant interested parties through what is here called focused consultation procedures. In this respect, the target group in question is provided a kind of privileged access to the Commission's policy-making process. Examples of such focused consultation mechanisms are formal consultation groups officially established by the Commission, or other structured consultation groupings, as well as *ad hoc* consultation exercises with invited representatives, for example through hearings.[86]

According to the Commission, the name focused does not, however, mean that access will be limited only for certain types of organisations. In line with the principle of open governance, the Commission keeps a very inclusive approach in this respect. It stresses that every individual citizen, enterprise or association can provide the Commission with input. Still, a clear selection criterion is essential.[87]

The way for the Commission to decide on target groups is set out in the minimum standards for consultation of interested parties. Accordingly, target groups consist of those affected by the policy, those who will be involved in implementation of the policy or bodies that have stated objectives giving them a direct interest in the policy. The Commission must make sure that all relevant parties have been given the opportunity to express their views before it defines a group. Apart from the elements mentioned above, the minimum standards list additional elements that the Commission should take into account when defining the target groups. These elements are, for example, the wider impact of the policy on other policy areas and the need to involve non-organised interests, specific experience or technical knowledge where appropriate. The

[86] See COM (2002) 277, *supra* note 41, p. 8.
[87] See COM (2002) 704, *supra* note 42, p. 11.

Commission should also strive for a proper balance between the representatives or different groups, for example large and small organisations or organisations in the EU and those in non-member countries.[88]

In order to make these focused consultations more transparent, the Commission uses the database CONECCS, mentioned above (see *supra* part 4.3.2). Apart from the directory of non-profit making civil society organisations, the database lists the Commission's formal or structured consultative bodies, in which civil society organisations participate. They have relatively regular meetings, at least once a year. Formal consultative committees, such as the Advisory Committee on the Common Agriculture Policy, are set up by a Commission decision. Other structured consultative bodies may, in addition to civil society organisations, include other bodies, such as private companies, universities or research institutes. Sometimes the Commission consults civil society organisations also within the consultation structures with Member States representatives. The website includes information about the remit, composition and working methods of these bodies.[89]

The idea of drawing up more extensive partnership agreements with a number of organised civil society sectors presented in the White Paper was dropped from the final version of the minimum standards on consultation. The aim was to allow the Commission to consult the partner sectors more widely than the minimum standards require. It would also have been a way to encourage civil society organisations to rationalise their internal structure. However, the European Parliament disagreed with the idea of establishing closer links with parts of civil society organisations in the form of partnership agreements or accredited organisations as it did not want civil society organisations to be granted a role which, either

[88] See COM (2002) 277, *supra* note 41, p. 8; and COM (2002) 704, *supra* note 42, pp. 11–12 and 19–20.

[89] See CONECCS, *supra* note 74; and COM (2002) 277, *supra* note 41, pp. 8–9.

wholly or in part, was that of those elected holding political responsibility. It also held that such a system could add an additional level of bureaucracy. Concern was moreover expressed by certain quarters within civil society who thought that there would be a *de facto* establishment of a regime of privileged associations. According to the Commission, however, this idea is still under consideration but given the observations it received, it prefers a pragmatic approach to ensure the success of implementing general standards.[90]

4.5 The Use of Expert Advice

External expertise makes an important contribution to the decision-making process in the European Union. They are often asked to perform uncontroversial scientific assessments but they may also address very controversial issues where the evidence is not always clear or evident.[91] However, the complex structure within which such external experts have been used has made it difficult to get a clear overview of the network.

In order to use experts in a more structured manner and in that way make the process more open and transparent, the Commission introduced principles and guidelines on the collection and use of expertise. These guidelines should be seen as a complement to the general principles and minimum standards for consultation described above (see *supra* part

---

[90] See COM (2002) 705, *supra* note 44, p. 16; and the European Parliament resolution of 15 November 2001 on the Commission White Paper on European Governance, C5-0454/2001-2001/2181(COS)), point 11 (e).

[91] This is for example the case in matters concerning BSE ("mad-cow"-disease) and GMO's (Genetically Modified Organisms) where policies have to be adopted in the face of significant uncertainty. These matters are made all the more problematic given that the Union is required to apply the precautionary principle and acknowledge the role of risk assessment and risk management when deciding policy outcomes. Interested parties and the public at large should be able to know what has led the Commission to make its decision, see COM (2002) 713, *supra* note 43, pp. 3–6.

4.3.3).[92] They apply since January 2003 and set out core principles and internal guidelines to Commission departments regarding collection and use of expert advice at all stages of Commission policy-making. In other words, they should be considered from the initial stage when identifying the need for a policy action and the shaping of the policy options to its proposal, implementation, monitoring and review. They apply whenever Commission departments collect and use advice of experts coming from outside the responsible department.[93]

The principles and guidelines are not legally binding, nor do they apply to the formal stages of decision-making as prescribed in the Treaty and in other Community legislation.[94] The guidelines on expert advice should also be separated from the minimum standards on public consultation described above. The minimum standards are used when the Commission seeks the view of civil society groups and other interested parties because of the constituencies they represent rather than because of the expertise they possess.[95]

By introducing these guidelines, the Commission wants to improve and enhance the use of experts for the establishment of Community policies. This does not only include scientific expertise but also know-how in a broad sense. The Com-

---

[92] See COM (2002) 713, *supra* note 43.

[93] The principles and guidelines cover the collection of advice through *ad hoc* and permanent expert groups, external consultants (individuals, groups or companies) and instances when these mechanisms are used in conjunction with in-house expertise (residing in Commission departments and in the Joint Research Centre).

[94] Therefore, both formal legislative procedures and the formal exercise of the Commission's implementing powers with the assistance of comitology committees are excluded, see *infra* part 5.2.

[95] Whenever there may be doubts as to whether the minimum standards on consultation or the guidelines on expertise apply, the Commission departments responsible will provide detailed guidance to the relevant external parties. See COM (2002) 713, *supra* note 43, p. 7. Advice received from EU agencies (e.g. European Environment Agency, European Food Safety Authority) should also, where appropriate, be used in a manner consistent with the principles and guidelines.

munication has two main objectives: to help Commission departments mobilise and exploit the most appropriate expertise and to guarantee that the process of collecting and using expert advice should be credible. In order to fulfil these objectives, three core principles are laid down: to seek advice of an appropriately high quality, to act on advice from experts in an open manner and to ensure that the methods for collecting and using expert advice are effective and proportionate.[96]

In order to assess the impact of expert advice, any proposal submitted by departments for Commission decision should also be accompanied by a description of the expert advice considered, and how the proposal takes this into account. This includes cases where advice has not been followed. As far as possible, the same information should be made public when the Commission's proposal is formally adopted. In 2005, the Commission will organise an independent evaluation of the application of the present guidelines.[97] The use of experts will also have a role to play in the impact assessment procedure (see *supra* part 4.1.2).

4.6 The Role of Regional and Local Government

Although the White Paper acknowledges the difference between consulting civil society and consulting local and regional government, the minimum standards for consultation do not treat regional authorities as a distinct part of civil society. Many have criticised the fact that the standards do not

[96] Underpinning the core principles are a series of guidelines regrouped under headlines such as identifying and selecting experts, managing the involvement of experts and ensuring openness. It is stated, for example, that policy issues requiring expert advice should be identified as early as possible and that the main documents associated with the use of expertise on a policy issue, and in particular the advice itself, should be made available to the public as quickly as possible, providing no exception to the right of access applies. See COM (2002) 713, *supra* note 43, pp. 6–13.

[97] See COM (2002) 713, *supra* note 43, pp. 11–13.

provide for individual and direct consultation of local and regional authorities. After all, representatives of the interest groups of civil society have not been elected in public elections and are not subject to parliamentary scrutiny. Local and regional authorities also have direct responsibility for implementing EU policy and legislation. In response to the wishes expressed in the consultation on the White Paper, the Commission committed itself to establish a more systematic dialogue with European and national associations of regional and local government at an early stage of policy shaping.[98] The initiative resulted in a Communication adopted in December 2003.[99] The Commission presents this systematic dialogue as a complement to other specific consultation provided for, for example, in the Treaty or in accordance with the minimum standards for consultation.

The reason for systematising the dialogue is to improve the process of developing European policies that have an impact on regions and municipalities such as regional development policy, transport, rural development or the environment. The Commission underlines that regional and local authorities often are well placed to assess the coherence and effectiveness of these policies. Therefore it hopes that their involvement will enable the Commission to take more effective decisions and to assess their impact. The dialogue is designed to encourage these bodies to make their views known before the formal decision-making processes are launched.[100] The Communication sets out a number of essential principles that should govern the Commission's relations with the associa-

---

[98] See COM (2002) 705, *supra* note 44.

[99] See COM (2003) 811, *supra* note 47. To prepare this communication, the Commission adopted a staff Working Paper on the ongoing and systematic policy dialogue with local-government associations in March 2003. It was published on the Internet as part of a process of public consultation; see Commission Working Paper of 28 March 2003 on an Ongoing and systematic policy dialogue with local-government associations.

[100] This dialogue will not prejudice the specific consultations provided for in the Treaties.

tions of local and regional authorities. It also defines the scope of this dialogue.[101]

In practice, the dialogue will take the form of regular hearings with European and national associations of regional and local authorities. The reason for defining the appropriate partners as associations is to achieve efficiency since, following the enlargement, the Union will include about 250 regions and 100 000 local authorities.[102] The Commission therefore wants to organise a dialogue with representatives that are able both to deliver a collectively agreed opinion from their members and to pass on to them the Commission's proposals and policy guidelines. Local authorities will, of course, still be able to express their individual views directly, within the consultations launched by the Commission, notably through the Internet. Furthermore, the Commission seeks to enhance the intermediation role played by the Committee of the Regions (CoR) and calls on it to identify the relevant associations in this dialogue on a case by case basis. It is the task of the CoR to co-operate with the different associations in order to establish the selection criteria. On the basis of proposals made by the CoR, the Commission will then decide the list of associations participating in the meetings. It may also amend or add associations to the lists.[103]

In the preparatory working paper leading to the Communication, it was suggested that the Commission would invite the CoR to organise meetings with European and national associations of regional and local government. However, in the final version the Commission states that it is responsible for

---

[101] See COM (2003) 811, *supra* note 47, pp. 3–5

[102] See COM (2003) 811, *supra* note 47, p. 5.

[103] The Commission considers that the CoR is best placed to identify the associations concerned by the various policies in question and suggest indicative lists of European and national associations relevant to the subjects to be discussed. These lists should contain associations represented at the highest level which are concerned by the policy, involved in implementing the policy or have a direct interest in the policy. See COM (2003) 811, *supra* note 47, pp. 6–7.

organising and holding the meetings. The systematic dialogue will be instituted based on the presentation of the Commission's annual work programme or the major policy initiative that have a direct or indirect territorial impact.[104] It may also be noted that the Treaty includes articles of importance for regions and local authorities in this respect.[105]

4.7 The Use of Key Networks

The Commission has also acknowledged the growing social and political importance of networks that link business, communities, research centres, and regional and local authorities in a non-hierarchical way. The White Paper stated that networks could make a more effective contribution to EU policies if they were made more open and their relation with the institutions were better structured. The Commission therefore envisaged developing a more systematic and proactive approach to working with key networks in order to enable them to contribute to decision-shaping and policy execution. It also wanted to present proposals by the end of 2003 on how the framework for trans-national cooperation of regional and local actors could be better supported at EU level. The Commission has already been able to encourage the interactive communication that these organisations increasingly use to link to their national and local bases through its internet based initiatives, such as the Interactive Policy Making (IPM) accounted for above (see *supra* part 4.3.1). The European consumer centre network covering 14 European consumer centres in 12 Member States and the Euro Info Centre network are examples of networks participating in the IPM initiative.[106]

[104] See COM (2003) 811, *supra* note 47, pp. 7–8.

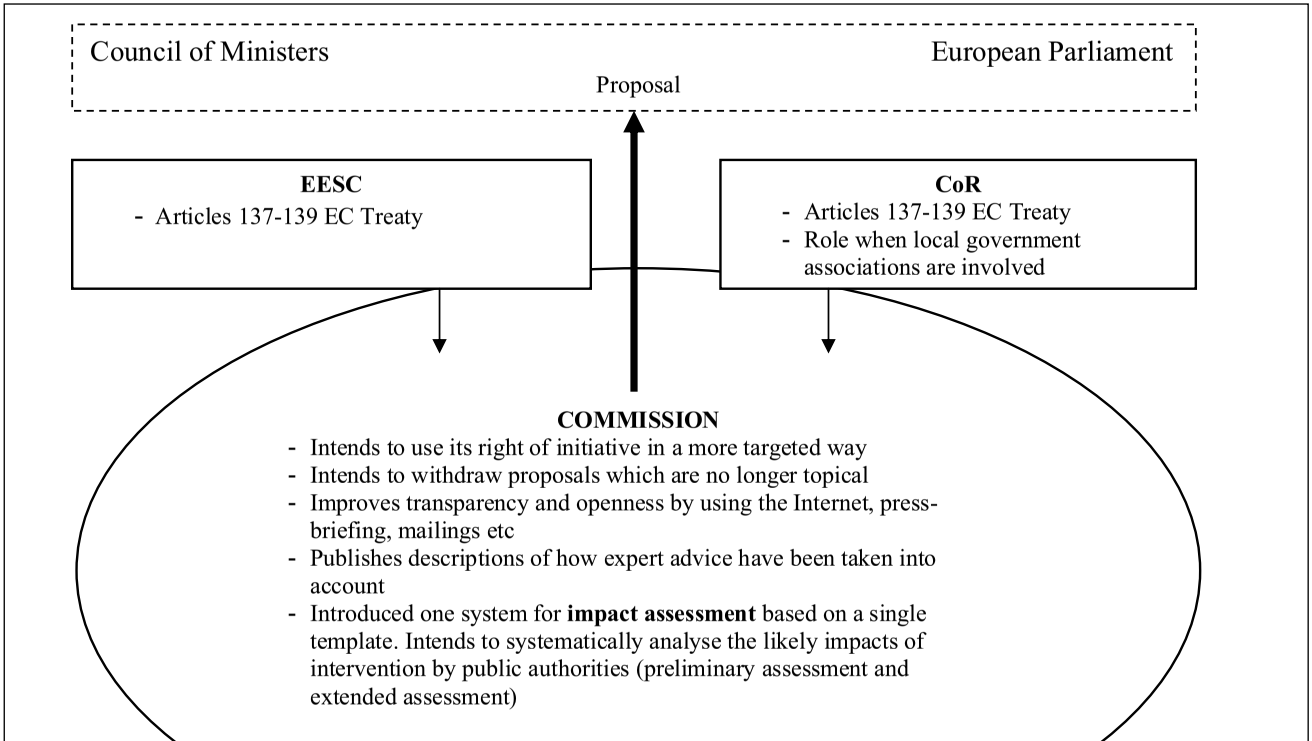
[105] Article I-5.1 of the Constitutional Treaty contains a clause guaranteeing respect for the constitutional structure of each Member State, inclusive of regional and local self-government. The Protocol on the principle of subsidiarity also makes provision for wide-ranging consultation before any legislative act is adopted, with the possibility of taking into account the regional and local dimension of the action envisaged.

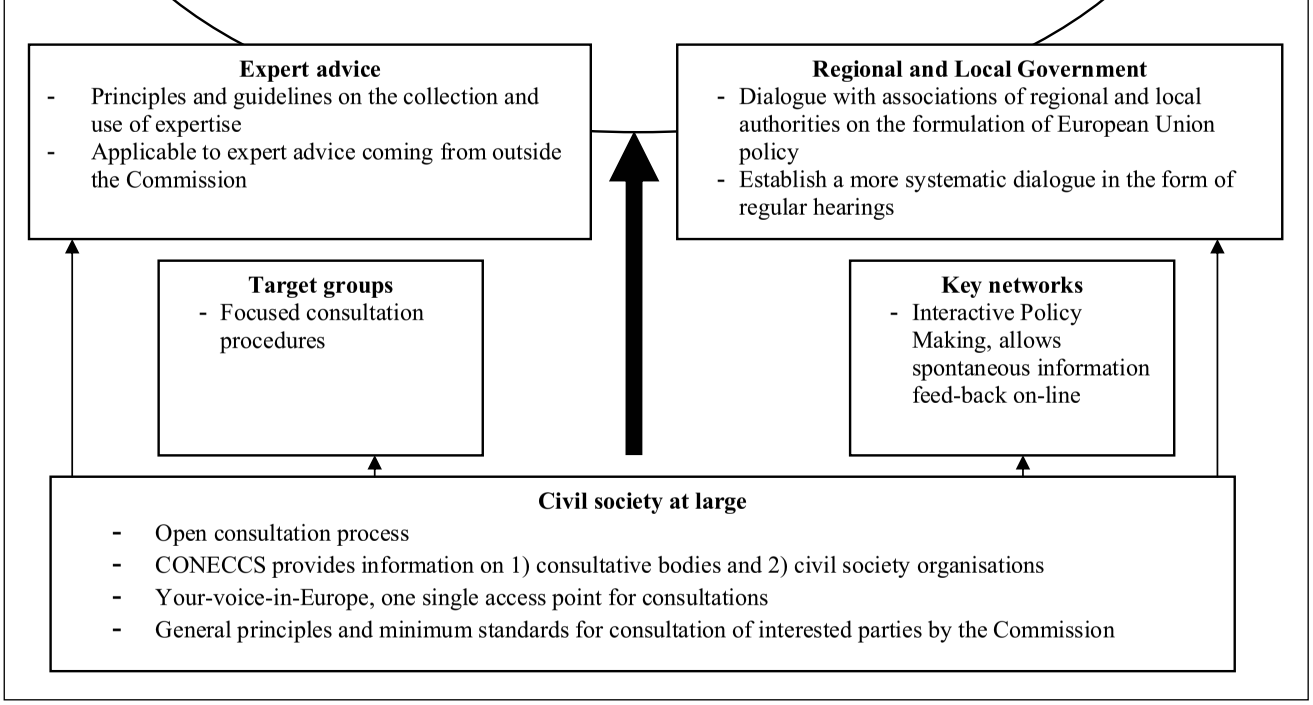
[106] See COM (2001) 428, *supra* note 3, p. 18; and COM (2002) 705, *supra* note 44, pp. 17–18.

4.8 Conclusion

Summing up the initiatives made to follow up the proposals in the White Paper at the initiating stage of the decision-making process three things may be noted (see Table 2 below). First, the Commission has realised almost everything set out in the White Paper for this stage. Second, the Commission has focused on systematising the existing processes, making them easier to understand and to apply through setting up uniform standards and databases, rather than coming up with new initiatives at this stage. Third, the system envisaged is based on a bottom-up approach where civil society at large plays a significant role in giving input to the Commission at an early stage of the process. Key networks, target groups, expert groups and regional and local governments are given a more privileged role in the process. The main part of the proposals lies in what the Commission itself sets out to do, i.e. the impact assessment procedure, and work improving transparency and openness. The next chapter will describe the proposals at the implementing stage of the decision-making process.

Table 2
Phase One – The Governance Reform and Shaping of Policy




Expert advice
- Principles and guidelines on the collection and use of expertise
- Applicable to expert advice coming from outside the Commission
Regional and Local Government
- Dialogue with associations of regional and local authorities on the formulation of European Union policy
- Establish a more systematic dialogue in the form of regular hearings
Target groups
- Focused consultation procedures
Key networks
- Interactive Policy Making, allows spontaneous information feed-back on-line
Civil society at large
- Open consultation process
- CONECCS provides information on 1) consultative bodies and 2) civil society organisations
- Your-voice-in-Europe, one single access point for consultations
- General principles and minimum standards for consultation of interested parties by the Commission

5 PHASE TWO – THE GOVERNANCE REFORM AND IMPLEMENTATION OF POLICY

5.1 Introduction

The following chapter will examine the measures taken by the Commission to follow-up the proposals for improving the decision-making process at the implementing phase. In this respect, the use of experts according to the Commission's guidelines accounted for above is also relevant as they apply at all stages of Commission policy-making (see *supra* part 4.5). Compared to the initiating phase, the Commissions proposals at this stage are more focused on reforms rather than on improving the existing system. In the following the Commission's proposal on reforming comitology, on involving regional and local government, on the use of regulatory agencies and finally on how to involve the market practitioners through co-regulation and self-regulation will be described.

5.2 Reforming Comitology

5.2.1 Introduction

According to Article 202 of the EC Treaty, the Council shall delegate powers to the Commission to implement legislation. The Court of Justice has repeatedly stated in its case law that this solution rests on the idea to "distinguish between the rules which, since they are *essential* to the subject matter envisaged, must be reserved to the Council's power, and those which being merely of an *implementing* nature may be delegated to the Commission" (emphasises added).[107] Thus, the Council is required to transfer a considerable part of the responsibility for lawmaking to the Commission.[108] Quite logically, the

[107] See, for example, Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster, Berodt & Co* [1970] ECR 1161, paragraphs 6 and 9; and Case 240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 36.

[108] The Council may also reserve the right, in specific cases, to directly exercise implementing powers itself.

Council is also entitled to impose certain requirements on the Commission when delegating this power to legislate. In practice the mechanism for political control by the Council on the Commission is exercised through the use of committees comprising representatives from the Member States and chaired by the Commission. This system is commonly referred to as comitology.[109]

Under the Council Decision 1999/468/EC, the so called comitology decision, which currently governs the comitology process, there are three types of procedures: *the advisory procedure, the management procedure* and *the regulatory procedure.* The difference between these procedures lies in the degree of involvement and power of Member State's representatives, in other words the extent to which the Commission is legally compelled to follow the committee's opinion. Under the most restrictive procedure, the regulatory procedure, the Commission can only proceed to adopt the implementing measure if the opinion is positive. The European Parliament only has a very limited right of supervision over the Commission in this respect. It may object when it feels that the Commission is exceeding its powers. However, the Commission is not obliged to follow the opinion of the European Parliament, only to re-examine the matter.[110]

Comitology has come under criticism as forming part of EU's "democratic deficit". In the White Paper the Commission addresses that criticism and proposes re-examining the conditions under which it adopts implementing measures. Instead, it advocates a system where legislation defines the conditions and limits within which the Commission carries out its implementing role instead of the current comitology system. The Council and the European Parliament should focus more on political direction, leaving implementation to the executive,

---

[109] See, in general, Bergström, C.F., *supra* note 32.

[110] See Council Decision 1999/468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184/23).

i.e. the Commission. According to the Commission, this reform would result in a simpler and faster decision-making procedure. Additionally the accountability would improve.[111]

A reform changing the comitology system requires that Article 202 in the EC Treaty is amended. Since the governance reform according to the White Paper should be achieved within the existing treaties, the Commission has chosen to approach the aim to reform the comitology system in two ways. On a more long-term basis it has promoted the amendment of Article 202, in order to establish a new system for delegating powers, within the work of the Convention on the future of the EU (see *infra* part 5.2.3). But as a temporary measure, the Commission has also taken an initiative to reform parts of the current comitology system.

5.2.2 Proposal for Amending the Current Comitology Decision

Given the relatively long period which will elapse before a new treaty may come into force, the Commission has taken an initiative to reform the current comitology system within, at least what it claims, the limits of the existing treaty provisions. However, it stresses that this proposal to amend the comitology decision should only be seen as a temporary measure.[112] As already stated in the White Paper, the Commission stresses the need for reforming the comitology procedures by pointing at the growth of co-decision. According to the Commission, the primary purpose of the proposal is therefore to increase the role of the European Parliament in the implementation of legislation decided by co-decision. The Commission also sees the reform as a way of clarifying the exercise of executive functions. But it is clear that an important part of the reform is also to give the Commission much more responsibility when exercising its powers in this respect.

---

[111] See COM (2001) 428, *supra* note 3, p. 31.
[112] See COM (2002) 719, *supra* note 43.

The proposal was first presented on 11 December 2002 and later amended on 22 April 2004 with regards to some of the objections raised by the European Parliament (see *infra* part 8.4). It entails three major changes. First, it tries to place the European Parliament and the Council on an equal footing during the supervisory phase of the comitology process by granting the European Parliament co-decision status with the Council when supervising the implementing powers conferred on the Commission.[113]

Secondly, the Commission proposes to reduce the number of procedures from three to two. It abolishes the management committee procedure and makes the least restrictive advisory committee procedure the standard one.[114]

Thirdly, the proposal envisages that the choice of the two remaining procedures, in relation to measures adopted under co-decision, should be prescribed and no longer left to the discretion of the legislating institution. The existing regulatory procedure, *i.e*. the most restrictive one, is revised for implementing measures under co-decision by introducing two distinct phases. In the initial phase, the Commission will be responsible for drawing up implementing measures. The committee can influence the substance of the measure by delivering an unfavourable opinion. However, it is ultimately the Commission that is responsible for the substance of the draft. In the second phase, both the European Parliament and the Council may oversee the executive role of the Commission by expressing opposition to the Commission's draft implementing measure. In that case, the Commission has four choices. It may, taking the objections into account, present a legislative proposal, make a modification of its draft, adopt the original draft without changes, or, finally, withdraw its draft. Thus, the Commission would be able to override the European Parlia-

[113] See Article 2 of the proposal, COM (2002) 719, *supra* note 43.
[114] See Article 1 of the proposal, COM (2002) 719, *supra* note 43.

ment and the Council and in no way be obliged to follow the opinion of the legislators.[115]

The main substantive changes in the amended proposal, compared to the original proposal, are that the Council always has to react to any European Parliament position that the Commission proposal is *ultra vires,* that the deadline for the legislators to raise objections has been extended by one month, that the Commission must make all relevant documents available at the Internet and that all relevant information must be at the European Parliaments disposal. Furthermore, the amended proposal includes a paragraph in the recital stating that the decision shall not affect the Lamfalussystructure in the field of financial services (see *infra* part 7).[116]

The Commission claims that this proposal falls within the limits of existing Treaty provisions. However, by giving additional powers to the European Parliament in comitology, it may go beyond the scope of Article 202 in the EC Treaty.[117]

---

[115] See Article 1 of the proposal, COM (2002) 719, *supra* note 43, and Amended proposal for a Council decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2004) 324 final. See also House of Commons, European Scrutiny Committee, Thirty-seventh report of session 2002-03, published 26 November 2003. Additionally, if the deadlines set for the regulatory procedure are not met, provision is made for an urgent procedure to enable the Commission to adopt executive measures immediately without prejudice to subsequent supervision by the European Parliament and the Council.

[116] See COM (2004) 324 final, *supra* note 115. See also, House of Commons, European Scrutiny Committee, Twenty-third report of session 2003-04, published 1 July 2004.

[117] The British Minister for Europe, Mr Denis MacShane has raised the question whether the Commission proposal rested on the correct legal base and also addressed the question to the Council Legal Service. See House of Commons, European Scrutiny Committee, Thirty-second report of session 2002–03, published 26 September 2003, pp. 31–33; and House of Commons Thirty-seventh report, *supra* note 115, pp. 16–18.

5.2.3 Amendment of Article 202 of the EC Treaty

The Commission's vision of a more long-term based solution for amending the current comitology system was expressed in a communication to the Convention in December 2002 suggesting that the powers to implement European legislation in the future should be entrusted exclusively to the Commission. It proposed a classification of legislative norms in three levels: *institutional laws, laws* adopted under the co-decision procedure and *regulations* adopted by the Commission, for the purposes of implementing laws. At the second level, the laws could make provision for the power of legislation to be delegated to the Commission for the purpose of amending legal instruments adopted by the legislator, for instance, with a view to adapting them in the light of technical progress. The Commission should only be able to exercise this power within the limits and subject to the conditions of its legislative delegation. Instead of the current control of the Council set out in Article 202 of the EC Treaty, the European Parliament and the Council would exercise an ex-ante control, for example through a call-back system. In other words, if the legislators were to come out against the measure, the Commission would withdraw its draft, amend it or present a proposal to the legislator.[118]

The outcome of the Convention and the IGC must in this respect please the Commission. The hierarchy of legal acts presented in the final Constitutional Treaty does to large

[118] See COM (2002) 728 final/2, *supra* note 45, p. 7. See also Working document of 7 November 2002 to the Working Group IX on Simplification, Proposal to distinguish legislative and executive functions in the institutional system of the European Union, paper by Mr. Ponzano, member of the Convention and Commission's representative in the Group, WD 16.

extent realise what the Commission wished for.[119] The system set out in the current Article 202 will therefore change in character if the draft Treaty enters into force.[120]

5.3 Involvement of Regional and Local Government through Tripartite Contracts

In the same way as the Commission wants the regions and local government to be involved and consulted at the policy initiating stage, it also finds it necessary to involve this level at the implementing stage. One suggested way is through the use of the so-called tripartite-contracts and agreements presented in the White Paper. They would mainly be concluded in the areas of regional and environmental policy but may also be relevant to use in other areas, for example social policy. After the idea to introduce these contracts was launched, DG Environment took the initiative to start pilot projects in the area. The intention to proceed with introducing tripartite contracts was strengthened when the Commission adopted a communication on a framework for target-based tripartite contracts in December 2002, examining what form

[119] Articles I-34 – I-37 of the Constitutional Treaty establishes a hierarchy of legal acts where the mechanisms of control of delegated acts are operated *ex-ante* by the legislator. A non-exclusive list enshrined in Article I-36 includes two types of control mechanisms: a right for the European Parliament or the Council of Ministers to call-back the legislation and a possibility to prescribe that delegated acts will only enter into force if the European Parliament or the Council of Ministers have not expressed any objections. According to Article I-37.3 the European laws, *i.e*. laws adopted under the procedure that today is referred to as co-decision, shall lay down in advance rules and general principles for the mechanisms for control by Member States of Union implementing acts. Also relevant in this respect is the declaration annexed to the Constitutional Treaty in which states "…the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated European regulations in the financial services area, in accordance with its established practice", see *infra* part 7.

[120] See, in general, Bergström, C.F. and Rotkirch, M., *Simply Simplificaion? The Proposal for a Hierarchy of Legal Acts,* Sieps 2003:8.

such contracts should take.[121] It contains a number of general characteristics of tripartite contracts and agreements relating to scope, actors and certain arrangements for participation and information in the implementation process. However, the Commission will only consider the possibility of target-based contracts after assessing the lessons drawn from launching pilot target-based agreements.[122]

Whereas tripartite *contracts* are concluded between the Commission, representing the European Community, a Member State and regional and local authorities in direct application of binding secondary Community law, tripartite *agreements* are concluded outside a binding Community framework. According to the Commission, the contracts and agreements can be justified when there is a proven case of enhanced political benefits, efficiency gains, the involvement of regional and/or local authorities and if they can lead to a speedier performance. But they may only be envisaged where they do not conflict with the constitutional systems of the Member States. The Commission will also base its decision on concluding such contracts with regard to available human and financial resources. In fact, the financial aspect might be the greatest obstacle to the conclusion of such contracts and agreements as they will not qualify for additional Community financing.[123]

Any one of the future contracting parties may take the initiative to establish a tripartite contract or agreement. The minimum objectives to be concluded in the contract will be specified in the basic legislative instrument. This instrument must always include an enabling clause by which, in accordance with Article 202 of the EC Treaty, the legislator authorises the Commission to conclude such contracts. As for tripartite agreements, minimum basic objectives are to be deduced from relevant preparatory documents. Finally, con-

---

[122] So far three agreements have been launched by DG Environment: in Lille, in Birmingham and in Pescara. DG Environment adopted an Action Plan Governance in 2002.

[123] See COM (2002) 709, *supra* note 43, p. 5.

siderable information will have to be provided on the content, implementation and results of the contractual or agreement-based approach. Regional and local authorities concerned will have to consult and involve organisations representing local and regional life as much as possible. The Commission has to submit an evaluation and follow-up report to the European Parliament, the Council and the Committee of the Regions.[124]

5.4 The Use of Regulatory Agencies

During the last decade, significant responsibilities have been assigned to an increasing number of EU-agencies. These agencies are bodies with a legal personality of their own which have been established in order to accomplish specific technical, scientific or managerial tasks.[125] In the White Paper on governance, the Commission argued that so-called *regulatory agencies* should be created in order to increase the effectiveness of the executive and improve the way rules and policy is applied. Quite clearly, such agencies have an important place in the broader picture suggested by the Commission (where the Council and the European Parliament focuses on political direction, leaving implementation to the executive).[126] In line with this, in its contribution to the Convention on the Future of the EU, the Commission proposed that a provision setting out the criteria for establishment, running and monitoring of regulatory agencies should be inserted. However, such an article was never introduced in the Constitutional Treaty.[127]

The Commission chose to follow up this matter in a Communication on the operating framework for the European Regulatory Agencies. It is not a proposal for a specific legal act. Instead, the Commission invites the European Parliament

[124] See COM (2002) 709, *supra* note 43, pp. 3–4.
[125] See Bergström, C.F. and Rotkirch, M., *Decentralised Agencies and the IGC: a Question of Accountability,* Sieps 2003:14.
[126] See COM (2001) 428, *supra* note 3, pp. 24, 31 and 32.
[127] See COM (2002) 728/2, *supra* note 45, p. 13.

and the Council, together with the Commission, to define the framework criteria for recourse to the agencies in question via an appropriate legal instrument. Such a framework would set up the criteria for the creation, operation and supervision of new regulatory agencies.[128] In this Communication the Commission identifies two types of agencies although some of the existing agencies in the Union do not fall into either of these categories, (see *infra* part 9).

The first type, *executive agencies,* are responsible for purely managerial tasks, *i.e.* assisting the Commission in implementing the Community's financial support programmes, and is subject to strict supervision by it.[129] The second type of agencies is called *regulatory agencies.* They on the other hand would be required, according to the Commission, to be actively involved in the executive function by enacting instruments which help to regulate a specific sector. In practice, each regulatory agency would normally be responsible for a variety of tasks which means that any classification based on them would tend to be artificial. However, for the purposes of the framework in question, the Commission makes the distinction between the *decision-making agencies i.e.* those empowered, *inter alia,* to enact legal instruments binding on third parties, and *executive agencies* (not to be confused with the executive

---

[128] See COM (2002) 718, *supra* note 43. Most of the existing agencies have been created on the basis of Article 308 EC Treaty. This article requires unanimity of the Council. See Bergström, C.F. and Almer, J., *The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC,* Working Document available at www.sieps.se. It may, however, be noted that the decisions to establish the most recent agencies have been taken by the Council and the European Parliament in accordance with the so called co-decision procedure. The Commission does also argue in its communication that the legal instrument creating a regulatory agency in the future should be based on the provision of the Treaty which constitutes the specific legal basis for that policy.

[129] A regulation laying down the statue for executive agencies already exists: Council Regulation 58/2003/EC of 19 December 2002 laying down the statue for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ 2002 L 11/1).

agencies referred to above), *i.e.* those which have no independent power of decision vis-à-vis third parties but perform all other regulatory tasks, including the organisation and co-ordination of activities which, in part, fall within the remit of national authorities, in order to enable the Commission to discharge its duties.

The Commission's concept *regulatory agency* creates some confusion and possibly misunderstandings. On the one hand these agencies are envisaged to regulate a specific sector in some cases and to adopt individual decisions in a clearly specified area of Community legislation that might result in codifying certain standards.[130] On the other hand the Commission emphasises that they would not be empowered to adopt legislative measures of general application.[131]

In the Commission's view, it is important that regulatory agencies have a certain degree of organisational and functional autonomy and that they are accountable for the action they take. However, the Commission itself wants to continue to have the ultimate responsibility, to ensure unity and integrity of the executive function. In order to achieve this balance the Commission suggests that it indirectly has a strong role in supervising the activities of regulatory agencies. The existing agencies are not organised according to a common system although many common features in their organisation may be distinguished. Most typically, there is a strong representation by the Member States and a more limited representation by the Commission in the composition of the supervisory board. The agency director is usually appointed by the supervisory board on a proposal from the Commission. In certain cases the director shall be appointed by the Commission[132] or the

[130] Existing agencies, such as the Office for Harmonisation in the Internal Market and the European Agency for Aviation Safety already adopt individual decisions binding on third parties.

[131] See COM (2002) 718, *supra* note 43, point 4.2, p. 8.

[132] The European Agency for Co-operation, the European Centre for the Development of Vocational Training and the Foundation for Improvement of Living and Working Conditions.

Council.[133] The Commission therefore envisages a stronger role for itself in general by suggesting in the Communication that the administrative board should be equally represented by the Commission and the Council. Interested parties should be represented but without voting rights. The Commission also suggests that, based on a list of candidates put forward by the administrative board, it should appoint, and if necessary dismiss, the director. Finally, the Commission would like the decision-making agencies' internal organisation for boards of appeal to deal with any complaints arising from decisions they adopt by third parties prior to any referral to the Court of First Instance. The European Parliament and the Council should have certain powers with regard to the political supervision of the agency.

5.5 Involvement of the Sectors Concerned

According to the Commission, implementing measures may be prepared within a framework of co-regulation under certain conditions. In the White Paper co-regulation is defined as something that "combines binding legislative and regulatory action with actions taken by the actors most concerned".[134] In other words, within the framework of a legislative act co-regulation makes it possible to implement the objectives defined by the legislator through measures carried out by active and recognised parties in the field concerned.

The idea is thought to achieve a better compliance with the rules by involving the actors affected by the legislation in the process of preparation and enforcement of the legal act. According to the Commission, co-regulation should only be used "where it clearly adds value and serves the general interest".[135] The participating organisations should be

[133] The Community Plant Variety Office and the Office for Harmonization in the Internal Market. In these cases, it is also the Council who shall exercise disciplinary authority over the agencies' directors as well as over other officials.

[134] See COM (2001) 428, *supra* note 3, p. 21.

[135] See COM (2001) 428, *supra* note 3, p. 21.

representative, accountable and capable of following open procedures in formulating and applying agreed rules. Co-regulation should not be used when major political choices are called into question or when rules need to be applied in a uniform way in all Member States. If the use of co-regulation fails to deliver the desired result it will always be possible for public authorities to intervene and establish the specific rules needed. Co-regulation has, for example, been used for agreeing on product standards under the so-called "New Approach" directives and in the environmental sector when reducing car emissions. The Commission remains convinced that co-regulation is an option for focusing legislative work on essential elements and for simplifying and improving implementation.[136]

Self-regulation concerns a large number of practices, common rules, codes of conduct and voluntary agreements which economic operators, social players, NGO's and organised groups establish on a voluntary basis in order to regulate and organise their activities. Unlike co-regulation, self-regulation does not involve a legislative act. The Commission underlines that such non-binding rules as self-regulation are part of the "broader solution" of which legislation is one part. It is therefore necessary "for more thought to be given" to the selection of policy instruments.[137]

In an inter-institutional agreement between the Commission, the Council and the European Parliament the criteria for co-regulation and self-regulation are defined. According to the agreement co-regulation means "the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field…".[138] In the explanatory

[136] See COM (2001) 428, *supra* note 3, pp. 21–22.
[137] See COM (2001) 428, *supra* note 3, p. 20.
[138] See European Parliament decision of 9 October 2003 on the conclusion of the inter-institutional agreement on Better Law-Making between the European Parliament, the Council and the Commission, 2003/2131/ACI, paragraph 18.

memorandum the Commission will have to explain to the competent legislative authority its reasons for proposing the use of co-regulation. The scope and extent of possible co-regulation will be set out in the basic legislative act. The parties concerned may then conclude voluntary agreements that will be forwarded by the Commission to the legislative authority. The Commission will verify whether or not the agreements comply with Community law. Furthermore, the European Parliament or the Council may include a provision for a two-month period in the basic legislative act during which each institution may suggest amendments to the agreement, object to the entry into force of the agreement and/or suggest that the Commission submit a proposal for a legislative act.[139]

Self-regulation is defined as "the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level…".[140] According to the inter-institutional agreement, the Commission will make sure that self-regulating measures comply with the EC Treaty. Since self-regulation is voluntary it can only be used if the market actors themselves initiate it. This could be a means of avoiding over-legislation at the European level but self-regulating measures adopted do not prevent the Commission from putting forward a proposal for a legislative act.[141]

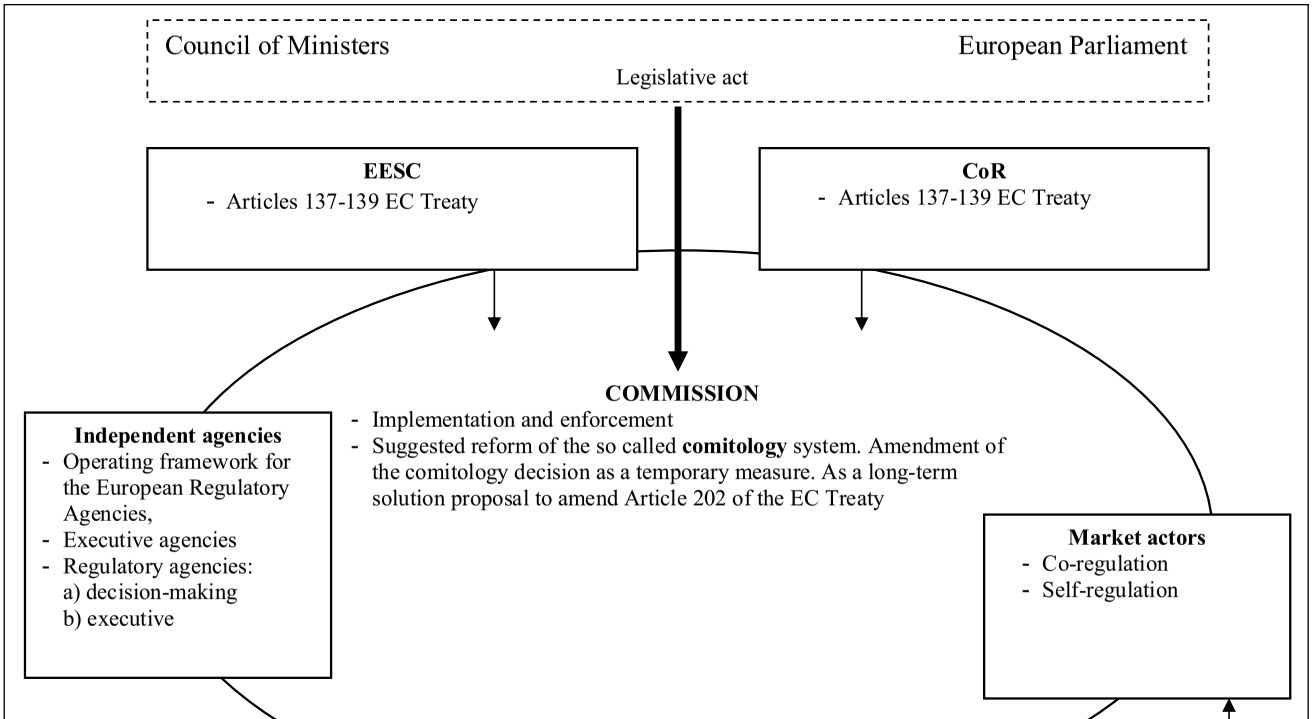
5.6 Conclusion

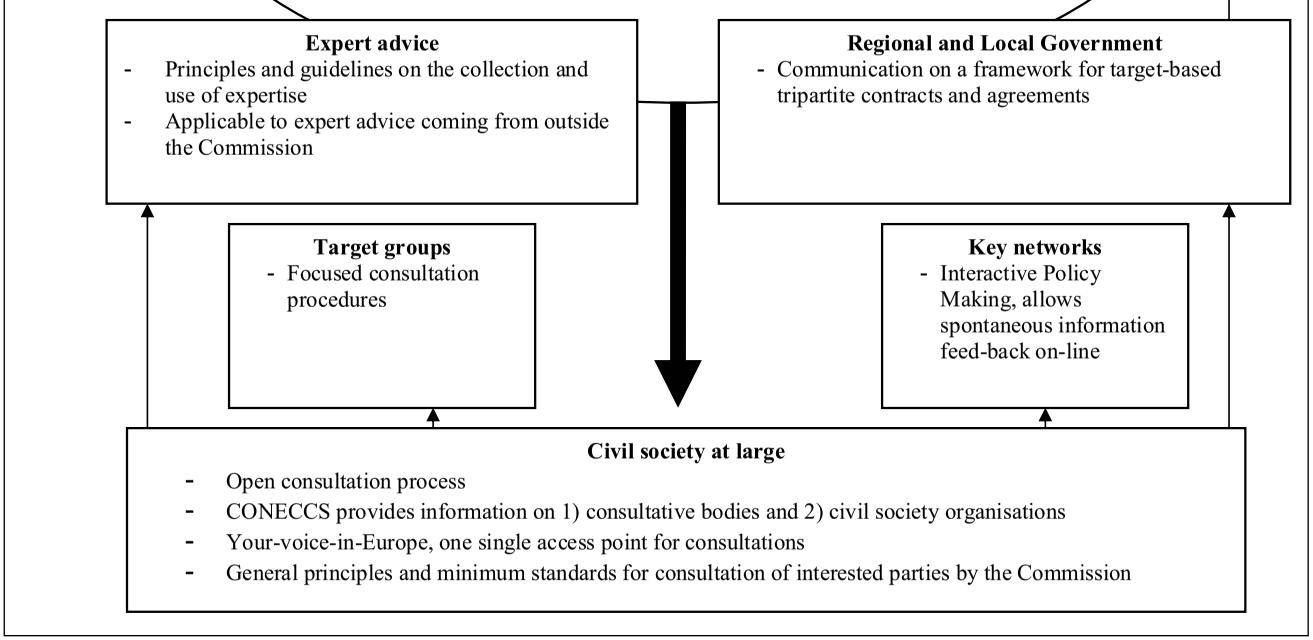
In Table 3 below, the Commission's proposals for following-up the White Paper agenda at the stage of implementing decision-making are summarised. Compared to the initiating phase the Commission envisages a level-down approach at this stage and the Commission also has a very clear agenda of its own for

[139] See paragraphs 18-20 of the inter-institutional agreement, *supra* note 138.
[140] See paragraph 22 of the inter-institutional agreement, *supra* note 138.
[141] See paragraph 23 of the inter-institutional agreement, *supra* note 138.

this part of the process. The legislators should adopt framework legislation and then co-operate in the supervision of the implementing measures adopted by the Commission. The Commission also wants to leave some of the regulatory powers to independent agencies and have a stronger role in supervising their activities. Finally, the transposition into national law and the enforcement would be improved through introducing tripartite contracts and involving the market practitioners and end-users. As was mentioned in the introduction to this chapter, the proposals for this stage of the process are very reform-oriented and much more dependent on the approval of the other institutions for their effect compared to the proposals at the first stage. The next chapter will describe the proposals regarding the final phase of the decision-making process, the monitoring phase.

Table 3
Phase Two – The Governance Reform and Implementation of Policy




Expert advice
- Principles and guidelines on the collection and use of expertise
- Applicable to expert advice coming from outside the Commission
Regional and Local Government
- Communication on a framework for target-based tripartite contracts and agreements
Target groups
- Focused consultation procedures
Key networks
- Interactive Policy Making, allows spontaneous information feed-back on-line
Civil society at large
- Open consultation process
- CONECCS provides information on 1) consultative bodies and 2) civil society organisations
- Your-voice-in-Europe, one single access point for consultations
- General principles and minimum standards for consultation of interested parties by the Commission

6 PHASE THREE – THE GOVERNANCE REFORM AND MONITORING OF POLICY

6.1 Introduction

The prime responsibility for applying Community law lies with national administrations and Courts but it falls to the Commission to monitor the transposal and proper application of Community law where necessary. The Commission's responsibility for monitoring the application of Community law is set out in Article 211 of the EC Treaty stating that "the Commission shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". In Article 226 of the EC Treaty, the Commission is given the means to take action against a Member State for failing to fulfil an obligation under the Treaty. The prosecution of suspected infringements of Community legislation is conducted in several stages: first the Commission records potential infringements, after an examination it may proceed by sending a Member State concerned a *letter of formal notice* followed by a *reasoned opinion* and, as a last resort, it may refer the case to the Court of Justice.[142] The Commission's role in this respect is often described as guardian of the Treaty.

The proposals set out in the White Paper aiming at improving the Commission's role as guardian of the Treaty (see *supra* part 3.4) were developed in a Communication on better monitoring of the application of Community law, adopted in December 2002.[143] The Communication aims not only at meeting the Commission's permanent concern in this field but also at taking up the challenge of the forthcoming enlargement.[144] It distinguishes between preventive measures carried out in cooperation between the Commission and the Member States

[142] See Article 226 of the EC Treaty. See also COM (2002) 725, *supra* note 43.

[143] See COM (2002) 725, *supra* note 43.

[144] See 20th Annual Report on Monitoring the Application of Community Law (2002), Brussels 21 November 2003, COM (2003) 669 final, p. 11.

to avoid infringements and effective management of controls and action against infringements.[145]

6.2 Improvements in the Prevention of Infringements

Among the possible preventive measures the Commission discusses are a variety of practical cooperation instruments, such as delivering interpretative communications on a specific matter of community law, publicising an annual report on monitoring the application of Community law in order to put peer pressure on Member States and developing a training programme in Community law for national administrations and the judiciary. However, no concrete commitments are made in this respect.[146]

The emphasis is instead put on monitoring and facilitating the transposal of directives. The Commission undertakes to improve its regular publication of transposal rates by starting to publish, on-line, much more detailed information on how Member States implement directives. It also commits itself to make a more generalised use of so called "package meetings", not only after but also before an infringement procedure has been initiated against a Member State. These meetings provide an opportunity for the Commission to discuss the problems with transposal of directives with the competent national authorities and give them technical assistance.[147] Furthermore, the Commission will in certain cases draft guidelines for transposal which would be recommended to the national authorities.[148]

---

[145] See COM (2002) 725, *supra* note 43, p. 4.

[146] See COM (2002) 725, *supra* note 43, pp. 5–6. In the Constitutional Treaty, Article III-285 introduces, in line with the thinking of the White Paper on Governance, the concept of administrative cooperation among the Member States in respect of implementing Union law.

[147] In this respect, it is very important that the Commission can identify the appropriate contacts. It therefore suggests that Member States should set up appropriate coordination points.

[148] See COM (2002) 725, *supra* note 43, pp. 7–8.

6.3 Effective Management of Controls and Action Against Infringements

The Communication on better monitoring of the application of Community law sets out a priority criteria by listing infringements that the Commission will regard as serious and therefore prioritise when exercising its role as guardian of the Treaty:

- Infringements that undermine the foundations of the rule of law, such as national court rulings that conflict with Community law or violations of human rights,
- infringements that undermine the smooth functioning of the Community legal system, such as repetition of an infringement in the same Member State within a given period and,
- infringements consisting of the failure to transpose or the incorrect transposal of directives.

By developing this priority criteria relating to the seriousness, the Commission hopes that it will manage its monitoring work rapidly and fairly. It also commits itself to annually assess the application of this criterion.[149]

Furthermore, the Commission stresses the need for a closer cooperation between itself and Member States in investigating infringements. It will therefore make a more systematic use of infringement proceedings for breach of Article 10 of the EC Treaty when Member States are reluctant to cooperate in infringements proceedings. Additionally, proceedings in these cases should be accelerated to last no more than four months between the letter of formal notice and referral to the Court.[150] In cases where Member States have failed to implement a directive, the Commission states that it will decide on sending a reasoned opinion six months after the Member State in question has received a letter of formal notice unless it has responded to it. In order to speed up the process of bringing implementing legislation into line, the Commission will furthermore produce implementing reports systematically in

[149] See COM (2002) 725, *supra* note 43, pp.11–12.
[150] See COM (2002) 725, *supra* note 43, p. 14.

some sectors. Finally, in the event of recurring difficulties with the application of the same directive, the Commission will consider introducing a legislative initiative to resolve the problem.[151]

Apart from the infringement procedure, the Communication mentions other means to achieve better enforcement of Community law. The Commission wants to promote the use of mechanisms that complement infringement proceedings, such as the SOLVIT problem-solving network, since it finds that they often result in a more effective handling of cases.[152] The Commission also urges citizens to make more use of their right to bring cases before national courts and ultimately claim compensation for damages caused them by infringements of Community law or failure to transpose directives. This mechanism is a very effective way to make Member States comply with Community law. The Commission will therefore try to do more to promote this possibility, for example by making reference to it in press releases after major infringement proceedings are terminated.[153]

Some results of the commitments made in the White Paper and the Communication described above can be found in the annual report on better lawmaking for the year 2003. For example, the Commission now routinely includes a provision in draft directives which requires Member States to provide the Commission with structured and detailed information on how Community law has been transposed into national law. An online site entitled "Calendar for transposition of Directives" has also been set up. It allows Member States and citizens to consult on a regular basis the deadlines applicable for transposition of Community directives. Finally, the new electronic standard

---

[151] See COM (2002) 725, *supra* note 43, pp. 18–19.

[152] Individuals who have encountered unjustified obstacles within the national administration of a Member State when trying to exercise these rights may seek assistance in solving the problem from a network of offices located in the Member States so called SOLVIT Centres.

[153] See COM (2002) 725, *supra* note 43, pp. 15–17 and 19.

form for notification of national implementing measures is currently being introduced by the Commission. It may also be noted that the Commission adopted recommendations on the transposition into national law of Directives affecting the internal market in July 2004.[154]

[154] See Recommendations from the Commission on the transposition into national law of Directives affecting the internal market, Brussels 12 July 2004, SEC (2004) 918 final.www.europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm#calendar. See also COM (2003) 669, *supra* note 144, and the Commission's website on Governance, www.europa.eu.int/comm/governance/governance_eu/comm_law_en.htm.

7 GOVERNANCE REFORM IN PRACTICE

7.1 Introduction

In the following chapter an example will be given of how the governance reform works in practice. As has been showed above, the agenda set out in the White Paper has been realised through several measures taken during the last couple of years. Parts of the reform are being applied within different policy sectors and at the different phases, such as the minimum standards on consultation that now govern all consultations conducted by the Commission. Some examples have been touched upon above, such as the new impact assessment procedure (see *supra* part 4.1.2). Other parts of the reform might best be exemplified through different cases, such as the example of how the Commission proposed to change the decision-making process in the field of anti-dumping measures by suggesting that the Council should delegate more decision-making power to itself.[156] Other examples of parts of the governance reform can be found in other policy areas.

In this chapter, we have chosen to describe a reform of one sector, the European Securities Market. By doing so, we want

---

[155] See Proposal for amending Council Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community and Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community, COM (2003) 380 final. The Commission suggested that the procedure for imposing a definitive anti-dumping duty should be amended. Instead of a system where the Council, acting by a simple majority, imposes the duty, the Commission proposed the following: " (…) a definitive anti-dumping duty shall be imposed, after consultation, by the Commission provided that there is no objection raised within the Advisory Committee. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a draft regarding the imposition of a definitive anti-dumping duty. The definitive anti-dumping duty shall be deemed to be imposed by the Commission if, within one month, the Council, acting by a simple majority, has not decided otherwise.".

[156] See 2283rd meeting of the Council (Economic and Financial Questions), held in Brussels on 17 July 2000, pp. 7–10.

to give a practical illustration of how the governance reform envisaged by the Commission may function. Even though the reform of the securities sector was neither initiated nor proposed by the Commission itself, the reform builds, to a large extent, on the same ideas as presented in the White Paper. It may therefore serve as a good example.

The reform of the securities market started in 2000 when it was clear that it was lagging behind the comparable markets of insurance and banking in terms of harmonisation. An independent group of Wise Men was set up by the Council for Economic and Financial Affairs (ECOFIN) on 17 July 2000[156] with the mandate to propose how to make the securities market keep up with the rest of the European financial market. The Wise Men Group was focusing "on the practical arrangements for implementation of the Community rules" and not on substance.[157] The group, chaired by the former president of the European Monetary Institute (EMI) Alexandre Lamfalussy, presented its final report on 15 February 2001, the so called Lamfalussy report.[158] The main conclusion in the report was that the securities market was in need of an institutional reform or what in this context might be called a governance reform.

7.2 The Proposal in the Lamfalussy Report

In the Lamfalussy report a number of proposals were made on how to reform the securities market. The underlying problem was that the regulatory framework was too rigid, too slow and overall not very well adapted to the needs of the fast changing and developing securities market.[159] The proposed remedy for this was to introduce a four-level system for adoption, im-

[157] See 2283rd meeting of the Council, *supra* note 156, p. 8.
[158] See Final Report of the Committee of Wise Men on the Regulation of European Securities Market, Brussels, 15 February 2001.
[159] See Final Report of the Committee of Wise Men, *supra* note 158, pp. 13–14.

plementation, transposition, and monitoring of the legislation. The four-level system now implemented and in force, is based on an extensive use of comitology and consultation with market practitioners and end-users. The basic idea of the system proposed by the Wise Men Group is the same as that underlying the White Paper; the legislators, the Council and the European Parliament, should focus on the essential elements of the legislation leaving the details and technical measures needing to be implemented to the Commission. This is combined with an institutional reform and recommendations on compulsory consultations, *i.e*. again very similar ideas as the ones put forward by the Commission itself in the White Paper.

At level one, the initiation phase, the Commission adopts a proposal for a directive or a regulation after a full consultation process. The proposal is thereafter sent to the European Parliament and the Council who together adopt the legislative act and reach agreement on framework principles and definitions of implementing powers according to the co-decision procedure.

At level two, the implementing phase, the Commission adopts the implementing measures decided at level one in cooperation with two committees, the European Securities Committee, ESC, and the Committee of European Securities Regulators, CESR (see below). The Commission first consults ESC and after that requests advice from CESR on the implementing measures. CESR prepares the advice in consultation with market practitioners, end-users and consumers and submits its advice to the Commission. On the basis of the advice from CESR the Commission then makes a proposal to ESC. The Commission adopts the implementing measures after an approving vote from ESC.

At level three, the transposition phase, CESR works to ensure consistent implementation and application of EU legislation in all Member States, for example by adopting guidelines and common standards.

At level four, the monitoring phase, the Commission fulfils its function as guardian of the treaty by checking compliance with EU legislation in Member States and, if necessary, by legal action if a breach is suspected.[160]

Table 4
The Lamfalussy Four-level System

LEVEL 4 – Enforcement – The Commission checks compliance with EU legislation in all Member States.
LEVEL 3 – Transposition – CESR adopts guidelines and standards in order to ensure consistent implementation and application in all Member States.
LEVEL 2 – Implementation – The Commission requests advice from CESR after consulting ESC. – CESR consults and gives advice on implementing measures to the Commission. – The Commission adopts the implementing measures after an approval from ESC.
LEVEL 1 – Initiation – The Commission adopts proposal for legislative act after consultation process. – Legislative act adopted by the Council and the European Parliament. – The Council and The European Parliament agree on the scope of delegation.

The Commission works in close co-operation with the two new committees, ESC and CESR, and they have an important role in the new four-level system. Before an example is given on how the system works it is therefore necessary to describe the committees in some greater detail.

[160] See Final Report of the Committee of Wise Men, *supra* note 158, p. 6.

The European Securities Committee, ESC, was established by a Commission decision in June 2001.[161] The decision established ESC in its advisory capacity. According to Article 2 of the decision "The role of the Committee shall be to advise the Commission on policy issues as well as on draft legislative proposals the Commission might adopt in the field of securities". This means that the Committee shall advise the Commission in level one initiatives, during the initiation phase. In level two, the implementing phase, the Committee functions as a regulatory comitology committee. ESC is composed of representatives of the Member States and chaired by a representative of the Commission.[162] As of February 2004 the ESC has held 18 meetings. Summary records of all meetings are made available on the ESC website.[163]

The Committee of European Securities Regulators, CESR, was also established by a Commission decision in June 2001.[164] CESR is an independent advisory group and its two main tasks are to:

– advise the Commission on level two measures, and

– coordinate national implementation on level three.[165]

CESR is composed "…of high-level representatives from the national public authorities competent in the field of securities".[166] The Committee shall consult extensively at an

---

[161] See Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee (OJ 2001 L 191/45). In November 2003 Article 2 of the Decision was amended by Commission Decision 2004/8/EC of 5 November 2003 amending Decision 2001/528/EC establishing the European Securities Committee (OJ 2004 L 3/33) extending the role of the Committee to advise the Commission not only in the field of securities but also on undertakings for collective investment in transferable securities (UCITS).

[162] See Article 3 of Decision 2001/528/EC, *supra* note 161.

[163] See http://www.europa.eu.int/comm/internal_market/en/finances/mobil/esc_en.htm

[164] See Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators (OJ 2001 L 191/43).

[165] See http://www.cesr-eu.org.

[166] See Article 3 of Commission Decision 2001/527/EC, *supra* note 164.

early stage with market actors, consumers and end-users before giving its advice to the Commission. CESR shall also submit an annual report to the Commission. The Committee meets at least four times a year and a member of the Commission is entitled to participate in all meetings. CESR produces guidelines, recommendations and standards. The work is prepared by expert groups established on a non-permanent basis.[167] In the following a short description will be given of how the four-level system has worked when adopting and implementing one of the directives in this field, the so called market abuse directive.

7.3 The Market Abuse Directive

7.3.1 Level One – Initiation and Adoption

The market abuse directive was adopted by the Council and the European Parliament in January 2003[168] following a proposal from the Commission in May 2001.[169] The proposal was the result of extensive consultation procedures held in 1999–2000, *i.e.* before the adoption of the minimum standards for consultations (see *supra* part 4.3.3) and before the implementation of the Lamfalussy proposals.[170] According to Article 17 of the Market Abuse Directive the Commission, assisted by the European Securities Committee, shall adopt implementing measures according to the regulatory committee

---

[167] See Articles 5 and 6 of Commission Decision 2001/527/EC, *supra* note 164; and CESR's website http://www.cesr-eu.org.

[168] See European Parliament and Council Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96/16).

[169] See Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2001) 281 final.

[170] See the Commission's website on market abuse http://www.europa.eu.int/comm/internal_market/en/finances/mobil/market-abuse_en.htm.

procedure provided that the measures do not modify the essential provisions of the Directive.[171]

7.3.2 Level Two – Implementation

According to the four-level system the Commission shall ask for technical advice from CESR before adopting implementing measures. The Commission sent its first request for technical advice on implementing measures to CESR in March 2002. This request was based on an agreement between DG Internal Market and ESC on 5 December 2001. In order to meet the deadline of an integrated market by the end of 2003, the Commission and ESC considered it to be important that CESR should start the work immediately, *i.e.* even before the final adoption of the Directive in question.[172]

CESR established one internal expert group on market abuse. This group has published 14 papers on market abuse and recommendations on how to regulate market abuse. The first paper was published in September 2000 and the last one in September 2003.[173] Since CESR is an independent body the Commission guidelines and recommendations do not apply to CESR. To meet the recommendations for openness and transparency recommended in the Lamfalussy report, CESR has adopted its own standards for consultations practices.[174]

The consultation practice applies to all work carried out by CESR (including the ad hoc expert groups). CESR shall consult interested parties (including market practitioners, consumers and end-users), make consultation proposals widely known, in particular by using the Internet and finally consult

---

[171] In Articles 1, 6, 8, 14 and 16 of the market abuse directive there is a reference to Article 17 and the Commission shall accordingly adopt the necessary implementing measures in accordance with these articles.

[172] See Provisional Request for Technical Advice on Possible Implementing Measures on the Future Directive on Insider Dealing and Market Manipulation (Market Abuse), Brussels, 18 March 2002.

[173] See http://www.cesr-eu.org.

[174] See Public Statement of Consultation Practices, December 2001, CESR/01-007c.

at all levels; national, European and international according to the consultation practice. Furthermore, the Committee shall publish an annual work programme in order to let interested parties know when to expect output from the Committee. The Committee shall also publish mandates given by the Commission, organise informal discussions at an early stage upon request and consult at a sufficiently early stage in the decision-making process. When CESR consults it will aim at releasing its thinking at various stages, produce reasoned consultative proposals, establish working consultative groups of experts and use face to face meetings if necessary for any particular target group. The responses to the consultations are made public and the Committee publishes reasoned explanations addressing all major points raised, consults for a second time if it seems necessary and publish all formal proposals and advice given under level two.[175]

When CESR received the request for advice from the Commission, a call for evidence was requested.[176] CESR received around ten submissions from trade associations representing banks, issuers and investment firms, as well as a number of submissions from individual organisations. On the basis of the first set of evidence received CESR started to work on a consultation document. Furthermore, CESR established a Consultative Working Group which held three meetings with the expert group on market abuse and gave advice on the drafting of the consultative document. In its consultation paper CESR set out its proposed advice to the Commission. The consultation was launched on 1 July 2002 and closed on 30 September 2002. Moreover, a number of open meetings and bilateral meetings were held in order to receive input on specific aspects of the proposal. CESR received over 100

[175] It should be noted that the consultation practice adopted by the Committee is a guideline that the Committee should try to follow but if it is not possible to follow the practice CESR shall publish its reasons for that. See Public Statement of Consultation Practices, *supra* note 174.

[176] The first paper was published on 27 March 2002 and the deadline for the contributions was set at 26 April 2002.

responses, all of which were made public on CESR's website. The responses received were sorted under ten headings, for example banking, investment services, issuers, legal professions, government, regulatory and enforcement. On the basis of the responses received the expert group redrafted the consultation paper in October and November. An open meeting was held with market participants in order to discuss the modifications made to the paper. The participants at the meeting were able to give more written contributions to CESR. In December 2002 the final Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive was published.[177]

7.3.3 The Commission Adopts a First Set of Implementing Measures

In March 2003 the Commission published three working documents on the basis of the recommendations given by CESR on implementing measures. The public was invited to give comments on the technical drafting of the implementing proposals. All comments were made public on the Internet and the Commission started drafting its formal proposal in the end of April. The Commission received 23 comments from the public on the first draft and one comment from the European Parliament's Committee on Economic and Monetary Affairs.[178] In July 2003 the Commission adopted the formal draft on implementing measures that was submitted to the European Securities Committee for a vote.[179] ESC received two revised

---

[177] See, in general, http://www.cesr-eu.org. See also Possible Implementing Measure on Market Abuse request for Advice and Call for Evidence, 27 March 2002, CESR/02-047; Results of CESR's public consultationon possible measures of the future Market Abuse Directive, 13 November 2002, CESR/02-226c; and CESR's Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive, December 2002, CESR/02-089d.

[178] See http://www.europa.eu.int/comm/internal_market/en/finances/mobil/marketabuse/2003-05-consult-contrib_en.htm.

[179] See the ESC website, http://europa.eu.int/comm/internal_market/en/finances/mobil/esc_en.htm.

versions of the document from the Commission until it reached majority and approved the Commission's final version of implementing measures on 29 October 2003. DG Internal Market could then start to work on the first implementing measures in November 2003. DG Internal Market published an informal working paper in order to receive some more comments on the technical drafting. In December 2005 the first implementing measures were adopted by the Commission in the form of two Commission Directives and one Commission Regulation.[180]

Parallel to this, the Commission started working on a second set of implementing measures in November 2003. It should be noted that there is no need to consult CESR again but the ESC has to vote on both measures. A working document was published in November and comments were made public in January 2004. Following the 19 responses to the second set the Commission published a formal draft on 27 January 2004. In February 2004 a revised version was published following the comments from the European Securities Committee.[181]

---

[180] See Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation; Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest; and Commission Regulation (EC) 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

[181] See comments from the public on http://www.europa.eu.int/comm/internal_market/en/finances/mobil/marketabuse/2004-01-consult-contrib_en.htm. See also Formal Commission draft on second set of measures implementing the European Parliament and Council Directive 2003/6/EC on insider dealing and market manipulation, submitted to the European Securities Committee, ESC document Nr. 48/2003. In April 2004 the Commission adopted the second implementing measure, see Commission Directive 2004/72/EC of

7.3.4 Level Three – Transposition

At level three, the transposition phase, CESR shall work to ensure consistent application of the legislation in all Member States. In April 2004 CESR published a consultation document on the role of CESR on level three under the Lamfalussy process. On 11 May 2004 an open hearing was held and the consultation was open until 1 June 2004. The consultation paper aims at presenting the views on how CESR should organise its work at level three. Regarding the Market Abuse Directive CESR has, so far, discussed potential problems with the Review Panel and established guidance on the definition of "accepted market practices" under the Directive.[182]

7.3.5 Conclusion

The Commission presented its proposal for the Market Abuse Directive in May 2001 and the directive was adopted in January 2003, the first set of implementing measures were adopted by the Commission one year later, in December 2003 and parallel to this the Commission has started drafting the second set of implementing measures. This process, from adoption of the proposal to the implementing of the Directive has taken approximately two and a half years. This is a relatively short period of time for legislation under co-decision.[183] During this time several consultations were held in different forms and at different stages in the process. One of the most important proposals in the Lamfalussy-report was the one on consultation. According to the report, the consultations

---

29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.

[182] See The Role of CESR at "level 3" under the Lamfalussy process, CESR/04-104b.

[183] According to the Lamfalussy report the average time for the adoption of legislation under co-decision is over two years. See Final Report of the Committee of Wise Men, *supra* note 158, pp. 13–14.

need to be a process, a dialogue and furthermore, transparency is essential for the system to function properly. As has been showed by the above example, the consultations conducted after the adoption of the Market Abuse directive on level two implementing measures seem to fulfil these requirements. CESR and the Commission have consulted interested parties at different times in the process and all relevant documents have been made available on the Internet. So far, the Lamfalussy-structure seems to be an improvement of the system. It remains to be seen what will happen on level three (the implementing phase) and level four (the transposition phase); it is still too early to tell how it will work. Some concerns remain; first, the framework directives adopted are still very detailed in some areas although the idea is that the legislators should only deal with the essential elements; second, concerns has been raised that staffing is inadequate both in the Commission and in CESR for dealing with these extensive consultation procedures. Consultations are very time-consuming and this is true also for the counter-parts in the consultation process, *i.e*. banks, investment firms and private actors, the ones being consulted.[184]

[184]Speech by Baron Alexandre Lamfalussy, Seminar on The Integration of Financial Markets in Europe, Stockholm, 21 April 2004.

8 REACTIONS TO THE COMMISSION'S AGENDA FOR REFORM OF EUROPEAN GOVERNANCE

8.1 Introduction

When Prodi announced that the Commission would launch a White Paper on Governance, expectations from other EU institutions and civil society on the final result were very high. But many were disappointed when the White Paper was finally delivered. A member of the European Parliament is reported to have said on the occasion of the presentation of the Commission's White Paper on Governance, that, given the result, he regretted that trees had had to die to produce it.[185] Neither did the political scientist Fritz W. Scharpf spare his words when criticising it by comparing the aspirations made by the Commission to the creation of a benevolent dictatorship.[186] Another scholar, Deidre Curtain, criticised the Commission for not delivering a general vision of public administration and governance and called the White Paper a missed opportunity for the Commission and for the European Union.[187] Although these words may seem too harsh, it is true that the White Paper itself left much to be desired, especially with regard to its presentation. Although one of the main goals of the White Paper was to bring the citizens closer to Europe, it was written

---

[185] See Steinberg, P., *Agencies, Co-Regulation and Comitology- and What about Politics? A Critical Appraisal of the Commission's White Paper on Governance,* Working Paper No. 6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance 2001, available at www.jeanmonnetprogram.org/papers/papers01.html, p. 1.

[186] See Scharpf, W. F., *European Governance: Common Concerns vs. The Challenge of Diversity,* Working Paper No. 6/01, *supra* note 185. For a general comment on the White Paper and the follow-up, see Sundberg, H. and Bengotxea, J., The Other Constitution – the Commission's White Paper on New Governance, *Europarättslig tidskrift* 2004 pp. 139–163.

[187] See Curtin, D., *The Commission as Sorcerer's Apprentice? Reflections on EU Policy Administration and the role of Information Technology in Holding Bureaucracy Accountable,* Working Paper No. 6/01, *supra* note 185.

in a "bureaucratic" language. It is probably hard for a person not accustomed to following these questions to understand the practical implications of the ideas launched in the White Paper only by reading the document.

But the White Paper has also been positively received, especially as a starting point for a process of discussion. Indeed, the Commission has so far followed up most of the recommendations and proposals made in the White Paper in a number of subsequent documents. Some of the reactions from Member States' governments, the European Parliament, the European advisory bodies and the academia on the action that the Commission has taken in this respect will be accounted for in the following.

8.2 Consultation of the Civil Society

Many would agree that the Commission's reform, to structure the consultation process and include more players into the circles of decision making, should be very positively received. But some academics have pointed at the danger that only active actors, *i.e*. those already now participating as organised, financially and conceptually powerful lobbying groups, will in reality be included in the process. Therefore, despite the Commission's affirmations to link Europe better with the citizens, those interests that are not privileged as "actors" and "players" could be excluded from the process. Formalising consultation procedures might also be less effective for some parties involved that have already had strong and well functioning informal connections with the Commission.[188]

---

[188] See Weiler, J. H. H., *The Commission as Euro-Skeptic: A Task oriented Commission for a Project-Based Union, A Comment on the First version of the White Paper,* Working Paper No. 6/01, *supra* note 185, pp. 2, 6–7; and Kohler-Koch, B., Organized Interests in European Integration: The Evolution of a New Type of Governance? in Wallace, H. and Young, A. R. (eds.), *Participation and Policy-Making in the European Union,* (Clarendon Press 1997), p. 47.

The reactions of the governments of the Member States vary. Some of the governments have been anxious to underline that consultation at EU level should only supplement and never replace consultation at national level. Other governments, for example the UK and the Swedish governments, have stressed their support for a common standard for EU consultation.[189] The UK Government especially welcomed the Commission's introduction of a consistent approach to the conduct of consultations through the minimum standards. In its view, it should apply to all proposals. It would also welcome a greater clarity in the selection of participants.[190] In the Swedish government's view, the minimum standards should have been regulated by binding legal rules. Moreover, it urged the Commission not to discriminate against interested groups at national level in favour of parties that are organised at European level.[191]

Another argument brought forward in the reactions to the minimum standards of consultation is the need to draw a distinction between consulting civil society and consulting regional and local government. The Committee of the Regions has, for example, underlined that the democratic legitimacy of representatives elected by direct universal suffrage must not be confused with the greater involvement of NGOs and other

---

[189] See Swedish comments on the White Paper on European Governance, Ministry for Foreign Affairs, 22 March 2002, available at www.europa.eu.int/comm/governance/contributions/index_en.htm, p. 1. The UK response to the Commission's White Paper on Governance, available at www.europa.eu.int/comm/governance/contributions/index_en.htm, pp. 1-4.

[190] See The UK response to the Commission's Package of Communications on Better Regulation, July 2002, available at http://europa.eu.int/comm/secretariat_general/sgc/consultation/docs/cont_uk_gov.pdf.

[191] See Swedish comments on the White Paper on European Governance, Ministry for Foreign Affairs, 30 July 2002, available at http://europa.eu.int/comm/secretariat_general/sgc/consultation/docs/contrib_su_gov.pdf.

arrangements for the representation of individual interests within society. The German government has also held that a clear distinction should be made between civil society on the one hand and regions and municipalities on the other. In its view, interest groups should not be involved in decisions or given responsibility for implementation since they have no democratic electoral mandate and are not subject to parliamentary supervision.[192]

The European Parliament reacted quite strongly to the Commission's initiative in reforming its consultation processes with civil society.[193] Although it welcomed the Commission's proposals for minimum standards for consultation, it did so in connection with emphasizing its unique role in possessing democratic legitimacy in the EU decision-making process. At an earlier stage, it also criticised some of the Commission's original ideas, such as setting up groups of experts and delegating tasks to them. The European Parliament was in particular not fond of the Commission's proposal to introduce accredited organisations or organisations with partnership agreements, holding that this would only add a further level of bureaucracy in the process. In its view, bodies independent from the Commission such as the Economic and Social Committee would be better suited to carry out such tasks. As described above (see *supra* part 4.3), the Commission also omitted that issue from its follow-up proposals. Furthermore, the European Parliament has several times stated that con-

[192] See Germany's opinion on the European Commission's White Paper on European Governance, 12 December 2001, available at www.europa.eu.int/comm/governance/contributions/index_en.htm, p. 2; Swedish comments on the White Paper on European Governance, *supra* note 189, p. 1; and The UK response to the Commission's White Paper on Governance, *supra* note 189, pp. 1–4.

[193] See Bouwen, P., *Competing for Consultation: Inter-Organizational Conflict between the Commission and the Parliament,* Discussion Paper published by the Robert Schuman Center for Advanced Studies and Sieps (May 2004).

sultation of interested parties can only supplement and never replace the procedures and decisions of legislative bodies.[194]

In its opinion on the White Paper the Economic and Social Committee also criticised certain aspects of the Commission's approach in involving the civil society in the decision-making process. In its view, it is important to make a clear distinction between "civil dialogue" and "social dialogue". In that respect, it had produced a set of eligibility criteria for the so called "civil dialogue" that should, for example, be applied in order to weight the opinions expressed in on-line consultations.[195] However, as described above, the Commission did not want to focus on the issue of representativeness at European level as the only criterion when assessing the relevance or quality of comments.

---

[194] According to the European Parliament, the improvement in the bond between citizens and the EU institutions should primarily be achieved by increasing the European Parliament's legislative powers. It stresses that governance is a task for all the European institutions and not only the Commission, and therefore underlines that inter-institutional cooperation in this field is very important. See the European Parliament Resolution of 29 November 2001 on the Commission White Paper on European Governance, A5-0399/2001, at 11 b; and European Parliament Resolution of 4 December 2003 on European Governance, A5-0402/2003, pp. 2, 9–10, 12–13 and 17. The European Parliament was also positive to the Commission's minimum standards on the use of experts. However, it did express a decided preference for parliamentary democracy over a democracy of experts and urged the Commission to publish the evidence and the way in which expert advice is used in the legislative process. The European Parliament was also critical of the fact that there was still no clear list showing which committees and working groups the Commission has consulted. See further European Parliament Resolution of 4 December 2003 on European Governance, A5-0402/2003, pp. 18–20.

[195] See Opinion of the Economic and Social Committee on European Governance-a White Paper, Brussels 20 March 2002, CES 357/2002 EN/o.

8.3 Involvement of Regional and Local Government in Decision-making

In the debate on the future of the European Union the European Parliament has considered the role of regional and local authorities to be a very important issue, especially as these authorities have taken on a more important role in transposing Community legislation and in running Community programmes. In its resolution on the role of regional and local authorities in European integration adopted in January 2003, the European Parliament confirmed its support for the concept set out in the White Paper which sees the regions and municipalities acting as intermediaries between the individual and the European institutions. In the European Parliament's view, consultation should in principal take place via the Committee of the Regions (CoR) or via the most representative European associations. Additionally, new methods of participation should be used, acknowledging the key role to be played by regional and local bodies. The regions should, for example, enjoy the same flexibility as regards the choice of methods as the national authorities where transposition of directives into national law falls within their competence. However, in its report on the White Paper adopted earlier, the European Parliament stated that there is no question of the direct delegation of powers and tasks to bodies or authorities at regional or local level in the Member States since it may undermine the basic structure of the Union and be in breach of the principles of subsidiarity and proportionality.[196]

[196] It also underlined that the European Parliament's legislative powers must be strengthened in order to enhance communication between citizens and the institutions of the Union. Furthermore the European Parliament supported the CoR aspirations and hoped that a new constitutional treaty would give it the right to bring a matter before the Court of Justice in some events. The European Parliament also wanted to make it possible for regions and other territorial entities to defend their rights before the Court under the authority of the Member State concerned. See European Parliament Resolution of 14 January 2003 on the role of the regional and local authorities in the European integration, P5_TA 0009/2003, pp. 2, 5, 8 and 10; European Parliament Resolution, A5-0399/2001, *supra* note 194, pp. 9 and 25.

The European Parliament has also welcomed the submission of the Commission proposals on introducing tripartite contracts and agreements on a trial basis. In its resolution on this subject it urged the Commission to press ahead with its pilot programme with a sense of urgency. The European Parliament also called on the Commission to ensure that adequate financial means are made available to ensure that there is full and fair opportunity for interested territorial authorities to participate. However, the European Parliament thinks that recourse to tripartite contracts or agreements should only be facilitated for genuinely unusual cases and be restricted to matters concerning improved implementation of Community law.[197]

The Commission's idea of introducing tripartite contracts received various reactions from the Member States governments. Whereas the British government wanted more detailed information on the purpose and the Dutch government thought that it was very useful to investigate further, the Swedish and German governments were more reluctant. The Swedish government feared that the proposal could increase bureaucracy and envisaged problems regarding controlling and sanctioning of such contracts. The German government strongly opposed a regional development policy at Community level as proposed in the White Paper. It stressed that it was a task for the Member States and the regions. In accordance, it stated that introducing target-based tripartite contracts would constitute an unacceptable encroachment on the Member States' executive powers. Germany hoped that the Commission should see the CoR as more of a political partner and propose

[197] See European Parliament Resolution, P5_TA 0009/2003, *supra* note 196, p. 6; and European Parliament Resolution of 4 December 2003 on Commission Communication entitled "A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities", P5_TA-PROV 0550/2003, pp. 1, 3, 6, 9 and 12.

ways in which the Committee's initiatives and proposals could be looked at more closely in the future.[198]

The CoR has adopted two opinions with regard to the Commission's White Paper and its follow-up. In the first one from March 2002, it welcomed the Commission's intention to strengthen the involvement of local and regional players in the decision-making process. It saw the introduction of tripartite contracts as an effective instrument for involving regional and local authorities, opening the way for them to contribute their experience and know-how. It also welcomed the development of its consultative role as advocated in the White Paper. But it criticised the White Paper for not entailing the procedures for implementing the principles set out therein.[199] Another suggestion it made concerned the EU directives. In its view, they should be general in scope so that local and regional authorities could decide on the practical arrangements for applying EU legislation. The CoR also wished to be involved in the development of mechanisms for consultation upstream of decision-making and in the implementation of co-regulation instruments but stressed that co-regulation never should be extended to areas in which legislation is required.[200]

In the second Opinion from July 2003, the CoR welcomed the Commission's efforts to standardise procedures for consulting with organised civil society. However, it proposed that local and regional government should be able to put forward their views not only on the Commission's work programme but also

---

[198] See Germany's opinion on the Commission's White Paper, *supra* note 192, pp. 1–2.

[199] For example, it found the idea on general use of partnership as a method of governance for policies with territorial impact very important. So far, the Commission has not followed up that idea, see *supra* part 4.6.

[200] See Opinion of the Committee of the Regions of 13 March 2002 on the White Paper on governance and the Communication on a new framework for cooperation on activities concerning the information and communication policy of the European Union, pp. 1.8, 1.9, 1.10, 2.9, 5.5 and 5.8.

on concrete legislative proposals. The CoR was also very satisfied that the Commission wanted it to be responsible for developing the regional dialogue. But it underlined that the involvement of local and regional authorities must be two-fold: on the one hand, systematic consultation of and monitoring by local and regional authorities in the pre-legislative stage, and on the other hand, a strengthened role for the CoR in the political decision-making process. Now that the Communication on a dialogue with associations of regional and local authorities is adopted it is possible to see in what respect the Commission has taken these views into consideration. The CoR may be disappointed at the Commission for not letting it be responsible for organising the dialogue. On the other hand, the Commission has proposed that a systematic dialogue will be instituted based on the presentation of the major policy initiatives that have a direct or indirect territorial impact. The CoR will also play an important role in selecting the associations that may participate. (see *supra* part 4.6).[201]

Regional associations have reacted to the Commission's work on systematising the dialogue with regional and local authorities.[202] Many have emphasised the importance of involving both European as well as national associations representing local and regional governments. They have also stressed that the selection criteria to identify the associations, which will be invited to participate in the dialogue, should be clear, transparent and the result of consultation between the Commission, the CoR and the associations through the setting up of a joint working group. Furthermore, the Commission should provide feedback on how the dialogue with the re-

[201] See Opinion delivered by the Committee of the Regions on 2 July 2003 concerning the follow-up to the Commission's White Paper on European Governance, pp. 8, 12, 16 and 17.

[202] All reactions to the staff Working Paper on the ongoing and systematic policy dialogue with local-government associations, adopted in March 2003, *supra* note 99, can be found on http://europa.eu.int/comm/regional_policy/consultation/territorial_en.htm.

presentatives of local and regional actors has been taken into consideration.[203]

8.4 The Commission's View on Reforming Comitology

The Commission's view on reforming comitology has received strong criticism in the academic responses to the White Paper. Many have held that the essence of the White Paper lies in its proposal to limit the involvement of the Council and the European Parliament to the definition of "essential elements", leaving the Commission to fill in the technical details via implementing "secondary rules" without being bothered by comitology procedures. The Commission has been called naïve for thinking that it can have all executive responsibility delegated and still continue to be ideologically and politically neutral. Such functional approach fails to acknowledge that the exercise of executive power is not always non-political and technocratic based on efficiency considerations. In fact, many policy choices below the level of "essential principles" may have high political salience. Although many see weaknesses in the comitology system they wonder whether the Commission is reasonable in putting the system into question. Compared to the proposals in the White Paper, comitology has the advantage that it structures regulatory policy pluralistically even in its "implementing stage". Also, the comitology system allows for sensitivity towards social and cultural differences and ensures that national bureaucracies are confronted with the concerns, experiences and positions of their neighbouring

[203] See AEBR, CEMR, CPMR and EUROCITIES, joint response to the Commission working paper "Ongoing and systematic policy dialogue with local-government associations", available at http://europa.eu.int/comm/regional_policy/consultation/territorial/reponse_jointe__observations_en.pdf; and Svenska Kommunförbundet och Landstingsförbundet, Synpunkter på Kommissionens arbetsdokument, "En kontinuerlig och systematisk dialog med sammanslutningar av regionala och lokala myndigheter i utformningen av politiken", available at http://europa.eu.int/comm/regional_policy/consultation/territorial/svenska_kommunforbundet.pdf.

states and does not completely rule out diversity in regulatory policy. The idea to essentially replace consensus-seeking procedures with the unilateral powers of the Commission has therefore been criticised for lacking of legitimacy by not leaving room for Member States to intervene when needed. This is the reason why many academics conclude that a wholesale delegation of legislative competencies to the Commission should not be made, at least not before the direct responsibility of the European Parliament for substantive policy choices or the political accountability of the Commission are strengthened.[204]

Reforming the comitology system has always been a very sensitive issue for the Member State's governments. Although decision-making could be done more effectively without the use of restrictive committees, the Member States do not want to let go of their control of delegated legislation, especially in sensitive areas and areas not subject to co-decision.[205] Still, some governments have acknowledged the fact that the system needs to be reformed.[206] The UK British Minister for Europe, Mr Denis MacShane, has indicated that that there was a need to reform the present system of comitology. At the same time, he has stressed that the flexibility of the three existing procedures has worked well hitherto and that certain measures would always need to be adopted under the regulatory procedure. Furthermore, the UK has expressed concern about the fact that the advisory procedure assumes greater importance under the Commission proposal (see *supra* part 5.2.2) as

---

[204] See Weiler, supra note 188, pp. 2 and 4–6; Scharpf, supra note 186, pp.1–2, 5–7 and 12; Joerges, C., *Economic order – technical realization – the hour of the executive: some legal historical observations on the Commission White Paper on European Governance,* Working Paper No. 6/01, *supra* note 185, pp. 14–15 and 17; and Joerges, C., Guest Editorial: The Commission's White Paper on Governance in the EU – A Symptom of Crisis? *Common Market Law Review,* vol 39, 2002, p. 444.

[205] See Bergström, C.F., *supra* note 32.

[206] See The Danish Government's comment to the European Commission on the White Paper on European Governance, available at http://www.europa.eu.int/comm/governance/contributions/index_en.htm.

it does not accord the Member States the same degree of influence as under the other existing procedures.[207]

The European Parliament has a much more positive view on the Commission's comitology reform.[208] This is understandable. For many years, the European Parliament has criticised the fact that Article 202 in the EC Treaty only allows the Council to supervise the Commission when exercising its delegating powers, even if the European Parliament is a co-legislator. In the so-called Bourlanges report, presented to the European Convention on the Future of EU, the European Parliament expressed its vision with regard to how delegation of legislative acts should be made and supervised in a future constitution.[209] The Commission's first proposal to amend the current comitology decision takes up the formula set in that report by making it possible for the European Parliament to object to an implementing measure. The proposal also brings in a distinction accepted by the European Parliament in the report between delegated legislation and measures that only have an individual scope or concern procedural or

[207] The adoption of time-sensitive, health and safety-type measures in the veterinary and phyto-sanitary field, as well as implementing measures in areas not subject to co-decision, should continue to be subject to the existing regulatory procedure. See House of Commons Thirty-seventh Report, *supra* note 117, p. 17, Mr Denis MacShane, British Minister for Europe.

[208] See European Parliament Resolution, A5-0399/2001, *supra* note 194, pp. 34–36, 40 and 42; and European Parliament Report of 3 December 2002 on the typology of acts and the hierarchy of legislation in the European Union, 2002/2140 (INI), A5 0425/2002 final. See also Bergström, C.F. and Rotkirch, M., Sieps 2003:8, *supra* note 120.

[209] In the so called Bourlanges Resolution, the European Parliament expressed its vision with regard to how delegation of legislative acts should be made and supervised in a future constitution. Foremost, it has argued that it is unjust since only a committee of national officials and not the European Parliament has a right to control delegated acts and to "call them back" and a blocked decision is referred back to the Council alone with no parliamentary involvement. It has also criticised the whole system for being complex and lacking of transparency, see European Parliament Report, A5 0425/2002, *supra* note 208.

administrative arrangements subject to advisory committees. However, the European Parliament demanded some amendments to be made before giving the Commission the "green light".[210]

According to the regulatory committee procedure, as it was set out in the initial proposal, *if* the European Parliament *or* the Council expressed any objections to the draft measure the Commission *must*;

1) withdraw its draft and present an ordinary proposal for legislation under the co-decision procedure, or

2) adopt the draft measure, *possibly* amending it taking the objections into account.

The European Parliament presented 17 amendments to the initial proposal in which, *inter alia*, the word "possibly" was deleted from the second option and, additionally, a third option was inserted which stated that the Commission could also chose to withdraw its draft altogether. The amendments were adopted by the European Parliament on 13 May 2003 but, "in the light of the Commission's position on the amendments", the rapporteur, Richard Corbett, asked for the report to be referred back to the Committee on Constitutional Affairs. Following "intense talks" between the rapporteur and the Commission a second report was presented on 11 July 2003. This time the European Parliament requested amendments to the end that the Commission should always take account of the positions of the European Parliament and the Council. Moreover, the Parliament suggested that the second option should be changed to;

---

[210] In this respect, the European Parliament reached a compromise and already approved a series of amendments in May 2003. However, the Commission stated that it disagreed with some amendments, and the European Parliament therefore referred the matter back to the Constitutional Committee in order to allow the rapporteur the possibility to enter into talks with the Commission. A compromise was finally agreed upon and the European Parliament adopted its report in September 2003.

2a) adopt the draft *accompanied by an appropriate statement,* or

2b) modify it.[211]

The Commission was only prepared to adjust its proposal partially to the Parliament's amendments. According to the amended proposal of 22 April 2004 it accepted the obligation to always take account of the positions of the European Parliament and the Council and the first and third option was also left unchanged. Regarding the second option, apparently the most controversial one, the demand stating that the draft should be "accompanied by an appropriate statement" was deleted. Instead the Commission inserted a sentence stating that "[t]he Commission shall inform the legislator of the action it intends to take on the latter's objections and of its reasons for doing so." Perhaps more importantly, the Commission changed the wording of the text; where it previously stated that the Commission *must* chose one of the following options, the amended proposal states that the Commission *may* chose one of the following options. The significance of this is difficult to estimate. The amended proposal was transmitted to the Council and the European Parliament in April 2004 (see *supra* part 5.2.2)..[212]

---

[211] The European Parliament also underlined that the new comitology decision should be without prejudice to any undertakings made by the Commission in the field of the securities legislation in order to make sure that the Lamfalussy process, based on a particularly wide use of comitology, should continue to apply. See European Parliament Second Report of 11 July 2003 on the proposal for a Council decision on amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, A5-0266/2003 final; and European Parliament legislative Resolution of 2 September 2003 on the proposal for a Council decision on amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, P5_TA-PROV 0352/2003.

[212] See COM (2004) 324, *supra* note 115.

8.5 The Operating Framework for Regulatory Agencies

The Commission's proposal to introduce regulatory agencies is also a subject that has received strong reactions. The Swedish government, for example, stated in its comment on the White Paper on Governance that it had reservations concerning increasing the number of European agencies with decision-making powers unless there is a clear and added value. It also held that such agencies would risk making the division of roles between agencies and national public authorities unclear and could undermine the power and responsibilities of national public authorities. The German government underlined that powers may only be granted to an agency in instances where purely technical decisions without any political ratifications are concerned. Other governments, such as the Netherlands, on the other hand supported the idea of establishing new European agencies empowered to make individual decisions.[213] The Committee of the Regions recognised the value of using European regulatory agencies to take over some of the executive tasks of the Union but underlined that it must only take place in clearly defined areas. It also pointed to the need for an effective surveillance and control system of such agencies.[214]

The European Parliament in its report on the White Paper first expressed a restrictive approach to the idea of creating further independent agencies, holding that such agencies could only be approved if specific scientific or technical expertise were required and must not lead to any watering down of the Commission's political accountability. It clearly stated that its rights of co-decision and political supervision would become

---

[213] See Swedish comments on the White Paper on European Governance, supra note 189, pp. 3 and 6-7; Germany's opinion on the Commission's White Paper, supra note 192, pp. 3-4; and The Netherlands' response to the White Paper on European Governance, available at http://www.europa.eu.int/comm/governance/contributions/index_en.htm, pp. 14 and 23.

[214] See CoR Opinion of 2 July 2003, *supra* note 201, p. 27.

more difficult if decision-making powers were increasingly delegated to decentralized agencies.[215] But it welcomed the Commission's communication in its Report on the operating framework for European regulatory agencies. It noted with satisfaction that the Commission's communication has duly taken into account its views. It was, for example, glad that the Commission had explicitly stated that the creation of agencies should be decided by the legislator on a case-by case basis according to the normal legislative procedure (co-decision) and not in general based on Article 308 of the EC Treaty. The European Parliament especially supported the Commission's efforts aimed at arriving at a limited number of models and agreed that a distinction should be drawn between decision-making agencies and executive agencies with no power to enact legal instruments binding on third parties.[216]

On a more critical note, the European Parliament disagreed with the Commission's intention to only have an *ex-ante* control function. Opposed to the Commission, the European Parliament considers it important that all the Community institutions play a part in this respect.[217] The term *regulatory* was also criticised. According to the European Parliament, the term should be avoided in order to rule out any misunderstandings since these agencies, described in the communica-

---

[215] See European Parliament Resolution, A5-0399/2001, *supra* note 194, pp. 16–18. In its proposal on a hierarchy of legal norms presented to the Convention, the European Parliament suggested that the legislative authority could confer implementing responsibility on a specialist agency or self-regulating body on the condition that this delegation could be withdrawn by the Council, the European Parliament or the Commission, see European Parliament Resolution of 29 January 2003 on the typology of acts and the hierarchy of legislation in the European Union, CONV 517/03.

[216] See European Parliament Report of 4 December 2003 on Commission Communication on "The operating framework for the European regulatory agencies", A5-0471/2003, pp. 1–3 and 15.

[217] It also wished to be involved in selecting the agency's director and to have a say in the selection of the administrative board.

tion, may not be empowered to adopt legislative measures of general application. Instead the Commission could look at the independence of an agency's technical judgements when classifying them. The European Parliament also wondered why the Commission did not say anything about the fate of the existing agencies and demanded an urgent review of them, particularly as regards the extent to which their activities are worthwhile. It urged the Commission to start considering whether the differences between agencies based on the EC Treaty and those based on the EU Treaty are still justified. Furthermore, it also called on the Commission to clarify which legal instrument the Commission intends to use for this framework. Finally, the European Parliament underlined the importance that scrutiny of the legality of the agency's legal acts is dealt with clearly and comprehensibly in the instrument establishing that agency.[218]

On 28 June 2004, the Council adopted the operating framework for European Regulatory Agencies. In its conclusions it noted that such a framework, being a legally binding instrument, should take due account of the need to ensure democratic control and respect for the principles of subsidiarity and proportionality. It called on the Commission, in its proposal for a framework, to provide a clear definition of *regulatory agencies* according to their competences and tasks. It acknowledged that the evolving and varying nature of the responsibilities of regulatory agencies, justifies the examination of all questions related to their structure, including the composition of management boards and the respective functions of their bodies. In addition to current experience, the Council held that this examination should take into account, *inter alia*, the competences exercised by, and the nature of the tasks allocated to, each agency. The Council notes that these conclusions are without prejudice to any ongoing work on the creation of

[218] See European Parliament Report, A5-0471/2003, *supra* note 216, pp. E, L, 1-3, 15, 17d), e) and g). 12–13, 18 and 24–25.

“regulatory agencies” as already proposed by the Commission or under discussion in Council." In the Council’s view, a future horizontal framework should only apply to those regulatory agencies established after the entry into force of such a framework.[219]

[219] See Bulletin EU 6-2004, Future of the Union and institutional questions (4/5), http://europa.eu.int/abc/doc/off/bull/en/200406/p1010004.htm.

9 CONCLUSIONS

This study gives an overview of the Commission's agenda for European governance reform set out in the White Paper, focusing on how the Commission envisages its own role in the EU decision-making process. Furthermore, it describes how a number of follow-up documents adopted by the Commission have essentially given effect to the initial recommendations and proposals set out in the White Paper. The aim has been to clarify how the governance reform has taken a concrete shape at the different stages in the decision-making process since the launch of the White Paper in 2001. To sum up, the Commission has realised almost everything it initially set out to do before the end of the term in 2004, namely, the adoption of minimum standards for consultation, the establishment of databases open to the public, the proposal for a new comitology decision, the framework for agencies and the codification of the conditions for infringement actions. Some ideas, such as introducing partnership agreements, have not resulted in any concrete action yet.

According to the Commission, the governance reform will make the decision-making process more democratic, legitimate, transparent, and effective. It is difficult to assess in what respect the reform actually achieves such results. Many of the adopted initiatives have not been in place long enough to be evaluated. Furthermore, it is hard to measure the impact of several processes, for example the extent to which the Commission considers the input of civil society before adopting new initiatives. On the basis of this study, some conclusions will therefore be drawn on the overall structure of the reform rather than on the possible success with regard to bringing "Europe closer to its citizens".

In order to illustrate how the Commission has fulfilled the White Paper agenda the decision-making process has been divided into three phases in this study, the initiating phase, the implementing phase and the monitoring phase. With regard to the nature of the proposals, it may be noticed that all the

innovative ideas and proposals involving binding rules relate to the implementing phase (see *supra* part 5). Here we find the only proposal for a legislative act, namely the proposal for a new comitology decision that has to be adopted by the Council. It may also be questioned whether this proposal can be realised without changing the EC Treaty. Moreover, the introduction of tripartite contracts and agreements is a new form for involving regional and local government in the decision-making process. Finally, the Commission presents a new framework for the creation of regulatory agencies. The proposals relating to the initiating and monitoring phases (see *supra* part 4 and 6) mainly focus on structuring processes that already exist by introducing principles and standards. In this respect, for example, the Commission has adopted the minimum standards on consultation, systematised the impact assessment process, and developed priority criteria for investigations and treatment of possible breaches. However, these "rules" are not legally binding, in contrast to the documents relating to the implementing phase. The processes have also been made more transparent through the establishment of several databases, for example CONNECS, a database set up in order for the general public and civil society organisations to see what organisations are involved in consultations, and Your-Voice-in-Europe, a single access point used for all consultations.

With regard to the substance of the proposals, one conclusion that may be drawn from this study is that the governance reform must be seen in its entirety. This may be difficult since the Commission's initiatives in this field relate to a wide range of subjects, from the setting up of new databases to the reform of the comitology system. Furthermore, the proposals have been presented during a four-year long period of time. But in order to understand the bigger picture of the reform it is necessary to look at how the different proposals relate to each other. The Commission's purported goal for the reform is to achieve "better decision-making". But when the different proposals relating to various aspects are seen as an entirety,

one can conclude that the reform will lead to the Commission gaining more power with less political supervision. In our view, it is clear that the Commission's underlying goal is to strengthen its own role in the decision-making process. Proposals pointing in this direction are, for example, a more strategic use of the right to withdraw proposals for legislation, the restriction of legislation to essential elements leaving the Commission to fill in technical details by implementing secondary rules, the restriction of comitology, the introduction of tripartite contracts and the use of regulatory agencies governed by administrative boards equally represented by the Commission and the Council, led by a director appointed by the Commission. Additionally, the proposals relating to "better consultation" show that the Commission is willing to structure and open up the decision-making process but only as long as it is not bound by any formal rules.

When looking at how the Commission presents the proposals leading to this strengthened role, it seems as though it uses the reforms leading to more openness and involvement of other players in the decision-making process as a means of justifying this shift of power. It is true that the governance reform has achieved a lot with regard to the structuring and transparency of how the Commission works. The establishment of databases, the publication of minutes and the opening-up of the decision-making process is a positive step towards making the Union and its decisions visible to the citizens. But it also creates problems. It has, for example with regard to the European Securities Market, been questioned if the advantages of the consultation processes outweigh the amount of time and the effort that need to be put into them, not only for the Commission itself but also for the ones being consulted. More importantly, these reforms cannot be used to legitimate a decreased political control of the Commission in the implementing phase. If legislation, by the Council and the European Parliament, is even more slimmed down to the essential elements than today, the Commission might deal with highly sensitive political issues without being effectively controlled.

The efficiency of the decision-making process in an enlarged Union is, of course, very important and it would be extremely time consuming to legislate if the Council and European Parliament has to deal with all details regarding the implementation of a legislative act. But this requires a mechanism for political control that is sufficiently satisfactory for both legislators. It might be true that the comitology structure needs to be reformed in order to put the legislators, *i.e*. the Council and the European Parliament, on a more balanced footing as supervisors of the Commission. Still, the solution suggested by the Commission will not necessarily lead to a more effective decision-making process since it might be more difficult for the legislators to agree on the scope of the delegation if the political control is weaker at the implementing phase.[220] Such proposals should therefore be combined with other reforms on how to compensate for the loss of political control, for example by making the Commission more accountable to the European Parliament. A substantive discussion on these matters is missing in the governance reform presented by the Commission.

As the Commission has stated itself, the governance reform launched in the White Paper and intended to be implemented under the existing treaties should be seen as a complement to the phase of the institutional reform launched by the Laeken Declaration. In this respect it is interesting to note that many of the issues treated in the White Paper were also discussed within the work of the European Convention on the future of EU. Furthermore, the Commission was very successful: for example, the Constitutional Treaty does state that a legislative act can only be adopted on the basis of a Commission proposal[221], that the Commission shall carry out broad consultations,[222] and introduces a hierarchy of legal acts with a

[220] See Almer, J., Institutionell reform av EG:s värdepappersmarknad, *Europarättslig tidskrift* 2003 pp. 40–59.
[221] See Article I-26.2 of the Constitutional Treaty.
[222] See Article I-47.3 of the Constitutional Treaty.

new mechanism for political control when the power to enact legislation has been delegated to the Commission.[223]

At present, it is still uncertain when and indeed if the new Constitutional Treaty will enter into force. Meanwhile, a reform is only possible under the existing treaties. The agenda set out in the White Paper is therefore relevant for many years to come.

[223]See Articles I-33-37 of the Constitutional Treaty, see also *supra* note 119.

ANNEX I
– A Chronological Overview of the Documents Related to the White Paper

11 October 2000	Commission Working Document of 11 October 2000 on Enhancing democracy in the European Union 2000, SEC (2000) 1547/7 final
June 2001	Commission Report on the consultations conducted for the preparation of the White Paper on democratic European governance, SG/8533/01 (June 2001)
25 July 2001	Commission's White Paper of 25 July 2001 on European Governance, COM (2001) 428
25 July 2001	Report produced by the Commission of the application of Community law over the past 30 years (Livre Blanc sur la Gouvernance Europeenne, Rapport sur l'application du droit communautaire par les États membres et sur le contrôle de celle-ci par la Commission, contenant des recommandations en vue de les améliorer du point de vue de la gouvernance démocratique européenne (version finale))
September 2001	Commission Working Paper, "Recommendations for the improvement of the application of Community law by the Member States and its enforcement by the Commission" (September 2001)
5 December 2001	Commission Communication of 5 December 2001, "Simplifying and improving the regulatory environment", COM (2001) 726 final
21 December 2001	Commission Communication of 21 December 2001, "Withdrawal of Commission proposals which are no longer topical", COM (2001) 763 final/2
20 March 2002	Commission Communication of 20 March 2002 to the European Parliament and the European Ombudsman on Relations with the complaint in respect of infringements of Community law, COM (2002) 141 final
22 May 2002	Commission Communication of 22 May 2002 to the European Convention on the Future of the EU, "A project for the European Union", COM (2002) 247 final

5 June 2002	Commission Communication of 5 June 2002, "European Governance: Better lawmaking", COM (2002) 275 final
5 June 2002	Commission Communication of 5 June 2002 on Impact assessment, COM (2002) 276 final
5 June 2002	Commission Communication of 5 June 2002, Consultation document: "Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 277 final
5 June 2002	Commission Communication of 5 June 2002, Action plan: "Simplifying and improving the regulatory environment", COM (2002) 278 final
October 2002	Technical guidelines on the implementation process for the Commission Services (October 2002)
11 December 2002	Commission Communication of 11 December 2002, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 704 final
11 December 2002	Commission Report of 11 December 2002 on European Governance, COM (2002) 705 final
11 December 2002	Commission Communication of 11 December 2002, "A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities", COM (2002) 709 final
11 December 2002	Commission Communication of 11 December 2002 on the collection and use of expertise by the Commission: principles and guidelines, "Improving the knowledge base for better policies", COM (2002) 713 final
11 December 2002	Commission Communication of 11 December 2002, "The operating framework for the European Regulatory Agencies", COM (2002) 718 final
11 December 2002	Proposal of 11 December 2002 for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2002) 719 final

11 December 2002	Commission Communication of 11 December 2002, "Better monitoring of the application of Community law", COM (2002) 725 final
11 December 2002	Commission Communication of 11 December 2002 to the European Convention on the Future of the EU on the institutional architecture, "For the European Union, Peace, Freedom, Solidarity", COM (2002) 728 final/2
11 February 2003	Commission Communication of 11 February 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Updating and simplifying the Community acquis", COM (2003) 71 final
28 March 2003	Commission Working Paper of 28 March 2003 on an Ongoing and systematic policy dialogue with local-government associations
9 October 2003	European Parliament decision of 9 October 2003 on the conclusion of the inter-institutional agreement on Better Law-Making between the European Parliament, the Council and the Commission, 2003/2131/ACI
19 December 2003	Commission Communication of 19 December 2003, "Dialogue with associations of regional and local authorities on the formulation of European Union policy", COM (2003) 811 final
22 April 2004	Amended proposal for a Council decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2004) 324
12 July 2004	Recommendations from the Commission on the transposition into national law of Directives affecting the internal market, Brussels 12 July 2004, SEC (2004) 918 final
22 September 2004	Report on European Governance (2003–2004) SEC (2004) 1153

ANNEX II
– A Substance-matter Overview of the Documents Related to the White Paper

Report on European Governance and outcome Public Consultation

- "Bilan" of the public debate on Governance and list of actions made since the publication of the White Paper on July 2001, Commission's White Paper of 25 July 2001 on European Governance, COM (2001) 428

Better Lawmaking

- Commission Communication of 5 December 2001, "Simplifying and improving the regulatory environment", COM (2001) 726 final
- Commission Communication of 21 December 2001, "Withdrawal of Commission proposals which are no longer topical", COM (2001) 763 final/2
- Commission Communication of 5 June 2002, "European Governance: Better lawmaking", COM (2002) 275 final
- Commission Communication of 5 June 2002, Action plan: "Simplifying and improving the regulatory environment", COM (2002) 278 final
- Commission Report of 11 December 2002 on European Governance, COM (2002) 705 final
- Commission Communication of 11 February 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Updating and simplifying the Community acquis", COM (2003) 71 final

Minimium Standards Consultation

- Commission Communication of 5 June 2002, Consultation document: "Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 277 final
- Commission Communication of 11 December 2002, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 704 final

Impact Assesment

- Commission Communication of 5 June 2002 on Impact assessment, COM (2002) 276 final

Expertise

- Commission Communication of 11 December 2002 on the collection and use of expertise by the Commission: principles and guidelines, "Improving the knowledge base for better policies", COM (2002) 713 final

Target-based Tripartite Contracts

- Commission Communication of 11 December 2002, "A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities", COM (2002) 709 final

Regulatory Agencies

- Commission Communication of 11 December 2002, "The operating framework for the European Regulatory Agencies", COM (2002) 718 final

Comitology

- Proposal of 11 December 2002 for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2002) 719 final
- Amended proposal for a Council decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2004) 324

Application of Community Law (Infrigements)

- Commission Working Paper, "Recommendations for the improvement of the application of Community law by the Member States and its enforcement by the Commission" (September 2001)
- Commission Communication of 20 March 2002 to the European Parliament and the European Ombudsman on Relations with the complaint in respect of infringements of Community law, COM (2002) 141 final
- Technical guidelines on the implementation process for the Commission Services (October 2002)
- Commission Communication of 11 December 2002, "Better monitoring of the application of Community law", COM (2002) 725 final
- Recommendations from the Commission on the transposition into national law of Directives affecting the internal market, Brussels 12 July 2004, SEC (2004) 918 final

Dialogue with Associations of Local and Regional Authorities

- Commission Working Paper of 28 March 2003 on an Ongoing and systematic policy dialogue with local-government associations
- Commission Communication of 19 December 2003, "Dialogue with associations of regional and local authorities on the formulation of European Union policy", COM (2003) 811 final

List of Materials

Treaties

Treaty on European Union (OJ 1992 C 191/1)

Treaty of Nice (OJ 2001 C 80/1)

Treaty establishing the European Community (consolidated text) (OJ 2002 C 325/1)

Draft Treaty establishing a Constitution for Europe (OJ 2003 C 169/1) 2003/2004 IGC – Provisional consolidated version of the Treaty establishing a Constitution for Europe, CIG 87/04, Brussels 6 August 2004

Legislation

Council Decision 1999/468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184/23)

European Parliament and Council Regulation 1049/2001/EC of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145/43)

Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC (OJ 2002 L 63/23)

Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators (OJ 2001 L 191/43)

Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee (OJ 2001 L 191/45)

Council Regulation 58/2003/EC of 19 December 2002 laying down the statue for executive agencies to be entrusted with certain tasks in the management of Community programmes (OJ 2002 L 11/1)

European Parliament and Council Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96/16)

Commission Decision 2004/8/EC of 5 November 2003 amending Decision 2001/528/EC establishing the European Securities Committee (OJ 2004 L 3/33)

Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ 2003 L 339/70)

Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest (OJ 2003 L 339/73)

Commission Regulation (EC) 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (OJ 2003 L 336/33)

Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions (OJ 2004 L 162/70)

Official Documents

Commission Documents

Commission Communication of 9 February 2000 on Strategic Objectives 2000–2005 “Shaping the New Europe”, COM (2000) 154

Commission Working Document of 11 October 2000 on Enhancing democracy in the European Union 2000, SEC (2000) 1547/7 final

Proposal for a Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2001) 281 final

Commission Report on the consultations conducted for the preparation of the White Paper on democratic European governance, SG/8533/01, (June 2001)

Commission Communication of 28 June 2001 on a new framework for cooperation on the information and communication policy of the European Union, COM (2001) 354

Commission’s White Paper of 25 July 2001 on European Governance, COM (2001) 428

Commission Communication of 21 December 2001, “Withdrawal of Commission proposals which are no longer topical”, COM (2001) 763 final/2

Commission Communication of 3 April 2001 on Interactive Policy Making, COM (2001) 1014

Provisional Request for Technical Advice on Possible Implementing Measures on the Future Directive on Insider Dealing and Market Manipulation (Market Abuse), Brussels, 18 March 2002

Commission Communication of 22 May 2002 to the European Convention on the Future of the EU, "A project for the European Union", COM (2002) 247 final

Commission Communication of 5 June 2002, "European Governance: Better lawmaking", COM (2002) 275 final

Commission Communication of 5 June 2002 on Impact assessment, COM (2002) 276 final

Impact Assessment in the Commission: Internal Guidelines on the New Impact Assessment Procedure Developed for the Commission Services
Commission Communication of 5 June 2002, Consultation document: "Towards a reinforced culture of consultation and dialogue – Proposal for general principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 277 final

Commission Communication of 5 June 2002, Action plan: "Simplifying and improving the regulatory environment", COM (2002) 278 final

Commission Communication of 2 July 2002 on an Information and Communication Strategy, COM (2002) 350 final

Commission's Feasibility Study: Contribution to a preliminary draft Constitution of the European Union of 5 December 2002, working document available at www.europa.eu.int/futurum/documents/offtext/const051202_en.pdf

Commission Communication of 11 December 2002, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission", COM (2002) 704 final

Commission Report of 11 December 2002 on European Governance, COM (2002) 705 final

Commission Communication of 11 December 2002, "A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities", COM (2002) 709 final

Commission Communication of 11 December 2002 on the collection and use of expertise by the Commission: principles and guidelines, "Improving the knowledge base for better policies", COM (2002) 713 final

Commission Communication of 11 December 2002, "The operating framework for the European Regulatory Agencies", COM (2002) 718 final

Proposal of 11 December 2002 for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2002) 719 final

Commission Communication of 11 December 2002, "Better monitoring of the application of Community law", COM (2002) 725 final

Commission Communication of 11 December 2002 to the European Convention on the Future of the EU on the institutional architecture, "For the European Union, Peace, Freedom, Solidarity", COM (2002) 728 final/2

Commission Communication of 11 February 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Updating and simplifying the Community acquis", COM (2003) 71 final

Commission Working Paper of 28 March 2003 on an Ongoing and systematic policy dialogue with local-government associations

Proposal for amending Council Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community and Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community, COM (2003) 380 final

Formal Commission draft on second set of measures implementing the European Parliament and Council Directive 2003/6/EC on insider dealing and market manipulation, submitted to the European Securities Committee, ESC document Nr. 48/2003

Commission staff working paper, 29 October 2003, SEC (2003) 1171/3

20th Annual Report on Monitoring the Application of Community Law (2002), Brussels 21 November 2003, COM (2003) 669 final

Commission Communication of 19 December 2003, "Dialogue with associations of regional and local authorities on the formulation of European Union policy", COM (2003) 811 final

Amended proposal for a Council decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM (2004) 324

Recommendations from the Commission on the transposition into national law of Directives affecting the internal market, Brussels 12 July 2004, SEC (2004) 918 final

European Parliament Documents
European Parliament Resolution of 29 November 2001
on the Commission White Paper on European Governance, A5-0399/2001

European Parliament Activity Report of 1 August 2001–31 July 2002 of the delegations to the Conciliation Committee, PE 287.614

European Parliament Report of 3 December 2002 on the typology of acts and the hierarchy of legislation in the European Union, 2002/2140 (INI), A5 0425/2002 final

European Parliament Resolution of 14 January 2003 on the role of the regional and local authorities in the European integration, P5_TA 0009/2003

European Parliament Resolution of 29 January 2003 on the typology of acts and the hierarchy of legislation in the European Union, CONV 517/03

European Parliament Second Report of 11 July 2003 on the proposal for a Council decision on amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, A5-0266/2003 final

European Parliament legislative Resolution of 2 September 2003 on the proposal for a Council decision on amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, P5_TA-PROV 0352/2003

European Parliament Resolution of 4 December 2003 on European Governance, A5-0402/2003

European Parliament Report of 4 December 2003 on Commission Communication on "The operating framework for the European regulatory agencies", A5-0471/2003

European Parliament Resolution of 4 December 2003 on Commission Communication entitled "A framework for
target-based tripartite contracts and agreements between the Community, the States and regional and local authorities", P5_TA-PROV 0550/2003

European Parliament Decision of 9 October 2003 on the conclusion of the inter-institutional agreement on Better
Law-Making between the European Parliament, the Council and the Commission, 2003/2131/ACI

Other Official Documents
Opinion of the Economic and Social Committee of 17 November 1999 on the role and contribution of civil society organisations in the building of Europe (OJ 1999 C 329/30)

2283rd meeting of the Council (Economic and Financial Questions), held in Brussels on 17 July 2000

Declaration No 23 on the Future of the Union attached to the Treaty of Nice

Final Report of the Committee of Wise Men on the Regulation of European Securities Market, Brussels, 15 February 2001

Laeken Declaration on the future of the European Union, annexed to Presidency Conclusions, European Council meeting in Laeken, 14-15 December 2001

Public Statement of Consultation Practices, December 2001, CESR/01-007c

Opinion of the Committee of the Regions of 13 March 2002 on the White Paper on governance and the Communication on a new framework for cooperation on activities concerning the information and communication policy of the European Union

Opinion of the Economic and Social Committee on European Governance- a White Paper, Brussels 20 March 2002, CES 357/2002 EN/o

Possible Implementing Measure on Market Abuse request for Advice and Call for Evidence, 27 March 2002, CESR/02-047

Contribution from Mr Barnier and Mr Vitorino to the Convention on 3 September 2002 on the Community method, CONV 231/02

Working document of 7 November 2002 to the Working Group IX on Simplification, Proposal to distinguish legislative and executive functions in the institutional system of the European Union, paper by Mr. Ponzano, member of the Convention and Commission's representative in the Group, WD 16

Results of CESR's public consultation on possible measures of the future Market Abuse Directive, 13 November 2002, CESR/02-226c

CESR's Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive, December 2002, CESR/02-089d

Opinion delivered by the Committee of the Regions on 2 July 2003 concerning the follow-up to the Commission's White Paper on European Governance

The Role of CESR at "level 3" under the Lamfalussy process, CESR/04-104b

AEBR, CEMR, CPMR and EUROCITIES, joint response to the Commission working paper "Ongoing and systematic policy dialogue with local-government associations", available at http://europa.eu.int/comm/regional_policy/consultation/territorial/reponse_jointe_observations_en.pdf

Case Law

Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster, Berodt & Co* [1970] ECR 1161

Case 240/90 *Germany v Commission* [1992] ECR I-5383

National Documents

The German Government's opinion on the European Commission's White Paper on European Governance, 12 December 2001, available at www.europa.eu.int/comm/governance/contributions/index_en.htm

The Danish Government's comment to the European Commission's White Paper on European Governance, available at http://www.europa.eu.int/comm/governance/contributions/index_en.htm

The Netherlands Government's response to the European Commission's White Paper on European Governance, available at http://www.europa.eu.int/comm/governance/contributions/index_en.htm

The UK Government's response to the European Commission's White Paper on European Governance, available at www.europa.eu.int/comm/governance/contributions/index_en.htm

The Swedish Government's comments on the European Commission's White Paper on European Governance, Ministry for Foreign Affairs, 22 March 2002, available at www.europa.eu.int/comm/governance/contributions/index_en.htm

The Swedish Government's comments on the European Commission's White Paper on European Governance, Ministry for Foreign Affairs, 30 July 2002, available at http://europa.eu.int/comm/secretariat_general/sgc/consultation/docs/contrib_su_gov.pdf

The UK Government's response to the Commission's Package of Communications on Better Regulation, July 2002, available at http://europa.eu.int/comm/secretariat_general/sgc/consultation/docs/cont_uk_gov.pdf

Svenska Kommunförbundet och Landstingsförbundet, Synpunkter på Kommissionens arbetsdokument, ”En kontinuerlig och systematisk dialog med sammanslutningar av regionala och lokala myndigheter i utformningen av politiken”, available at http://europa.eu.int/comm/regional_policy/consultation/territorial/svenska_kommunforbundet.pdf

House of Commons, European Scrutiny Committee, Thirty-second report of session 2002–03, published 26 September 2003

House of Commons, European Scrutiny Committee, Thirty-seventh report of session 2002–03, published 26 November 2003

House of Commons, European Scrutiny Committee, Twenty-third report of session 2003–04, published 1 July 2004

Articles and Literature

Almer, J., Institutionell reform av EG:s värdepappersmarknad, *Europarättslig tidskrift* 2002 pp. 40–62

Bergström, C.F. and Almer, J., *The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC,* Working Document, available at www.sieps.se.

Bergström, C.F., *Comitology – Delegation of Powers in the European Union and the Committee System,* (Stockholm University 2003)

Bergström, C.F. and Rotkirch, M., *Simply Simplification? The Proposal for a Hierarchy of Legal Acts,* Sieps 2003:8

Bergström, C.F. and Rotkirch, M., *Decentralised Agencies and the IGC: a Question of Accountability,* Sieps 2003:14

Bouwen, P., *Competing for Consultation: Inter-Organizational Conflict between the Commission and the Parliament,* Discussion Paper published by the Robert Schuman Center for Advanced Studies and Sieps, (May 2004)

Curtin, D., *The Commission as Sorcerer's Apprentice? Reflections on EU Policy Administration and the role of Information Technology in Holding Bureaucracy Accountable,* Working Paper No. 6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance 2001, available at www.jeanmonnetprogram.org/papers/papers01.html

Hall, B., European governance and the future of the Commission, *Centre for European Reform Working Paper,* (2002)

Joerges, C., *Economic order – technical realization – the hour of the executive: some legal historical observations on the Commission White Paper on European Governance,* Working Paper No. 6/01, Symposium:

Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance 2001, available at www.jeanmonnetprogram.org/papers/papers01.html

Joerges, C., Guest Editorial: The Commission's White Paper on Governance in the EU – A Symptom of Crisis? *Common Market Law Review,* vol 39, 2002

Radaelli, M. C., *Impact Assessment in the European Union: innovations, Quality and Good regulatory Governance,* Conference background Report, European Commission Conference, (Brussels, 3 December 2003)

Scharpf, W. F., *European Governance: Common Concerns vs. The Challenge of Diversity,* Working Paper No. 6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance 2001, available at www.jeanmonnetprogram.org/papers/papers01.html

Scott, J. and Trubek, D.M., Mind the Gap: Law and New Approaches to Governance in the European Union (2002), *European Law Journal* Vol 8, pp. 1–18

Shub R., Let's all talk' plan could bring Brussels outsiders into the EU fold, *European Voice,* (4–10 July 2002)

Steinberg, P., *Agencies, Co-Regulation and Comitology- and What about Politics? A Critical Appraisal of the Commission's White Paper on Governance,* Working Paper No. 6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance 2001, available at www.jeanmonnetprogram.org/papers/papers01.html

Sundberg, H. and Bengotxea, J., The Other Constitution – the Commission's White Paper on New Governance, *Europarättslig tidskrift* 2004 p. 139–163

Weiler, J. H. H., *The Commission as Euro-Skeptic: A Task oriented Commission for a Project-Based Union, A Comment on the First version of the White Paper,* Working Paper No. 6/01, Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance 2001,
available at www.jeanmonnetprogram.org/papers/papers01.html

Wallace, H. and Young, A.. R. (eds.), *Participation and Policy-Making in the European Union,* (Clarendon Press 1997)

Speeches

Speech by Romano Prodi in the European Parliament on 15 February 2000

Speech by Heinz Zourek, Deputy Director General Enterprise DG, Conference on Impact Assessment, Brussels, 3 December 2003

Speech by Baron Alexandre Lamfalussy, Seminar on The Integration of Financial Markets in Europe, Stockholm, 21 April 2004

Websites

Calendar for transposition of Directives www.europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm#calendar

The Commission's website on Governance www.europa.eu.int/comm/governance/index_en.htm

Committee of European Securities Regulators http://www.cesr-eu.org

CONECCS www.europa.eu.int/comm/civil_society/coneccs/index_en.htm

Council of the European Union http://ue.eu.int/

Convention on the Future of the EU http://european-convention.eu.int

Eur-Lex www.europa.eu.int/eur-lex/en/index.html

European Securities Committee http://www.europa.eu.int/comm/internal_market/en/finances/mobil/esc_en.htm

Futurum www.europa.eu.int/futurum

Intergovernmental Conference 2000 www.europa.eu.int/comm/archives/-igc2000/geninfo/index_ en.htm

Intergovernmental Conference 2003/2004 http://ue.eu.int/cms3_fo/showPage.ASP?id=251&lang=en

Market Abuse-website http://www.europa.eu.int/comm/internal_market/en/finances/mobil/marketabuse/

Your-Voice-In-Europe www.europa.eu.int/yourvoice

SIEPS PUBLICATIONS AVAILABLE IN ENGLISH

2004:1op
The Netherlands 2004 EU Council Presidency
– Dutch EU Policy-making in the Spotlights
Author: Mendeltje van Keulen

2004:1u
European Governance
– an Overview of the Commission's Agenda for Reform
Authors: Josefin Almer and Matilda Rotkirch

2003:1op
Contrasting Transatlantic Interpretations
– the EU and the US towards a Common Global Role
Author: Ludger Kühnhardt

2003:19
Industrial Structure and Industry Location in an Enlarged Europe
Author: Karolina Ekholm

2003:18
Coming of Age? Economic Management of the European Union
Authors: Per Molander and Allan Gustafsson

2003:17
Reinventing Cohesion – the Future of European Structural Policy
Author: Daniel Tarschys

2003:14
Decentralized Agencies and the IGC – a Question of Accountability
Authors: Carl Fredrik Bergström and Matilda Rotkirch

2003:9
Reforming the Council – a Work in Progress
Authors: Helen Wallace and Fiona Hayes-Renshaw

2003:8
Simply Simplification? The Proposal for a Hierarchy of Legal Acts
Authors: Carl Fredrik Bergström and Matilda Rotkirch

2003:7
The Invisible Transformation of Codecision
– Problems of Democratic Legitimacy
Authors: Henry Farrell and Adrienne Héritier

2003:1
The Open Method of Coordination
– a New Governance Architecture for the European Union?
Author: Claudio M Radaelli

Swedish Institute for European Policy Studies

Universitetsvägen 10 F
SE-106 91 Stockholm
Office: Stockholms universitet,
Frescati, House F, 6th floor
Tel: +46-(0)8-16 46 00
Fax: +46-(0)8-16 46 66
E-mail: info@sieps.se
www.sieps.se