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The Governance of the European Union: The Potential for Multi-Level Control

Colin Scott*

Abstract

In its White Paper on the Governance of the European Union the European Commission has adopted a narrow concept of governance which focuses almost exclusively on public institutions exercising legislative and executive power (in other words institutions of *government*). The article suggests that a theory of multi-level control in the EU would attend to greater variety both in the available governance institutions and the techniques of control. The deployment of an analysis grounded in theories of control suggests that the European Commission is substantially holding to a long held preference for instruments of government premised on the exercise of hierarchical power. This reform path sits uneasily with revived concerns to render the governance of the EU more democratic. Equally it inhibits the generation of more efficient governance arrangements which place greater dependence on communities, competition and design as alternative bases of control to hierarchy. Control theory suggests that the assertion of different reform agendas and institutional structures by other actors can check the more wayward (and arguably illegitimate) tendencies within the Commission plan, whilst drawing in alternative bases of control which, when combined, may yield technically superior governance solutions.

I. Introduction

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The governance of the European Union has become a major preoccupation both for the EU's own bureaucratic and political elites and for the academic community of EU watchers. The reform agenda has been driven variously by perceived latent defects in existing structures, the crisis surrounding the dismissal of the Santer Commission in 1999, the problem of responding to the enlargement of the EU and a tendency to question both the efficacy and legitimacy of traditional top-down governance arrangements which have evolved in the EU and its member states.[1]This combination of factors led the Prodi Commission appointed in 1999 to place the reform of governance at the top if its agenda.[2]

With the publication of *European Governance: A White Paper* in July 2001[3] the European Commission has adopted some of the language of long-established political science analysis of problems of governing.[4] The rich concept of governance recognises widespread dispersal of the key resources relevant to the exercise of power amongst both public and private actors, and uses this insight both better to understand processes by which we are governed and to provide a basis for reprogramming relations and institutions of governance so as enhance their capacity to deliver particular desired outcomes. In its White Paper on the governance of the European Union the European Commission has followed the lead both of other supranational policy makers and, to some extent, of EU scholars in adopting a narrower concept of governance which focuses almost exclusively on public institutions exercising legislative and executive power (in other words institutions of *government*).[5]

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[1] L. Metcalfe 'Reforming the Commission: Will Organizational Efficiency Produce Effective Governance?' (2000) 38 *Journal of Common Market Studies* 817.

[2] D. Dinan 'Governance and Institutions 1999: Resignation, Reform and Renewal' (2000) 38 (Annual Review) *Journal of Common Market Studies* 25,27-30; N. Lebessis and J. Paterson 'Developing New Modes of Governance' in de Schutter, Lebessis and Paterson (eds) *Governance in the European Union* (Office for Official Publications of the European Communities, 2001), 262-3.

[3] Commission of the European Communities (2001a) *European Governance: A White Paper* COM (2001) 428, 25.7.2001.

[4] See R.A.W. Rhodes *Understanding Governance* (Open University Press, 1997).

[5] OECD *Governance in Transition* (OECD, 1995); World Bank *Governance: The World Bank's Experience* (World Bank, nd).

Though there are good pragmatic reasons for this narrower focus in the policy literature (notably a concern with the Commission not to stray into reform proposals which might require Treaty amendment), it is argued here that EU scholarship should not follow that lead. Accordingly I argue that the analysis of institutional reforms in EU governance through the lens of theories of control demonstrates that the focus of reform is narrow not just in an institutional sense, but also in terms of techniques which are available to better achieve the task of governing. The article suggests that a theory of multi-level control in the EU would attend to greater variety both in the available governance institutions and the techniques of control. Control refers to the whole variety of mechanisms by which steering of behaviour occurs and to all levels of activity: citizens, civil society and undertakings; local, regional and national state bodies; EU and other supranational institutions.

The deployment of this analysis suggests that the European Commission is substantially holding to a long held preference for instruments of control premised on the centralised exercise of hierarchical power. This orientation towards hierarchy may be an essential feature of the EU governance structures but it sits uneasily with revived concerns to render the governance of the EU more democratic and thus more legitimate. Equally it inhibits the development of alternative governance instruments based in the alternative control mechanisms of community, competition and design, which have been identified both in theoretical and empirical analyses with the achievement of more efficient and effective governance.

II. Governance and Government in The EU

Confident post-War European governments placed heavy emphasis on the governance instruments of command and control. The oil shock of the early 1970s and accompanying fiscal crises set in train processes which cast doubt on the all-encompassing capacities of

direct state action.[6] Change in the styles and instruments of governance within the EU are still being felt. These changes are characterised overall by recognition of the diffuse nature of resources and capacities relevant to good governance, and continuing doubt as to the claims of governments to be legitimate and effective. At its simplest the hierarchical governance structures of governments now face challenges from the competing orders of the market and civil society. For each of these three rationalities it is possible to construct justificatory principles setting out why they have superior claims to legitimacy and effectiveness.

Seen within the context of this challenge the Governance White Paper is a remarkably modest affair, barely recognising the existence of the alternative ordering mechanisms of civil society and markets, seeing them as, at most, subsidiary to traditional governance arrangements within the delimited policy domains characterised as 'regulation'. The Commission takes governance to be 'rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.'[7] It is thus somewhat surprising to find that the main discussion of institutional reform are limited to the effectiveness and coherence dimensions. The key proposals are to continue the process of reducing the detail in EU legislation, to make greater use of non-legislative instruments and to make more use of independent European agencies in the implementation of policy. These proposals are likely to provide some structural support for greater effectiveness and coherence, as they concentrate policy and executive power further in the hands of the Commission. However, in themselves, they offer little to enhance openness, participation and accountability. Whilst the Commission White Paper provides a strong commitment to operationalize these values it is questionable whether, without the support of structural

[6] J. O'Connor *Fiscal Crisis of the State* (St Martin's Press, 1973); C. Offe *Contradictions of the Welfare State* (Hutchinson, 1984).

[7] Commission of the European Communities *op* cit n 3, 8. The 'principles of good governance' mutated during the White Paper process as they were originally said to be accountability, clarity, transparency, coherence, efficiency and effectiveness and thus did not refer to participation: Commission of the European Communities *Work Programme, White Paper on European Governance, 'Enhancing Democracy in the European Union'* (Commission Staff Working Document SEC (2000) 1547/7 Final, October 2000), 4.

reforms capable of supporting them, they represent more than a symbolic commitment to the language of democractic legitimacy.[8] This leads to the conclusion that the use of the term governance is mainly rhetorical given either an unwillingness or inability to consider governance models which do not have strong governmental capacities at their core. There is very little in the White Paper that builds on the richer governance concept such as that used in the policy networks literature which emphasises 'self-organising, inter-organisational networks' characterised by interdependence between organisations (both state and non-state), a pattern of interactions within networks, observation of 'rules of the game' negotiated between the actors, and a degree of autonomy from the state.[9]

The stunted public debate about governance is the product of deep ambivalence about claims to legitimacy and legitimacy in the EU governance structures.[10] The concept of democratic legitimacy comes down to the justifications for the exercise of governing authority.[11] The debate about underlying justifications has been cast in terms of a contest between technocrats and democrats (although in practice legitimate government is likely to require elements of both forms of justification, together with the forging of some form of European identity).[12] Schematically technocrats see the legitimacy of EU governance being derived from the quality of its outputs, while the democrats emphasise the quality of its inputs and processes as the source of legitimacy. The technocrats see EU

[8] N. Walker 'The White Paper in Constitutional Context' Jean Monnet Working Paper 10/01, (New York University School of Law, 2001), text around footnotes 80-84.

[9] R.A.W. Rhodes 'Introduction: The ESRC Whitehall Programme: A Guide to Institutional Change' in R.A.W. Rhodes (ed) *Transforming British Government, Vol 1: Changing Institutions* (MacMillan 2000), 8; N. Winn 'Who Gets What, When and How? The Contested Conceptual and Disciplinary Nature of Governance and Policy-Making in the European Union' (1998) 18 *Politics* 119.

[10] A different interpretation of the narrow range of the White Paper is that a political requirement to have the paper published in July 2001 made it impossible to assimilate the more innovative and forward-looking thinking of some of the Commission working groups which had been working on the governance topics: L Metcalfe 'More Green than Blue: Positioning the Governance White Paper' (2001) 14 (4) *EUSA Review* 3, 4.

[11] F. Scharpf 'Interdependence and Democratic Legitimation' MPIfG Working Paper 98/2 September 1998.

[12] C. Lord and D. Beetham 'Legitimizing the EU: Is there a 'Post-Parliamentary Basis for its Legitimation' (2001) 39 *Journal of Common Market Studies* 443.

governance as necessarily being a technical job which will be achieved more effectively if decision making is relatively insulated from politics. For the technocrats the existing decision making structures of the comitology system and the putative development of independent regulatory agencies represent an ideal.[13] Democrats look at the technocrat's optimum governance structures and decry the democratic deficit, opacity and lack of scope for participation in decision making.[14] Democrats suggest that the majoritarian principle of governance which is seen to underlie the legitimacy of governance within the member states should also obtain at the EU level.[15]

The technocratic and democratic vision have shared assumptions that what matters is what happens in the central governance institutions of the EU. A rational actor analysis suggests that, for different reasons, the current emphasis on a centralised EU bureaucracy and legislative function will continue to serve the interests of the agenda-setters in the Commission (because they favour working in elite, non-executant bureaucracies), Member State governments (because it offers the possibility of retaining key influence at the expense of lower tiers of government combined with the possibility of shifting blame for unpopular policies), and big business (because of the relative insulation of EU regulation from the hazards of politics).[16] It is for these reasons that few of the policy actors involved are likely to point out the partial nature of the public governance debate which has recently begun.

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[13] G. Majone 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *European Law Journal* 5.

[14] J. Neyer 'Justifying Comitology: The Promise of Deliberation' in K. Nunnreither and A. Weiner *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, 2000); B. Steunenberg, C. Koboldt and D. Schmidtchen 'Beyond Comitology: A Comparative Analysis of Implementation Procedures with Parliamentary Involvement' in P. Moser, G. Schneider and G. Kirchgässner (eds) *Decision Rules in the European Union: A Rational Choice Perspective* (Macmillan, 2000).

[15] D. Obradovic 'Policy Legitimacy and the European Union' (1996) 34 *Journal of Common Market Studies* 191.

[16] P. Dunleavy 'Explaining the Centralization of the European Union: A Public Choice Analysis' P. Moser, G. Schneider and G. Kirchgässner (eds) *Decision Rules in the European Union: A Rational Choice Perspective* (Macmillan, 2000).

III. Theories of Control

Governance is, in essence, about control and the technologies by which control is achieved.[17] The term governance shares its etymology with the word cybernetics which is used to connote the science of control systems. Each word derives from the Greek word for steersman.[18] Control is the effect which inputs to a system have so as to hold the system within a particular state or produce particular outputs. Regulation, classically conceived, provides one important model of a control system. Within the regulatory model of control norms are set by legal rules, the rule making power often being delegated to an agency in some systems, such as the United States, but more commonly being held by a government department within the EU. A monitoring function is exercised by a government department, by a specially established agency or sometimes by an interest group. Deviations from the standards or rules, when detected, may be corrected by the application of sanctions for breach, sometimes by a government department or agency, but more commonly through application to a court within the EU. I characterise this classical regulatory model as a hierarchical control system to indicate that there are other systems of control which form part of the techniques of governance and which may involve different institutional forms. Recent scholarship has argued from a number of perspectives that attempts to control any form of activity are likely to be most successful when going with the grain of the activity to be controlled.[19] This idea

[17] N. Rose 'Government and Control' (2000) 40 *British Journal of Criminology* 321. Others have tended to think in terms of mechanisms of coordination rather than control: Hollingsworth and Boyer ** (**1997); C. Offe 'Civil Society and Social Order: Demarcating and Combining Market, State and Community' (2000) XLI *Archives Europeenes de Sociologie* 71.

[18] S. Beer *Decision and Control* (Wiley, 1966).

[19] Teubner 'Juridification: Concepts, Aspects, Limits, Solutions' in G. Teubner (ed) *Juridification of Social Spheres* (de Gruyter, 1987); G. Burchell (1991) 'Civil Society and the System of Natural Liberty' in Burchell, Gordon and Miller (eds) *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf), 127; P. Grabosky (1995) 'Using Non-Governmental Resources to Foster Regulatory Compliance' 8 *Governance* 527, 528.

finds formal expression in the 'law of requisite variety' expressed in the form that only 'variety can destroy variety'.[20] If the forms taken by systems to be control are varied then the control mechanisms for these must be equally varied.[21]

A Institutions

The starting point for demonstrating the potential of control theory is to recognise the highly fragmented character of contemporary governance. Resources relevant to the capacity to govern are widely dispersed. These resources are not limited to authority, but include also wealth, organisational capacity and information.[22] Thus many, if not most, actors are potentially both controllers and controllees. Thus with controllers there is a long history of non-governmental resources being deployed for control purposes for functions which might be regarded as governmental in character.[23] The analysis of controllees is not restricted to understanding what are conceived of as regulatory problems but extends to the control of government bureaucracies at both European and domestic level[24] and governance within ordering systems which lack a central governmental element, as with wholly voluntary self-regulatory regimes and control through the market. Thus a central question of any governance reform is who is to do the controlling.[25]

B Techniques

[20] Beer *op cit* n18 279-80.

[21] Principia Cybernetica Web 2001 - http://pespmc1.vub.ac.be/REQVAR.html (visited 4 October 2001).

[22] C. Hood *The Tools of Government* (Macmillan, 1983), 18; T. Daintith (1997) *Regulation* (Chapter 10 of Vol XVII of the *International Encyclopedia of Comparative Law)* (Martinus Nijhoff, 1997), 13.

[23] Grabosky *op cit* n19, 527.

[24] See, for example, C. Hood, C. Scott, O. James, G. Jones and T. Travers *Regulation Inside Government* (Oxford University Press, 1999), chapter 8.

[25] Offe *op cit* n17, 78-79.

A burgeoning international policy literature has developed to address the topic of alternatives to classical regulation,[26] and the issues has recently been taken up by the European Commission alongside the preparation of the Governance White Paper.[27] The legal basis for developing a wider range of control forms in the EU arguably derives from the Treaty Principles of subsidiarity and proportionality.[28] The principle of subsidiarity underlies the recognition of the capacities of a variety of actors at different levels to effectively carry out tasks under circumstances where the EU institutions do not have exclusive competence. The principle of proportionality supports the search for 'softer forms of law'[29] and alternative techniques of control which are less intrusive than hierarchical controls.[30]

A number of scholars have independently developed hypotheses as to the number of viable control systems over social, economic and political activity and suggested that there are four basic forms of control of which the hierarchical is one. Two of the other models are relatively widely accepted. These are control through rivalry or competition

[26] OECD *Regulatory Reform* (2 vols, Paris, OECD, 1997); Industry Canada *Voluntary Codes: A Guide for their Development and Use* (1998); *An Evaluative Framework for Voluntary Codes* (2000); Lex Fori *La Meillure Pratique Dans Les Recours A Des Norms Juridiques "Douces" Et Son Application Aux ConsommateursAu Seine De L'Union Europenne*(2000); Australian Task Force on Self-Regulation *Industry Self-Regulation in Consumer Markets* (2000); Better Regulation Task Force *Alternatives to State Regulation* (Cabinet Office, 2000); See also J. Braithwaite 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Journal of Criminology* 222.

[27] Commission of the European Communities *Interim Report from the Commission to the Stockholm European Council: Improving and Simplifying the Regulatory Environment* COM (2001) 130 Final, 7.3.2001.

[28] Art 5, EC; Protocol No 30 on the Application of Principles of Subsidiarity and Proportionality (1997).

[29] G. de Búrca 'Reappraising Subsidiarity's Significance After Amsterdam' Harvard Jean Monnet Working Paper 7/99.

[30] The Commission accounts for the application of these principles in legislative measures in its annual Better Lawmaking report to the European Council.

and community-based control (based within civil society).[31] A fourth basis of control, discussed below, is design. Observation of social controls in play suggests that these four forms of control rarely appear in pure form are likely to be deployed in a 'complex "mix" of institutional arrangements'.[32]

Control through rivalry is epitomised (though not restricted to) market-type mechanisms within which the dispersed activities of buyers exercising preferences serves to set implicit standards for quality and price of goods and services, the buyers' search activities constitute a monitoring mechanisms, and the buyers' capacity for exit and loyalty serves to punish deviations from the market norms. Such mechanisms of control or coordination were a policy boom area in the 1980s and 90s.[33] This kind of market-based control system has been widely deployed in non-market situations, for example by giving public purchasers duties to tender for provision of goods and services and to favour those which are offered most cheaply or at the best value.

Community-based control systems have also been widely observed both in formal models, such as self-regulatory regimes, and informal models such as the 'old boy network' said to be fundamental to the control of financial services for many years both in the UK and in Japan,[34] and to the control of the high bureaucracy in many states. Within such community-based systems norms may be set through informal interaction or through formal processes, monitoring may be carried out by special institutions or through the interaction and discussion of members of the community, and deviations can either be formally punished through application of sanctions, or informally punished through some form of black mark or other loss of credit within the community. The

[31] W. Streeck and P. Scmitter 'Community, Market, State – and Associations?' (1985) 1 *European Sociological Review* 119.

[32] Offe *op cit* n17, 79 .

[33] J. Rogers Hollingsworth and R Boyer (eds) *Contemporary Capitalism: The Embededness of Institutions* (Cambridge University Press, 1997), 439ff.

[34] M. Clarke *Regulating the City* (Open University Press, 1986); U. Schaede 'The "Old Boy" Network and Government-Business Relationships in Japan' in H. Baum (ed) *Japan: Economic Success and Legal System* (Walter de Gruyter, 1997).

formalised models, sometimes labelled as 'associationalism',[35] actually tend to combine hierarchy with community-based control, though with non-state hierarchy or a contractual basis to the hierarchical element. Thus associations represent a hybrid form, whereas informal networks tend to be more purely based on community for setting of norms and achieving of compliance.[36]

The fourth, and least notorious pure form of control is control by design. This control type takes at least two forms: contrived randomness and architecture. Contrived randomness is the deliberate injection of randomness into some process[37] Contrived randomness is widely deployed by state bureaucracies to control social and economic activity as with random breath-tests, random sampling of tax files and random customs checks. Each of these practices exemplifies randomness in monitoring. Hood suggests it would be possible, and sometimes happens, that randomness is also applied to the development of norms and to the mechanisms by which deviations from norms are tackled. Architecture offers a means to control by the design of buildings, roads, products and software. In a celebrated article Shearing and Stenning have noted the combination of architectural and environmental controls which the Disney Corporation imposes on visitors to Disney World.[38] The central feature of architectural controls is that they are self-executing and represent an absolute constraint.[39] Thus you cannot park a vehicle in a space where there is a concrete parking bollard and you cannot secure access to a locked room without a key.

Considering all four of the pure forms of control together, a helpful example from Lessig shows that the public policy of ensuring that everyone wears a seat belt when riding in a motor-car can be approached through hierarchy ('thou shalt wear a seat belt'),

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[35] P. Hirst 'Statism, Pluralism and Social Control' (2000) 40 *British Journal of Criminology* 279.

[36] Rogers Hollingsworth and Boyer *op cit n* 33, 15.

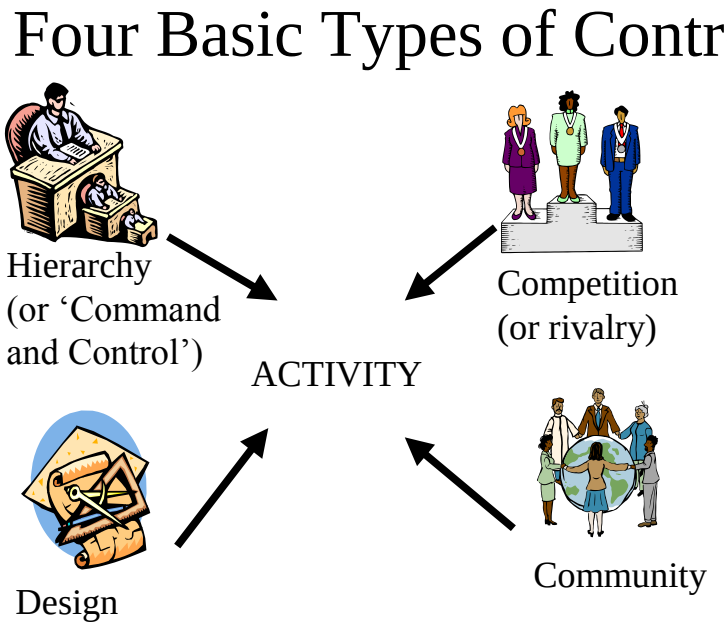
[37] C. Hood *The Art of the State* (Oxford University Press, 1998), 64-68.

[38] C. Shearing and P. Stenning 'From the Panopticon to Disney World: The Development of Discipline' in A. Doob and E. Greenspan (eds) *Perspectives in Criminal Law* (Aurora, Canada Law Book Co, 1984).

[39] L. Lessig *Code and Other Laws of Cyberspace* (Basic Books, 1999), 236.

community (educating citizen's to make it socially unacceptable to fail to belt up) rivalry (creating competition for subsidies to those producing safer vehicles) and through architecture (designing cars in such a way that cars are immoblised when weight is detected in any seat of the car but no seatbelt applied) (Figure 1).[40]

Figure 1



(Adapted from Hood *et al Regulation Inside Government* (1999) and Lessig *Code and Other Laws of Cyberspace* (2000)

Any brief consideration of these four forms of control in operation reveals that they often do not operate in isolation or in pure form. Many control systems can be characterised as hybrids of two or more for the four pure forms of control. Analysis of the possible hybrid forms reveals that in total there are fifteen pure and hybrid forms, each of which characterises what ought to be a viable control system. Further variety would be introduced by distinguishing the character of different elements of the control system (for example the monitoring mechanism and the enforcement mechanism). Among the hybrids are regimes where hierarchical rules are used to promote market based controls

[40] *Ibid*, 93-94.

(as with competition law), where hierarchy is used to mandate or ratify self-regulatory regimes (enforced self-regulation and co-regulation respectively).[41]

IV. Multi-Level Control in the EU

A Patterns of Control

We have seen that taking pure and hybrid forms of control together that a theoretical perspective presents at least fifteen different forms of control. If we further disaggregated the possible forms of control by considering the character of different elements of viable control systems – standard setting, monitoring and enforcement – then the number of different forms of control would be considerably larger. An analysis of control methods in the EU suggests that both the practice and the debate of new governance are heavily oriented towards hierarchical forms of control. Where community-based control is deployed this is typically with explicit or implicit linkage to some element of hierarchy.[42]

The most keenly discussed and practised novel forms of governance in the EU are those which link hierarchy to community-based control. The new approach directive introduced in the early 1980s[43] is an instrument which firmly retains hierarchical control over determining the ends in a given policy domain (through specification of 'essential requirements') while delegating to private standardisation bodies (an example for formalised community-based control) the determination of detailed standards by which those ends are met. Monitoring for and enforcement of compliance with the rule remains hierarchical in character, through public agencies (though in practice many enforcement agencies have been shown to operate as much through community as hierarchical-based

[41] Ayres and J. Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), 102.

[42] A. Héretier 'New Modes of Governance in Europe: Policy Making Without Legislating' in A. Héretier (ed) *Common Goods: Reinventing European and International Governance* (Rowman & Littlefield, 2001).

[43] Council Resolution of 7 May 1985..

control methods). Even with its limited delegation of standard-setting authority the 'new approach' has attracted critics who suggest that this form of standard-setting would be more appropriately carried out by expert independent agencies at the EU level.[44]

The Commission response to this debate in the White Paper is to argue for the deepening of the 'Community method' of policy making by taking further steps to remove detail from Community legislative instruments and make more use of non-legislative instruments.[45] This proposal would effectively delegate greater executive authority to the Commission and place greater emphasis on the technical efficiency of the Commission in carrying out its functions. This effect would be compounded by the adoption of the Commission proposals to place less reliance on regulatory and management committees under current comitology procedures[46] and greater reliance on independent EU regulatory agencies[47] The proposals for greater use of agencies appear to be significantly constrained by the wish to avoid the necessity of Treaty amendments, which would restrict such agencies to making individual decisions and not permit them to adopt general regulatory measures, nor to operate in areas of political controversy. Independent agencies are in any case substantially alien to the political culture of a majority of the EU member states. It has long been argued, contrary to Majone, that the US form of the independent agency is unlikely to take hold in the EU.[48] Taken together these

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[44] G. Majone and M. Everson 'Institutional Reform: Independent Agencies, Oversight, Coordination and Procedural Control' in de Schutter, Lebessis and Paterson (eds) *Governance in the European Union* (Office for Official Publications of the European Communities, 2001), 135-6.

[45]Commission of the European Communities *op cit* n3, 4. This proposal builds on a well established programme for 'simplification of legislation for the internal market' (SLIM): I. Maher '"Legislative Review in the EC Commission" in J. Shaw & G. More (eds), *New Legal Dynamics of European Union* (Oxford, Oxford University Press, 1996).

[46] Commission of the European Communities *op cit* n3, 31.

[47] *Ibid*, 23. There are currently twelve European agencies of which three (European Medicines Evaluation Agency, Community Plant Variety Office and the Office for Harmonisation in the Internal Market) are described by the Commission as regulatory: Commission of the European Communities *Rapport du Groupe de Travail Establissment d'un Cadre Pour des Agence de Régulations À Vocation Decisionelle* June 2001,7.

[48] Joerges, C '"Deliberative Supranationalism: A Defence" 2002 (forthcoming).

considerations suggest that this proposal will be of limited effect. Whereas the committees involve a high degree of participation by member state representatives (and are sometimes referred to as mini-Councils) agencies are more squarely within the control of the Commission at the EU level.[49] The overall effect of these key proposals in the White Paper is likely to concentrate the policy making and executive authority of the Commission.[50] Such proposals are framed within a particular technocratic vision of legitimacy which emphasises the capacity of the Commission to develop coherent policies efficiently, drawing in expertise and resources into new structures which are more within its control than the current comitology arrangements.

Another potential form of hybrid control is the drawing together of national regulatory authorities in 'transnational regulatory networks',[51] as with the proposal of the Lamfalussy Committee for the establishment of a European Securities Regulators Committee (ESRC). Within the Lamfalussy proposals the ESRC would work on 'joint interpretation recommendations, consistent guidelines and common standards' as an adjunct to EC legislation, and also engage in peer review and comparison between regulatory practices 'to ensure consistent implementation and application',[52] in this last role displacing the Commission in a role it has played with increasing intensity in many domains in recent years.

A related innovation in EU policy making was introduced in the development of processes of social dialogue by the Maastricht Treaty.[53] In analytical terms the social dialogue is very similar to the new approach, in the sense that community and hierarchy

[49] *Ibid.*

[50] F. Scharpf 'European Governance: Common Concern vs. The Challenge of Diversity' MPIfG Working Paper 01/6 September 2001.

[51] G. Majone 'The Credibility Crisis of Community Regulation' (2000) 38 *Journal of Common Market Studies* 273, 295

[52] A. Lamfalussy (Chairman) *Report of the Committee of Wise Men* (2000), 6.

[53] B. Bercusson 'The Dynamic of European Labour Law After Maastricht' (1994) 23 *Industrial Law Journal* 1.

are combined in the standard setting aspect of the controls, while the hierarchical form of control underlies the monitoring and enforcement (though in practice enforcement agencies may manage relationships other than wholly hierarchically.[54]) The main formal usage of the social dialogue technique is within employment policy under the procedures introduced by the Maastricht Treaty (Arts 138, 139 EC). The main participants in the social dialogue are employment ministers, the Commission and the so-called 'social partners' (unions and employers organisations). The right to initiate policy remains with the Commission and if, after nine months of negotiation, the social partners can reach agreement then that agreement is forwarded to the Council for implementation by means of a directive. The Council may adopt or reject the agreement (Commission of the European Communities 2001b: 13).[55] Five agreements have been adopted since 1993, three of general application and two in particular sectors.[56] Though implemented in the form of directives it is plausible that the acceptance of such measures may in part be a product of their origin in social dialogue.[57] Employment policy is particularly amenable to this form of policy making because of strong traditions of social dialogue in many

[54] P. Grabosky and J. Braithwaite *Of Manners Gentle* (Oxford University Press, 1986); E. Bardach and R. E. Kagan *Going By the Book* (Temple University Press, 1982).

[55] Commission of the European Communities *op cit* n 27 (regulation), 13.

[56] Council Directive 96/34/EC on the Framework Agreement on Parental Leave OJ 1996 L 145/4; Council Directive 97/81/EC OJ on the Framework Agreement on Part-Time Work OJ 1998 L 14/9; Council Directive Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work OJ 1999 L175/43; Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports OJ 2000 L14/29; Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation OJ 2000 L302/57l; C. Barnard 'Flexibility and Social Policy' in G.De Búrca and J. Scott (eds) *Constitutional Change in the EU from Uniformity to Flexibility* (Hart, 2000).

[57] D. Trubek and J. Mosher 'EU Governance, Employment Policy, and the European Social Model' Paper prepared for the European Union Center Conference on 'Reconfiguring Work and Welfare in the New Economy: A Transatlantic Dialogue' University of Wisconsin-Madison, May 2001.Though we should note that Directive on Parental Leave 96/34/EC was challenged unsuccessfully in litigation by an interest group which was unhappy both with the process by which the directive was made and its substantive terms: *UEAPME* v *Council of The European Union* Case T-135/96 [1998] ECR II 2335.

member states and reasonably wide acceptance of the representative capacities of employers groups and trade unions, though in practice management representatives have not always been sufficiently convinced of the merits of the process to participate within it.[58] Whatever the shortcomings of the social dialogue, it would be much more difficult to imagine such arrangements in policy domains where there is less consensus on and fragmentation of representative groups, as with environmental policy and consumer protection. The Commission has addressed this issue in its White Paper by setting out preconditions for co-regulation to be considered an applicable technique. These preconditions are centrally concerned with defining policy domains in terms that 'fundamental rights or major political choices are not called into question'.[59] This precondition has hardly applied to all those domains in which the new approach has been successfully pursued and is suggestive of a very cautious approach by the Commission under which co-regulation may be deployed less rather than more in the future. We might additionally point out that it will be for the Commission to determine when these pre-conditions are met and so it will control the process by which the decision to use co-regulation is made.

Innovatory use of relations between management and labour is not restricted to social dialogue on norms or standards. Implementation of directives made pursuant to Article 137 may be delegated to management and labour where they so request this of a member state government. (Art 137(4), EC). This provision creates an option for management and labour to cooperatively carry out implementation (and thus monitoring and enforcement) of directives with a longstop role for the state where this option is taken up. Member states are required to ensure that the conditions exist within which they can ensure compliance with the directive. To date this provision has not been deployed in any of the Member States. We find the greatest potential of intensive community-based control in the social policy are, with standards set through dialogue implemented in directives with

[58] G. Falkner 'The Council or the Social Partners? EC Social Policy Between Diplomacy and Collective Bargaining' (2000) 7 *Journal of European Public Policy* 705, 717-8.

[59] Commission of the European Communities *op cit* n3 21.

the option of community-based monitoring and enforcement. These measures diverge more extensively from the hierarchical model than the new approach directives.

Where purer forms of community-based control have been deployed within the new governance of the EU this has been typically in areas where the Commission (and sometimes the Council) is at the centre of that community (with a small 'c'). Community-based controls deployed in this context represent an extension of control in ways that would not be possible hierarchically due to the lack of appropriate authority or insufficient policy consensus. Such controls represent only a very limited experimentation with community-based control with little extension beyond the world of the high bureaucracies.

Put negatively the EU institutions have given little attention to developing or deploying self-regulation, classically understood as industry groups combining in a formalised community-based control system. In some domains member states are permitted to place some reliance on existing self-regulatory regimes (as with control of misleading advertisements where self-regulation has been backed by the power of administrative authorities to seek injunctive relief)[60]. But pure delegation to self-regulation is virtually unheard of, notwithstanding the existence of highly developed arguments as to how self-regulation could be constitutionalised, proceduralised and controlled so as to exploit its strengths while addressing weaknesses in legitimacy and effectiveness.[61] The aversion to self-regulation (other than when embedded within a hierarchical regime as with the new approach) is partially explained by the diversity of experience with community-based controls in the member states. At EU level there are concerns that NGOs are insufficiently democratic in their internal procedures to offer sufficient representativeness in broader governance processes.[62] We might currently question whether all member

[60] Council Directive on the Control of Misleading Advertisements 84/450/EEC, OJ L250, 19.09.1984 (as amended by Directive 97/55/EC OJ L290 23.10 1997.

[61] J. Black 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24; A. Ogus 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97.

[62] A. Warleigh 'Europeanizing Civil Society' (2001) 39 *Journal of Common Market Studies* 619.

states have sufficiently strong civil society institutions generally to make some form of proceduralised self-regulation viable in many domains. These concerns will likely be accentuated with the accession of new member states with weaker civil society institutions in coming years.

'Soft law' - norms promulgated by governance institutions which are not legally binding but which are intended to have normative effect – has long been recognised as a central instrument of EU governance .[63] It is sometimes equated, erroneously, with self-regulation. Soft law instruments may be the normative part of a community-based control (as where monitoring and enforcement are also carried out with community methods) but more typically soft law in the EU is promulgated against a background of hierarchical Commission authority. Thus in the competition law field there are many examples both of particularised soft law (as with letters of comfort) and more generalised soft law (as with notices to undertakings and to member state governments on application of competition rules in telecommunications and postal sectors).[64] But in this case soft law arguably derives its force from the hierarchical enforcement capacities of the Commission rather than from more typical community-based methods of monitoring and enforcement. The enthusiasm of the Commission to place greater reliance on soft law as part of the new governance agenda is explained by the capacity soft law has to extend the Commission's competence into areas where it lacks formal (or in some cases usable) rule making powers. The greater use of soft law might find a legal basis in the Treaty principles of subsidiarity and proportionality, as noted above.

A key test of the new emphasis on soft law instruments is emerging in the proposal from the Health and Consumer Protection Directorate General (DG SANCO) for new rules on

[63]F.Snyder 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' in T. Daintith (ed) *Implementing EC Law in the United Kingdom* (Wiley, 1995); M. Cini 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime' (2001) 8 *Journal of European Public Policy* 192; Lex Fori *op cit* n26.

[64] eg Commission Notice on the Application of the Competition Rules to the Postal Sector and on the Assessment of Certain State Measures Relating to Postal Services SEC (97) 2289 OJ C 36, 6.2.98.

fair trading.[65] Presenting his position at the informal Consumer Council in Lund at the end of April 2001 Commissioner Byrne indicated that the Commission sees major gaps in consumer protection provision in the EU and that neither harmonisation nor mutual recognition provided realistic or effective ways to address these gaps. The proposal is to deploy a 'general regulatory framework' based upon some form general duty to trade fairly (using either a duty to engage in 'fair commercial practices' or the narrower 'duty to avoid misleading and deceptive practices'.[66] A key element of the proposal is the mechanisms through which the general principles will be operationalised through self-regulatory codes and through 'non-binding practical guidance' either in the form of Commission recommendations or in a grey list annexed to the Directive (as was used in the Directive on Unfair Terms in Consumer Contracts[67]). A key strength of such non-binding principles is that they will reduce legal uncertainty while having sufficient flexibility that that they be amended (either by Commission recommendation or, if annexed to legislation, by a comitology process). Co-regulation in the consumer area is intended to follow the approach of the Governance White Paper in being deployed only were certain conditions are met. Political objections to the proposals derive from anxieties that well-established systems of self-regulation (as for advertising) will be undermined by introducing elements of soft-law and co-regulation which will, in effect, be mandatory.

The well-established understanding of the role of soft law in the EU demonstrates that the Commission has long deployed what are essentially community-based controls over the Member State governments and undertakings and citizens in the member states. Thus the trend towards promoting greater 'flexibility' in EU governance through greater use of

[65] Commission of the European Communities, *Green Paper on European Union Consumer Protection* Com (2001) 531 Final, 2.10.2001.

[66] *ibid*, 13.

[67] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 095 , 21/04/1993 pp29 – 34

community-based controls, identified during the 1997 intergovernmental conference,[68] represents a shift in emphasis rather than a radical redrawing of governance instruments. This flexible instrumentation received new emphasis when one form was labelled the open method of coordination (OMC) in the Lisbon Summit conclusions with the expectation that it would be applied across a range of policy domains including economic policy, research policy, the information society, social policy, education policy and pension reform.[69] OMC is, in essence, a form of community-based control as between the member states which may combine some elements of hierarchy. It is the central position of the Council that leads to the characterisation of OMC as community-based control. For the Commission the OMC represents a threat to its powers and one that should be contained.[70]

Hodson and Maher describe the OMC as indirectly coercive in the economic policy sphere because of the presence of externalities and 'functional interdependence' between the member states.[71] I prefer to think of these features as providing the motives for cooperation. As a method of policy making OMC exhibits considerable variety across the different policy domains to which it is said to apply in particular as to the extent to which decision making is open and coordinative. In some domains the emphasis is on coordination with tightly specified guidelines and sanctions for those member states which transgress the applicable standards. In other domains the emphasis is on openness with a genuine attempt to encourage member states to experiment with and to share their experience of different standards and policy choices with little coercion.

An example of tight coordination is provided by economic policy where the underlying basis for standard-setting is guidelines adopted by the Council. Monitoring of resultant

[68] H. Wallace 'Flexibility: A Tool of Integration or a Restraint on Disintegration?' in K. Nunnreither and A. Weiner *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, 2000).

[69] D. Hodson and I. Maher 'The Open Method as New Form of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39 *Journal of Common Market Studies* 719, 721, 726.

[70] Scharpf *op cit* n50.(2001)

[71] *op cit* n69, 727.

action by the member states (implementing their own National Action Plans) is carried out by the Commission and the Council. Member States perceived to have deviated from the underlying standards have received public rebukes. It remains to be seen whether the censure of the Irish government for its adoption of a fiscal policy out of line with ECOFIN Recommendations on implementing the Broad Economic Policy Guidelines demonstrate the effectiveness of open coordination or undermines its credibility.[72] With the e-Europe policy (which is concerned with promoting access to digital information sources throughout the EU) a good deal less is at stake and coordination is more open. Thus the e-Europe action plan adopted by the Council at Feira in 2000 contains more open-textured policy objectives.[73] Even in this domain, however, member states have not been immune from Commission pressures, exercised for example through competition law and single market measures, to promote such desiderate as reduced charges for leased lines and local loop unbundling.[74]

Benchmarking is a looser and less formal type of community-based control which involves attempts to define either best practice or performance indicators and then to encourage the widespread take up of the benchmarks to units to which they potentially apply. If the benchmarking process works well then the standards which are set should reflect the practices of the best-performing units within a particular domain. Monitoring occurs through comparison and feedback with benchmark standards and the main incentives to achieve standards linked to publication of comparative data on performance (Public Sector Benchmarking Team 1998, for e-Europe see Commission of the European Communities 2001c).[75] Benchmarking was developed as a technique for enhancing

[72] Hodson and Maher *op cit* n69, 736.

[73] European Council (2000) *e-Europe 2000 Action Plan*.

[74] Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop OJ 2000 L336/4; 'EU in Renewed Push for Better Internet Access' *Financial Times* 2nd August 2001.

[75] Public Sector Benchmarking Team *Towards Best Practice: An Evaluation of the First Two Years of the Public Sector Benchmarking Project 1996-98* (Cabinet Office, 1998); For e-Europe see Commission of the European Communities, *Communication for the Commission to the Council and the European Parliament e-Europe 2002: Impact and Priorities* COM (2001) 140 Final.

quality and performance in private sector industries, and, during the 1990s, percolated into public sector performance management. The adoption of the language and practice of benchmarking within EU governance in some domains diverges from accepted concepts of benchmarking where it is applied to policies as opposed to operational standards. In these cases the target of the intervention is to align policies rather than performance *per se*. Used in this manner the policy technique referred to as benchmarking is likely to come to resemble the Open Method of Coordination (and benchmarking is explicitly said to be part of the OMC), in the sense that it is likely to have to address divergence not only or mainly of performance against an agreed set of objectives, but rather divergence in policy views. Only in those policy domains where objectives are subject to a high degree of consensus on policy is benchmarking likely to be seen in its original form of attempting to enhance performance. This is likely to be in sectors that are relatively insulated from the political process generally and the Council in particular. A key example is provided by the e-Europe initiative. The kind of policy benchmarking which is occurring in other domains is a novel form of coordination and is better classified as part of OMC.

To argue that the new governance in the EU has been substantially restricted to community-based controls within hierarchical settings is not to claim that the other possible forms of control are completely absent. Design-based elements of control are evident in some spheres, as with the random selection by the European Court of Auditors of one in every 200 Euros for audit, and in attempts to insulate fraud control, first through physical location of the Commission fraud unit (UCLAF) away from other parts of the Commission and subsequently through establishment of a new unit (OLAF) outside the Commission.[76] Competition-based controls are also evident, not just in the linkage of hierarchy to competition-based controls in the competition policy regime, but also with similar linkage in rules on mandatory disclosure of information to consumers (for example of standardised interest rates for consumer credit[77]) and in the practices of

[76] EC Decision 1999/352; Regulation EC No 1073/1999; Dinan *op cit* n2, 38.

[77] Council Directive on Consumer Credit 87/102/EEC OJ L42, 12.02.1987 48-53 as amended by Directives 90/88/EEC OJ L61 10.03.1990 14-18; 98/7/EC, 16.02.1998 OJ L 101, 01.04.1998 pp17-23.

the Internal Market Directorate General in using a published league table (or 'scoreboard') to indicate the extent of member states' implementation of directives as a supplement to its hierarchical capacities to commence infringement proceedings.[78] Notwithstanding these, and no doubt many other examples of the deployment of the full range of control mechanisms what is of interest is the very limited terms of the public debate and its orientation to hierarchical forms of control.

B Explaining the Pattern and Discourse of Control

I have argued that the observable pattern of controls within the shows a marked tendency towards the hierarchical basis. This is particularly true of the 'Community method' which the Commission seeks to deepen. However it is also evident in other methods of policy making and implementation that tentative movements towards less hierarchical methods has been occurring most strongly in those policy domains where the Commission retains substantial capacity to exercise elements of hierarchical control.[79] In some domains the open method of coordination appears to threaten the Commission's dominance, displacing it with Council pre-eminence.[80]

The preference for hierarchical controls cannot be explained simply by reference to a lack of imagination in the governance sphere. Rather it is intimately linked with the *telos* of the EU and its orientation toward market integration. The success of market integration in the EU is premised upon the relative insulation of the instruments of integration from political processes.[81] The ends of the EU are already determined by the Treaty and admit of little by way of experimentation with forms of control which either do not have identifiable ends (as with market-based control) or which leave it open to participants to determine not only means but also ends (as with community-based control). The Commission has said as much, indicating that the open method of coordination should be

[78] Hood *et al op cit* n24, 177-180.

[79] Heretier *op cit* n42.

[80] Scharpf *op cit* n50.

[81] Majone *op cit* n13 (1998); Dunleavy *op cit* n16.

'used to achieve defined Treaty objectives'[82] rather than introduce wider experimentation with policy choices. Within the ethos of the EU institutions and most of its observers there has to be hierarchical control both over member states and undertakings and citizens. Accordingly the richest experimentation in governance forms is in those areas where the EU institutions, and notably the Commission and the Council, are direct participants such that explicit or implicit amendment to the ends of the EU project are legitimate within the overall ethos.

C Implications of the Pattern of Control: Governance, Technocracy and Democracy

If there is an inevitable preference for hierarchical control techniques, not only with the Commission, but with the EU institutions more generally then this has important implications for the debate about future governance and the way that reform proposals are read. The adoption even of those alternative ways of governing discussed in the White Paper is likely to be, at best, half-hearted and ineffectual. Rather we are likely to see greater emphasis placed on plans to deepen the Community method, tightening of the coordinative (as opposed to the open) aspects of the OMC, and proposals for new hierarchical institutions in the form of European agencies. Within this scenario the technocratic nature of EU governance is likely to be deepened rather than diluted, and with a particular, centralised version of technical efficiency. The analysis suggest the ascendancy of a technocratic perspective on EU governance within which ends are relatively fixed and the means of policy delivery and implementation must, consequently, be relatively tightly controlled.

This hypothesis presents us with at least two problems. First, normative assessments based upon evaluation of inputs and process (which may have been encouraged by the rhetoric of the White Paper itself) are rarely likely to be satisfied by the EU governance regime. Second the orientation towards hierarchical control appears substantially to close

[82] Commission of the European Communities *op cit* n3, 22.

off those alternative mechanisms for developing and implementing policy which address the shortcomings, in terms of efficiency, of traditional hierarchical governance.

A key strand of normative thinking on reprogramming EU governance to make it more legitimate is characterised as 'proceduralization' . The theory of proceduralization is squarely based within democratic discourses.[83] Julia Black describes a 'thin' version of proceduralization linked to liberal democracy and a 'thick' version linked to theories of deliberative democracy.[84] The thick version of proceduralization seeks to develop infrastructure under which legitimacy is achieved through the deliberation of citizens. This requires procedures for guaranteeing participation and promoting undistorted communication. Both means and ends are potentially for deliberation within a proceduralized model.

Distinct from the argument about legitimacy is the attribution of regulatory failures to the limited capacities of the legal system to comprehend and intervene effectively in other sub-systems. Materialised law, typical of hierarchical regulatory regimes, should, within this perspective be displaced by procedural law which permits learning and reflection between systems.[85] The development of community-based systems of control subject to hierarchical elements only in their procedural dimension provides a possible way of

[83] Cf J. Cohen and C. Sabel 'Directly Deliberative Polyarchy' (1997) 3 *European Law Journal* 313.

[84] J. Black 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597, 606-608; K.-H. Ladeur 'Proceduralisation and its Use in Post-Modern Legal Policy' in de Schutter, Lebessis and Paterson (eds) *Governance in the European Union* (Office for Official Publications of the European Communities, 2001); R. Dehousse 'European Governance in Search of Legitimacy: The Need for a Process-Based Approach' in de Schutter, Lebessis and Paterson (eds) *Governance in the European Union* (Office for Official Publications of the European Communities, 2001); O. de Schutter 'Proceduralising European Law: Institutional Proposals' in de Schutter, Lebessis and Paterson (eds) *Governance in the European Union* (Office for Official Publications of the European Communities, 2001).

[85] Black, *op cit*,n84 613.

meeting the requirements of this agenda. However, the adoption of anything other than the thinnest of proceduralised and participatory forms of governance appears unlikely.

Control theory offers a potentially more promising way out of the normative dilemma. The theory of collibration sees a continuing role for the state in structuring interactions, but in such a way as to harness those societal stabilising mechanisms which arise out of the diffusion of resources relevant to the exercise of power.[86] The development of a collibration-based theory of legitimacy would require the development of an analysis of tensions within the governance structure which have the effect of holding the main players in check in a manner which provides an acceptable alternative to democratic control. describes these as 'structural and process elements of democratic legitimation' and itemizes them to include: 'mutual horizontal control and "distrust"'; 'bargaining democracy'; and 'pluralistic authorities in a "composite polity"'.[87] These mechanisms each refer back to some democratic element, often at one remove. She finds a 'patchwork of democratic practices of different backgrounds'.[88] Between them these organically developed controls on the capacities of actors within the EU policy process lead to a description of a pluralistic and diffuse set of controls over each of the main actors. Where problems emerge (either with effectiveness or legitimacy, however defined) the recipe from collibration suggests reconfiguring those capacities and powers of those actors so as to affect the overall pattern of control. This might involve enhancing the powers, for

[86] C. Hood 'Concepts of Control Over Public Bureaucracies: "Comptrol" and "Interpolable Balance"' in F-X. Kaufmann (ed) *The Public Sector* (de Gruyter 1991); A. Dunsire and C. Hood 'Proceduralisation and the UK Public Administration Reform' in de Schutter, Lebessis and Paterson (eds) *Governance in the European Union* (Office for Official Publications of the European Communities, 2001); cf Offe *op cit* n18, 81. For an attempt to operationalise a number of collibratory principles in the EU context see P. Schmitter 'What is There to Legitimize the European Union… and How Might This be Accomplished?' Jean Monnet Working Paper 14/01 (New York University Law School, 2001).

[87] A. Héretier 'Elements of Democratic Legitimation in Europe: An Alternative Perspective' (1999) 6 *Journal of European Public Policy* 269, 273. See also A. Héretier 'The White Paper on European Governance: A Response to Shifting Weights in Interinstitutional Decision-Making' Jean Monnet Working Paper 13/01 (New York University Law School, 2001).

[88] *Ibid* 277.

example of elected politicians, whether at regional, national or European level, or seeking ways to involve disenfranchised groups by sponsoring or empowering interest groups.[89] Equally it might involve seeking to contain some elements of power so as to inhibit outcomes skewed towards the interests of particular groups. The social dialogue provides an example of collibration in its enhancement of the powers of labour and (implicitly) constraints on the powers both of the Commission and the Council.

V Conclusions

The Commission White Paper on Governance represents only a partial contribution to the debate about legitimate governance in the EU. Partial in the two senses that it neglects other important elements of the governance picture and that it offers a perspective which is favourable to the institutional interests of the Commission. On one perspective the Commission proposes only to deepen the technocratic basis to its decision making. If its role is characterised precisely as one in which it is to act with relative autonomy to achieve the Treaty objectives largely through technocratic means then this might be unobjectionable. But such a deepening of the 'Community method' will not, by itself, address the concerns about legitimacy which animate the governance debate in the EU. It is precisely because the current range of issues on the EU governance agenda cannot be addressed either efficiently or legitimately through the long-established technocratic means that the problems of democratic legitimacy have remained unaddressed. Furthermore the implicit rejection of a plurality of means for making and implementing policy denies to the EU the chance to experiment with potentially more efficient and effective governance forms.

Consistent with the assignment of a 'narrow role' of the Commission role in EU governance is the view that we should look to other EU institutions to address the democratic deficit. The espousal by the Council of the open method of coordination has considerable potential to renew the democratic character of policy making in some

[89] As occurs with consumer representation in EU standard-setting processes: G. Howells '"Soft Law" in EC Consumer Law' in P. Craig and C. Harlow *Lawmaking in the European Union* (Kluwer, 1998).

domains and permit greater experimentation. In order to achieve this the deployment of the OMC will have to be assessed for its potential to value openness equally with its coordinative characteristics and will have to be protected from any attempt by the Commission to fold it into the Commission's own centralising and hierarchical ethos. Though the Council has a variety of avenues by which it might seek to reorient or democratise EU governance experience of the Inter-Governmental Conference at Nice suggests that the Council faces severe coordination problems which are unlikely to diminish. A further possibility is that we look to parliamentarians at regional, national and EU level to engage in both the legislative participation and executive scrutiny processes which lend legitimacy to the actions of national governments. Put slightly differently if we are looking to the Commission to broaden the democratic legitimacy of the EU we are looking to the wrong institution. Commission leadership on governance is likely to involve more centralised and hierarchical control over policies, and thus over Member States.

A future for the EU within which each of the institutions, national and regional, governmental and non-governmental (such as the representatives of civil society) adjusts its position to reflect changing requirements (in terms of legitimacy and effectiveness) within the overall structure, even if it cannot be traced along a precise trajectory, has the potential to adjust the exercise of power in such a way as to check the more wayward (and thus illegitimate) aspects of the contemporary arrangements. Such a development, while falling far short of a proceduralised or participatory democratic governance structure, would accord well with the prescriptions of control theory that we should find a workable balance between those elements of the governance system which are in tension. It would be almost unthinkable that such a dynamic (unplanned and unpredictable) could be captured or foreshadowed within the terms of a White Paper.

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