Statewatch comments on

European Commission's WhitePaper on governance

28 March 2002

Statewatch: Comments on the Commission's White Paper on Governance

Statewatch has made the following submission to the European Commission commenting on its White Paper on Governance in the EU. Also included is an overall commentary: "The European Commission's White Paper on governance: A vista of unbearable democratic lightness in the EU?" by Professor Deirdre Curtin which first appeared in Statewatch bulletin.

Statewatch submission, 28 March 2002

Introduction

1. Statewatch welcomes the Commission's initiative to publish a White Paper on Governance, and invite widespread public comment. The following comments follow the order established by the White Paper, and focus in particular upon the issues of freedom of information and governance concerns in the field of justice and home affairs.

2. As a general point, it is unfortunate that the Council has not established a similar reflection upon the accountability, transparency and legitimacy of its work, particularly given the Council's role as a legislative body and its increasing executive powers.

Better Involvement

3. It is unfortunate that the Commission confines itself to mentioning the adoption of the Community rules on access to documents held by the Council, Commission and European Parliament without mentioning further steps necessary to implement the recent rules. As regards implementation of the new rules, it is unfortunate that the Commission did not make public its implementing rules by the deadline set out in the Regulation, given the six-month transition period set out in the Regulation. It is also unfortunate that the Commission does not consider whether broader steps should be taken to establish rules on access to information within the EU legal framework.

4. The Commission's implementing rules concerning access to documents appear to ignore the obligation in the Regulation to set up a register of documents that would cover all documents, especially given the prior ruling of the Ombudsman against the Commission on the issue of establishing a public register of its documents.

5. Furthermore, it is particularly unfortunate that the Commission has overlooked the deadline set out in the regulation on access to documents for assessing the compatibility of access rules in other legislation with the new Regulation, as well as making proposals concerning the EC's archives regulation and the rules governing existing Community agencies.

6. It is also unfortunate that the other Community bodies established by the Treaties have not taken any steps to align their access rules with the rules set out in the new Regulation on access to documents, and indeed in the case of the Court of Justice have never adopted any rules on access to documents at all. Although this failure to act is not the responsibility of the Commission, the Commission should nonetheless take steps to encourage the other bodies to act.

7. To date there are no signs of further development of Eur-lex, as mentioned in the Commission's White Paper, besides access to Official Journal texts after the time limit which previously applied. The real priority here is to connect the Eur-lex system to the registers of documents that must be established by June 2002 to implement the new Regulation on access to documents. It is unfortunate that the Commission gives no indication of what further development of Eur-lex it considers necessary.

8. In any event, it is important that the public have the opportunity to discuss and influence decision-makers before a formal legislative text is distributed, as the Commission recognises in the context of the Economic and Social Committee and the Committee of the Regions. To this end, Eur-lex should also be integrated with discussion papers distributed within the political institutions, including the Commission's SEC documents, which are rarely made available on Commission websites (and are paradoxically more often available on the Council's register of documents). This should also include Commission Communications, White Papers, Green Papers, working papers, and reports and analyses prepared for the Commission, along with similar documents prepared within the Council framework.

9. There should also be a commitment by the Commission and Council to adopt more discussion documents in areas where this is currently rare, and to give an effective time period for the reaction from the public, national parliaments (including sub-central bodies) and the European Parliament before subsequently taking initiatives forward. This is particularly relevant in the area of policing and criminal law along with certain aspects of immigration and asylum law (notably visas, border controls and illegal immigration), where there are many recent examples of discussions begun and concluded within the Council with no parliamentary or public involvement (for instance, the Action Plan on illegal immigration adopted 28 February 2002, and the proposal for amendment of the Europol Convention following a year of internal discussions within the Council with no outside participation). This entails rethinking working methods in these areas entirely from scratch, not just to reshuffle working parties (as the Council is currently contemplating) but to restructure decision-making to introduce public policy papers equivalent to Green Papers, White Papers, working papers and Communications and to allow for effective public and parliamentary involvement in decision-making at all stages.

Civil society

10. The Commission does not make clear what it means by rules on good governance and accountability of NGOs. Without further detail, and in the absence of the Code of Conduct which was promised for the end of 2001, it is difficult to see what specific points the Commission is making. In particular, it is not clear whether the planned general rules will set out rules on whether the Commission must consult on particular initiatives; at present, at least within the field of Justice and Home Affairs, the decision whether or not to consult with NGOs before adoption of proposals for legislation seems to be entirely at the discretion of whichever official is most involved with drafting the proposal in question.

11. The discussion of civil society does not appear to consider seriously the prospect that all initiatives should be subject to a form of 'electronic democracy' allowing civil society the opportunity to comment on draft policies or legislative measures by contacting the Commission in reply to a discussion paper or draft legislation. The Commission has already applied this principle to certain discussion papers and it is disappointing that it does not see the need to consider whether to generalise this practice, possibly by adopting a version of the United States' rules on consultation on administrative acts (extended to legislation and policy development).

12. There is a particular need to extend arrangements for consultation with civil society to the Council, which has simply never made arrangements for such consultation despite the growth of its executive role in policy and legislative development and implementation.

Better advice

13. It is striking that Justice and Home Affairs measures are being developed without only limited public disclosure of the information used to set such policies. In some areas where information is disclosed (for example, the 'success rate' for asylum applications quoted in Commission documents), its use is highly questionable, in part because the national information used to compile the common statistics is questionable (for example, the UK statistics only include asylum applications which are successful at the first instance) and in part because of the use the Commission makes of it (failing to include successful claims for subsidiary protection, and failing to exclude inadmissible claims). In other areas, entire policies are constructed without any indication of the scope of cross-border crime (even as to whether it is increasing or not) and without public reporting of the application of agreed policies (for instance, the fact that there is now no annual report on the Schengen Information System nor on the powers exercised under the Schengen acquis). Any measures taken to improve the level of advice offered to the Commission must take account of these factors, and must necessarily also apply to the Council.

Open method of coordination

14. The Commission notes that the use of open coordination 'should not exclude' the European Parliament from the policy process, and then refers only to regular reporting to the European Parliament. It would appear that while the EP will not be 'excluded', its normal role in the adoption of rules will be drastically reduced. Furthermore, the discussion of open coordination does not sufficiently consider the role of national parliaments or the public in arrangements for the open method of coordination.

Simplification

15. The Commission has not considered whether Schengen rules could be simplified, in conjunction with bringing such rules fully within the scope of EC or EU measures.

EU agencies

16. The Commission's discussion of agencies does not address the need to ensure that such agencies always have access to documents rules based on those applicable to the Council, Commission and Parliament. To date, as mentioned above, the Commission has not yet reviewed the rules of the existing agencies to ensure that they meet this requirement. This will entail ensuring that the agencies can be challenged as regards application of the access rules before the Court of Justice, setting out a list of circumstances in which documents must be disclosed automatically, and providing for a register of documents. The 'confidentiality' clauses in the regulations setting up agencies also have to be reconsidered, as they clearly contradict the principle of access to information.

17. In the field of immigration policy, clear rules for data protection (involving recourse to the Court of Justice and a complaints system) should also be established if any new agencies are to be introduced. Any new agencies in the field of immigration law should be subject to a searching inquiry as to whether there is effective judicial, parliamentary and public scrutiny of their activity; in particular, all their acts having legal effects (not just staff decisions, as is the case for many existing agencies) must be subject to legal challenge. Any transfer of Schengen Information System (SIS) functions to an agency will provide an excellent opportunity to correct the current weaknesses in the legality, legitimacy and accountability of the SIS, particularly as regards immigration data.

Application of EU law

18. The Commission's discussion of this topic fails to consider the extent to which its role as supervisor of the application of EC law also needs to subject to be adequate supervision. In a long string of cases, the Commission has fought against any judicial control of its discretion to bring infringement proceedings, and subsequently any public scrutiny of the documents related to those proceedings. As a result, there is a certain amount of public suspicion over the Commission's use of these powers; this is inevitable in light of the lack of effective public scrutiny. The Commission should recognise that the public interest in effective supervision of the application of EC law would be more effectively served by greater public scrutiny of the Commission's exercise of its powers. In particular, there is little reason to refuse disclosure of documents once a procedure has been terminated, or where the Commission has publicised the details of its complaints in a press release.

19. The Commission should also press for consideration of whether the infringement procedure should be extended (by means of a Treaty amendment) to policing and criminal law matters.

20. It is difficult to comment on the Commission's planned focus of its infringement activities on certain cases, without any indication of the 'other forms of intervention' that would be applied in other cases.

Global governance

21. The Commission's discussion on this issue does not explain how the continued use of the 'international relations' exception to refuse access to documents on EC negotiations can be reconciled with the goal of increasing public participation in decision-making at global level.

Comitology

22. The Commission's desire to see the 'comitology' process restructured would be more compelling if the Commission had implemented its obligations to the public under the existing comitology decision of 1999. To date there is still no register of comitology documents as required by the 1999 decision, and the first obligatory annual report on the new rules (for 2000) was not published until December 2001. The list of comitology committees was published late as well. Frankly, there is no case for strengthening the Commission's powers within these committees if the Commission cannot fulfil its existing obligations as regards accountability to the public. However, in any event, an extension of the European Parliament's control over the Commission's decision-making is essentail.

23. Unfortunately, although this is not formally its responsibility, the Commission fails to consider the issue of the rules (there are none at present) applicable to the Council's exercise of delegated powers. There is a clear argument that the rules governing the Commission's exercise of delegated powers must be extended mutatis mutandis to the Council, in particular as regards the public accountability and parliamentary control of these powers.

Public debate

23. Finally, although this matter principally relates to the Council, it is unfortunate that the Commission's White Paper does not discuss the need for more public meetings of the EU institutions, and greater disclosure of the positions of the Member States in negotiations, as means of ensuring the parliamentary and public knowledge, control and accountability of the EU.

Statewatch, 28 March 2002

The European Commission's White Paper on governance: A vista of unbearable democratic lightness in the EU?

by Professor Deirdre Curtin (Utrecht University)
Statewatch bulletin vol 11 no 6 (November-December 2001)

Examines the background to the planned "debate" on the future workings of the EU and whether it can meet the demands of civil society for the right to know what is being discussed and how decisions are made.

The context of the Commissions' "governance" agenda

The defining act of the Prodi Commission was, according to its own rhetoric, to be its much-vaunted, much touted, White Paper on Governance in the European Union, just as the White Paper on the Internal Market was considered the (highly successful) equivalent of the Delors Commission. The sub-text of the White Paper on Governance from the very beginning of its preparation was the ambition to introduce more democracy into the various phases of policy preparation, decision-making and implementation processes of the European Union. Indeed the Commission's "Work Programme" of October 2000 is explicitly sub-titled "Enhancing democracy in the European Union". It grandly proclaims in this perspective that: "if it is accepted that democracy in Europe is based on two twin pillars - the accountability of executives to European and national legislative bodies and the effective involvement of citizens in devising and implementing decisions that affect them- then it is clear that the reform of European modes of governance is all about improving democracy in Europe".

The White paper adopted by the Commission at the end of July 2001 is more modest in its ambitions. The sub-title has disappeared and the focus is much less about the general public interest in enhancing democracy and much more about enhancing the traditional role of the Commission in the Union's decision- making processes (in particular by strengthening the so-called "Community method" of decision-making). The White Paper is rather "about the way in which the Union uses its powers given by its citizens. It is about how things could and should be done". At the same time the decision by the Commission to focus only on those aspects of the topic which did not in principle require Treaty amendment, a task regarded as more appropriate for the forthcoming Inter-Governmental Conference to amend the existing Treaties in 2004, is not only artificial but limits both the approach and the recommendations of the White Paper very considerably.

That said the Commission did attempt to portray the process leading up to the adoption of the White Paper as an open and inclusive one and to work on improving its image as a listening and engaged public administration. Quite striking were the pains taken by the Commission to ensure that the process leading up to the production of the definitive White Paper was as open and inclusive as possible (via extensive Internet sites and links, public hearings, invited experts and other "actors") and to listen and engage publicly with some of what it termed the "new actors of Europe". The latter term it transpired related mainly to "new" actors such as local and regional authorities involved in the process of implementation and enforcement of Community (first pillar) law as well as constitutional entities such as national parliaments. In addition the term "civil society" was reserved for a wide-range of non-governmental actors albeit that their positioning in the rule-making process was clearly prior to the drawing up of policy proposals rather than in a continuum during the policy-making and implementation process in its entirety. The term "governance" itself involves recognition of the need to move beyond being a bounded public administration towards a more unbounded existence where it is recognised that there is a need to include outside interests and stakeholders in the process of decision-making. The use of the word "governance" is precisely meant to indicate a level and intensity in the "unboundedness" process. The conscious use of the term "governance" thus announces a significant erosion of the boundaries separating what lies inside an administration and what lies outside (politics, the citizens, other stakeholders).

A certain chronology of events is also not without its relevance in understanding the process and outcome of the White Paper on Governance. An important part of the impetus leading to the production of the White Paper by the Commission was not self-imposed but rather were framed by the events leading to the resignation of the Santer Commission in March 1999. The Committee of Independent Experts' First Report in March 1999 (CIE) rather publicly lanced the boils of

1999. The Committee of Independent Experts' First Report in March 1999 (CIE) rather publicly lanced the boils of secrecy and of lack of (collective) responsibility of the Commission as a whole. A secretive administrative culture is the single and predominant reason given by Paul van Buitenen, the whistleblower, in his book Strijd voor Europa (The Struggle for Europe), to explain why the events in question could happen and how those facts became submerged in what at times amounted to a virtual conspiracy of silence. The resulting crisis was for many Euro-sceptics empirical vindication of the so-called "rottenness at the heart of Europe". The reflections by the CIE on increasing the accountability and the transparency of the Commission and of the EU political system in general were forward-looking and designed to enable the body politic in general and the Commission in particular to find paths back towards some level of good health. The gist of the general problem, according to the Committee, is openness and transparency as linked with responsibility and accountability in European political and administrative life. These fundamental principles should permeate the Commission's, and indeed the Union's, political and administrative culture in all areas and at all levels. This reflects a sense of contemporaneity that many can identify with in many different political and administrative contexts all over the world.

So far so good. The (Kinnock) White Paper on Administrative Reform which was produced in March 2000, after an extensive (internal) consultation process, focused on those issues of internal reform and management which could be dealt with by the Commission as part of its own internal organisation. Moreover given the (amazing) fact that in all its 50-odd years of existence as the most important part of the public administration of the EU it had never undergone a proper reform of the way it is organised and functions, this exercise was scandalously overdue and could, given time constraints, only touch upon the tip of the iceberg in terms of the most pressing organisational and management defects highlighted by the CIE in its reports.

But in undertaking this in itself rather limited exercise of internal administrative reform the Commission came up repeatedly against the glass ceiling that, no matter how it twisted and turned in terms of reformed managerial and financial re-organisation, it simply did not have the resources to cope with the (ever- increasing) number of tasks allocated to it. At the root of many of the Commissions' problems in carrying out its various tasks is that it has simply acquired too many roles cumulatively over the past decade in particular without a concomitant increase in resources. Overload led to confused priorities and inadequate co-ordination.

The changing scope of public administration in the European Union

Given the unique (albeit still largely undefined) nature of the EU, there is more to the story of the evolution of public administration or public tasks at that level than a simple parallel with national administrations, also in terms of their "unboundedness" or otherwise. Given the unique configuration of the EU as a multi-level governance polity, it was never just simply a matter of a central administration with some decentralised tasks (at the national level). Rather, there was from the very beginning a complex interweaving of the tasks of the (central) (direct) administration, the Commission, with the tasks of the (central) (indirect) administrations of all the Member States, sometimes as an elaborate partnership arrangement, sometimes as a straight-forward hierarchial arrangement.

The contours of certain more specific trends can nonetheless be discerned at least in outline form in the overall EU public administration landscape. I would in any event mention the following examples. First, the power which "experts" acquired within the centralised power-structure of the Commission via the instigation and exponential growth of the comitology procedures is an example of the erosion of administrative boundaries and has been richly documented in recent years. Second, an increasing number of (sensitive) tasks of public administration are arguably carried out by a growing number of independent bodies such as Europol, pro-Eurojust, etc., and there are clear moves to move towards regulatory (and operational) as well as more classical information-gathering agencies also in this field. Third, there is a marked growth in position and tasks and influence of informal committees with no legal basis (eg, Chief of Police tasks, also other examples in CFSP and external relations. Fourth, the General Secretariat of the Council exercises powers comparable to a public administration over certain policy areas and such tasks have gradually grown in importance and significance since the Treaty of Maastricht. To say that the latter are simply "inter- governmental" in nature and effect is in my view to close ones eyes to the reality of an increasingly inter- twined and complex fabric of public administration at the level of the EU. Finally, on the national side of public administration this too has become much more variegated both as a result of the "hiving-off" of functions to (quasi-) private sector parties and as a result of increasing trends towards decentralisation and regionalisation at the national levels of administration.

Instead of a vision of public administration and governance as it has developed over the years, in all its detail and its fragmentation, the Commission chooses instead to focus exclusively on classical aspects of the decision-making and implementation process as it relates to its own tasks and functions as originally conceived and honed in the foundational years of the EC ("the Community-method"). The fact that the Commission does not at any stage make the slightest reference to the growing governance structures in the field of policing and criminal law (the so-called "third pillar"), in which it is now actively involved, is remarkable. The only explanation I can give is that of the entire philosophy which underpins the WP itself in its final form, namely that for political reasons consolidation and re-trenchment of its classic

institutional position are of the order of the day despite clear evidence of the fact that the whole question of governance at the level of the EU can only be begun to be understood by placing it more in a wider context of "structural pluralism". The Commission therefore deliberately chooses to ignore completely a difficult and rapidly evolving part of governance in the EU, namely its new functions and tasks in the field of criminal and policing law in particular (so-called third pillar), its tasks (and those of other institutions) in regard to the myriad bodies, working parties, organs and networks in and around these areas and the serious lack of co- ordination among them as well as the exponential growth in data-bases, some based in the Commission, some not, and the growing number of proposals to link that data outside of any broader control framework of good governance or anything else.

The horizontalisation of governance and problems of accountability

Part of a possible significant shift in contemporary society is indeed the advent and multiplication of networks right across the various spectrums of economy, polity and society. Networks are explicitly conceptualised as pluri-centric forms of governance in contrast to uni-centric or hierarchial forms of governance. It is in any event becoming a truism that information and communications technology (hereafter: ICT) has a strong network character: the Internet has be described as a loosely connected network of networks with communication technology at their core. The horizontalisation of governance in the form of networks can indeed be regarded as a major trend in modern-day public administration . In the EU it is certainly not limited to the fields of economic policy making and related areas. Also in the sensitive fields of policing and criminal law we are witnessing an untold and very scantily documented rise in different forms of network governance outside and in addition to formal institutional structures. If we read the Council conclusions of 20 September last it finally is laid down in black and white for all to see just how central a role committees of (senior) civil servants, networks of public prosecutors and task-forces of Police Chiefs, and quasi-institutions such as the Provisional Judicial Cooperation Unit (Pro-Eurojust) are assuming, in the construction of EU policy-making in the field of law enforcement.

One major problem is that the trend towards increased horizontalisation of governance relationships does not fit at all with an understanding of accountability in purely vertical pyramidal terms. In other words, accountability as it has been traditionally understood and applied in the Member States of the EU and in the EU itself (despite the absence of the rigid division of powers found at the national level) is premised on the vertical structure of public administration and the absolute primacy of (representative) politics in that context. The democratic process by which the executive is accountable to the legislature is the crowning principle of this system and the concept of administrative responsibility (or ministerial responsibility) its symbolic seal. Such vertical accountability is embedded, albeit certainly imperfectly, in the EU system as well. Indeed in recent years it has been reinforced in significant ways, in particular by the development of (further) executive responsibility to the European Parliament and indeed this would seem to be part of the Commission's implied agenda for the 2004 IGC institutional reform process .

But at the same time there is more to developing notions of accountability tailored to the modern-day "fourth branch" of government, both at the national level and at the international level and their complex inter-weavings. More effort of imagination is required than a simple copy (albeit adapted) at the level of EU structures and processes of the classical national system of vertical accountability. The clash between the vertical structure of government and the trend towards horizontal networks, no fan of hierarchy, is one of the main problems facing government (governance) in the information society. This fundamental problem is not alluded to at any stage in the White Paper. Instead, the Commission in its WP is content to adopt a congratulatory approach to its information policy (including the controversial new regulation on public access to documents) and some meagre thoughts in a separate communication on developing its communications policy . Indeed further examination of the Report of the (internal) Working Group 2a ("Consultation and Participation of Civil Society") as well as that of Working Group 1a (" Broadening and enriching the public debate on European matters"), reveals that the general attitude displayed within the Commission to the significance of ICT is a highly ambivalent one, confined largely to viewing it in purely instrumental terms. In other words, it tends to focus on the introduction of more on-line information (for example, data-bases providing information on civil society organisations active at the European level or listing all consultative bodies involved in EU policy-making) rather than on reflecting on the institutional potential and dynamics of the technology in a broader (citizenship) framework .

The decision by the Commission not to deal with the key issues of access to information and the linked question of the communication policies of the institutions is a major defect in the White Paper and pre- determined a fairly marginal role for "active" civil society representatives in its development of the governance agenda in the EU. In my view the Commission in its WP gravely underestimates the changing relationship between public administration and citizen and the role which ICT is playing in that regard. It is a rather futile exercise to attempt to pigeon-hole as part of an exclusively vertical pyramid of accountability the role of the citizen and their civil society representatives in the manner which the Commission attempts to do. In effect the Commission's contribution only goes in the direction of expanding the composition of an advisory and to date fringe-organ, namely the Economic and Social Committee, to include "representatives" of civil society. Actually the point is not only the risk that the Commission "selects" according to certain criteria a limited number of Brussels-based NGO's with sufficient capacity etc., giving it funds, buying its loyalty, but that a golden opportunity is lost to harness the energy, the interest and the engagement of a wide variety of civil society actors,

many of whom are not necessarily looking for strict "participation" rights as such but rather to engage in a vigorous and dynamic fashion in public debate, where different viewpoints can be heard, deliberated upon and ultimately be decided upon by the formal decision-makers.

The evolving relationship between citizens and public administration

What is as a matter of fact (rather than pious aspiration) very striking in these times is the empirical evidence pointing towards the increasing interest of citizens in theme-related information and theme-related activity as an alternative form of political engagement. As a result of engaged, albeit non-traditional, political activity citizens not only have much greater motivation to themselves (or via an association or interest group to which they belong) seek out information as to the performance of the public administration, they are thus better placed than ever to scrutinise the manner in which public administration tasks are carried out. Moreover it follows that (large groups of) citizens no longer need or wish to have passive relations with the public authorities but rather wish to play a vigorous part in defining these contacts as they see fit. In other words, citizens are themselves developing their role, using the technology offered to them by ICT both in terms of acquiring information and maintaining virtual and horizontal relations with no traditional time and space constraints, and are more willing to actively engage on (specific) issues than in times where a more heroic view of politics prevailed .

In other words the input of civil society is in my view not to be harnessed to some convenient point in the decision-making system and then that a chosen few are selected at the behest of a central actor (in this instance the Commission or an organ such as the Economic and Social Committee) to be allowed to participate in the formulation of an opinion of an advisory organ with a very limited role to play across the broad thrust of the public administration and governance process. A more fruitful and tailored approach is to seek "spaces" for deliberation by a wide range of interested parties at various stages in the decision-making and implementation processes, prior to the adoption by those formal political actors who ultimately can be held responsible and to account in a mature political system. At the same time it can additionally be considered whether actors from a broadly based civil society should be given an opportunity to input into the public debate at certain crucial moments (a type of "notice and comment" as provided for in the US Administrative Procedures Act and in the UN Aarhus Convention). The initiation of such procedures at the level of the EU needs to take account of the scattered and eclectic nature of public administration at that level.

Another avenue worthy of serious exploration is the grant of digital access rights to information also at the level of EU public administration and governance structures. In the Netherlands the Dutch Commission on Constitutional Rights in the Digital Era recently drafted proposals to adapt the Dutch Constitution to the information society and included a right of access to information held by the government. Recognition of information rights can help to render the constitutional state an appropriate accommodation for the information society; such embedment is particularly important in the European (constitutional) context. Moreover only an approach which integrates dynamic and tailored information rights for citizens into thinking on accountability of rapidly changing governance structures across a broad range of policy-areas can begin to contribute seriously to the debate on genuine improvement of democracy at the level of the European Union and at the (inter-twined) level of the Member States. From that fundamental perspective the Commission's White Paper on European Governance bears witness to an almost existential lightness and certainly does not offer those struggling with complex issues of governance and of democracy with serious vistas out of contemporary dilemmas associated with the European Union's perceived lack of legitimacy on the part of citizens.

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