

EUI WORKING PAPERS

LAW No. 2006/26



Participatory Governance and European
Administrative Law:
New Legal Benchmarks for the
New European Public Order

RAINER NICKEL



EUROPEAN UNIVERSITY INSTITUTE

Department of Law

**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

*Participatory Governance and European Administrative Law:
New Legal Benchmarks for the New European Public Order*

RAINER NICKEL

This text may be downloaded for personal research purposes only. Any additional reproduction for such purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The author(s)/editor(s) should inform the Law Department of the EUI if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1725-6739

© 2006 Rainer Nickel

Printed in Italy
European University Institute
Badia Fiesolana
I – 50016 San Domenico di Fiesole (FI)
Italy

<http://www.iue.it/>
<http://cadmus.iue.it/dspace/index.jsp>

Abstract

European Governance is more than just a policy instrument without legal significance. Its regulatory sub-divisions, such as Comitology, the Lamfalussy procedure, and the growing number of European administrative agencies, have colonized substantive parts of the law-shaping and law-making processes. This contribution argues that European Governance is a distinct phenomenon that cannot be easily reconciled with traditional notions of legislation and administration, but needs to be theorized differently. Accordingly, its legal shape has to be adjusted to this new situation, too. Neither a - still only vaguely defined - concept of 'accountability', nor a non-binding policy concept of 'good governance' can fill this gap.

A re-definition of European Governance - as an 'integrating administration' - has to take the new developments of a distinct European administrative governance sphere seriously. At the same time, it has to address the specific legitimacy *problématique* of the new governance structures in a sufficient manner. The specific character of these structures calls for an institutionalization of *participatory* patterns within the governance structures: by ensuring the involvement of civil society actors, stakeholders and the public in the arguing, bargaining, and reasoning processes of both European governance and European regulation, the odd position of European governance, which oscillates between legislative and administrative functions, can be targeted more adequately.

Keywords

Accountability / administrative law / civil society / comitology / European law / governance / legitimacy / multilevel governance / networks / participation / public administration / regulation

***Participatory Governance and European Administrative Law:
New Legal Benchmarks for the New European Public Order♦***

Rainer Nickel^{*}

European Governance is more than just a policy instrument without legal significance. Its regulatory sub-divisions, such as Comitology, the Lamfalussy procedure, and the growing number of European administrative agencies, have colonized substantive parts of the law-shaping and law-making processes. This contribution argues that European Governance is a distinct phenomenon that cannot be easily reconciled with traditional notions of legislation and administration, but needs to be theorized differently. Accordingly, its legal shape has to be adjusted to this new situation, too. Neither a - still only vaguely defined - concept of ‘accountability’, nor a non-binding policy concept of ‘good governance’ can fill this gap (Section I.). A re-definition of European Governance - as an ‘integrating administration’ – has to take the new developments of a distinct European administrative governance sphere seriously. At the same time, it has to address the specific legitimacy *problématique* of the new governance structures in a sufficient manner (Section II.). The specific character of these structures calls for an institutionalization of *participatory* patterns within the governance structures: by ensuring the involvement of civil society actors, stakeholders and the public in the arguing, bargaining, and reasoning processes of both European governance and European regulation, the odd position of European governance, which oscillates between legislative and administrative functions, can be targeted more adequately (Section III.).

♦ This text will be published in: Erik O. Eriksen, Christian Joerges & Florian Roedel (eds.), *Law and Democracy in the Post-National Union* (Oslo: ARENA Reports, 2006).

* Marie Curie Fellow, European University Institute, Florence/Johann Wolfgang Goethe University, Frankfurt am Main. The research on this contribution was supported by a Marie Curie Intra-European Fellowship under the European Community’s Sixth Framework Programme (Contract no. MEIF-CT-2003-501237).

I. Good governance and European administration

‘Governance’ is not a legal term – this opinion was and still is, at least until recently, the state of the art in European administrative law. While, for a number of years now, neighbouring sciences, such as political and social sciences, have increasingly used and embraced the term both as an empirical category for new forms and modes of the execution of public power, and as an analytical category to differentiate these developments from ‘classical’ concepts of government and administration,¹ the term ‘governance’² has not yet entered the legal texts of the EU, or classical legal textbooks. Given the fact that the legal profession is known to be rather averse to change, its terminological conservatism may explain its reluctance to embrace governance as a legal concept, while the more trendy (or more attentive and creative) political sciences happily welcome the new concept: the fact that ‘this is the end of the world as we know it’ (REM) appears to be less threatening for social scientists than for lawyers.

Better reasons can be named, however, to explain why governance has not become a keyword in European public law, yet. ‘Governance’, in its vague meaning³ of a new steering and implementation technique of political programmes, does not evoke the necessary legal guard rails for the execution of public power: while we expect governments and administrators to be democratically legitimised, guided by the legal acts of parliament and controlled by the courts, we do not know which legal mechanisms and/or standards to apply to European governance techniques, structures, and decisions. Benchmarking and knowledge-generating procedures, such as the Open Method of Co-ordination, intertwined public-private regulatory mechanisms, such as the Lamfalussy method, and a gigantic network of bureaucracies called Comitology, under the roof of the Commission, which is engaged in both policy-making and policy-implementing, these phenomena are all far away from a hierarchical, Weberian-style bureaucracy and a Kelsenian hierarchy of norms.

Out of this difficulty to cope with new forms of governance and its legal supervision, the term ‘accountability’ has been promoted as a possible substitute term,

¹ Harold Wilson, *The Governance of Britain*, (London: Weidenfeld & Nicolson, 1976) was one of the first authors to use the term in the context of a political regime. An early approach to governance as public management is reflected in James Warner Bjorkman, *The governance of the health sector: issues of participation, representation and decentralization in comparative perspective*, (Berlin: Wissenschaftszentrum Berlin, 1979). The ground-breaking titles, however, are the volume by James N. Rosenau and Ernst-Otto Czempiel (eds.), *Governance without government: order and change in world politics*, (Cambridge/England, New York: Cambridge University Press, 1992), for the field of international relations, and Markus Jachtenfuchs & Beate Kohler-Koch, *Europäische Integration*, (Opladen: Leske & Budrich, 1996), who fostered the term ‘multi-level governance’ for the EU.

² For an instructive account of the interdisciplinary concept of governance, see Gunnar Folke Schuppert, “Governance im Spiegel der Wissenschaftsdisziplinen”, in: Gunnar Folke Schuppert (ed.), *Governance-Forschung*, (Baden-Baden: Nomos, 2005), at 371-467.

³ The United Nations Commission on Global Governance defined in 1995 that “Governance is the sum of many ways individuals and institutions, public and private, manage their common affairs”, Commission on Global Governance, *Our Global Neighbourhood*, (Oxford: Oxford University Press, 1995), Chapter 1, also available at: <http://web.archive.org/web/20011222021819/www.cgg.ch/chap1.html>.

with similar roots in political economy as the term ‘governance’ itself.⁴ Carol Harlow’s book on “Accountability in the European Union”⁵ reflects such a deep unease with the governance/accountability newspeak extremely well: she starts with a chapter entitled ‘Thinking about Accountability’, in which she sees the need to explain and defend the use of the term ‘accountability’ with a view of the common roots of governance and accountability in New Public Management concepts. Thus, accountability through law is just one possible concept out of many; efficiency or transparency could substitute law as a normative benchmark. In essence, accountability is a vague umbrella term, which has the general idea that it denotes mechanisms and procedures which serve the purpose to hold public administrators accountable *vis-à-vis* the citizens.⁶

The European Commission’s 2001 White Paper on Governance, however, went beyond the mere acknowledgement that something had changed in the self-description of European bureaucracy and its functional mechanisms. It promotes a concept of *good* governance,⁷ thus introducing a normative yardstick into the discussion about governance. The European Charter of Fundamental Rights reflects this turn to a qualitative approach to governance; in its Article 41, the citizens are granted a ‘right to a good administration’, albeit limited to ‘his or her affairs’ and focused on individual measures instead of on all administrative actions.⁸ In contrast to this limited and individualistic concept of ‘good administration’ in the Charter, the Commission’s concept of ‘good governance’ is applicable to all forms of the extensive regulatory functions and actions that characterize the present system of EU governance, including

⁴ Interestingly, neither the term ‘governance’ nor the term ‘accountability’ can be translated in a fitting manner into another European language. In German, ‘Regieren’ (governing) and ‘Steuerung’ (steering) were used as auxiliary terms, but these terms do not capture the whole range of governance mechanisms, leaving out, for example, self-regulatory mechanisms as a means for indirect public management. Other terms, such as the ‘Gewährleistungsstaat’ (Schuppert, Hoffmann-Riem) still embrace the idea of the state as a reference point for re-regulation; this renders the term rather useless in the non-state context of the EU. For similar problems with the term ‘accountability’, see C. Harlow (note below), esp. at 14-18.

⁵ Carol Harlow, *Accountability in the European Union*, (Oxford: Oxford University Press, 2002). Others have identified an ‘accountability and legitimacy deficit’ of the European Union, without explaining in detail, however, how these deficits are linked, or whether these are political or legal deficits. See especially Anthony Arnall, “Introduction: The European Union’s Accountability and Legitimacy Deficit”, in Anthony Arnall & David Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002).

⁶ The usage of the term ‘accountability’ in (post-)modern concepts of public administration/governance conveys a remarkable portion of irony: The roots of the contemporary concept can be traced back to the reign of William I, in the decades after the Norman conquest of England in 1066. In 1085, William required all property holders in his realm to render a *count* of what they possessed. These possessions were assessed and listed by royal agents in the so-called Domesday books. Thus, in its original meaning, ‘accountability’ referred to *sovereigns holding their subjects to account*. See Mark Bovens, “Analysing and Assessing Public Accountability, A conceptual framework”, *European Governance Papers*, (EUROGOV) No. C-06-01, <http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf>, at 6.

⁷ COM (2001) 428, July 2001. For a number of thoughtful and critical reviews of the White Paper, see Ch. Joerges, Y. Mény & J. Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, (2001), <http://www.jeanmonnetprogram.org/papers/01/010601.html>.

⁸ Charter of fundamental rights of the European Union, Official Journal C 364 , 18/12/2000, at 1-22.

new governance mechanisms such as Comitology, the Lamfalussy procedures, and the Open Method of Co-ordination.

The White Paper's outline of 'good governance' contains a catalogue of five principles that describe the policy goals of the Commission (openness, participation, accountability, effectiveness, and coherence).⁹ It fails, however, to translate these positive goals into a clearly normative – legal – language. 'Good governance' is not (yet) a legal concept, and the question remains as to how the law should deal with the turn to governance. One possible answer might be to draw on the idea that a modern understanding of European governance as a heterarchical compound of Eurocrats who act as policy- planners and makers, organizers, network co-ordinators and supervisors in countless policy networks¹⁰ does not pre-empt a description of the EU in administrative or bureaucratic terms, at least from a legal point of view.¹¹ The creation of the single market was – and is – accompanied by extensive and detailed re-regulation activity,¹² and this regulatory activity is *de facto* the work of public officials from the Member States and of officials from the Commission, accompanied by experts in the respective regulatory field. Both its central function for the internal market and its governance reflect the fact that the focus of modern administrative law is not on individual administrative decisions but on the general regulation of issues such as market failure and the balancing of risks.¹³

As a consequence, the answer to the question of the legal *gestalt* of good governance may be found in the administrative law of the EU *de lege lata*. Its well-known fragmented character, however, renders it difficult to assess outlines for legal constraints on regulatory activity: European administrative law consists of a patchwork of scattered EC treaty provisions, general principles of European law shaped by the ECJ and its case-law, and secondary norms within special fields of regulation. Most remarkable is the fact that major regulatory activities, such as the Comitology procedures, are hidden in an opaque provision of the EC Treaty, instead of being outlined in depth and in a prominent chapter of the Treaty. The wording of Article 202 EC, in particular, hides the fact that the real power of decision-making tends to shift to 'expertise'. This expert knowledge is mainly provided by the administrations of the Member States,¹⁴ and generated within a plethora of EC committees. Fundamental

⁹ European Governance – A White Paper, COM (2001) 428, July 2001, at 10.

¹⁰ See, especially, Karl-Heinz Ladeur, "Towards a Legal Theory of Supranationality – The Viability of the Network Concept", (1997) 3 *European Law Journal* at 33-54.

¹¹ Alexander Somek, "On Delegation", (2003) 23 *Oxford Journal of Legal Studies* 703-709, at 703-704.

¹² See for an early account Giandomenico Majone, *Regulating Europe*, (London, New York: Routledge, 1996).

¹³ See Carol Harlow, "European Administrative Law and the Global Challenge", in: Paul Craig & Grainne de Búrca (eds.), *The Evolution of EU Law*, (Oxford: OUP, 1999), 261-286, at 273; A. Somek, *supra* note 10, at 704.

¹⁴ See Renaud Dehousse, "Misfits: EU Law and the Transformation of European Governance", in: Ch. Joerges & R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, (Oxford: Oxford University Press, 2002), at 207; Christian Joerges, "Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures", in: Christian Joerges, Karl-Heinz Ladeur & Ellen Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making*, (Baden-Baden: Nomos, 1997), at 295.

questions of ‘good governance’, such as whether and under what conditions the documents and the minutes of EC committees, set up according to Article 202 and the Comitology decision, can be viewed by private parties, were not even roughly defined within the regulatory framework of EU administrative law, and consequently had to be decided by the Community courts¹⁵ on rather vague legal terms.

In a number of recent cases, the Community courts were confronted with legal challenges to European governance structures. Questions of access to the documents of the committees, the Council secretariat, and the Commission,¹⁶ challenges to regulatory procedures, claims regarding the violation of procedural rules,¹⁷ the right to be heard,¹⁸ and other legal issues surrounding the new governance structures had to be dealt with by the courts. Because a comprehensive (‘constitutional’) legal framework is lacking, the courts had to decide on a day to day basis. It is no wonder, then, that the legal coming to terms with new governance structures resembles a piecemeal process, and that attempts to formulate a physiognomy of European administrative conflicts¹⁹ pose more questions than they have so far been able to answer.

For European administrative lawyers, this unpleasant situation strongly suggests that it may make more sense to stick to the traditional arsenal of European administrative law. A look at contemporary depictions of European administrative law confirms this presumption. Prominent European lawyers, such as Paul Craig, in his recent writings,²⁰ or Jürgen Schwarze, in the new edition of his ground-breaking work on European Administrative Law,²¹ do not even mention the term ‘governance’. Their

¹⁵ In the *Rothmans* case, the Court of First Instance (CFI) resolved the case in favour of the right to access to documents and stressed the importance of the principle of transparency. It held that “for the purposes of the Community rules on access to documents, ‘Comitology’ committees come under the Commission itself,...which is responsible for rulings on the applications for access to documents of those committees”. With its decision, the CFI paid tribute to the new governance amalgam of Commission and committees that is called “Comitology”. CFI, judgment of 19 July 1999, Case T-188/97, *Rothmans International BV vs. Commission*, quotation at note 62.

¹⁶ See footnote 16 *supra*, and the *Italian foreign language teachers* case on access to Commission documents relating to a treaty infringement procedure against Italy: CFI, judgment of 11 December 2001, Case T-191/99. The teachers, lecturers of foreign mother tongue in Italy, demanded access to the documents and statements the Italian Republic had delivered to the Commission. In its judgment, the CFI dismissed the their action.

¹⁷ In the *Germany vs. Commission* case, the ECJ declared a regulation on construction materials void on the grounds that procedural rules had been violated; allegedly, the draft for a decision had not been sent within a certain time-frame to the Member State, and not in the right language. ECJ, decision of 10 February 1998, Case C-263/95, *Germany vs. Commission*.

¹⁸ See, for example, the recent decisions in the *Bactria* and *Jégo-Quééré* cases, Case T-339/00, *Bactria Industriehygiene-Service Verwaltungs GmbH vs. Commission* (2002) and Case T-177/01, *Jégo-Quééré & cie SA vs. Commission* (2002), where the CFI reaffirmed that in the context of regulatory/delegated rulemaking, and in absence of special provisions in the Treaty or in special legislation, there is no individual right to be heard or to be consulted in the process of rulemaking.

¹⁹ Jean Bernard Auby, “Physionomie du contentieux administratif européen”, in: Jacques Ziller (ed.), *What’s New in European Administrative Law?*, EUI Law working paper 2005/10, <http://cadmus.iue.it/dspace/handle/1814/3330>.

²⁰ Paul Craig, “Process Rights in Adjudication and Rulemaking: Legal and Political Perspectives”, in: Jacques Ziller (ed.), *supra* note 19.

²¹ Jürgen Schwarze, *Europäisches Verwaltungsrecht*, (Baden-Baden: Nomos, 2. Auflage 2005).

main concern still lies with the relationship between the EU level and the Member State level of administrative law, and with decisions concerning individuals, and not with the regulatory activity of the EU as such. This is not to say that the vague legal character of the new governance structures goes unnoticed, but that it is, to some extent, perceived as belonging more to the political side of the policy process. In Paul Craig's words, it is a matter of 'normative choice' for the Community courts to decide, for example, that the right to be heard in relation to individual determinations is fundamental, while a similar right to participation or consultation in the context of regulatory activity depends on a clear legal basis in the Treaty or secondary legislation.²² Administrative law, and the concept of 'good governance', it seems, do not contain sufficient legal substance to determine the choices of the Community courts.

II. European Governance as an *integrating administration*

The aforementioned *résumé* is dissatisfying in two respects: it does not sufficiently take into account that the EC/EU has transformed itself from a mainly functional compound of economic co-operation and economic policy co-ordination to a law-generating *hydra*. Its fields of administrative activities and regulations have extended from the re-regulation of the European market in the 1980s and early 1990s, to *services publiques*, such as education, health, social security, broadcasting, public transportation,²³ as well as to the domain of public order in the 'area of freedom, security, and justice' at the present time. Secondly, it is the centralisation/de-centralisation issue that has to be addressed when theorizing about European administrative law: administrative actions in the European realm are increasingly 'decentred' in the sense that they are neither rooted in a single legal source or structure, nor are they formed or implemented by a single administrative entity, be it the European Commission, or the administrations of the Member States, respectively. They represent the transformed reality of an "intégration décentralisée" (Eduardo Chiti) and "décentralisation intégrée" (Loic Azoulay).²⁴ A new administrative space has emerged in which the traditional Community methods and structures of hierarchy and delegation, in the framework of an executive federalism, are supplemented by new forms of procedural, communicative, and conflictual techniques.²⁵ A special characteristic of this new space of regulatory and administrative activity is the fact that its institutional structures have emerged outside the traditional Community method with its legislative triangle of Council, Commission, and European Parliament, and, in some aspects, even completely outside the reach of the ECJ.

This new European public legal order is still in search of its legal form. The fusion of classical government functions (regulation and administration) with new

²² Paul Craig, in: Jacques Ziller (ed.), *supra* note 19, at 27.

²³ See the landmark decision of the ECJ in the *Altmark Trans GmbH* case, judgment of 24 July 2003, Case C-280/00.

²⁴ Loic Azoulay, "Extension et élévation du champ du droit administratif européen", in: Jacques Ziller (ed.), *supra* note 20, at 44 with further reference to Edouardo Chiti, "Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies", (2004) 10 *European Law Journal* at 402.

²⁵ Loic Azoulay, *supra*, at 44.

institutional modes and forms, combined with the absence of a classical parliamentary legislator, blurs the distinction between legislation and administration to a heretofore unknown degree. One crucial question, then, is whether this development should be described in and measured on constitutional terms and norms (with regard to doctrines of separation of powers, of popular sovereignty, or of constitutional rights, for example), or whether it should be described in terms of administrative law and administrative accountability, with its own distinctive set of normative expectations (following the doctrines of rule of law/*Rechtsstaat*, for example).

While it is widely acknowledged that the new structures of European governance *de facto* occupy a prominent position in the real world of the EU activities today, and that they operate in large parts beyond the formally constituted rules of the treaties,²⁶ their legal shape and role is still underexposed. Only recently some efforts have been undertaken to shed light on the New European Public Order. Eduardo Chiti has observed the “emergence of a Community administration”,²⁷ and most recently Herwig Hofmann and Alexander Türk have made an attempt to map the New European Public Order under the title of what they perceive as ‘Europe’s Integrated Administration’.²⁸ They analyse the wide-ranging spectrum of governance structures that have emerged under the roof of the EC/EU (Comitology, European Agencies, the Open Method of Co-ordination) and discuss whether these diverse developments, forms, and institutions add up to a constitutionalisation of EU Governance - in the form of administrative law.

Such an account of Europe’s administration deserves closer attention in three respects: Firstly, can we really speak of an *Integrated Administration* in view of the fragmentation of administrative law and procedures at the level of the Community/Union? A second aspect that deserves scrutiny is the popular thesis that the general structures of EU administration add up to some form of administrative ‘constitution’. Finally, in a concluding remark (infra Section III), I wish to address some additional aspects that should be observed when designing a possible ‘juridification’ of European governance and when developing normative concepts of ‘good governance’, especially the crucial question of how to achieve a better inclusion of civil society in administrative law-making processes.

²⁶ See Graínne de Búrca, “The Institutional Development of the EU: A Constitutional Analysis”, in: Paul Craig & Graínne de Búrca (eds.), *The Evolution of EU Law* (Oxford: OUP, 1999).

²⁷ Eduardo Chiti, “The Emergence of a Community Administration”, *37 Common Market Law Review* (2000), at 309-343.

²⁸ Herwig C.H. Hofmann & Alexander Türk, “Constitutionalising Governance? The Case of Europe’s Integrated Administration”, in this volume; H. Hofmann & A. Türk, “An Introduction to EU Administrative Governance” and “Conclusions: Europe’s integrated administration”, both in: H. Hofmann & A. Türk (eds), *EU Administrative Governance* (Cheltenham: Edward Elgar, forthcoming 2006).

1. *The diffusion of administrative structures*

Hofmann and Türk base their analysis on the well-founded observation that the classical model of EU administration (branded by Koen Lenaerts as ‘executive federalism’²⁹), with a distribution of administrative functions on two distinct levels, no longer reflects the reality of administrative action in the framework of the EU. Indeed, while the law in the books sees the Member States in the role of the executors of EU input, nowadays we can observe the ‘intensive co-operation of administrative actors from the Member States and the EU in all phases of the policy cycle from agenda-setting over decision-making to implementation of policies’ (Hofmann & Türk p. 1³⁰). The Member States themselves increasingly produce input, and the EU is – via composite administrative procedures – more and more involved in the implementation of administrative programmes that are shaped by the Member States, too. This situation radically places in question whether the description of EU governance by political scientists as multi-level governance³¹ is still the correct metaphor. In some important fields, such as the system of EU committees (‘Comitology’), theoretically separate levels melt together into a *Verbund*, a compound operation in which the roles of the controllers and the controlled seem to have become twisted and entangled.

The most striking feature of this *Verbund* is the fact that it operates to a large extent beyond the formally constituted legal framework of the treaties. EU committees, for example, are not EC or EU treaty institutions, and the same holds true for European Agencies. Only at sub-treaty level can we find legislative acts which contain fragments of something like a general legal framework for administrative actions and decision-making.³² However, these fragments only partially juridify the *Verbund*. Naturally, the same holds true for the adjudication of the ECJ, whose interpretations of the legal structures and whose intervention in the actual handling by the actors necessarily remain punctual.³³

Hofmann and Türk use the term “Integrated Administration” for this governance system. Their understanding of administration is based on a formal, or rather, an institutional category. They define administration as “activity by actors from the EU or

²⁹ Koen Lenaerts, “Some Reflections on the ‘Delegation of powers’ in the European Community”, 28 *Common Market Law Review* (1991), at 11-35.

³⁰ In the following, I will quote their contribution to this volume as “Hofmann & Türk”, with reference to the original paging.

³¹ See, in particular, Markus Jachtenfuchs & Beate Kohler-Koch, *Europäische Integration*, (Opladen: Leske & Budrich, 1996).

³² These are especially: the Comitology Decision, Council decision 1999/468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23; the Agencies Regulation: Council Regulation 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1; the Regulation on Access to Documents: Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145/43.

³³ See, for example, the aforementioned Rothmans decision of the Court of First Instance, judgment of 19 July 1999, Case T-188/97, *Rothmans International BV vs. Commission* on the access to committee documents, and the decision of the ECJ on procedural requirements for a valid decision of a committee: ECJ, decision of 10 February 1998, Case C-263/95, *Germany vs. Commission* (referring to the language regulation from 1958, Regulation 1/58).

Member States, which fulfil public duties and are not directly elected legislators, members of Member States governments (such as Ministers in the Council) or members of the judiciary”.³⁴ This definition suggests that every action of public officials in the EU (with the exception of Member State Ministers and judges) is administrative action, and thus also covers the preparation of legislative acts, and regulative actions under the umbrella of the Commission. The latter functions, however, point to a somewhat legislative role (in the case of Directives and Regulations) or quasi-legislative roles (in the case of Comitology) than towards ‘administration’ in the traditional sense – the execution of the legislative will. Although Hofmann and Türk acknowledge this legislative (and sometimes even adjudicatory) function of public officials in the EU, they claim that this does not conflict with the term ‘administration’.³⁵

The very wide³⁶ definition of administration also leads to a very wide definition of administrative law. Hofmann and Türk claim that “administrative rules and principles are rules which regulate the functioning of the EU and the interaction between its institutions as well as the relations between individuals and public bodies in the implementation of EU policies”.³⁷ This definition seems to include not only the administrative rules within legal acts on specific policy fields such as environmental law, and the fragmented general rules of EU administration, but also the TEU and the TEC. Even the Charter of Fundamental Rights, once adopted as a legally binding document, would possibly fall under the definition of “rules and principles that regulate the relations between individuals and public bodies in the implementation of EU policies”. If read in this way, the whole legal structure of the EU would add up to ‘administration’, a definition upon which the strongest critics of the EU and its democratic deficit could easily and happily agree.

A less formal definition of administration may take into account that the supposedly clear lines between legislation and administration are blurred not only in the context of the EU, but also in the Member States themselves. Important fields of regulation, such as environmental law or risk regulation, are dominated by administrations (and private actors whose regulations “deserve recognition”) because the legislator largely appears to be unable to provide for the resources, manpower, knowledge assessment, and experience that are necessary for the fulfilment of the regulatory tasks.³⁸ The emergence of a regulatory *Verbund* of administrations on the EU

³⁴ See Hofmann & Türk, “An Introduction to EU Administrative Governance”, *supra*, note 28. – Although Hofmann and Türk themselves mention the involvement of private actors – especially in the field of standard setting – in the implementation phase, their formal definition of administration, if taken literally, clearly excludes private actors from administrative functions.

³⁵ See Hofmann & Türk, *supra*, note 34.

³⁶ The definition is too wide and too narrow at the same time; see, *supra*, note 32: the exclusion of private parties acting *functionally* as part of governance structures (e.g., in Lamfalussy procedures) from the definition of ‘administration’ can hardly be justified.

³⁷ See Hofmann & Türk, *supra*, note 34.

³⁸ For an account of this modern tendency to ‘gubernative structures’ in the German context, see Armin von Bogdandy, *Gubernative Rechtssetzung*, (Tübingen: Mohr, 2000); for similar accounts in the EU context, see Karl-Heinz Ladeur, “The Changing Role of the Private in Public Governance: The Erosion of Hierarchy and the Rise of a New Administrative Law of Co-operation”, EUI Working Paper Law No. 2002/9; and Renaud Dehousse, “Misfits: EU Law and the Transformation of European

level only reflects this development towards administrative structures that colonize and occupy law-generating procedures, and fulfil extensive law-making functions.

It is not by chance that the auxiliary term “governance” (and not government or administration) is widely used to denote these structures and actions which do not fit into our traditional typology and methodology. A re-definition of governance according to the institutional background of the actors, and not along the lines of their actions and functions, as Hofmann and Türk seem to suggest, may provide a terminological safe haven, but it may also, to some degree, cover up core aspects of EU governance structures, instead of describing and revealing them adequately.

The essence of Hofmann and Türk’s approach lies elsewhere, however: their analysis of the Comitology and Lamfalussy procedures, of the growing number of European Agencies and of the Open Method of Co-ordination underlines the point that the intensive co-operation of administrative actors from the Member States and the EU has increasingly blurred the traditional distinction of direct and indirect administration within the EU. Various forms of administrative interaction play a central role in the development and implementation of policies in the EU. Hofmann and Türk conclude that a “homogeneous organisational phenomenon has emerged” which has a “specific character being neither a federal state nor an international organisation”. Instead, this phenomenon constitutes a third way between a clear-cut federalism and the traditional two-level system of direct and indirect administration. In summary, they hold that this heterarchic, but homogeneous, structure deserves to be called ‘integrated administration’ (Hofmann & Türk p. 1 and 4).

According to Hofmann and Türk, this finding is not only the result of a sociological observation, it is also a normatively desirable model for EU administration. They claim that, through broad and intensive participation of the administrations of the Member States, an integrated administration does not threaten the very existence of the EU Member States, because it avoids the creation of heavily hierarchic structures (see Hofmann & Türk p. 4). However, the term *integrated* administration conveys the strong notion of a unity in a field where actually diversity prevails. As the authors themselves observe, administrative structures in the EU are of an evolutionary nature and represent a patchwork, rather than a coherent structure, and this holds especially true with regard to the institutional structure, with its sometimes confusing variety of European Agencies and Comitology committees. In its White Paper, the European Commission even strongly favoured the establishment of new regulatory agencies, in place of Comitology committees, in order to enhance coherence of the organizational structure³⁹ (and in order to strengthen its institutional position, too). Thus, to call this variety ‘homogeneous’, as Hofmann and Türk do, is clearly a misnomer. Additionally, there is very little co-ordination between the policy fields, and only limited legal coherence, because there is no clear general framework to guide and limit the various *fora* and procedures of EU administrative governance, but only scattered provisions which regulate administrative action. Thus, it appears questionable as to whether it is justified

Governance”, in: Christian Joerges & Renaud Dehousse (eds.), *Good Governance in Europe’s Integrated Market*, (Oxford: Oxford University Press, 2002), 207.

³⁹ COM (2001) 428, July 2001, at 19 and 24.

to describe the existing patchwork of administrative constellations of a diffuse and fragmented character as *integrated*, rather than as *integrating*.

Additionally, the projection of an *integrated* administration is difficult to reconcile with the existing legal structure of the EU, which is, as mentioned before, very fragmented, and, in the absence of a treaty provision which allows for a comprehensive European administrative law code (and a political initiative for such an endeavour), this situation will remain relatively stable in the foreseeable future. In this environment, a *normative* claim for integrated administration would need a stronger support from those affected by an integrated administration – the European citizens and the European public. While the integration of the market(s) was clearly a political and legal project the European states agreed upon, supported by a wide-ranging consensus among the Member States and their constituencies, the administrative integration process is viewed with a lot more scepticism and suspicion. It cannot be separated from the deep mistrust for the apparently overwhelming and anonymous bureaucratic rule within the EU. The French and Dutch votes on the Constitutional Treaty may be taken as an expression of this scepticism.

2. A ‘salad bowl’ concept of legitimacy

The insight that we are facing a *de facto self-integrating* EU/Member State administration, a diffuse and incompletely formalized governance structure evolving mainly outside the legal framework of the treaties, immediately raises legitimacy concerns. Hofmann and Türk correctly stress that “[i]n this situation, the establishment of traditional Weberian-style legitimacy through intra-administrative chains of hierarchical responsibility becomes increasingly difficult” (Hofmann/Türk p. 5). They present and discuss three distinct models for legitimacy of governance in the EU: the ‘parliamentary/government’ model, based on the idea of a true federal European state,⁴⁰ and the ‘regulatory model’,⁴¹ based on the assumption that the EU should be confined to technical, not social, regulation, as two more traditional approaches, and the model of ‘deliberative supranationalism’⁴² as a more up-to-date approach that takes the evolution of governance modes such as Comitology seriously.

Hofmann and Türk reject all three models – for different reasons – as insufficient. They claim that “these models of legitimacy for the exercise of governance in the EU each address certain aspects, but they are not in themselves sufficient to provide for the whole set of criteria for legitimacy of such a complex phenomenon as

⁴⁰ See for the famous proposal of the former German Secretary of State, Joschka Fischer, in his Humboldt University speech, and the following discussions about a ‘core Europe’: Christian Joerges, Yves Mény & Joseph H.H. Weiler, *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, (2000), available at www.jeanmonnet.org.

⁴¹ Giandomenico Majone’s book *Regulating Europe*, (London, New York: Routledge, 1996) represents this position best.

⁴² See the seminal article by Christian Joerges & Jürgen Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, (1997) 3 *European Law Journal* 273.

government and governance by integrated administration in the EU” (Hofmann & Türk p. 8). This ‘whole set of criteria’, however, does not add up to a single, compact normative approach, but remains quite flexible: the complex and heterogeneous nature of European administrative governance requires “the development of models which are adapted to the necessities of the integrated nature of the EU”, and “additional difficulties arise from the fact that conditions for legitimacy differ according to each policy phase” (Hofmann & Turk p. 8).

This concept of legitimacy that Hofmann and Türk present and then flesh out in the course of their text is – necessarily, they claim – incoherent when viewed through a traditional lens: instead of referring to a single frame of reference for their legitimacy claims (democracy, a constitution, effectiveness), they accept various concepts and aspects as possible sources for administrative legitimacy. This allows them to differentiate between the activities forming and shaping the legislative process, and the implementation phase of EU governance (Hofmann & Türk p. 8). In the former context of legislative activity, legitimacy is “more dependent on its transparency, the integration of expertise and the participation of affected interests, rather than on the judicial control by courts”. However, it remains somewhat unclear why they differentiate within the legislative activity between an ‘agenda-setting process’ and a ‘policy-making process’. The legitimacy of the former is said to depend on transparency, expert integration and participation of interest groups, while the legitimacy of the policy-making process is supposed to be based on the institutional balance between the actors involved in the legislative process. However, it appears to be difficult to find a clear-cut division between agenda-setting and policy-making, as Hofmann and Türk themselves have pointed out in other sections of their contribution (see Hofmann & Türk p. 15-16). In the reality of European regulation and rule-making processes, both activities are more often than not inseparably linked, and coincide in a single regulatory project and strategy.

In summary, Hofmann and Türk reject a ‘one-size-fits-all’ approach, and underline that questions of legitimacy have to be answered according to the structures of the different levels of administrative action: sources of legitimacy vary significantly from the agenda-setting process over the policy-making process to the implementation process. In a seemingly small, but significant shift they turn from questions of legitimacy (without defining their own understanding of legitimacy in depth) to *accountability* (Hofmann & Türk p. 14). While questions of legitimacy in most theoretical approaches are seen as being linked to both the problem and the possibility of supranational law in the absence of a fully-fledged European parliamentary democracy and a single European public sphere, the term *accountability* clearly narrows the perspective: in Hofmann and Türk’s view, the shift to *accountability* “means that we need to explore criteria and means of holding the relevant actors contributing to the creation and implementation of EU accountable”, which “requires a rethinking of the notions of political and judicial accountability as currently discussed in the constitutional debate” (Hoffman & Türk p. 10).

Accountability of administration has many facets and can be defined in many different ways, as already stated above. We may ask: Who is accountable to whom (the

regulators to the citizens; the private participants of regulatory processes to the market forces; the Member State officials in Comitology committees to the European public?), to what extent, and what are the legal and factual consequences of a violation of accountability benchmarks and rules? Hofmann and Türk fail to deliver a more precise answer to all of these questions. Instead, their search focuses on the role of the courts, as in many administrative law concepts in which accountability replaces classical notions of the rule of law and the *Rechtsstaat* principle. Courts, in particular the Community courts, still play a central role in controlling administrative activity, and, according to Hofmann and Türk, it is their task to elaborate and to safeguard the rules and principles of good governance (see Hofmann & Türk p. 10). However, it is important to confront such an approach with the lack of clear general rules and regulations for European administrative procedures, including a legally-binding concept of good governance. This renders it very difficult, if not impossible, for the Community courts to elaborate criteria out of the vague ‘general principles of law’ such as equality or fairness. In addition, courts have to respect both political decisions and the limits of judicial control. In Hofmann and Türk’s words, “[t]he more political control is afforded in areas more akin to legislative activity – agenda-setting and policy-making through expert groups and the activity of council working parties – the less detailed judicial control will take place” (Hofmann & Türk p. 12).

In order to fill this gap, Hofmann and Türk propose a “system of checks and balances”, without explaining in detail, however, in what sense such a system would be different from the already existing EU system of balanced institutions and powers. Maybe this is meant as a metaphor for techniques of mutual observation? In addition, they also mention the Commission’s internal ‘Hearing Officer’ and alternative dispute settlement procedures, such as the ombudsman procedures, as possible blueprints for enhanced administrative accountability, without elaborating further, however, on how a further extension of these additional, and not strictly ‘legal’, accountability mechanisms would enhance the legitimacy of EU governance. A recent proposal of European lawyers for the installation of a new “European Criminal Law Ombudsman”⁴³ underlines the problems and pitfalls of such a ‘soft law’ approach: This proposal stresses the urgent need for a counterweight against the administrative-institutional preponderance of Europol, Eurojust and other forms of the hybrid New European Public Order, and, at the same time, shows that the ‘old’ procedural safeguards against fundamental rights infringements are toothless with a view to the new, network-based structures of European Governance. Thus, the installation of an(other) Ombudsman, to a certain degree, represents an act of desperation; the law hastens after governance, and governance wins.

⁴³ This is a proposal launched by the CCBE (Council of Bars and Law Societies of Europe, the apex organisation of European lawyers) in 2004. The Ombudsman is supposed to function as a counterweight against the growing activities of the EU institutions in the field of criminal law, including the European Arrest Warrant, see http://ec.europa.eu/justice_home/news/consulting_public/fundamental_rights_agency/doc/contribution_ccbe_en.pdf.: “In the European Union, Europol and Eurojust are working across borders in the interest of law enforcement, but there is an urgent need for a new form of ‘cross-border protection’ of defence rights to counterbalance this.” CCBE statement of 22 December 2004, at p. 8.

III. Governance is here to stay: How to reconcile democratic legitimacy and supranational governance?

Is it sufficient to seek legitimacy in a diverse mixture of accountability mechanisms alone, with an underlying concept of something similar to a composite legitimacy? Like a number of other authors who try to translate European governance into legal terms, Hofmann and Türk do not exactly ask this question, but it appears to me that they do address the problem, albeit under the different heading of a constitutionalisation of European administration. These approaches rely on a concept of ‘constitutionalisation’ while defining this term in the given context of European governance not in the literal sense of a written constitutional document, but in the sense of a two-level system of constitutional norms (of a higher order) and a general framework for European administrative activities. This inevitably leads to the quest for a European Administrative Procedures Act, or a similar codification of general administrative law. A set of procedural cornerstones within a general administrative law framework would clearly help to structure and legitimise administrative activity in the EU. Two aspects speak against such a codification, however: Attempts to unify historically grown fields of law on the European level, as the passionate discussions about a European Civil Law code shows,⁴⁴ touch upon the very nerves of law-making in supranational constellations.⁴⁵ Additionally, the Treaties do not contain a clear and explicit competence for the creation of a European Administrative Law code. The fragmented character of existing administrative rules will thus persist for the foreseeable future.

A pragmatic view of these obstacles may hold that a comprehensive codification is not only impossible, but also unnecessary, and it may underline the rationality of the governance structures that have emerged. Hofmann and Türk, for example, turn the vice of an increasingly integrated administration via co-operative procedures and networks (the ‘underworld’, as Joseph Weiler coined it for the Comitology committees) into a virtue: the structures of Comitology, European Agencies and Lamfalussy procedures, in their view, represent “the substance behind the theoretical notion of shared sovereignty”. This may well be true, but, at the same time, this statement highlights the problematical nature of the administrative compound even more. An integrating administration disconnects the citizens – the *European* citoyennes et citoyens – from the European law-making processes, be it in the form of agenda-setting and ‘classical’ law-making under the umbrella of the Council, be it in the form of Comitology or Lamfalussy procedures where, in many cases, the ‘real’, material content of norms is defined.

A mere upgrading and perfection of accountability mechanisms, especially if they are basically of a *judicial* and/or *non-legal* nature, then, cannot deliver a sufficient answer to these legitimacy problems. The combination of judicial supervision and the soft techniques of ombudsman interventions that Hofmann and Türk embrace undoubtedly play an important *additional* role, especially with regard to transparency,

⁴⁴ For a very outspoken contribution on this discussion, see Pierre Legrand’s *ad personam* intervention “Antivonbar”, 1 *Journal of Comparative Law* (2006), at 13-40.

⁴⁵ The issue of a codification and its limits cannot be broadened here. For a critical perspective on a European Administrative Law code, see Carol Harlow, “Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot”, (1996) 2 *ELJ* at 3.

visibility and procedural fairness in individual cases. What they do not address, however, is the fact that a bureaucratic culture of compromises and ‘best practices’, even if agreed upon in a more or less deliberative fashion, cannot replace a process of *public* deliberation on legally-binding norms, but reminds of and amounts to a form of benevolent absolutism. In its place, a ‘culture of contestation’ is needed, where the (thin) European public sphere and the (thick) Member State public spheres can be integrated and included in the law-generating processes.

The Draft Constitutional Treaty, with its Article 47 on ‘participatory democracy’, and the Commission’s White Paper, with its reference to participation as a fundamental principle of European governance, express this deep unease with the classical Community method and the new governance structures alike. Even if the Commission’s White Paper commitment to the participation of civil society may be called a misnomer, because, in substance, it is reduced to the well-known technique of consultations,⁴⁶ it stands for a symptom of crisis. The same may be said about Article 47 of the Draft Constitutional Treaty, where the principle of ‘participatory democracy’ is anchored. The content of the provisions that it includes remain very vague and unsubstantial with regard to the actual legal position of civil society actors within participatory processes. However, both documents may point towards alternative ways of facing the legitimacy gap, a gap that has been deepened by the process of an integrating European administration.

A mere change in terminology – from government/administration to governance, from administrative law to accountability – without a proper theory of the very concept of ‘governance’ itself cannot provide satisfying answers to the legitimacy gap, and cannot cover the failure of classical administrative law instruments and concepts to grasp the novelty of European governance.

European governance extends to the field of legislation to a much higher degree than governments do within the framework of the nation-state, especially in the form of the Comitology structure and the emerging concepts of regulation following the Lamfalussy procedure. It is precisely this aspect which has fuelled the discussions about supranational rule-making and its relation to democracy: while democratic ‘fundamentalists’ claim that this renders the EU rule-making structure undemocratic in principle, others have argued that pure technical legislation does not need strong legitimacy (especially Andrew Moravcsik⁴⁷ and Giandomenico Majone⁴⁸). However, a third way of thinking about risk regulation and legitimacy has offered a surprising proposal: Christian Joerges and Jürgen Neyer have turned the notion that non-elected public officials from the Member States decide upon the major part of material risk

⁴⁶ For a more detailed critique, see Rainer Nickel, *Participatory Transnational Governance*, in: Ch. Joerges & E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, (Oxford: Hart Publishing, forthcoming 2006), also available as CLPE working paper, <http://ssrn.com/abstract=885380>, especially at 34-44.

⁴⁷ Andrew Moravcsik, “In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union”, 40 *Journal of Common Market Studies* (2002), at 603-624.

⁴⁸ Giandomenico Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards”, 4 *ELJ* (1998), at 5.

regulation into a virtue of the rule-making system. They underline that this technique of rule-making has the potential to preserve democratic legitimacy, instead of destroying it. Their starting point is the fact that rule-making in the Member States always and inevitably – especially in the context of an integrated market – has grave external effects. The population of the Member State which is at the receiving end of this chain cannot influence this rule-making process in a different way than through mechanisms that may at least make sure that its perspectives will be voiced and heard, too. In an – admittedly simplified – manner, the effect of Comitology deliberations can be described as resulting in a preservation of democratic will-formation across borders.

The concept of deliberative supranationalism was created in the context of the system of Comitology committees established according to Article 202.3 TEC, and a number of aspects give weight to the assumption that it cannot be transferred easily to other structures of European governance. European Agencies, for example, are structured differently, even if some observers hold that they do, in fact, represent Comitology, albeit under a different name. If applied to another emerging governance technique, however, namely, the Lamfalussy procedure, parallels with Comitology are even harder to draw. This is mainly due to the fact that this regulatory concept relies upon the involvement of the regulated sector, which leads to a high degree of involvement of private actors into the regulating mechanisms. These actors may voice views that are representative for the affected industries, but they certainly do not represent the constituencies of the respective Member States. Extending the concept of deliberative supranationalism, as theorized by Joerges and Neyer, to all areas of European governance would, therefore, overstretch its own conceptual framework.

As a consequence, European governance cannot comprehensively be captured and theorized by such a concept as deliberative supranationalism. A possible alternative to resignation, or a mere confirmation of the existing structures as somehow rational and thus legitimized (as Niklas Luhmann would probably hold), has been mentioned above: participatory structures are needed to ensure the involvement of civil society actors, stakeholders and the public in the arguing, bargaining, and reasoning processes of European governance and European regulation.⁴⁹ If European governance is here to stay, the social *humus* necessary for democratic self-regulation, an element which is clearly missing at present, has to be integrated into the ‘laws of law-making’ which guide European governance mechanisms. In the meantime, European Governance continues to be executed without being properly constituted.

⁴⁹ For details of a concept of participatory governance in supra- and transnational contexts, see Rainer Nickel, *supra* note 46, Sections I and III.