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An Overview of Regulatory Innovation in the European Union

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Abstract: This chapter reviews the regulatory innovation process in the European Union, with a focus on the environmental sector. It examines the EU documents on regulation and, in particular, the 'eight pillars of European governance' listed by the European Commission in its follow-up to the 2001 White Paper on European Governance, as a useful means of categorising the practical consequences which the European Union attaches to the different implications of the governance debate in the EU. It goes on to summarise the initiatives on regulatory innovation as kick-started by the White Paper on Governance, and to map the current state of each of these initiatives. It concludes that no fundamental reform is required, but rather only a slim number of targeted remedies; the only real solution to the regulatory fog is acceptance and deregulation.

I. INTRODUCTION

A. Regulation and Regulatory Instruments

Defining 'regulation' may seem paramount for a chapter focusing on regulatory innovation. However, in practice a precise definition of 'regulation' risks arguments at the margin,[1] especially as all employed definitions or understandings of the concept point to a vast domain of modern life and law. 'Government intervention to steer individuals' and companies' lives' would seem to be the least complicated and easiest to use concept—even if it can in this sense be more or less equated with 'law' itself. The key to any useful definition would have to be 'government', in my view, and

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[1] S Weatherill, 'The challenge of better regulation' in S Weatherill (ed), *Better regulation* (Oxford, Hart Publishing, 2007) 1, 1.

of all the regimes a regulatory study could focus on, this article reviews regulatory intervention at the European Union (EU) level. I will stick with the government focus of regulation, even if regulation need not always invoke government. Indeed, self-regulation by private parties, as we shall discuss further below, is periodically promoted as an alternative to government intervention, including at the EU level.

Negative externalities (all unwarranted consequences of the production of goods and services which are not reflected in its price) are an important target for regulatory action and hence are sometimes employed as part of the definition:[2] public authorities emerge when the negative externalities of the market are perceived as a public problem, and when the appropriate regulation of this problem by the market itself does not seem possible.[3]

For the most part, this chapter is inspired by the author's experience in the environmental sector. Consequently, while the more conceptual analysis can be and is applicable to EU regulation generally, examples are mostly drawn from environmental law and policy in the European Union (EU).

Regulatory law—and especially environmental law and policy—is, by any measure, a relatively young phenomenon in international law and policy. Nevertheless, one can arguably detect a recurring pattern in States' choice of policy instruments for environmental law in particular. States usually start out with a top-heavy, command and control approach, characterised in that early form at least by direct regulation. In its most absolute (and perhaps most caricatured) form, direct regulation implies that the Government prescribes uniform environmental standards across large regions, mandating the methods required to meet these standards, licensing production sites which adopt the required methods and ensuring compliance through monitoring and sanctions.[4]

States, as well as individual organisations, subsequently encounter a number of regulatory failures of this approach. These arguably include, in particular, economic inefficiency, environmental ineffectiveness and democratic illegitimacy.[5] This subsequently leads to a shift to a bottom-up approach to environmental action, focusing on specific actors rather than on regulatory mechanisms,[6] and a shift to new instruments,[7] including environmental

[2] Compare P Magnette, 'The politics of regulation in the European Union' in D Geradin, R Muñoz and N Petit (eds), *Regulation through Agencies in the EU* (Cheltenham, Edward Elgar, 2005) 3, 4. In light of this article's focus on environmental law, the externalities route to regulation is particularly attractive.

[3] *Ibid*.

[4] J Golub (ed), *New instruments for environmental policy in the EU* (London, Routledge, 1998) 2.

[5] *Ibid*, 3.

[6] A Weale (ed), *Environmental Governance in Europe* (Oxford, Oxford University Press, 2000) 61.

[7] Golub, above n 4, 4 ff.

taxes and charges, green tax reform, tradable permits, State subsidies, deposit/refund systems, labels, audits, and voluntary agreements.

This shift at the EU level, for instance, has led to the catch-phrase that 'industry is not just part of the problem, but also part of the solution'. This has culminated in some enthusiasm, in industry circles, for voluntary agreements between industry and the authorities.[8] This bottom-up approach in turn leads again to disappointment, as well as to more fundamental issues, such as whether one ought to design policy-making in such a way as to seek agreement before setting public policy.[9]

'Performance-based regulation' is arguably one of the developments in trying to combine the advantages of both command and control and bottom-up approaches. In the literature on the use of performance as the basis for regulatory standards, a performance-based regulatory standard is a rule, regulation, or standard which specifies the desired outcome but gives firms discretion in how they meet the outcome.[10] Firms arguably could employ a number of instruments to reach the desired outcome. In the author's view, some of these link environmental law and policy with political theory as well as ethics and give rise to some fascinating challenges in making environmental protection policies work: questions of corporate social responsibility, eco-management schemes and eco-audits, and liability come to mind.

The typical swing in regulatory instruments, from command and control via market-based to intermediate, has been most visible in EU (both Member States and 'Brussels') and US environmental policies. Incidentally, trial and error in regulatory approaches in these jurisdictions has raised the question as to whether, much like technologies tend to lead to leap-frogging in developing countries (an often suggested hypothesis for telecommunications, for instance, or energy infrastructures), regulatory reform may be subject to this phenomenon, too.[11]

B. Regulatory Instruments and Innovation in the European Union

The search for the proper mix of regulatory instruments has recently received new attention within the EU Commission, within the context of the broader 'governance' debate. Talk of 'new' regulatory instruments is

[8] K Deketelaere and E Orts (eds), *Environmental contracts—Comparative approaches to regulatory innovation in the United States and Europe* (London, Kluwer Law International, 2001) 201 ff.

[9] C Coglianese, 'Is Consensus an Appropriate Basis for Regulatory Policy?', in Deketelaere and Orts, above n 8, 97.

[10] C Coglianese *et al*, *Performance-based regulation*, JF Kennedy School of Government, Harvard University, Regulatory policy program report No RPP-03 (2002) 3.

[11] Compare, for pollution-focused theories, with M Munasinghe, 'Is environmental degradation an inevitable consequence of economic growth: tunnelling through the environmental Kuznets curve' (1999) *Ecological Economics* 89.

a cyclical phenomenon. In the early 1990s, the Commission quite keenly mentioned 'market-based instruments', in particular, as part of a whole range of policy instruments. These could broadly be grouped into three categories. First, there are those which are aimed at internalising environmental costs in the cost structure of companies—the most immediate answer to Arthur Pigou's analysis of Alfred Marshall's concept of 'externalities'. The Commission succeeded in having Council and Parliament adopt a watered-down Directive on environmental liability, for instance[12] (one which eventually took a much less radical form than originally envisaged). Other instruments of internalisation, such as environmental taxation, are practically out of reach for the Commission, as these are subject to national sovereignty (consensus and thus veto power, as opposed to qualified majority voting). The second category of what the Commission in the early 1990s called 'market-based instruments' consists of those which aim to direct consumer preference through providing environmental information, with instruments such as eco-labels and eco-management regimes. However, this category would seem to have overestimated consumer response to environmentally proactive goods, services, or companies in general. Finally, closely linked to (although in economic theory radically different from) the first instrument—because it also ensures regulatory behaviour as part of a company's standard market behaviour—is the assignment of property rights (Coase). This of course was not realised by the Commission in the 1990s, but later led in particular to the EU's flagship instrument for climate change law, namely the Emissions Trading Scheme.[13]

As noted, the Commission has recently revisited the issue of regulatory instruments. This has been part of a wider exercise in the European Union, through which the EU wants to reconnect to its citizens in an exercise of better 'governance'. The April 2001 White Paper on European Governance is a general review of better governance through increased accountability and transparency. It includes a chapter on better lawmaking, which is the one that interests us most within the context of this chapter. In particular, the White Paper on Governance singles out the environmental sector as a prime candidate for what it now dubs as 'self-regulation' and 'co-regulation'. Under the 'self-regulation' formula, industry itself would suggest a way forward for a given environmental challenge, and the Commission would at most acknowledge this initiative, through a Recommendation coupled with a monitoring regime. The co-regulation formula would be more akin to a true contract between the European Community and industry. This

[12] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L143/56.

[13] Directive 2003/87/EC establishing a scheme for greenhouse gas emissions allowance trading, OJ 2003 L275/32.

type of instrument exists already: they are currently called 'environmental agreements', mentioned above. Under the new name of 'co-regulation', they would be characterised by increased involvement of the European Parliament and of the Council of Ministers, as well as by a stricter monitoring mechanism.

The White Paper in general, and self-regulation and co-regulation in particular, have received a lot of attention in EU circles, often included in the *maelstrom* of 'better regulation' initiatives—although, certainly in the case of self- and co-regulation, developments have not continued with quite the speed which the EU institutions were perhaps expecting in the 1990s.

Interestingly, in the debate on regulatory innovation at the EU level, one may have to take account of the often powerful instruments which the EU requires to do away with national barriers which hamper, for instance, the internal market, or the national business law and business practices which stand in the way of a true pan-European energy market. Hence:

> [T]he EU depends on a rather aggressive pattern of common regulation as a means to break down the fragmenting effect of diverse and, in some cases, centuries-old regulatory traditions in the Member States: without such a framework of legal rules, states, their firms and their citizens are exposed to damage caused by the undesirable impact (or its lack) in their neighbours.[14]

C. Purpose of this Chapter

This chapter reviews the regulatory innovation process in the European Union, with a focus on the environmental sector. There is a wider context (which I shall not discuss here), however, which covers issues which have a potentially significant impact on regulatory innovation.[15] These include: first, the Aarhus Convention, which will empower citizen groups as well as environmental NGOs, not just vis-à-vis the EU, but also at the level of the Member States, and not just with respect to locus standi, but also with respect to the availability of information—I refer later in the chapter to a process which I like to call the 'Aarhusisation' of regulatory law;[16] secondly, the attempts—which have failed so far—better to involve non-industry actors in the standardisation process; thirdly, the cries to increase

[14] Weatherill, above n 1, 1, 13, referring to Kelemen's and Menon's contribution in the same article.

[15] Author's presentation at New Haven CT, 31 March 2004, 'Regulatory competition and environmental innovation in the EU', Yale Association of Environmental Law, unpublished.

[16] See C Hilson, 'Risk and Human Rights before the ECHR: Towards a new approach', ch 12 in this volume.

transparency as well as European Parliament input into the many technical committees which guide the implementation of, and follow-up to, EU legislation once it is adopted—I touch upon this when reviewing 'committees', below; and, finally, interestingly, there are arguments in some sectors of industry, in particular SMEs as well as industry in the new Member States, that traditional command and control actually has some advantages to it, including predictability and straightforwardness, which other regulatory instruments often lack.

D. Conclusion of the Introduction

To paraphrase *Winnie the Pooh*, the mutterings of a lawyer of such little brain as myself undoubtedly pale in comparison with the fairly vast analysis in social sciences of the theory of regulation, deregulation, and better regulation in international organisations. The intention of this chapter is to add the insight of a lawyer who, while spending much of his time in various academic institutions around the world, also has over 15 years of legal practice under his belt. Hence, whether rightly or wrongly, part of the better regulation test which I shall employ in this chapter is whether institutional and other changes actually add anything in practice. When studying and observing European regulatory frameworks, I am often reminded of an anecdote reported in a back issue of *The Economist*, the exact reference of which I am afraid escapes me. A journalist on the newspaper reportedly overheard a discussion between a French minister and his US counterpart. Acknowledging the merits of a particular regulatory solution, the French minister apparently added: 'I appreciate what you say works in practice. But will it work in theory?' Even if this were not true, it would still be a good story—especially to illustrate the dangers of the over-conceptualisation of regulatory practice.

II. BEYOND COMMAND AND CONTROL

Many a lecturer on regulation, especially in introductory settings, summarises (typically US and/or EU) regulatory history on Safety, Health and Environmental (SHE) regulation, by reference to a fairly straightforward graph. As noted, common understanding on the history of SHE regulation has it that one starts off with command and control, matures to market-based instruments, and graduates with a proper mix of both (but retaining a certain disdain for command and control).

'Command and control' is not easily defined. Hitherto it has been a label attached to (in particular past) regulatory practice rather than a conceptual

approach with which one begins. The European Environment Agency's glossary[17] defines it as:

(1) In relation to policy and management, command-and-control instruments (e.g. mechanisms, laws, measures) rely on prescribing rules and standards and using sanctions to enforce compliance with them.
(2) Command-and-control regulation requires polluters to meet specific emission-reduction targets and often requires the installation and use of specific types of equipment to reduce emissions.

There is evidently no specific authority attached to the Agency's definition and one can find many a different wording elsewhere. In fact the Agency's definition would seem quite lacking in a number of respects. The first leg of its definition could almost be a definition for 'the law'. Specifically in the context of regulatory law, many of the so-called new instruments, at the national and at the EU level, also prescribe rules and standards and use sanctions to enforce their compliance. On the other hand, the Agency's definition does not specifically refer to a central tenet of command and control, namely the permit (also known as licence or authorisation) which allows regulators detailed and ongoing control over an activity.[18]

A flurry of unfavourable reviews of the—at the time dominant—format of regulatory intervention led to 'command and control' turning into a negative label, one associated with rigidity, some form of a 'one-size-ought-to-fit-all' remedy. Indeed, some of the criticism is undoubtedly targeted at a caricature of the regulatory tool, rather than at the mechanisms actually employed in practice.[19] A more neutral approach may hence be found by referring to 'direct regulation'[20] or to 'command' systems versus 'economic incentive' systems. Stewart defines these respectively as follows:

> Command systems limit, directly or indirectly, the quantity of residuals that each actor may generate;
>
> [Economic incentive systems] establish, directly or indirectly, a price that must be paid for each unit of residuals generated, but leave each actor free to decide on the level that it generates.[21]

Changes in the regulatory landscape are not just linked to the passage of time. Through, inter alia, the empowerment of the information society, new players have entered the regulatory scene which were either absent in the heyday of command and control, or were at least an awful lot less organised and/or informed. These would include business (albeit that business is the

[17] glossary.eea.europa.eu/EEAGlossary.
[18] M Lee, *EU Environmental Law* (Oxford, Hart Publishing, 2005) 183.
[19] See, similarly, *ibid*, 183 ff.
[20] *Ibid*, 184.
[21] R Stewart, 'Economic incentives for environmental protection: Opportunities and obstacles' in R Revesz, P Sands and R Stewart (eds), *Environmental law, the economy and sustainable development* (Cambridge, Cambridge University Press, 2000) 174.

one non-governmental branch of regulatory actors with a fairly established role in decision-making), civic society, and national and international regulatory agencies. The advent of greater scrutiny by non-government actors arguably does not just enrich (or complicate) the regulatory process from a practical point of view. Increased participation by these actors represents a value judgement: in democratic societies, one *wants* these stakeholders (a more fanciful term than the previously used 'interested parties'[22]) to be involved in the regulatory process. Within the context of better lawmaking generally, the European Commission has called this an ethical requirement:

> The advent of a democratic conscience is strengthening the need for accountability and proportionality in the way powers vested in the European institutions are exercised. This need is expressed more especially in transparency, clarity and the willingness to stand up to scrutiny. What we have here, then, is a veritable ethical requirement.[23]

Thus, better lawmaking generally, and regulatory innovation in particular, are under the influence of what I would like to call the 'Aarhusisation' of international and national regulatory/environmental law: the process by which interested parties, in particular ordinary citizens, are empowered to have a greater say in decision-making through the three pillars of access to information, effective participation, and access to courts (including locus standi). The current focal point of this process is the UN/ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[24]

III. A TYPOLOGY OF REGULATORY INSTRUMENTS IN THE EU—IN THE INSTITUTIONS' OWN WORDS

Given the more than considerable attention paid by the European institutions to 'new' instruments of environmental policy, one would imagine EU documents on the matter clarifying the distinction between what the EU seemingly regards as 'old' instruments of regulatory policy, and those which it seeks to promote as 'new' instruments. In its 2007 Green Paper on market-based instruments for environment and related policy purposes, the Commission

[22] According to the European Commission, 'an interested party is an individual or group that is concerned or stands to be affected—directly or indirectly—by the outcome of a policy process; or represents the general interest of groups concerned by such an outcome, within and outside the EU': COM(2002) 713, Communication from the Commission on the collection and use of expertise by the Commission: Principles and Guidelines, n 4.

[23] Communication from the European Commission on European Governance: Better lawmaking COM(2002) 275.

[24] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1999) 38 *International Legal Materials* 517. See also the discussion of this Convention by Hilson, ch 12 in this volume.

equated 'economic' with 'market-based instruments' (MBIs), and lists indirect taxation, targeted subsidies and tradable emission rights by way of example:

> The EU has increasingly favoured economic or market-based instruments ('MBI')—such as indirect taxation, targeted subsidies or tradable emission rights—for such policy purposes[25] because they provide a flexible and cost-effective means for reaching given policy objectives.[26]

In this document, the Commission hints that there are other MBIs, in particular referring to the Common Agricultural Policy, without however identifying what these other MBIs are. Indeed, the only other MBI mentioned in the Green Paper is the category of deposit-refund systems. Further on in the document, the Commission identifies a number of what it calls 'standard types of MBI', listing these as taxes/charges/fees, subsidies and tradable permits.[27] 'Charges' are identified as 'usually a payment in return for a clearly identified service or cost'.[28] However, there is no indication of what the Commission understands by 'fees'.

The internalisation of negative externalities lies very much at the core of the approach of the 2007 Green Paper:

> The economic rationale for using market-based instruments lies in their ability to correct market-failures in a cost-effective way. Market failure refers to a situation in which markets are either entirely lacking (e.g. environmental assets having the nature of public goods) or do not sufficiently account for the "true" or social cost of economic activity. Public intervention is then justified to correct these failures and, unlike regulatory or administrative approaches, MBIs have the advantage of using market signals to address the market failures.[29]

In a 2002 follow-up to the July 2001 White Paper on European Governance, the Commission had instead focused more specifically on the 'better lawmaking' elements of the governance efforts, announcing three specific Communications:[30] an Action plan for simplifying and improving the regulatory environment; Promoting a culture of dialogue and participation; and a Systematic approach to impact assessment by the Commission.

Concerns about and interest in EU lawmaking, and better EU lawmaking, arguably always fall into one of three categories:[31] the perhaps rather

[25] The policy purposes meant are addressing climate change internally and on an international scale, promoting environmental sustainability, reducing dependence on external resources and ensuring the competitiveness of European economies, halting loss of biodiversity, preserving natural resources that are under pressure and protecting public health: Green Paper on market-based instruments for environment and related policy purposes, COM(2007) 140, 2.

[26] *Ibid*.

[27] *Ibid*, 14.

[28] *Ibid*, 5.

[29] *Ibid*, 4.

[30] Communication on European Governance, above n 23.

[31] ACM Meuwese, *Impact assessment in EU lawmaking* (Alphen a/d Rijn, Kluwer, 2008) 19, quoting KA Armstrong, *Regulation, deregulation, re-regulation* (London, Kogan Page, 2000).

more legal-technical problems concerning the 'juristic' (a rather horrible but often-used term) or 'drafting' quality of measures; concerns about the economic impact of legislation on competitiveness; and doubts as to the underlying constitutional legitimacy of regulation. The latter category, constitutional legitimacy, is a near-permanent current in any EU initiatives on regulation, and one which evidently ties directly into the 2001 White Paper.

The potential for theorisation of the EU's regulatory strategy is extraordinarily high, and no doubt of great merit to the study of institutional dynamics in an organisation such as the EU. However, review of both the Commission's official writings on regulation, and the academic cottage industry that has sprung up around it,[32] tends to lead to rather more theoretical fog than presumably intended. Eventually, I have found the most complete, if somewhat extensive, categorisation of regulatory innovation in the EU, to have been provided by the, now rather ironically archived, European Commission webpages on governance.[33] These provide for the following governance/regulatory matrix in the EU:

The eight pillars of European Governance
1. The White Paper and its implementation
2. European public space
3. Better lawmaking
   - — Participation of civil society
   - — EU policy impact assessment
   - — Use of expertise
   - — Decentralisation through agencies
   - — Convergence of national policies: the open method of co-ordination
   - — Application of Community Law
4. Geographic decentralisation: the regional and local dimension of the European Union (multi-level governance)
   - — Permanent dialogue with associations of regions and cities
   - — Target-based tripartite agreements and contracts
5. A networked Europe
6. Economic governance
7. Corporate governance
   - — Corporate social responsibility
8. Refocusing policies and institutions
   - — European governance and the Constitution
   - — Committee procedures[34]

[32] Of which one could, I suspect, call the current chapter a product.
[33] ec.europa.eu/governance/governance_eu/index_en.htm, archived since 31 July 2007.
[34] Table based on the European Commission's webpage on European Governance, available at: ec.europa.eu/governance/governance_eu/index_en.htm.

I shall address each of these in turn to highlight the main characteristics of the regulatory landscape in the EU.

IV. THE EIGHT PILLARS OF EUROPEAN GOVERNANCE

Book of Proverbs, 9:1:

'Wisdom hath builded her house, she hath hewn out her seven pillars'.

The eight pillars of European governance, listed by the European Commission in its follow-up to the 2001 White Paper on European Governance, are a useful means of categorising the practical consequences which the EU attaches to the different implications of the governance debate in the European Union. Indeed, if one counts the first one ('the White Paper and its implementation') as superfluous, since all of the various sub-headings are truly part of the implementation of the White Paper, there are really seven pillars of European Governance—surely a reference to TE Lawrence's autobiography.[35]

The quality of Community legislation had already received conceptual attention in Brussels at the time of the Internal Market—1992 project;[36] however, much of the work at the time was designed to improve the legal drafting of Community legislation. Especially in view of the huge amount of minimum harmonisation Directives which were required to complete the Internal Market project, streamlined and well-drafted Community law was an absolute necessity.

Not surprisingly, it is the legislative drafting at the level of the European Commission which is likeliest to have an immediate impact on the eventual legislation. This is the case by virtue of the Commission having a near-exclusive power of initiative, especially in the Community pillar of the EU. Evidently, with the Council and the European Parliament having gained co-decision power across a wide array of Community policies, the impact of these institutions on the quality of legislation has likewise grown. This is especially the case where Parliament and Council make important amendments to the general structure or direction of the proposed legislation.[37] I now turn to consider each of the 'eight pillars'.

[35] TE Lawrence, *Seven Pillars of Wisdom: A Triumph* (London, Jonathan Cape, 1937).

[36] See, eg, J-C Piris, 'The quality of Community legislation: The viewpoint of the Council legal service' in AE Kellermann *et al* (eds), *Improving the quality of legislation in Europe* (The Hague, Kluwer, 1998) 25 ff.

[37] A case in point is the REACH Regulation, the cornerstone of the EU's new chemicals policy (Regulation 1907/2006, OJ 2006 L396/1, with a corrected (and much slimmer version) in OJ 2007 L136/3). It started out as a well-rounded proposal, from a legalistic point of view, but frankly ended up as a muddle, after the repeated interventions by Council and Parliament (which may well have been for good policy reasons—an issue beside the point for our purposes here).

A. The White Paper and Its Implementation

Listed as one of the headings of the European Commission's governance follow-up, this heading in essence regroups all the others, and its individual meaning is unclear.

B. European Public Space

The ambition to create a 'European space' is part of a wider attempt to broaden and enrich public debate on European issues. Although easily equated with a 'communications strategy', the creation of a public space is more than that. It aims to 'transform the citizens of the European Union into actors in the European political process'.[38] Within the context of the current chapter (which is less concerned with bringing Europe closer to its citizens, than the Commission's White Paper, evidently), the most pressing consideration is whether making the citizens 'actors' in the European political process adds an efficiency to regulatory design. The answer, in my view, is mixed.[39] Essentially, bringing Europe closer to its citizens arguably requires what one could call a 'Euroblogging' culture. The term 'blogs' in this sense is not to be read merely literally, but rather as a contemporary litmus test for real interest in a phenomenon. The (admittedly often self-confessed) influence of online blogs on American politics, for instance, is a tell-tale sign of the American public's committed interest in US politics, not at all paralleled by similar initiatives at the EU level (or perhaps even at the national level within the EU).

However, for a regulator it is not so much the *intensity* of public interest in the issue to be regulated which is relevant, but rather the *quality* of the intervention. In particular, a regulator would be most interested either in information which it does not yet possess or in gaining prior approval of a regulatory strategy by the regulated, so as to facilitate enforcement. Accountability is less of a self-serving goal of a regulator—however, it is one which, in today's governance society, many regulators will either commit to by themselves, or indeed will legally be required to do so.

Hence, for a regulator, and by extension for regulatory innovation, the goals of the 'European public space' are most relevant when they relate to the 'Aarhus rights'[40] of access to information, participation, and access to justice:

> These 'Aarhus rights', whether they derive from the Aarhus Convention itself, from domestic Aarhus-type legal provisions with an earlier pedigree, or from

[38] Report of Working Group on Broadening and enriching the public debate on European matters, June 2001, no official COM or other reference, available via: ec.europa.eu/governance/areas/group1/report_en.pdf, 5.

[39] Please note that the analysis here relates to the regulatory aspect of citizens' involvement only: citizens' involvement in Europe as a *political* project is largely a different debate.

[40] See n 24 above.

> parallel developments in the human rights field, will for some time continue to play a fundamental role in the development of the rule of law.[41]

—and, I would add, in the development of regulatory innovation.

C. Better Lawmaking

(i) Commission Review of the State of European Governance

In its review of the state of European governance, the European Commission listed six issues under the EU's 'better lawmaking' heading: the participation of civil society; EU policy impact assessment; the use of expertise; decentralisation through agencies; convergence of national policies; the open method of co-ordination; and the application of Community law. In the meantime, the 'better lawmaking' chapter of European governance is now generally referred to as 'better regulation',[42] with sometimes slightly different headings from the six below, but in general covering the same topics.

(a) Participation of Civil Society

Arguably, the participation of civil society in European policy-making ought to be looked at from two different angles. On the one hand, those with commercial interests in the development of EU regulation have more or less across the board and for a long time, found their way to the desks of European officials and Members of the European Parliament alike.[43] For this group, current exercises have focused on increasing efficiency, and on improving transparency and accountability. The challenge is different for that part of civil society which does not have commercial but rather more general interests in the development of European politics. They have for a long time (indeed one's intuition would be to use the word 'traditionally') suffered from a lack of financial resources[44] and, consequently, also the time and human resources, for them to be able comprehensively to follow up all relevant environmental, health and safety regulation in the EU.

[41] S Sec, '"Aarhus environmental rights" in Eastern Europe' in TFM Etty and H Somsen (eds), (2005) 5 *Yearbook of European Environmental Law* 21.

[42] See: ec.europa.eu/governance/better_regulation/index_en.htm.

[43] Although even business has complained of not having enough input into the regulatory process, in a 2006 Clifford Chance sample survey on (UK) Business and EU regulation, reproduced in S Weatherill (ed), above n 1, 405 ff.

[44] For example, unlike in the United States, almost all EU Member States lack a tradition of philanthropy, leaving most non-governmental organisations with limited financial resources to monitor and influence EU decision-making. Both at the EU level and in quite a few Member States, this either gives NGOs limited funds and hence typically a local impact only, and/or creates dependency upon government and EU funds (the perceived dependency often leads NGOs to refusing official funds).

(b) EU Policy Impact Assessment

> Proposals must be prepared on the basis of an effective analysis of whether it is appropriate to intervene at EU level and whether regulatory intervention is needed. If so, the analysis must also assess the potential economic, social and environmental impacts.[45]

The EU has a dedicated website for planned and completed impact assessments (IAs),[46] and one need only read a couple of them to realise the impact which (especially the more recent) IAs (must) have had in high profile dossiers such as REACH, the EU's flagship new chemicals policy. REACH is indeed often quoted as defining the moment when IAs matured at the EU level.[47]

There are of course some remaining issues in the use of IAs, including: (1) the use of IAs by agencies (see the further analysis on agencies below);[48] (2) the fate, scope and redirection of IAs as and when legislative proposals change direction (although a well-designed IA typically foresees various scenarios and the direction of the legislative process almost by default could go in any of the optional directions); (3) the level of input which the Commission in particular seeks from stakeholders (too great an emphasis on seeking input from those stakeholders is likely to rekindle the governance debate); (4) the availability of resources (or indeed the lack thereof); and (5) the interpretation of the results of such IAs.[49,50]

Some of the more uncomfortable critique suggests that IAs may have an in-built bias towards command and control techniques, at the expense of alternative forms of regulation.[51]

A specific instruction for cost-benefit analysis is included in Article 174 EC as one of the principles of EC environmental policy:

> 3. In preparing its policy on the environment, the Community shall take account of:
>
> — available scientific and technical data;
> — environmental conditions in the various regions of the Community;
> — *the potential benefits and costs of action or lack of action*;
> — the economic and social development of the Community as a whole and the balanced development of its regions. (Emphasis added)

[45] White Paper on European Governance, COM(2001) 428.

[46] See: ec.europa.eu/governance/impact/practice_en.htm.

[47] See, for example, John Cridland CBE, Deputy Director-General of the Confederation of British Industry (CBI), quoted by Meuwese, above n 31, 186.

[48] As agencies in the EU prima facie have less direct regulatory power than those in, for example, the United States, developments such as the use of IA are less of an issue than one might expect.

[49] For more details, see inter alia, Meuwese, above n 31, in particular 251 ff.

[50] Bear in mind Benjamin Disraeli's warning that '[t]here are three kinds of lies: lies, damned lies, and statistics' (attributed to Disraeli by Mark Twain: see M Twain (C Neider (ed)), *The Autobiography of Mark Twain* (New York, Harper Perennial Classics, 2000)).

[51] R Baldwin, 'Tensions aboard the enterprise' in S Weatherill (ed), *Better Regulation* (Oxford, Hart Publishing, 2007) 27 ff.

The 'benefits and costs' referred to in Article 174 evidently include both economic considerations and the environmental impacts of both action and inaction. The IAs reflect this, often with a much wider scope than purely environmental considerations. For instance, in the various REACH IAs the costs to human health of regulatory inaction formed a main driver in developing the legislation.

(c) Use of Expertise

The use of experts in EU decision-making is closely related to risk analysis decisions.[52] The title of the Working Group report, which helped prepare the White Paper's chapter on the use of experts, rather neatly summarised the challenge: 'Democratising expertise and establishing scientific reference systems'.[53] This expert group identified seven aims which it suggested needed to be achieved to address the democratisation agenda: access and transparency; accountability; effectiveness; early warning and foresight; independence and integrity; plurality; and quality. In December 2002, a Commission Communication[54] developed these elements, setting out guidelines for Commission departments on how to obtain and use the advice of external experts as part of the consultation process leading to the formulation and application of Community policies, and describing the practical arrangements for applying these guidelines.

Of particular concern for the European Commission is the specific nature of the EU's risk analysis process. This puts the responsibility for the risk *management* part of the process[55] firmly in the hands of those with political authority (a feature which, many argue, lies at the core of the EU's firm belief in the precautionary principle as an important driver for risk management).[56] Hence, the lack of clarity as to *who is actually deciding*—experts or those with political authority[57]—is arguably of more immediate concern to European policy-makers than it is to regulators in other parts of the world. In those jurisdictions which allow delegation of complete regulatory authority to agencies, notably the United States (evidently with some form of executive oversight), experts are part and parcel of the risk management decision. By contrast, as noted, the EU believes it should be up to accountable politicians to decide upon the desired regulatory response to scientific

[52] For more on risk analysis at the EU level, see G van Calster, 'Risk regulation, EU law and emerging technologies: Smother or smooth?' (2008) 2 *NanoEthics* 61.

[53] See: ec.europa.eu/governance/areas/group2/report_en.pdf, May 2001.

[54] Communication from the Commission on the collection and use of expertise by the Commission: Principles and Guidelines, COM(2002) 713.

[55] Risk management is the part of the risk analysis chain where one decides what the appropriate response ought to be to the scientific findings of the risk assessment stage. This may range from no action at all, via mitigating measures (such as restrictions of use), to a complete prohibition of a given substance or activity.

[56] See also van Calster, n 52 above.

[57] See n 45 above.

findings (or lack thereof), thereby leaving the experts firmly out of the risk management decision. This requires a clear distinction between the experts and the risk managers, a distinction which is often difficult to maintain.

(d) Decentralisation Through Agencies

Although the Commission, in its governance review, listed agencies as seemingly the expression par excellence of decentralisation, in reality the protagonist of decentralisation at the EU level is quite simply the overall institutional set-up of the EU (a finding to which the Commission would certainly subscribe). As a consequence of the subsidiarity principle, there is a general presumption in favour of the Member States as the best level for regulation. However, it is clear that the decentralisation element of the EU's set-up is not part of the regulatory design element of the governance exercise, but rather a part of the more general policy objective to bring Europe closer to its citizens.

'Agencies', on the other hand, are very clearly what the Commission has in mind when reviewing decentralisation. The 'usual suspects' among the EU's agencies, are, according to a 2001 listing[58] (more such agencies have since been created): *Agencies serving the internal market* (a regulatory model), such as the Office for Harmonisation (Alicante), the Community Plant Variety Office (Angers) and the European Agency for the Evaluation of Medicinal Products (London), all of which perform quasi-regulatory functions (for example, the publication of trade marks and the issuing of authorisations to release products into commercial circulation) and provide services to sectors of industry; *The observatories* (a monitoring model), which category comprises the European Environment Agency (Copenhagen), the European Monitoring Centre for Drugs and Drug Addiction (Lisbon) and the European Monitoring Centre on Racism and Xenophobia (Vienna), whose main task is to provide objective, reliable and comparable information, acquired through a network of partners; *Agencies promoting social dialogue* (a co-operation model), namely the European Centre for the Development of Vocational Training (Thessaloniki), the European Foundation for the Improvement of Living and Working Conditions (Dublin), and the European Agency for Safety and Health at Work (Bilbao), which have a tripartite management board designed to ensure full representation of the social partners (employers and labour) as well as the Member States and the Commission, reflecting openness to civil society; and, finally, *Agencies operating as subcontractors to the European public service* (an executive model), which are the European Training Foundation (Turin), the Translation Centre for Bodies in the EU (Luxembourg) and the Agency

[58] XA Yataganas, 'Delegation of Regulatory Authority in the European Union: the Relevance of the American Model of Independent Agencies' NYU Jean Monnet Papers Series, 2001/1. The list reproduced in the text here is indicative and not exhaustive.

for the Reconstruction of Kosovo (Thessaloniki/Pristina), now of the whole of Yugoslavia—the first of these is a technical assistance office, the third has more extensive management powers, and the second provides all the translations required by the agencies.

'Agencies' may usefully be denoted as being decentralised organisations which assist the executive branch of government (as opposed to the legislative and judicial branches). It is noteworthy, however, that in a more recent approach to agencies, the legislative branch often calls upon them to assist in the drafting of legislation). More formally, one could refer to them as a 'variety of organisations … that perform functions of a governmental nature, and which often exist outside the normal departmental framework of government'.[59] The European Commission has defined 'regulatory agencies' as 'agencies required to be actively involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector'.[60]

The EU has been somewhat slow, rightly or wrongly, in turning increasingly to the creation of regulatory agencies in a variety of fields. It has also been more reluctant to delegate regulatory powers to these agencies.[61] The United States, by contrast, not only has more happily created many more such agencies, but its laws and courts also are more accepting of the extent of the delegation of regulatory powers to such agencies.

Another contrasting note with the United States, and crucial from the point of view of the governance and regulation debate, is the absence of one overall regulatory regime for agencies in the EU. The Commission cites the widely differing tasks and responsibilities assigned to these European agencies as a stumbling block for the successful introduction of such an overall regime,[62] although it has presented such a general framework for what it calls 'executive agencies' (that is to say, those responsible for purely managerial tasks) as opposed to 'regulatory agencies'. These regulatory agencies are required to be actively involved in the executive function of the Commission by enacting instruments which help to regulate a specific sector.[63]

A particular concern within the EU is, as EU readers will probably be aware, the stifling approach of the European Court of Justice. By contrast with the United States, the European Court of Justice (ECJ) has held, in a long line of case law, that agencies cannot in principle be entrusted with

[59] G Majone, 'The credibility crisis of Community regulation' (2000) 44 *Journal of Common Market Studies* 273, 290.

[60] Communication of 11 December 2002 on the operating framework for the European regulatory agencies, COM(2002) 718, 4.

[61] D Geradin, 'The development of European regulatory agencies: What the EU should learn from American experience' (2005) 12 *The Columbia Journal of European Law* 1.

[62] Communication from the Commission on the operating framework for the European regulatory agencies, COM(2002) 718, 4.

[63] *Ibid*, 2–3.

powers that go beyond those for which they do not require discretionary assessment.[64]

In the present author's view, the patchwork of the institutional set-up, powers and procedures of these agencies, together with their differing degrees of autonomy and decision-making power, continues to impede their proper governance. In turn, this renders the oversight of these agencies rather opaque and difficult, leading to suspicions among interested parties and observers alike, and ultimately to decreased efficiency in the involvement of the agencies.

(e) Convergence of National Policies: the Open Method of Co-ordination

As part of the process of preparing the White Paper on Governance, a Report produced by the Commission had tabled recommendations on this subject.[65] In particular, the Report provided a definition and a generally positive—albeit cautious—review of the various cases in which the Member States had used the 'open method of coordination' as a means of achieving convergence between certain national policies. The White Paper set out the circumstances for using the open method of co-ordination: first, using the open method of co-ordination must not dilute the achievement of common objectives in the Treaty or the political responsibility of the institutions; secondly, it should not be used when legislative action under the Community method is possible; and finally, it should ensure overall accountability in line with the following requirements: (i) it should be used to achieve defined Treaty objectives; (ii) mechanisms for reporting regularly to the European Parliament should be established; (iii) the Commission should be closely involved and play a co-ordinating role; and (iv) the data and information generated should be disseminated widely and should provide a basis for determining whether legislative or programme-based action is needed in order to overcome particular problems highlighted.

The Working Group which had preceded the White Paper had identified two main areas where the 'open method of co-ordination' (OMC) appeared to be appropriate: namely, where the subject-matter is closely tied to culture and identity, and therefore harmonisation is unsuited; or where the systems operated in the Member States are so diverse that harmonisation would imply an effort disproportionate to the objective and results to be achieved.[66] As examples of the latter situation, the group cited employment and social protection.

[64] The *Meroni* doctrine of the European Court of Justice: Joined Cases 9 and 10/56, *Meroni e Co, Industrie Metallurgiche, SpA v High Authority* [1958] ECR 11.

[65] These two paragraphs quote from: ec.europa.eu/governance/governance_eu/nat_policies_en.htm.

[66] Report of working group on national policy convergence, June 2001 at: ec.europa.eu/governance/areas/group8/report_en.pdf, at 33–4.

For the present author, OMC, being a soft-law instrument, testifies to the typical challenges associated with regulatory innovation. Gradually, in a given sector, the boundaries of classic instruments become clear. These are, typically, direct regulation type instruments. However, in the specific case of OMC the limits are not so much a result of the inherent characteristics of the regulation, but rather of the institutional checks and balances of the regime from which they emanate—specifically, in the EU, the boundaries of the 'Community method' in areas which belong to the third and second pillars (justice and home affairs, as well as foreign policy and defence). In order to remedy the shortcomings of direct regulation, all types of soft-law instruments are employed, which, at least in the short term, are applauded as providing the answer to the aforementioned weaknesses. Fairly quickly, however, the cracks in the new alternative appear. These include: the adoption, by the innovative instrument, of some of the direct regulation instrument's characteristics, such as slow adaptation and long run-in periods; but also, and in my view importantly so given the governance agenda of the European Institutions, the fact that they by-pass normal systems of accountability.[67] As noted, however, in the particular case of OMC the rationale behind recourse to the alternative instrument is not so much replacing a rigid direct regulation instrument with a flexible and manageable (at least in the short term) soft-law instrument, but rather Member States' recognition of the added value of a co-ordinated approach in a given area, coupled with a reluctance (mainly for sovereignty reasons) to have the standard Community method intervene. In conclusion, the rather peculiarly named Open Method of Co-ordination may be here to stay; indeed, the Lisbon Treaty[68] expands OMC (not necessarily in so many words), especially in the field of economic convergence.

In general, the Commission is not necessarily a big fan of OMC. Indeed, this leg of the governance programme is not one which has received much follow-up. The main reason for that is undoubtedly the ultimately entirely political nature of the co-ordination approach: as the sectors which are being used as examples indicate, co-ordination would seem to be the preferred method for Member States to co-operate to some degree in areas which are seen as very closely linked to national sovereignty, culture and tradition, hence ruling out, in the minds of national politicians, intervention at the European level (except, of course, in those areas of national sensitivity which have already been assigned to the EU).

[67] See these and other arguments in C Sabel and J Zeitlin, 'Active welfare, Experimental governance, and pragmatic constitutionalism: The new transformation of Europe' (2003), unpublished paper presented at the International Conference of the Hellenic Presidency of the European Union, 'The Modernization of the European Social Model and EU Policies and Instruments', Ioannina, Greece, 21–22 May 2003, cited inter alia by D Chalmers, *et al*, *European Union Law* (Cambridge, Cambridge University Press, 2006) 139, and J Bohman, 'Constitution Making and Democratic Innovation: The European Union and Transnational Governance' (2004) 3 *European Journal of Political Theory* 315.

[68] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007 C306/1.

(f) Application of Community Law

The correct, timely and efficient application of European law has evidently always been a focus of the European institutions. Indeed, through (inter alia) the workings of the subsidiarity principle, the first and foremost port of call for the application of European law, and for signalling incomplete, late or wrong application, has always been European citizens (in the broad sense of the word, including individuals as well as undertakings).

The crucial element of concepts such as direct effect and supremacy is that they, to varying degrees, by-pass national authorities in the application of Community law. With the ECJ playing a central role, Community law has a direct bearing upon a great number of national proceedings and, crucially, national proceedings form the backbone of application of Community law. While Commission intervention, through its role as the 'guardian' of the Treaty, is often very visible and high-profile (especially in those cases where it requests the ECJ to impose a fine on a recalcitrant Member State for continuing to fail to implement a specific piece of legislation),[69] again, the enforcement of Community law would fare a lot worse were it not the for the possibility of direct recourse to European law by individuals.

The role of individuals in ensuring the enforcement of EC law of course makes it even more crucial for those laws to be as precise and accessible as possible. It also calls for mechanisms to improve the implementation and enforcement rates of the Member States. Much of the better regulation agenda relates directly to this challenge: the better the regulation, the easier/better/more straightforward and controllable its implementation. The Commission's work on the issue of the application of EC law within the context of EU governance and the White Paper has focused more particularly on often very procedural issues surrounding access to the ECJ, the potential for injunctions and fines.[70]

(ii) Additional Elements of Better Lawmaking in the 'Better Regulation' Exercise

Whilst the White Paper on Governance and its eight pillars have no longer been subject to follow-up by the Commission in an umbrella approach,[71] the separate pillar of better lawmaking continues to form the subject of a more conceptual methodology under the 'Better Regulation' label. This

[69] For eg, Case C-304/02 *Commission v France*, judgment of 9 December 2008, on the common fisheries policy.

[70] See, eg, Commission Secretary General, *Rapport sur l'application du droit communautaire par les États membres et sur le contrôle de celle-ci par la Commission, contenant des recommandations en vue de les améliorer du point de vue de la gouvernance démocratique européenne*, July 2001, available at: ec.europa.eu/governance/areas/studies/applicreport_fr.pdf.

[71] And indeed the relevant website archived.

had led, for example, to the continuation of the SLIM program,[72] and to increased codification and impact assessment exercises.[73]

D. Geographic Decentralisation: The Regional and Local Dimension of the European Union (Multi-Level Governance)

Geographic decentralisation ought to come naturally to the European institutions, given the inherent decentralisation in the EU's institutional set-up. In particular, the fact that all heads of powers that rest with the EU institutions are attributed means that any power which has not specifically been assigned to the EU remains with the Member States.

(i) Permanent Dialogue with Associations of Regions and Cities

The EU has a specific body which is the natural port of call for reviewing the potential for, and impact of, Community policies on a regional and/or local level: the Committee of the Regions. The Committee was established with the specific purpose of giving the local authorities a greater say in the decision-making process. However, everyone who is active on the Brussels scene will testify that the Committee of the Regions carries little or no weight in the decision-making process in the Union, with direct contacts and lobbying by the regions vis-à-vis Council, Commission and Parliament being the instruments of choice for the regions, especially those with considerable constitutional clout in their home Member State.[74] Hence, interestingly, the Commission's preparation for the regional authorities chapter in the White Paper and follow-up focused on achieving more effective, transparent and coherent consultation of the regions and local authorities as key interested parties in the standard consultation process of the Commission. That may seem odd, given the existence of the Committee of the Regions; however, it is also a realistic assessment of where best to hear the varying interests at the local and regional level.

(ii) Target-based Tripartite Agreements and Contracts

This heading in the Commission's governance exercise is a curious mix of jargon and detailed (but modest) policy initiatives. The lion's share of attention in the relevant sections of the review of the Commission's policy

[72] Commission Communication of 28 February 2000 on SLIM: Simplified Legislation for the Internal Market, COM(2000) 104, continued since.

[73] Third Strategic Review of Better Regulation in the European Union, COM (2009) 15.

[74] See also T Börzel, *States and Regions in the European* Union (Cambridge, Cambridge University Press, 2002) 73 ff; Chalmers *et al*, above n 67, 129; R McCarthy, 'The Committee of the Regions: An advisory body's tortuous path to influence' (1997) 4 *Journal of European Public Policy* 439.

is taken up by a very specific initiative under the name of 'solidarity fund', giving more or less direct financial and budgetary control to the local authorities in a limited number of specific Community-funded projects, typically in an urban environment. This is laudable enough, and undoubtedly of direct importance for the local residents; however, quite how this fits within the overall governance system remains unclear (notwithstanding the innovative feature of granting some form of direct control over EU funds to the local authorities).

E. A Networked Europe

This part of the governance follow-up is one which is either brilliant and far-sighted or simply much ado about nothing. The Commission's discussion on the subject is certainly rather thought-provoking and some of the characteristics identified by the relevant working group help to explain the difficulty in creating the transparency, coherence, completeness and inclusivity of consultation which the Commission clearly (and justifiably) craves as an underlying theme of the overall governance exercise.

The relevant Commission working group (which preceded the White Paper on Governance)[75] delivered probably the most theoretical paper of all of the preparatory groups: arguably, a paper with less of an immediate impact on the current administration of the European institutions than others, but perhaps identifying a number of undercurrents which could prove to be crucial for the governance and regulation debate in the long term. The group defined 'networking' by opposing it to two other forms of interaction within the EU Institutions, namely 'contract/market' and 'hierarchy'. *Contract/market*, the type of interaction most commonly used by all of us, is a type of organisation of interaction with a high degree of flexibility (provided, of course, that the market is really 'free', that is to say, without monopolies, captive customers, and so on), based on a specific, ad hoc contract (although hybrid forms such as repetitive transactions do of course exist). *Hierarchy* refers to an archetypal bureaucratic model, with many dependent partners and expanded rule-books, designed to address the day-to-day running of the organisation—under such a model, inflexibility reigns. By contrast, *Networks* are

> an intermediate form which associates in a structured but loose way independent parties each of which controls part of the resources and skills needed by all to achieve a common objective.[76]

[75] Report of working group, 'Networking people for a good governance in Europe', May 2001, available at: ec.europa.eu/governance/areas/group9/report_en.pdf.
[76] *Ibid*, 3.

Importantly, the main instrument for all participants (such as the European institutions, stakeholders, etc) in the network is information. The driving force for co-operation between the various members of the network is not the invisible hand of the market (contract/market model), nor the very visible hand of the hierarchy (hierarchy model), but rather the 'continuous handshake'.[77] The report lists a number of advantages of networks which, if materialised, would certainly bring serious advantages to European governance; however, there are many preconditions to these advantages being fully rolled out, which currently certainly are not fulfilled at the EU level.

The Working Group identified the following elements as distinct advantages of the network model as opposed to, in particular, hierarchy:

> [I]n hierarchies, members are bound by a detailed contract and very formalised processes dictate how higher levels interact with less powerful, lower ones. Networks associate more informally, based on common objectives, complementary resources and skills. Relationships occur for mutual benefit and are based on trust. Networks tend to operate by consensus between partners for whom information is the main [instrument];
>
> provided that objectives have been well defined and are agreed by all members, networks permit quick access to trusted sources of information and reductions in controls. They are more efficient than forecast, negotiation or authority in the face of uncertain, changing, complex or very diverse situations;
>
> networks are resilient to failure of a member, whilst in hierarchies or pyramidal networks, lack of performance from a member at the top can block all those that are under him … In networks, skills of members tend to add complementing and supplementing each other, whilst in hierarchies individuals at the top make a difference, with the result that pyramids are conditioned by the absorption capacity, openness and creativity of top members;
>
> networks require reciprocity, but this can be postponed: not the visible hand of the hierarchy nor the invisible one of the market, but the 'continuous handshake'. In networks trust is built slowly through common work, but 'the books are kept open';
>
> hierarchical organisations can have a reinforced impact, with the decision of a single being enacted by many. They are easy to set-up or disrupt but they tend to be rather inflexible. In networks, individuals are enriched by their diversity, with the suggestion of a single being multiplied by many, if they are convinced by this suggestion. Networks are flexible for reacting rapidly to changing circumstances but they take time both to set-up or to dismantle;
>
> networks tend to be gender neutral as more of the nodes, be it a person or an organisation can propose their norms, values and cultural characteristics. It also appears that women rise easier to executive posts when managing networks (where

[77] T Weil and F Durieux, 'La gestion de l'innovation en réseau', Rapport to ANRT, 2000, cited in Report of working group, 'Networking people for a good governance in Europe', above n 75.

trust building and team animation are required) than in pyramids, where power relationships dominate.[78]

The group identified four major existing network types within the European Union, characterised by their function. First, there are networks for Information and Assistance to citizens and organisations on Commission policies or programmes: Euro info centres are an example of this. These networks typically co-function as national information and assistance centres, and their loyalty to the EU 'cause' (or at the very least their giving priority to the EU) may sometimes be questionable. Often, it is also a challenge to maintain supervision and common principles among all the various networks. On the other hand, the fact that these networks do have pre-existing roots at the national level and their own local organisation make them very attractive networks indeed (in view of the subsidiarity principle as well). Secondly, there are networks for consultation when defining or reviewing a policy or programme: as examples of these, the group cites the consultative forum for the environment and sustainable development, as well as the environmental impact assessment network and what it calls the 'Consultation of NGOs for Environmental Policy'. These are typically organised along specific subject-matter lines. One of the perceived advantages of these networks is what the group called the 'wider consultation than powerful Brussels based "lobbies"'—in my view, the group gets carried away when it suggests that these networks may at some point in the future be used for monitoring and, eventually, implementation. Thirdly, there are networks for implementing and adapting EU policies such as programmes or legislation: the most visible of these, as identified by the working group, are the Network of European Competition Authorities (ECN) and IMPEL, the network of national organisations implementing EU environmental policy. The main strengths of these networks are, arguably, the best practice method and their flexibility; on the downside, the transparency and accountability of these networks is often questionable. Moreover, as they go along, these networks tend to develop fairly rigid structures and organisational methods, hence doing away with some of their very initial advantages vis-à-vis hierarchy. Finally, there are networks for developing policies/policy-making (including regulation): these are composed of officially-appointed delegates of the Member States and may be found in particular in technical working groups (for example, TACs, or Technical Adaptation Committees) and standardisation bodies. The advantages and disadvantages of these networks are similar to those of the previous category: one gets great practical expertise in the room, but

[78] Report of working group, 'Networking people for a good governance in Europe', above n 75, 3–4.

accountability and transparency remain a serious concern, as does the tendency to incremental rigidity.

All in all, both the opportunities and challenges of networks in my view correspond very well to the advantages and pitfalls of what earlier in this chapter I termed the 'Aarhusisation' of regulatory law. The empowerment of stakeholders through information dissemination (both bottom-up and top-down) and activism on the basis of such information, in particular through networks, is an essential characteristic of modern regulatory law. However, although the immediate returns of Aarhusisation are evident, once those have been creamed off, then ensuring continued returns may require high maintenance. Regulatory innovation (for example, through networks) tends fairly quickly to adopt the mistakes and complications of the un-inventive regulation which it seeks to replace (inflexibility, questions of accountability, and so on). The preparatory work for this heading of the EU's governance agenda illustrates this last point very well. The 'limits' listed by the working group in its 'networks characteristics' table correspond more or less exactly to what are perceived as the weaknesses of the 'old' regulatory regime.[79]

F. Economic Governance

While evidently of crucial importance for the political future of the Union, the immediate impact of this heading of the governance exercise for the regulatory design debate would seem limited. In fact, the White Paper itself did not go into much detail on this issue. This contrasts with the attention given to economic governance in the subsequent exercise to draft a Constitutional Treaty, and in the Lisbon Treaty. Economic governance is not further discussed in this chapter.

G. Corporate Governance

Corporate social responsibility (CSR) is described as a concept '[w]hereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.[80] CSR effectively operationalises the concept of sustainable development at company level. Principle 3 of the Rio Declaration defines 'sustainable development' as follows: 'The right to development must be fulfilled

[79] *Ibid*, 6 ff.

[80] European Commission Green Paper, 'Promoting a European framework for Corporate Social Responsibility', COM(2001) 366, 6.

so as to equitably meet developmental and environmental needs of present and future generations'.

(i) Sustainable Development

The origin of the principle of sustainable development is well known, at least in its most visible format, as emanating from the World Commission on Environment and Development, better known by reference to its chair—Dr Gro Harlem Brundtland—as the *Brundtland* Commission. The Commission was asked by the United Nations in 1983 to address 'the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development'. Its work led to the definition of sustainable development as development 'that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[81] Although not all that evident from the *Brundtland* report itself, the sustainable development principle has for some time been broken down into a three-tier concept, encompassing ecological, social and economic development.

In international environmental law, however, sustainable development is (arguably) broken down into four constituent parts:[82] (1) the principle of *inter-generational equity*, which amounts to the need to preserve resources for the benefit of future generations; (2) the principle of *sustainable use*, which refers to a more immediate concern to use resources wisely, appropriately, rationally and prudently; (3) *intra-generational equity*, which implies the balanced use of the world's resources by the various parts of the world; and (4) the *integration* principle, which implies that environmental considerations are taken into account in economic and development objectives, and that development objectives are taken into account in deciding environmental projects.

The fourth element, which Sands has identified as being part of the principle of sustainable development, may seem somewhat uneasy. The way in which the integration principle is defined in international law is arguably too explosive or, alternatively, self-evident, depending on how one defines its true direction. If the integration principle 'simply' requires all of its constituent three elements to be included in concrete policy, then it amounts to nothing more than a tautology. If, on the other hand, it is more akin to the European Union's version of the integration principle,

[81] *Report of the World Commission on Environment and Development*, General Assembly Resolution 42/187, 11 December 1987 (United Nations 1987): see www.un.org/documents/ga/res/42/ares42-187.htm.

[82] P Sands, *Principles of international environmental law*, 1st edn (Manchester, Manchester University Press, 1995) vol 1, 198 ff.

then it would raise controversy. Article 6 of the Treaty on European Community (which is part of the EU set-up, itself a pillar structure), provides:

> Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3,[83] in particular with a view to promoting sustainable development.

Article 152 EC includes a similar integration provision for public health considerations, as does Article 153 EC for consumer protection. However, the integration principle for environmental protection arguably has the trappings of hierarchy attached to it. Whilst the integration principles for public health and consumer protection are included in their specific titles within the EC Treaty, the integration of environmental protection is included in the overarching '*Principles*' Title, to which it was promoted from having previously been included in the environmental Title only. This apparently 'higher' place in the pecking order for environmental protection, whilst not suggesting an unquestionable priority for environmental issues,[84] does suggest that environmental protection has something of a higher calling amongst the EC's objectives.

Such a higher status for environmental protection would be a non sequitur in the current understanding of the principle of sustainable development in the international legal order. In that sense, the tautological reading of the integration principle suggested above may well have its merits. Indeed, especially in the 1990s, the principle of sustainable development was often understood in a condensed meaning. Politicians and international negotiators alike (let alone the public at large) effectively equated sustainable development with environmental protection. This led to an explosion in international environmental treaties in the 1990s, and eventually to a re-orientation at the 2002 Johannesburg Summit on sustainable development.[85] The Action Plan adopted at the Johannesburg Summit, under pressure from developing countries, firmly took the more or less exclusive focus on environmental protection, as had occurred during the 1990s, back to the three-pillar approach as initially intended.[86]

[83] Art 3 EC lists the activities which the EC shall develop in order to reach the Community's overall objectives, which are included in Art 2 EC.

[84] See thorough analysis in, eg, N Dhondt, *Integration of environmental protection into other EC policies* (Groningen, Europa Law Publishing, 2003) and H Vedder, *Competition law and environmental protection in Europe—Towards Sustainability?* (Groningen, Europa Law Publishing, 2003).

[85] Called 20 years after the 1992 Rio de Janeiro conference, which can rightly be seen as the cradle of a large part of current international environmental agreements.

[86] See Report of the World Summit on Sustainable Development, Johannesburg, South Africa, A/CONF.199/20, available at: daccessdds.un.org/doc/UNDOC/GEN/N02/636/93/PDF/N0263693.pdf?OpenElement.

(ii) Corporate Social Responsibility

Much as at State level, the intuition of many companies is to focus on the economic leg of sustainable development, that is to say, at the level of the individual company, making as great a profit as possible. CSR aims to widen the vision of companies so as to ensure a triple dividend, or a so-called triple bottom-line,[87,88] also known as 'people, profit, planet'.[89] In a typical discussion of CSR, the social or 'people' leg of the exercise is often underscored by suggesting that good people management (in particular of employees) fairly immediately contributes to the profit of the company, as a result of the higher output from a contented workforce.[90] Attention to environmental issues would seem to have less of an immediate appeal or, indeed, return, although there are of course exceptions such in areas such as raw materials and energy savings.[91]

A perennial discussion surrounding CSR, and at least a partial explanation for the European Commission's doubts as to whether to approve much of a formal role for the Institutions in regulating CSR, is the *invisible hand* argument taken from Adam Smith's *An enquiry into the nature and causes of the wealth of nations*:

> As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which

[87] A phrase often attributed to John Elkington: see his 'Towards the sustainable corporation: Win-win-win business strategies for sustainable development' (1994) 36 *California Management Review* 90.

[88] The Commission has defined the triple bottom line as 'the idea that the overall performance of a company should be measured based on its combined contribution to economic prosperity, environmental quality and social capital': European Commission Green Paper on corporate social responsibility, above n 80, 26.

[89] Initially coined by/for Shell oil.

[90] See, eg, European Commission Green Paper on corporate social responsibility, above n 80, 7.

[91] Akin to the 'no regrets doctrine' at State level: in the United States, the 'no regrets doctrine' was developed by the Bush (Sr) Administration—and taken up by the subsequent Clinton administration—in response to early European action to combat climate change. Bush Sr argued that, in the face of uncertainty, rather than taking precautionary action which implies an often high degree of uncertainty, the US should only advocate taking measures which it would never come to regret. This would include, for instance, energy savings measures which, if climate change were proven a fad (or uninfluenced by human behaviour) would have had the certain, cost-effective benefit of saving energy and which, if climate change were proven true and man-influenced, would have been at least a partial response to the phenomenon.

> was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it.[92]

In this view, CSR is a distraction which at best is superfluous and at worst harmful. It is *superfluous*, so this argument goes, because the *invisible hand* theory teaches us that a company, in seeking profit, adds the most value to the welfare of the nation, thus allowing that nation to adopt a more all-inclusive social and environmental policy (and hence squaring the sustainable development circle). Moreover, any immediately pressing social and environmental issues can be regulated by law, and subsequently be obeyed by the relevant companies: in other words, the environmental and social effects of economic activity ought to be dealt with by direct regulation, subsequently to be adopted by companies. It is potentially *harmful*, so the same theory goes, because CSR gives an unregulated publicity platform to companies who may not always genuinely care about either the environment or the social impact of their business. Moreover, opponents of CSR question the legitimacy and accountability of captains of industry who represent the international business community, waving the CSR banner at such international summits as the 2002 World Summit on Sustainable Development.

The Commission's 2001 Green Paper on CSR focused on the social policy leg of CSR and aimed in particular at creating partnerships with industry (with special attention given to small and medium-sized enterprises), so as to bring greater transparency and to increase the reliability of evaluation and validation.

H. Refocusing Policies and Institutions

(i) European Governance and the Constitution

The 2004 Rome Treaty establishing a Constitution for Europe—which, readers will recall, was eventually voted down by Dutch and French voters and subsequently replaced with the Lisbon Treaty[93]—contains quite a few references to good governance, which are either too general to have a real impact on the subject-matter of this chapter, or are not new and discussed elsewhere.

[92] A Smith, *An enquiry into the nature and causes of the wealth of nations* (first published 1776) Book 4, ch 2.

[93] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007 C306/1.

Examples of governance-related provisions in the draft Constitution included:[94]

— Two of the treaty's provisions use, for the first time in EU primary law texts, the concept of governance (good governance) at EU level (Article I-50(1)) [Lisbon: Article 15] and at global level (Article III-292(2)(h)) [Lisbon: Article 21(2)(h)]:
  – Article I-50(1): 'In order to promote good governance and ensure the participation of civil society, the Union Institutions, bodies and organisms shall conduct their work as openly as possible'.
  – Article III-292(2): 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order: h) to promote an international system based on stronger multilateral cooperation and good global governance'.
— Article I-3 ('The Union's objectives') [Lisbon: Article 3] says in para 3 that 'The Union shall ... promote economic, social and territorial cohesion, and solidarity among Member States'.
— Article I-5 [Lisbon: Article 4(2)] contains a clause guaranteeing respect for the constitutional structure of each Member State, 'inclusive of regional and local self-government'.
— Article I-23(1) ('The Council of Ministers') [no longer present in the Lisbon Treaty] required the Council to 'jointly with the European Parliament, enact legislation, exercise the budgetary function and carry out policy-making and coordinating functions, as laid down in the Constitution'. This is linked to Article I-37(2) ('Implementing acts'), which states that 'Where uniform conditions for implementing binding Union acts are needed, those acts may confer implementing powers on the Commission or, in specific cases duly justified and in the cases provided for in Article 40, on the Council'.
— Article I-46 [Lisbon: Article 10] enshrines the principle of representative democracy, while Article I-47 [no longer present in the Lisbon Treaty] introduced the principle of 'participatory democracy' in EU primary law texts.
— Article III-285 [Lisbon: Articles 6, 74, 76, 197 *ff*] introduces, in line with the White Paper on European Governance, the concept of administrative co-operation among the Member States in respect of implementing Union law.
— The Protocol on the principle of subsidiarity [Lisbon: Protocol No 2] makes provision for wide-ranging consultation before any legislative act is adopted, with the possibility of taking into account the regional and local dimension of the action envisaged. The Protocol states that,

[94] ec.europa.eu/governance/governance_eu/con_gov_en.htm.

for each European framework law, there should be a 'subsidiarity statement' in which the Commission appraises the regulatory and financial implications of the framework law for local and regional authorities.

(ii) Committee Procedures

The 'committee' heading of the EU's governance policy may at first sight look like a heading for 'anoraks', or at least EU institutional geeks. Readers should be aware that it is not. Committees, and the satellite *über*-jargon of 'comitology', 'represent one of the European Community's major constitutional fault lines'.[95] National law typically empowers the executive to adopt decrees, or executive orders or similar instruments, designed to enable practical or technical updates to legislation, or to provide the legislation with the kind of detail that is needed to ensure its implementation. At the national level, accountability for the executive evidently comes with elections: should Government trespass on Parliament's prerogatives, this can be turned into an election issue and hence the government will (or at least should) be judged on its democratic merits. At the European level, however, the Commission is not subject to that type of democratic control; moreover, the workings of the comitology process effectively place the most democratic of the EU's institutions, the European Parliament, outside of the equation.[96] Comitology is the general process by which the Council of Ministers, which represents the national interests, requires the Commission to co-operate with national experts (typically civil servants) in committees when adopting executive decisions needed to put legislation into practice. While the arrival of the co-decision procedure[97] somewhat legitimised this procedure from the democratic point of view (rather than the Council alone instructing the Commission to adopt executive decisions), in fact the procedure remained highly exclusionary vis-à-vis the Parliament.[98] Indeed, comitology proceedings inherently take place between national civil servants and the Commission. A 2006 amendment[99] to the 1999 core Comitology Decision[100] has now introduced an option (the 'Regulatory Procedure with Scrutiny')[101] which has increased the say of Parliament in the proceedings

[95] M Westlake, *The Council of the European Union* (London, Cartermill, 1995) 338.

[96] See, eg, A Hamann and H Ruiz Fabri, 'Transnational networks and constitutionalism' (2008) 6 *International Journal of Constitutional Law* (*ICON*) 481, 503.

[97] By which the European Parliament, as the term implies, co-decides legislation together with the Council, and hence was promoted to become a true part of the legislative branch of the European Community.

[98] See n 96 above.

[99] Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 2006 L200/11.

[100] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L184/23.

[101] The regulatory procedure with scrutiny allows the legislator to oppose the adoption of draft measures where it indicates that the draft exceeds the implementing powers provided

of Committees—without, however, making Parliament a partner as a matter of course in the exercise of delegated power.

V. CONCLUSION

As discussed, there is both a considerable body of official Commission documentation on regulation and an academic cottage industry that has sprung up around it, and this chapter undoubtedly does not do all of the issues justice. Rather, it has attempted to summarise the initiatives on regulatory innovation as kick-started by the White Paper on Governance, and to map the current state of each of these initiatives. In the end, however, I would have to agree with Jacobs AG[102] that perhaps a substantial part of the debate on regulatory reform amounts to no more than a storm in a teacup. Undoubtedly, there have been mechanisms which have either corrected some instruments traditionally used in regulation (for example, better and/or more transparent use of experts) or added a useful new layer (for example, impact assessment). However, perhaps overall the regulatory design at the EU level may not require drastic remedies at most stages. Rather, over and above a slim number of targeted remedies, the only real solution to the regulatory fog may be a combination of acceptance—EU regulation is never going to reach Mickey Mouse levels, but which national regulation does?—and deregulation.

Is there indeed a need for fundamental reform?[103] Practice shows that, often, the most effective measures in regulatory improvement are not driven by theory or conviction. For instance, following the 'big bang' of EC enlargement in May 2004, Commission departments were instructed quite specifically to produce shorter documents in order to keep down translation costs: a standard length of not more than 15 pages for communications and explanatory texts was specified (the pre-accession average was 37 pages).[104] The cynics among us may argue that this alone has done more to improve regulatory design in the EU than many grand exercises before it.

for in the basic instrument, or that the draft is incompatible with the aim or the content of that instrument or fails to respect the principles of subsidiarity or proportionality. See, eg, G Schusterschitz and S Kotz, 'The comitology reform of 2006: increasing the powers of the European Parliament without changing the treaties' (2007) 3(1) *European Community Law Review* 68.

[102] FG Jacobs, 'The quality of Community legislation—What is to be done?' in AE Kellermann *et al* (eds), *Improving the quality of legislation in Europe* (The Hague, Kluwer, 1998) 13, 14.

[103] *Ibid*.

[104] See Commission Memo 05/10, of 13 January 2005, available via RAPID.