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## GOOD ENVIRONMENTAL GOVERNANCE IN THE EU: LESSONS FROM WORK IN PROGRESS?

*'Whereas previous environmental measures tended to be prescriptive in character with an emphasis on the 'thou shalt not' approach, the new strategy leans more towards a 'let's work together' approach.'*  
(Fifth Environmental Action Programme, 1993)

### 1. Introduction

The leading question in this book is to ascertain whether the notion of 'European good governance' offers operational parameters for policy practice and for institutional relations within the EU, between the EU and its member states, and between European governments and European civil societies. This contribution is especially concerned with the question of whether the concept of good governance is relevant to European Environmental Law and, if so, in what sense and to what extent.

#### 1.1. *Relevance of the White Paper*

The White Paper calls for a renewal of the 'Community method' by advocating less of a 'top-down approach and an expansion of its policy tools with non-legislative instruments'.<sup>1</sup> This approach could well have a bearing on environmental policies as we find that new instruments such as subsidies, taxation and tradable pollution rights, as well as gentlemen's agreements, benchmarking and auditing are being introduced within this sector.<sup>2</sup>

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<sup>1</sup> White Paper, p. 4 (see also p. 8).

<sup>2</sup> Note the Fifth Environmental Action Programme (EAP), which will be discussed later in this contribution.

The White Paper presents five underlying principles of good governance: openness; participation; accountability; effectiveness; and coherence. Again, one can well imagine that these principles are relevant to environmental policies. Openness and participation, for instance, relate to the Directives on public access to information on the environment,<sup>3</sup> on environmental impact assessment (EIA)<sup>4</sup> and on integrated pollution prevention control (IPPC)<sup>5</sup> and the regulation on the European Environment Agency.<sup>6</sup> Likewise, the principle of Coherence has a bearing on article 6 EC, which states that 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies (...).'

## 1.2. Focus on Legal Policies

All in all, a sufficient basis for further analysis. In this contribution the analysis will focus on the choice of legal policies in environmental law. That is to say on the specific choice of and the (possible) guidelines in the use of (binding) legal instruments. This objective requires research to be conducted into the (possible) match between the Commission's 'principles of good governance', on the one hand, and the legal cornerstones of and existing legal policy practices in environmental law in Europe, on the other.

With regard to 'legal cornerstones' we will focus on relevant *primary* EC law, such as the provisions of article 2 ('... a high level of protection and improvement of the quality of the environment'), article 3 ('A policy in the sphere of the environment'), article 6 (the aforementioned integration principle), article 174 (objectives, aims, principles, relevant data and international agreements with regard to Community environmental policies), arts. 175 and 176 (concerning voting procedures and the right to retain or introduce unilateral measures), as well as the notion of sustainable development (art. 2 EC and art. B of the EU Treaty: '... and to achieve balanced and sustainable development,...'). One can imagine that these primary 'cornerstones' of EU environmental law offer a basis for a specified range of 'appropriate environmental policy-practices', in which certain legal instruments may or may not play a part (or only under certain premises or conditions).

Research into the relationship between the Commission's principles of good governance and the environmental legal policies that are being pursued or are presently in preparation, requires a closer look at the main environmental measures (such as directives) and programmes (mainly the EAPs) that have been put forward by the EC. Both horizontal or non-sectoral legislation and *key* vertical or sectoral legislation offer an interesting perspective as instances of legal policy making – especially with a view to what types of legislation are being used, such as framework directives, directives that leave room for implementation by co-regulation, resolutions, and white and green papers.

With these (above) approaches there is a focus on the EC level. Clearly the White Paper also includes the level of global, national, regional and local authori-

<sup>3</sup> Directive 2003/4, (2003) OJ L 41.

<sup>4</sup> Directive 85/337, (1997) OJ L 73/5 (amended).

<sup>5</sup> Directive 96/61, (1996) OJ L 257/26 (amended).

<sup>6</sup> (1999) OJ L 117/1.

ties.<sup>7</sup> It will not be possible to address all of these levels in this contribution, however. Because the success of legal policies primarily rests with implementation on the national level, a concise analysis will be presented of some trends in member states' environmental law in conjunction with legal policy choices on the Community level.<sup>8</sup>

### 1.3. *Perspective*

This contribution aims to present a broad view rather than an in-depth analysis of good governance and environmental law in Europe. The function of the contributions on substantive issues in this book is to determine whether the notion of good governance strikes a chord in these areas. This contribution is therefore not primarily meant to serve environmental law experts, but rather those members of the general legal public who are interested in matters of governance and law.<sup>9</sup>

The subtitle 'work in progress' might be taken to suggest that the principles and initiatives in the White Paper are still far removed from today's environmental policy making. It can also be taken to imply that environmental legal policy making has been a 'front runner' in opening up the perspective of good governance, albeit that the goals have not yet been achieved. Thus an analysis of environmental legal policy making could be interesting in the sense that it offers a view on how the principles of good governance function in practice and will hopefully serve to show which of the two interpretations holds true.

Firstly, however, we will look at how we must understand the notion of governance and indeed the notion of *good* governance, in order to fine-tune this article's contribution (see § 2). Then we will analyse the environmental legal cornerstones and legal policy practice (in § 3 to § 6) against the backdrop of the five main principles of good governance. In view of these findings a conclusion will be drawn (in § 7) as to whether we are witnessing a shift in European environmental governance and how the results of the analysis relate to the (possible) future framework of the EU draft constitution.

## 2. *Good Governance*

The aim of first addressing the notion of good governance in a more general way is to obtain a clearer picture of what we should be looking for when comparing the Commission's approach with the cornerstones and practices of environmental law in Europe.

<sup>7</sup> White Paper, p. 10.

<sup>8</sup> The observations in this regard are mainly derived from R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *Public Environmental Law in the European Union and the United States, A Comparative Analysis*, Kluwer Law International 2002, especially the chapter on comparative remarks.

<sup>9</sup> For this reason this contribution relies more heavily on the corpus of existing law ('that which is already there').

## 2.1. *The Principles of Good Governance*

The White Paper lists five principles underlying the notion of good governance (on the basis of democracy and the rule of law) at all levels of government:<sup>10</sup> 1) Openness, which primarily means active communication by the institutions and making governmental decisions more accessible and better understandable; 2) participation, mainly by ensuring wide involvement throughout the whole policy chain; 3) accountability, which entails that institutions and member states explain their actions and take the necessary responsibility for such actions; 4) effectiveness, requiring that policies are effective and timely, with clear objectives, an evaluation of their future and past impact, and are pursued at the proper level and implemented in a proportionate way; 5) coherence, necessitating that policies and actions cross the boundaries of sectoral policies, are performed with a clear view as to overall consistency and are more easily understood.

Furthermore, the White Paper suggests a number of proposals for change: 1) better involvement in shaping and implementing EU policies; 2) improving the quality and enforcement of EU policies; 3) a stronger link between European governance and the rest of the world; 4) refocusing the role of the institutions.<sup>11</sup>

## 2.2. *The Concept of Good Governance*

The White Paper offers little clarity concerning the concept of governance:

“‘Governance’ means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence’.<sup>12</sup>

The core element in governance seems to be the (closer) relationship between government and civil society. It takes a ‘joint venture’ between government and society to set and to implement policy targets. In this respect, according to the White Paper, ‘... , people have disappointed expectations but expectations nevertheless’. Therefore, ‘A better use of powers should connect the EU more closely to its citizens and lead to more effective policies.’ This reflects the current view of many democratic welfare states that the relationship between government and society has shifted from a top-down (vertical) relationship to a reciprocal (or more horizontal) one. In legal terms the primacy of collective decision making may still rest with governments, but the choice of policies, with regard to both the targets and the means of achieving such targets and their implementation, require a ‘closer harmony’ with those members of society that are mainly involved. Organizations representing civil society<sup>13</sup> mobilize people and support. Moreover, they can serve as an early warning system for political debate. The EU wants to encourage the development of civil

<sup>10</sup> Ibidem.

<sup>11</sup> White Paper, p. 11.

<sup>12</sup> White Paper, p. 8, n. 1.

<sup>13</sup> See for a definition, White Paper, p. 14, n. 9.

society and expects organizations representing civil society to follow the principles of good governance.<sup>14</sup>

### 2.3. *The Theory of Good Governance*

If the White Paper aims to renew of the Community method then we need to reflect somewhat more closely on the types of governance and the shifts therein as presented in the academic literature.

In a strategic study commissioned by the Netherlands Organisation for Scientific Research (NWO), entitled: '*Shifts in governance: Problems of Legitimacy and Accountability*', Van Kersbergen and Van Waarden presented an overview of the various strands in the academic governance discourse.<sup>15</sup> The authors discuss changes in governance concerning the fact that traditional ways of governing society, politics and the economy are changing. These changes take place in various forms in location, in capabilities and in styles of governance. It is interesting to note the different meanings given to the concept of governance in the literature, with a view to questions of legitimacy and accountability:<sup>16</sup> firstly, governance as in *good governance*, secondly, governance as in *Governing without Government*, and thirdly, governance in *Neo-Institutional Economics*.

*Good governance* in the 'World Bank view' refers to a sound and sustainable economic development, efficient government, effective civil society and a successful private sector, based on a participatory and liberal democratic tradition, equity, equality and the rule of law. In both the private and the public sector, we find strands of this good governance concept.<sup>17</sup>

*Governing without government* is often used with reference to global governance, considering the non-hierarchical relations between interdependent states. In networks theory we find this concept in relation to the idea of governance taking place in *pluricentric* networks, in contrast to *multicentric* (market) and *unicentric* (hierarchical/state) forms of governance, and also in *multi-level governance* (both in intrastate and/or international relations).<sup>18</sup>

*Neo-institutional economics* emphasizes that markets are not spontaneous social orders but are created and maintained by institutions laying down and enforcing the basic rules of the game and structuring incentives. Economic transactions are not only governed by governments but by all kinds of governance structures, whose mechanisms are subject to renewed study.

<sup>14</sup> White Paper, p. 15.

<sup>15</sup> K. van Kersbergen and F. van Waarden, *Shifts in Governance: Problems of Legitimacy and Accountability*, Paper on the theme 'Shifts in Governance' as part of the NOW's Strategic Plan 2002-2005, July 2001, p. 4-77.

<sup>16</sup> Ibidem, p. 15. Note that I have taken the liberty of regrouping their presentation in three main clusters.

<sup>17</sup> Under the heading of *corporate governance* and *new public management*.

<sup>18</sup> *Governing without governments* is also a key issue with reference to the ability of civil society, especially of local societies, to self-organize and self-manage their common pool resources and prevent their depletion.

#### 2.4. *Shifts?*

Unfortunately the White Paper does not explicitly link its definition of governance to any of the above strands of academic literature. In my view, however, the ‘World Bank view’ seems closest to the Commission’s objectives, especially with regard to the stronger involvement of citizens and civil society in EU policy making and policy implementation. This view also holds true, if we compare the White Paper proposals with some of the so-called ‘shifts in governance’, that is to say changes in types or styles, models or modes of governance, also presented in Van Kersbergen and Van Waarden’s article.<sup>19</sup>

Clearly, although the right to a judicial review is a baseline for the White Paper,<sup>20</sup> the ‘shift from governmental to court governance’ is not an objective of the White Paper. The same applies to the ‘shift from governance through public to governance through semi-public organizations’ – although the White Paper does propose an increase in the number of regulatory agencies. However, this is limited to areas where one single public interest is predominant and the choices available have little or no political content.<sup>21</sup>

Furthermore, the White Paper highlights the need to reinforce the ‘culture of consultation and dialogue’<sup>22</sup> and the Commission advocates that civil society must itself follow the principles of good governance,<sup>23</sup> if only to offer a basis for co-regulation.<sup>24</sup> A ‘shift from governance by public to governance by private organizations’, however, is not the objective of the White Paper, but, at its best, it aims to renew the Community method by ‘[...] the refocusing of the Institutions [...]’.<sup>25</sup>

For that same reason one could argue that a ‘shift from government to network governance’ does not seem to feature in the White Paper’s plans. Clearly the Commission’s objective of ‘renewal’ is not a project leading up to shared legal powers with civil society actors. Even co-regulation is proposed under the firm condition that ‘[...] a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is set in the legislation.’<sup>26</sup> Still, the White Paper does indeed propose a closer linkage between EU institutions (and member states’ governments), on the one hand, and civil society, on the other. Such a closer link can only be achieved through, amongst other things, more openness and more room for participation. It requires opening up towards society and considering it to be a more trustworthy partner in collective decision making. This would amount to *pluricentrism* only in the more moderate sense of agreeing that ‘governments in Europe’ need to interact and indeed co-operate in social networks and should promote the existence of such networks.

<sup>19</sup> Ibidem, p. 29–50.

<sup>20</sup> If only because it follows on from the (explicitly adhered to) rule of law.

<sup>21</sup> The present EEA (European Environmental Agency) does not belong to this category.

<sup>22</sup> Ibidem, p. 16.

<sup>23</sup> Ibidem, p. 15.

<sup>24</sup> Ibidem, p. 21.

<sup>25</sup> Ibidem, p. 33.

<sup>26</sup> Ibidem, p. 21.

## 2.5. Focus

The White Paper does not propose a revolutionary shift. That, however, is not to say that its main objective of a closer relationship between governments in Europe and Europe's civil societies, embedded in a notion of good government that is similar to the World Bank's perspective, should not be taken seriously.

In the following analysis this 'closer relationship' offers an important viewpoint as regards environmental law in Europe. An attempt will be made to determine if the *good governance* approach reaches beyond the scope of 'more interaction' and extends to *neo-institutional governance* which involves the introduction of innovative legal policies in the shape of new environmental policy instruments. Is there a move towards 'market-based instruments' that appeal to a 'shared responsibility' (such as 'economic' or indirect and 'suasive' or self-regulatory instruments), away from or in addition to command and control (or direct/top-down) regulation?<sup>27</sup> The outcome of this analysis will – hopefully – add to a better understanding of the White Paper's principles of good governance and offer a position for a (critical) appraisal of the EU draft Constitution.

For the reason of more easily introducing 'Environmental Law in Europe' to 'non-specialists', the analysis will commence with the good governance principles of *coherence* and *effectiveness*, to be followed by *accountability* and will conclude with a combined analysis of *openness and participation*.

## 3. Coherence

The principle of *coherence* stresses the need for overall consistency across the boundaries of sectoral policies. Thus, not only can it serve the overall effectiveness of policies, but it can also make policies easier to understand, thus creating a baseline for civil society's involvement. From the point of view of environmental law a few aspects are clearly related to this principle.

### 3.1. Sustainability and Integration

Article 2 EC lays down the Community task of (among other things) promoting a: '[...] harmonious, balanced and sustainable development of economic activities, [...] sustainable [...] growth, [...] a high level of protection and improvement of the quality of the environment [...]' Article 2 of the EU Treaty lists the objective: '[...] to achieve balanced and sustainable development [...]'. Sustainable development is defined in the 5<sup>th</sup> Environmental Action Programme (EAP) as: 'continued economic and social development without detriment to the environment and the natural re-

<sup>27</sup> See, for instance: A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, 'European Governance and the Transfer of 'New' Environmental Policy Instruments (NEPI's) in the European Union', 81 (3) *Public Administration*, 2003, p. 555-574 and B. Rittberger and J. Richardson, 'Old wine in new bottles? The Commission and the use of environmental policy instruments', 81 (3) *Public Administration*, 2003, p. 575-606.

sources on the quality of which continued human activity and further development depend.<sup>28</sup>

It is generally assumed that the introduction of the concept of sustainability (and the reference in article 2 EC to ‘a high level of protection’) does make it clear that there is no (longer a) hierarchy between the economic and the ecological objectives of the EU/EC.<sup>29</sup> Furthermore, sustainability requires a closer and more ‘positive’ relationship between environmental policies and other policy areas. This also follows from the integration principle of article 6 EC. Due to this article, ‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development.’ The wording ‘must be’ means that the external integration of environmental objectives, amongst which are the requirements of article 174 EC (see below), is achieved in other policy sectors.<sup>30</sup> The integration principle does not mean that the environment has priority over other policy areas; it primarily serves to underline the emancipation of environmental policies. If, however, within another policy area an objective can be attained in a number of ways and without prejudice, article 6 EC would require that the best environmental option is chosen. We must keep in mind, though, that the EC/EU institutions have a broad discretion when it comes to defining environmental policy – a discretion that will be marginally tested by the courts.<sup>31</sup>

Several strategic EC initiatives underpin the importance of integration and sustainability.<sup>32</sup> Already in 1983, in the 3<sup>rd</sup> EAP, the notion of integrating environmental policy making into other policy areas was launched.<sup>33</sup> Subsequently the 4<sup>th</sup> EAP, which appeared after the Single European Act, strengthened the call for integrated policy making.<sup>34</sup> The most explicit call to escape from ‘the environmental ghetto’ was made by the introduction of the new policy of ‘sustainability’,<sup>35</sup> in the 5<sup>th</sup> EAP. Policy concerns were addressed in target sectors, such as energy, agriculture, industry and tourism, by a better application of the ‘polluter pays principle’

<sup>28</sup> OC(1993) C 138/1, p. 12. See also art. 2(4) of regulation (3062/95) on Tropical Forests, (1995) OJ L 327/9, and, with reference to the 1987 Brundtland Report, the definition in P. Sands, *Principles of International Environmental Law*, part I, Manchester, Manchester University Press, 1994, p. 198, a development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

<sup>29</sup> G. van Calster, ‘Public Environmental Law in the European Union’, in R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *Public Environmental Law in the European Union and the United States, A Comparative Analysis*, Kluwer Law International, 2002, p. 465–515, at p. 474. J.H. Jans, *European Environmental Law*, Europa Law Publishing, 2000, p. 9.

<sup>30</sup> J.H. Jans, *supra* note 29, p. 18. Note: ‘must be’ does not detract from the fact that art. 174(3) EC includes merely as ‘taking account of’ certain aspects of environmental policy making.

<sup>31</sup> *Ibidem*, p. 21–22; G. van Calster, *supra* note 30, p. 477.

<sup>32</sup> For a summary, see: J. Scott, ‘Law and Environmental Governance in the EU’, *International and Comparative Law Quarterly*, 2002, p. 996–1005.

<sup>33</sup> (1983) OJ C 46/1. See also B. Rittberger and J. Richardson, *supra* note 27, p. 576–577.

<sup>34</sup> (1987) OJ C 328/1.

<sup>35</sup> B. Rittberger and J. Richardson, *supra* note 27, p. 577 (following D.A. Schön and M. Rein, *Frame reflection. Toward the resolution of intractable policy controversies*, New York, Basic Books, p. 4).

(through the internalization of external costs) and by promoting participation and the notion of 'shared responsibility'.<sup>36</sup>

In 1998 at the Cardiff summit the Council accepted the Commission's '*Partnership for Integration*' report,<sup>37</sup> in which environmental integration was presented as a 'chief concern' in the EU and it was stipulated that the dialogue between sectoral and environmental policy makers (on all levels) should be facilitated. In 2001, at the Gothenburg European Council, the Commission responded to the Council's request at the Helsinki summit of 1999 that a proposal should be prepared for a long-term strategy dovetailing policies for economically, socially and ecologically sustainable development. The final document, *A Sustainable Europe for a better world: A European Union Strategy for sustainable development*,<sup>38</sup> offered a promising perspective. This was met by further support in the 6<sup>th</sup> EAP,<sup>39</sup> which called for support for environmental integration 'by effective environmental assessment of new policy proposals'. The Gothenburg conclusions called upon the Commission to present mechanisms to ensure sustainability impact assessments on all major policy proposals, covering economic, social and environmental consequences. Although this presentation of mechanisms was expected at the Laeken summit of 2001 it was not until the 2002 Barcelona summit that the Commission – merely – underlined the need to assess 'the overall impact and coherence of policies (...) against overall long term objectives', adding that 'The Commission is currently developing mechanisms for assessing the sustainability impact.'<sup>40</sup> Meanwhile in 2001 the Directive on strategic environmental assessment, relevant to strategic policy proposals, was adopted.<sup>41</sup>

Through article 6 EC the environmental principles of article 174 EC (like the precautionary principle – see also § 5) can become interpretative guidelines for setting environmental standards both within *and* outside the environmental policy area. Together with the concept of sustainability (in art. 2 EC and art. B of the EU Treaty) this should benefit the overall consistency in environmentally relevant decision making in the EC. It should be remembered, though, that the integration principle only binds the Community institutions and, strictly speaking, not the member states.<sup>42</sup> In the course of secondary legislation and its implementation, however, member states will be increasingly bound by external integration – for instance, on the basis of the Directive on strategic environmental assessment. Work is currently being done to formulate further guidelines for translating the integration principle into other policy areas.<sup>43</sup>

<sup>36</sup> Ibidem.

<sup>37</sup> COM(1998) 333 final.

<sup>38</sup> COM(2001) 264. See also: Presidency Conclusions, Gothenburg European Council, 15-16 June 2001, especially. 4-8.

<sup>39</sup> Further discussed below, under § 4.1.

<sup>40</sup> Presidency Conclusions, Barcelona European Council, 15-16 March 2002, especially 15 and furthermore 27-39.

<sup>41</sup> Directive 2001/42, (2001) OJ L 197/30.

<sup>42</sup> See case C-379/92 *Peralta* 1994 [ECR] I-3453.

<sup>43</sup> <[http://www.europa.eu.int/comm/dgs/environment/index\\_en.htm](http://www.europa.eu.int/comm/dgs/environment/index_en.htm)>.

### 3.2. *Coherence and IPPC*

When discussing integrated policy making, we should also consider the Directive on Integrated Pollution Prevention and Control (IPPC).<sup>44</sup> This Directive is primarily concerned with a more integrated, 'horizontal' approach to environmental problems. Instead of separately controlling emissions into the air, water and soil – thereby running the risk that pollution is transferred from one medium to the other – this Directive offers a framework for an integrated approach. The focus of integration lies in the granting of permits (arts. 4-9). Member states are under an obligation to ensure that the conditions of and the procedure for issuing a permit are fully co-ordinated if more than one public authority is competent (art. 7). The authorities concerned should orientate towards an effective integrated approach to the proposed activity. The Directive also lays down a number of generally applicable substantive criteria (art. 3). The permit itself is to include specific requirements for air, water and soil protection, and for pollutants that are likely to be emitted from the installation in question. The permit should also include emission limit values (based on the best available techniques – BAT) (art. 9).

Although the introduction of general environmental law codes had already begun in the member states before the IPPC Directive was introduced, this Directive has clearly given a new impetus to this trend, if only by the requirement that when issuing permits there is to be co-ordination between different environmental sectors. In some cases – as in Denmark, Ireland and the Netherlands – member states have gone beyond co-ordination and have (fully) integrated permits.<sup>45</sup> Because the IPPC Directive also requires BAT standards, one can expect that many general environmental law codes will also be (come) framework legislation, laying down competences for setting quality standards and emission limit values.

### 3.3. *Summing Up*

Amongst environmental law specialists it is a well-known statement that external integration begins with internal integration. For this the IPPC Directive is relevant because it obliges member states to integrate environmental care internally. This internal integration is increasingly matched by general environmental law codes in the various member states. Furthermore, in several directives, such as the *Nitrate*, the *Post-Seveso II*, the *Wild birds* and the *Habitats Directives*,<sup>46</sup> one can find examples of linking environmental care to spatial planning, so as to ensure external integration.<sup>47</sup> The Nitrate Directive, for example, requires that the member states designate vulnerable zones containing areas of land that drain into waters identified by the same member state as being affected by nitrate pollution (on the basis of community

<sup>44</sup> See n. 5.

<sup>45</sup> R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 573, as well as p. 97 and p. 103 (Denmark), p. 257 (Ireland) and p. 358 (the Netherlands).

<sup>46</sup> Directive 91/676, (1991) *OJ L* 375/1; Directive 96/82, (1997) *OJ L* 10/13; Directive 79/409, (1979) *OJ L* 103/1 (amended); Directive 92/34, (1992) *OJ L* 206/7.

The difficulties relating to the different procedures following from art. 175(2) EC will be discussed in § 5.2 (accountability; procedures).

standards). For these zones action programmes are to be set up, also entailing mandatory measures, such as limit values. In the *Post-Seveso II* Directive on hazardous accidents, member states are obliged to ensure that town and country planning takes account of higher risks in areas surrounding hazardous activities. The Directives on wild birds and on habitats<sup>48</sup> include obligations for town and country planning to establish, for instance, special conservation areas. In a similar sense the Directive on Environmental Impact Assessment<sup>49</sup> improves external integration. Furthermore, the Directive on strategic environmental assessment shows that the concept of sustainability offers a platform for external integration on the level of strategic planning or programming in different policy areas. Meanwhile on the member state level we find that in some cases, such as in Austria, Denmark, France and the Netherlands, attempts are being made to link plans more closely in the areas of the environment, urban planning and nature conservation.<sup>50</sup> On a more general note, one can also conclude that the notion of sustainability (as included in art. 2 EC and taken from the Rio Convention) is on the increase in member states' policy statements and general legislation and certainly also in planning documents.<sup>51</sup>

From the point of view of *coherence*, also in the sense of making environmental law more understandable, the question remains whether the introduction of a general environmental law code in a number of member states should be followed at the EC level. Such a comprehensive general framework directive could also give guidelines for policy co-ordination.

More importantly, however, integration and sustainability clearly strike a chord with the notions of shared responsibility amongst all the social actors involved and a more bottom-up (as against top-down) approach may be seen in the choice of instruments. Nevertheless taking the step from the 'declaratory level' to the 'operational level'<sup>52</sup> still poses serious problems. This will be commented up in the next section (especially under § 4.1).

#### 4. Effectiveness

The principle of *effectiveness* is especially interesting with regard to the introduction of new environmental instruments, signifying a turn towards a market-based approach embedded in the notion of shared responsibility between government and civil society. For the purpose of discovering whether such a shift away from 'command and control' legislation has taken or is taking place, a number of relevant aspects have been selected.

<sup>48</sup> See n. 46.

<sup>49</sup> Directive 85/337, (1985) OJ L 175/40, with a major amendment by Directive 97/11, (1997) OJ L 73/14.

<sup>50</sup> R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8: Austria, p. 14; Denmark, p. 102-103; France, p. 183-184; the Netherlands, p. 355-357 and, generally, p. 57.

<sup>51</sup> *Ibidem*, p. 572.

<sup>52</sup> B. Rittberger and J. Richardson, *supra* note 27, p. 575.

#### 4.1. *Strategic EC Environmental Policy Perspective*

According to article 175, paragraph 3 EC the Community is to adopt general action programmes, setting priority objectives, on the basis of which the Council is to take the necessary initiatives (by introducing measures) whereby these objectives can be attained. Earlier, in § 3.1 of this contribution, some of these EAPs were already mentioned. Even before article 175 EC was introduced the Community had adopted its first EAPs, setting priorities for a time scale of 4 to 5 years. Plans were presented in 1973, 1977, 1983, 1987 and 1993.<sup>53</sup> Each of these plans had its own focus. The first two EAPs were mainly concerned with setting the objectives and principles and pointing out the most essential remedial actions. The third EAP was primarily concerned with the preventive approach and integrating the environment in a socio-economic context. Promoting a high level of protection by the use of strict environmental standards was the main element in the fourth EAP.

For this contribution the Fifth EAP is especially interesting, as it was the first EAP with a truly strategic content. Its title, 'Towards Sustainability', indicated that environmental policies were to entail a change in patterns of behaviour in society as a whole, especially through the much stronger involvement of all social actors. The aforementioned notion of 'shared responsibility' is presented as a prerequisite for sustainable development and is understood to entail 'partnerships' with and participation of social and economic actors in setting and implementing environmental policies, through applying a much broader range of instruments: more bottom-up (as in self-regulation, by labelling and auditing), more market-based (e.g. taxes and fiscal measures) and more 'horizontal' or 'suasive' actions (support by means of public information and education).

In 1998 a review of this Fifth EAP was presented,<sup>54</sup> stressing, amongst other things, the need for: 1) a more consistent approach to the integration principle; 2) the use of a broader range of instruments; 3) investing in better communication, diffusion of information, training and education so as to increase awareness concerning the need for greater sustainability and to promote the required behavioural changes.

Finally, in 2002, the sixth EAP, '*Environment 2010: Our Future, Our Choice*', was launched.<sup>55</sup> To achieve improvements in priority areas, such as climate change and nature and biodiversity, five approaches are set out. According to this EAP, these approaches:

'emphasize the need for more effective implementation and more innovative solutions. The Commission recognizes that a wider constituency must be addressed, including businesses that can only gain from a successful environmental policy. The Programme seeks new and innovative instruments for meeting complex environmental challenges. Legislation is not abandoned, but a more effective use of legislation is sought together with a more participatory approach to policy making. The five key approaches are to: 1) Ensure the implementation of existing environmental legislation; 2) Integrate envi-

<sup>53</sup> (1973) OJ C 112/1; (1977) OJ C 139/1; (1983) OJ C 46/1; (1987) OJ C 328/1 and (1993) OJ C 138/1.

<sup>54</sup> Decision 2179/98, (1998) OJ L 275/1

<sup>55</sup> Decision of 22.07.2002, (1998) OJ L242.

ronmental concerns into all relevant policy areas (applying the Integration principle – MAH); 3) Work closely with business and consumers to identify solutions; 4) Ensure better and more accessible information on the environment for citizens; 5) Develop a more environmentally conscious attitude towards land use. The new Programme provides the environmental component of the Community's forthcoming strategy for sustainable development. It continues to pursue some of the targets from the Fifth Environment Action Programme, which came to an end in 2000. But the new Sixth Environment Action Programme (...) goes further, adopting a more strategic approach. It calls for the active involvement and accountability of all sections of society in the search for innovative, workable and sustainable solutions to the environmental problems we face'.<sup>56</sup>

It is worth noticing, explicitly in the above quote, that 'legislation is not abandoned' and that the implementation of existing environmental legislation must be ensured. Perhaps the 6<sup>th</sup> EAP is an attempt to promote new instruments based on the view that conventional instruments should be retained. Or, in other words, a proposal aimed at a 'flexible response' to existing and forthcoming environmental problems, which will more frequently lead to the use of a mix of instruments in order to tackle one and the same environmental problem. Furthermore, the 6<sup>th</sup> EAP is the first EAP to be adopted under the co-decision procedure (as agreed upon in the Maastricht Treaty) and can be considered to have an even greater legal significance; maybe it is even legally binding, as Rittberger and Richardson proclaim.<sup>57</sup> Certainly this could add some weight to the question of whether the present EAP is yet another instance in a series of merely 'declaratory' strategy documents or whether it presents a document that by virtue of its legal stature requires that its (key) elements and proposals are made operational.

In the following we will look at this operational level, along the lines of the institutional framework for introducing new environmental instruments. Firstly, we will look at a leading EC principle, that of proportionality, and, secondly, the interplay between the EC and its member states, mainly with a view to the implementation of EC legislation. In conclusion a few examples of the attempts to introduce new environmental instruments will be presented.

#### 4.2. *Proportionality*

According to the guidelines included in the Protocol to the Treaty of Amsterdam on the interpretation of the principle of proportionality, listed under article 5 EC ('Any action by the Community shall not go beyond what is necessary to achieve the objectives of this treaty.')

<sup>58</sup> the Community should aim for measures that respect national legal provisions to the greatest extent and (that) leave the highest degree of discretion to the member states. Directives are preferred above regulations and framework directives are preferred above detailed legislation. The use of minimum standards (such as for emissions) is generally preferred, because it leaves room for

<sup>56</sup> <<http://europa.eu.int/comm/environment/newprg/index.htm> DD 24/02/2003>.

<sup>57</sup> B. Rittberger and J. Richardson, *supra* note 27, p. 582.

<sup>58</sup> Considered to be of great importance to the principles of good governance: White Paper, p. 10-11.

member states to decide whether or not to apply stricter standards. Furthermore, non-binding measures, such as recommendations and voluntary codes of conduct, should be used where possible.<sup>59</sup>

Clearly in environmental law the Directive is the main operational regulatory device, with an increasing preference for using minimum standards. Framework directives are now in operation in the areas of water,<sup>60</sup> air<sup>61</sup> and waste.<sup>62</sup> They allow for further regulations through 'daughter directives' in which we find emission limit values and/or quality standards or objectives (possibly linked to a standstill requirement).<sup>63</sup> Establishing these daughter directives can be mandatory on the basis of a list of substances or other pollutants or of products or other recipients which are susceptible to environmental harm.<sup>64</sup> Further regulation on the member state level is accommodated by explicitly allowing competence to maintain or introduce more stringent standards.<sup>65</sup>

Minimum harmonization, even when it is exhaustive, leaves room for member states to introduce more stringent standards and is therefore more readily used where the internal market is less affected, as in the case of (minimum standards for) the quality of water and air, as well as for flora and fauna.<sup>66</sup> A directive that offers minimum rather than total harmonization<sup>67</sup> is often recognized by the so-called 'minimum harmonization clause'. This clause, however, is increasingly less used as member states can always have recourse to article 176 EC and unilaterally introduce or maintain more stringent protective measures (if they are otherwise compatible with the Treaty) – although this matter is still subject to some debate.<sup>68</sup>

Often, regulatory discretion is given to member states on the basis of their obligation to adopt environmental (implementation) plans and programmes (possibly linked to certain priority pollutants or other types of priorities), setting out specific policy lines and further measures – as in the framework directives on waste (art. 7),

<sup>59</sup> See Council resolution on the drafting, implementation and enforcement of Community environmental law, (1997) *OJ C* 321/1.

<sup>60</sup> See Directive 2000/60, (2000) *OJ L* 327/1.

<sup>61</sup> Directive 96/62 on ambient air quality assessment and management, (1996) *OJ L* 296/55.

<sup>62</sup> Directive 91/156, (1991) *OJ L* 78/32.

<sup>63</sup> Primarily saying that if the factual quality is better than what the directive requires, the factual quality becomes the standard (see for instance art. 11, § 6 of the Water framework directive).

<sup>64</sup> See art. 4 of the 'Air framework directive'.

<sup>65</sup> See arts. 10(3) and 11(4) of the 'Water framework directive', and also Case C-138/98, *Fornasar*, in relation to art. 18 of the 'Waste framework directive'. Furthermore, the 'Waste framework-directive' offers general rules on (categories of) waste but goes on (see arts. 3-5) to require member states to introduce (additional) measures on prevention, reduction and recovery of waste (and, although not strictly within a framework directive, art. 14 of the Wild birds directive).

<sup>66</sup> J.H. Jans, *supra* note 29, p. 112.

<sup>67</sup> This is a type of harmonization that is only used if there is a strong link with the free movement of goods, so especially when product standards are involved (as with the amount of exhaust fumes and the amount of noise produced by cars).

<sup>68</sup> See J.H. Jans, *supra* note 29, p. 118.

water (art. 11) and air pollution.<sup>69</sup> Meanwhile, plans and programmes also appear outside framework directives, as in the Habitats Directive (the so-called management plans for special conservation areas in art. 6). These instruments also include room for participation either by the general public or interested parties, which also strengthens the communicative element in environmental policy making.

#### 4.3. *Interplay and Implementation*

In their analysis of new environmental policy instruments (*nepis*), Jordan *et al.* refer to five role models for European interplay, which are particularly relevant to policy transfer, especially transfer to '*nepis*'.<sup>70</sup> Within the role model of the *passive arena* (1) innovation takes place without the involvement of EC-institutions, but simply by the diffusion of information and knowledge between member states with similar environmental problems and similar environmental law systems. The emulation of the German Eco-labelling system is mentioned as a typical example of this type of transfer. In the *facilitating arena* (2) we find a transfer between member states and between member states and the EC institutions, but now the diffusion is enhanced by the EC as a network of policy actors and processes. The sharing of ideas through the EC channels, such as when Dutch officials showcased their environmental planning views in the wake of the 5<sup>th</sup> EAP, is an important driving-force for innovation. In the *harmonization arena* (3) the objective of a Single European market (SEM) is the determining factor behind innovative policy transfer. The effects of member states' regulations on the SEM, as in the case of the German Packaging Waste Ordinance, can be an important motive to introduce new and Communitarian instruments and thus avoid (further) distortions. EC regulation represents a governance structure as a *competitive arena* (4) in which member states 'compete for economic advantage and try to limit their regulatory adjustments costs'. Member states may want to remain ahead of EC regulation and influence both the EC environmental agenda and other member states in favour of adopting legislation which is similar to their own. The EMAS Directive (discussed below) offers the example of Great Britain and other member states promoting the adaptation of the 'British scheme' that was already in place in their jurisdictions. Finally, then, in the role model of the *independent actor* (5) we find the EC institutions, mainly the Commission, that adopt an entrepreneurial attitude in employing new initiatives either through the official decision-making procedures, as in emissions trading and energy taxation, or entering into voluntary agreements, as is the case with industry concerning fuel economy.

It is particularly interesting to focus on the *harmonization arena* and to ask what room is left within that context for member states that wish to use new policy instruments as a means of implementing EC legislation. Considering the approach suggested in the previous section (§ 4.2), directives, especially framework directives, can explicitly provide room for member states' regulatory initiatives.

<sup>69</sup> Art. 7(3) of the 'Air framework directive', for instance, stipulates that member states are to take the necessary steps to ensure compliance with limit values and also to establish action plans to abate the risks of exceeding thresholds.

<sup>70</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 556-558.

Within the boundaries of implementing EC environmental law, however, the option of co- or even self-regulation seems to be excluded by the requirements of article 249 EC. In other words, the type of 'horizontal' legislation that the White Paper proposes is not an option for member states, unless either the EC so obliges, or a member state has recourse to article 176 EC.

A first possibility would have been to implement a directive by referring to technical standards that are being produced by or in conjunction with the industry itself – like the ISO and CEN standards. Thus the 'target groups' themselves could be more strongly committed to the regulatory process. The problem here is that these types of technical standards are not in themselves binding and often are proposed merely as guidelines for 'good environmental practice'; so it is up to whoever so wishes to apply them. From the case law of the Court of Justice we may conclude that this mode of implementation is only acceptable if the use of these standards is explicitly prescribed in legislation that is binding, because only then can citizens exert their rights.<sup>71</sup>

Similarly the idea of implementation by environmental agreements would more closely involve major stakeholders. However, these types of agreements are arrived at voluntarily, between certain parties (most often administrative branches of government and sectors of industry), entailing that certain objectives should be met (or more often – only – aspired for) in relation to a certain activity, product or substance. These characteristics do not (sufficiently) match the transposition requirements of being legally binding (also on third parties) and of full implementation (derived from art. 249 EC). Only if such an agreement would be referred to in binding legislation as being generally binding, could one imagine that this mode of transposition would be acceptable.<sup>72</sup> Again, if the directive itself were to propagate this method of implementation it would be legally acceptable.<sup>73</sup>

Meanwhile in 1996 the Commission issued a recommendation concerning environmental agreements implementing Community directives – which was matched in 1997 by a Council Resolution on the same subject.<sup>74</sup> The bottom line is that both institutions wish to promote the use of these agreements and, to match that aspiration, have laid down guidelines for the implementation of Community environmental directives by agreement. These guidelines consist of two sets of rules, one set of rules that should be complied with in all cases and one set of rules that should be complied with if appropriate. In the first – compulsory – list we find provisions on the enforcement, clarity and timeliness of objectives, publication, monitoring and reporting (to authorities and the general public), as well as openness (of the agreement to other possible parties). In the second list – on 'appropriateness' – we find

<sup>71</sup> See for instance Case 361/88, 1991, I-2567 and C-59/89, 1991, I-2607 (TA-Luft). J.H. Jans, *supra* note 29, p. 144-145.

<sup>72</sup> Case 215/83, 1985 1055; J.H. Jans, *supra* note 29, p. 146-147.

<sup>73</sup> Directive 93/76 (1993) OJ L 237/28. To limit carbon dioxide emissions by improving energy efficiency (SAVE), art. 1: 'Programmes can include laws, regulations, economic and administrative instruments, information, education and voluntary agreements whose impact can be objectively assessed.' See also Case C-255/93 I-4949.

<sup>74</sup> Commission recommendation 96/733 (1996), OJ L 333/69 and Council Resolution of 7 October 1997, (1997) OJ C 321/6. The Commission also mentions European-wide agreements but is sceptic on that issue.

clauses on ascertaining whether the aspired results are being reached, on the access of third parties to (in-company) information on the implementation of the agreement, and finally on sanctions.

Together with Jans we may conclude that if these requirements are met, there is indeed little difference between transposition through environmental agreements or through legally binding (unilateral) legislation. In his view, article 249 EC leaves little room for a more lenient approach to this matter – although, so far, we have no case law on the application of these guidelines.<sup>75</sup>

Meanwhile, jumping ahead to the *independent actor* profile, we find that the Commission itself has also taken up initiatives on voluntary agreements at the Community level. In this it has ‘rallied’ support in the 5<sup>th</sup> EAP and in some of the member states’ criticism of the EC’s interventionalist instruments.<sup>76</sup> By late 2001, however, only some 12 voluntary agreements had been adopted, such as on fuel economy with European and – later – with Japanese and Korean car manufacturers. Questions have been raised as to aspects of legitimacy, legality and transparency; especially considering that the Council and the European Parliament are kept outside the negotiations and that there is no specific legal basis for entering into these types of agreements in the EC Treaty. From the Commission’s standpoint however, voluntary agreements offer an interesting means to pursue its own objectives beyond the reach of (increased) parliamentary powers.<sup>77</sup> Recently, however, the Commission has issued a Communication containing a new framework proposal on Community-level voluntary agreements as a means of co-regulation and self-regulatory arrangement *within* legislative targets set by the EC.<sup>78</sup>

Finally, returning to the member states’ level, the *harmonization arena* has taken its toll on some voluntary agreements by simply replacing them by EC legislation. Examples are the End-of-life Vehicles Directive (effectively rendering Austrian and German schemes void)<sup>79</sup> and the Packaging and Packaging Waste Directive (replacing an existing voluntary agreement in the Netherlands – although the directive itself has again been implemented through voluntary agreements!).<sup>80</sup>

#### 4.4. Exemplars

Meanwhile, against the backdrop of these limitations, we do indeed witness the introduction of less top-down regulations. A few examples are listed below.<sup>81</sup>

The EC regulations on Eco-labelling<sup>82</sup> and Eco-management and auditing (EMAS)<sup>83</sup> present a communicative type of regulation, in which, although these

<sup>75</sup> J.H. Jans *supra* note 29, p. 148; Jans proposes even further requirements.

<sup>76</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 566.

<sup>77</sup> *Ibidem*.

<sup>78</sup> Environmental agreements at the Community level within the framework of the action plan on the simplification and improvement of the regulatory environment, COM(2002) 412 final.

<sup>79</sup> Directive 2000/53, (2000) OJ L 269/34.

<sup>80</sup> Directive 94/62, (1994) OJ L 365/10.

<sup>81</sup> As voluntary agreements have already been discussed in above, they are not included within these examples.

<sup>82</sup> Regulation 880/1992, (1992) OJ L 099 (amended).

<sup>83</sup> Regulation 761/2001, (2001) OJ L 114/1.

schemes are moulded in a directly binding format, participation takes place on a voluntary basis.

The Eco-label award Regulation is based on the German example. The Commission, in an entrepreneurial role, deemed it necessary to protect the SEM against a proliferation of similar schemes.<sup>84</sup> The regulation is aimed at promoting, for consumers, the option of purchasing products which are less harmful to the environment. By labelling, the consumer has more insight concerning the environmental benefits of that product. The label is attached to a product only if the environmental impact of a product is reduced in the course of its entire life cycle. A company can apply for the award of an eco-label to one (or more) of its products (arts. 6-7) – again, this is a completely voluntary decision. Each member state has a national authority which is competent to judge whether or not a label can be awarded (arts. 7 and 14). In deciding this authority is to apply the guidelines contained in the Regulation.<sup>85</sup> Awarding an eco-label entails that this authority enters into an agreement with the applicant on matters concerning the use of the label (art. 9).<sup>86</sup> For the eco-label scheme to become successful stakeholder support will be essential. The revision of the scheme in 2000<sup>87</sup> seems to have led to a somewhat greater acceptance (since 2001 the number of applications has risen by 150 percent).<sup>88</sup>

The EMAS regulation is concerned with the voluntary participation of industrial companies in an eco-management and audit scheme, designed to monitor and improve the environmental performance of a company and to offer information on the performance to the general public (art. 1). A company's application will only be granted when it adopts an environmental eco-management system that incorporates (continuously updated) standards included in or set on the basis of the regulation (art. 3). If all the criteria are voluntarily met, a competent national authority will register the company. Being registered (arts. 6-8) can be advantageous to companies mainly by virtue of a more favourable public image.

Similarly, features of less top-down regulation can be found in sectoral (or vertical) legislation. In stimulating the use of agreements and economic incentives the Nitrate Directive,<sup>89</sup> for instance, requires member states to establish a 'code of good agricultural practice' which can serve as a basis for entering into (voluntary) agreements with farmers. Directive 70/220 on air pollution caused by vehicles<sup>90</sup> offers an interesting possibility of financial incentives for buying clean cars. Furthermore, Directive 99/94 on consumer information on fuel economy and CO<sub>2</sub> emissions sets out to improve information to the public on car performances.<sup>91</sup>

A somewhat different innovative strand of regulations has been introduced in the field of tradable allowances.<sup>92</sup> Regulation 2037/2000 on substances that deplete

<sup>84</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 569.

<sup>85</sup> In part delegated to the Commission.

<sup>86</sup> The Commission has issued a standard agreement: Decision 2000/729, (2000) OJ L 293/20.

<sup>87</sup> Regulation 1980/2000, (2000) OJ L 237.

<sup>88</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 570.

<sup>89</sup> Especially art. 4 of Directive 91/676, (1991) OJ L 375/1.

<sup>90</sup> (1970) OJ L176/1, amended by Directive 94/12, (1994) OJ L100.

<sup>91</sup> (2000) OJ L12/16.

<sup>92</sup> See J. Scott, *supra* note 32 and E. Woerdman, *Implementing the Kyoto Mechanisms: Political Barriers and Path Dependence*, Ph.D. thesis at the University of Groningen (the Netherlands), 2002.

the ozone layer,<sup>93</sup> implementing the Vienna Convention and Montreal protocol,<sup>94</sup> contains a system of trade through licences to import or export controlled substances from other countries (which may or may not be parties to the Montreal protocol). More important, and certainly more innovative, is the Directive establishing a scheme for greenhouse gas emission allowance trading within the Community.<sup>95</sup> This scheme precedes the obligations under the first commitment period of the Kyoto protocol (2008-2012) and aims to prepare the Community for allowances trading. The possibility of allowances trading has two important advantages: 1) emission reduction will take place where it is most cost-efficient to do so. This in itself does not reduce the total emissions, but it does improve collective efficiency, to the benefit of all the permit holders; 2) the use of a trading system will minimize distortions in competition. Furthermore, one may argue that trading systems will be a stimulus to developing less pollutant production techniques.<sup>96</sup>

To these examples we can add the carbon-energy tax. The Commission took up the initiative to introduce such a tax scheme in response to the studies on and the use of environmental taxes in member states such as Denmark and the Netherlands and also because of fears, from other member states, of (distortions in the SEM and) competitive impacts caused by national tax schemes.<sup>97</sup> Although there was a positive momentum for an EC initiative, member states' sovereign(ity) interests in conjunction with the unanimity requirement within the Council, made it very difficult to arrive at an agreement. A 1997 proposal proved unconvincing, but finally, in 2003, a framework directive was adopted.<sup>98</sup>

Clearly, instruments of indirect and self-regulation are taken up at the member state level.<sup>99</sup> In many countries we can find examples of new instruments, such as taxation,<sup>100</sup> subsidies,<sup>101</sup> tradable emission rights,<sup>102</sup> gentlemen's agreements<sup>103</sup> and schemes for labelling, audits and management.<sup>104</sup> Regardless of these examples, the previous enthusiasm over these types of arrangements has somewhat died down.

<sup>93</sup> (2000) OJ L 244/1.

<sup>94</sup> (1988) OJ L 297/10 (Vienna Convention) and (1988) OJ L 299/21 (Montreal Protocol).

<sup>95</sup> Directive 2003/87 (2003) OJ L 275.

<sup>96</sup> See also J. Scott, *supra* note 32, p. 1002.

<sup>97</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 565-566.

<sup>98</sup> Directive 2003/96, (2003) OJ L 283/51.

<sup>99</sup> R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 570.

<sup>100</sup> See ECO, Product, Fuel and Green taxes in Austria, Denmark, Germany, Italy and the Netherlands; R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 17, p. 109, p. 219, p. 293 and p. 367.

<sup>101</sup> See the income tax system in Flanders (Belgium) and the German subsidies (in connection with agreements on reduction-targets); R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 54-55 and p. 220.

<sup>102</sup> These are difficult to find on a member state level. There certainly are (or have been) discussions on this matter, but no implementation - apart from tradable rights in the agricultural area.

<sup>103</sup> Like in Flanders (on waste policy), in Denmark (with a general legal basis in the Environmental Protection Act!) and in Germany (both on a private and public law basis), R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 52, 108 and 222.

<sup>104</sup> For instance in Flanders, Denmark, Ireland, Italy and Spain; R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 52-53, p. 103, p. 260-261, p. 293 and p. 428.

Maybe initially the expectations were too optimistic. As was said concerning the 6<sup>th</sup> EAP, at this point in time the idea of completely moving away from direct regulation and replacing the top-down model by strictly horizontal instruments is no longer considered viable or desirable. A more eclectic approach has seen the light of day, in which with each problem an optimal mix of instruments is sought.<sup>105</sup>

#### 4.5. *Summing Up*

The objectives of sustainability and a high level of protection (art. B EU Treaty, arts. 2 and 174(1) EC Treaty) are ambitious yet operationally underdetermined. Much is to be gained but very little is ensured. What can effectively be achieved lies in the wake of the willingness of all concerned to consider environmental policy making as a joint venture. An important question is how the effectiveness of environmental legal policies can be improved in the context of the EC framework. How much room can and indeed should be given to the implementation of EC legislation by private guidelines, environmental agreements and environmental management systems? Or, for that matter, what room should be left for autonomous legislation by member states?

Given the focus of this contribution, the principle of *effectiveness* is especially relevant to the attempts to make more use of horizontal instruments (instead of top-down or vertical ones). On that note clearly the IPPC Directive (discussed under § 3.2) offers something of a disappointment. The main instruments in this Directive are permits and general emission standards. Although the Directive is geared towards creating more integration, it nevertheless does not satisfy the promises included in the preceding 5<sup>th</sup> EAP Programme. Possibly the more ‘balanced approach’ of the 6<sup>th</sup> EAP found its predecessor in the IPPC Directive.

Having said this, we find that there are also many regulatory initiatives that do seem to fit with the EAP’s call for ‘partnerships’. The aforementioned EMAS and Eco-labelling regulations clearly signify this. Furthermore, we have seen that the concepts of framework directives (such as for water, air and waste), (interactive) planning and programming, using minimum instead of total harmonization, are clearly present. When we look at the initiatives on the member state level, we also find that there are many examples of regulatory initiatives within the realm of indirect and self-regulation, especially taxation, subsidies, environmental agreements (sometimes even on a statutory basis), environmental management schemes and voluntary codes of conduct (good practice).

### 5. **Accountability**

Taking responsibility and explaining actions are the key elements of the principle of *accountability*. In the context of Environmental Law comments will be limited to two issues, mainly in view of what is still to be discussed under § 6 on openness and participation. The first issue to be commented upon (under § 5.1) is environmental principles, taking the viewpoint that it takes a substantive ‘benchmark’ before

<sup>105</sup> See also B. Rittberger and J. Richardson, *supra* note 27, p. 603.

transgressors can be truly held to be accountable. The second issue for comment (under § 5.2) is internal EC decision-making procedures in environmental law.

### 5.1. Principles

The *second* paragraph of article 174 EC presents a number of principles of European environmental policy: 1) a high level of protection; 2) the precautionary principle; 3) the prevention principle; 4) the source principle; 5) the polluter pays principle; 6) the safeguard clause. One could well argue that these principles offer standards for accountability, but one should be aware of two important aspects. First of all, these principles meet a general characteristic of principles in that they are intrinsically vague. This means that it takes case law and, possibly, further guidelines to determine their more precise content and to be able to truly apply them as benchmarks. Secondly, the question remains whether and, if so, to what extent courts are willing to use these principles as legal criteria. As such we should distinguish between direct use, such as rules of conduct, and indirect use, such as guidelines for the interpretation of other substantive or procedural regulations (take, for instance, the relationship between the burden of proof and the precautionary principle). When applied directly we should consider that when discretionary competences lie at the heart of the legal dispute, this may give rise to a more marginal test as to whether certain principles have been adhered to.

The principles of ‘a high level of protection’, ‘precaution’ and ‘prevention’, offer interesting examples of the above.

The principle of attaining a high level of protection is typically a principle that entails so much discretion that it is questionable whether it could indeed be considered a *legal* principle – or rather a political objective. Apart from the fact that the section includes the words ‘*seek to achieve* a high level...’, a ‘high level of protection’ is not to say ‘the highest level of protection’; there is still room for weighing interests, amongst which are possibly the diversity of situations in the various regions of the Community. Amongst the institutions of the EC, however, the principle offers an argumentative basis in the political debate.<sup>106</sup>

Secondly, the precautionary principle is relevant as it requires proper account to be taken of available scientific and technical data (as required by art. 174, § 3 EC) and it also determines that even indicative or tentative scientific data may suffice as a basis for taking protective measures.<sup>107</sup> Absolute scientific certainty (even if it were to exist) is not a prerequisite for introducing restrictive measures: ‘*in dubio pro natura*’. The precautionary principle also applies to the IPPC Directive in determining the ‘best available techniques’, when considering the possible risks involved.<sup>108</sup> We also find the precautionary principle being applied in examples of secondary legislation, especially in aiding the interpretation of relevant provisions.<sup>109</sup>

<sup>106</sup> J.H. Jans, *supra* note 29, p. 32.

<sup>107</sup> See J.H. Jans, *supra* note 29, p. 33-34.

<sup>108</sup> See Annex IV of Directive 96/61, (1996) OJ L 257/26.

<sup>109</sup> For instance, case C-180/96, *United Kingdom v. Commission* [1998] ECR I-2265.

Thirdly, the prevention principle was an important subject in the 3<sup>rd</sup> EAP.<sup>110</sup> It was stressed in this programme that the improvement of information and knowledge, as well as the diffusion thereof amongst decision-makers, interested parties and the public as a whole(!) is of the utmost importance. All relevant information should be considered in the earliest possible stage in the decision-making process. The Directive on the freedom of access to information on the environment,<sup>111</sup> which will be discussed below, is an important outcome of this line of reasoning. The same can be said of the Directive on Environmental Impact Assessment (EIA – also to be discussed below).<sup>112</sup> The preventive principle contributed to the understanding that, alongside to *direct* measures to further the environmental cause, article 174 EC also underpins *indirect* measures, such as freedom of access to information, the shaping of the environmental decision-making process (as in the EIA and IPPC Directives), and EMAS and Eco-labelling regulations. As I will go on to show below (in § 6) this acknowledgement is an important step towards good environmental governance.

It should be well understood that the environmental principles are only directly binding on EC institutions and that these often involve considerable discretion.<sup>113</sup> Again, though, the courts may use these principles as guidelines in interpreting secondary EC legislation and, sometimes, in judging specific member states' autonomous measures.<sup>114</sup>

Especially in member states with General Environmental Law Codes (such as in Denmark, Finland, Ireland and the Netherlands), or drafts to that end (such as in Germany and Italy), we find environmental principles being codified (or proposals to do so). In Spain a reference to such principles is even included in the Constitution, with an explicit link to the principles of article 174 EC. In most cases there is a strong similarity between the EC principles and the 'state principles'. Generally speaking, these state principles are considered to be mere guidelines for policy making, rather than legal principles of a kind similar to principles of natural justice. It is expected, though, that these principles will have an indirect legal effect such, as for instance, through the process of interpreting existing regulations.<sup>115</sup>

Whether or not environmental principles should or should not extend to a right to a clean or healthy environment is a matter taken up in § 7.

## 5.2. Procedures

From a legal point of view procedures represent the fabric of the competences and responsibilities of the institutions involved. Let us then turn to these procedures

<sup>110</sup> (1983) OJ C 46/1.

<sup>111</sup> Directive 90/313, (1990) OJ L 158/56.

<sup>112</sup> Directive 85/337, (1985) OJ L 175/40 (amended).

<sup>113</sup> J.H. Jans, *supra* note 29, p. 21-22; G. van Calster, *supra* note 29, p. 477.

<sup>114</sup> On the binding effect for member states, see G. Winter, 'Environmental Principles and Community Law', in J.H. Jans (ed.), *The European Convention and the Future of European Environmental Law, Proceedings of the Avosetta Group of European Environmental Lawyers*, Groningen, Europa Law Publishing, 2003, p. 3-25. Compare as an example also the Walloon Waste case, Case C-2/90 *Commission v. Belgium* [1992] ECR I-4431.

<sup>115</sup> R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 567-568.

first. In the Treaty of Maastricht (1993) it was decided that decisions under the Title (then VII) on the Environment<sup>116</sup> could be taken by a qualified majority. An exception – still – applies to a number of specific policy areas as mentioned under the second paragraph of article 175 EC, amongst which are fiscal provisions, town and country planning measures and the management of water resources, as well as measures affecting the member state's choice between energy sources. In those cases the Council can only decide unanimously, unless it is unanimously decided by the Council that on a certain matter within the scope of these exempted areas a decision will be taken with a qualified majority.

Given the close relationship between environmental protection and improvement, on the one hand, and town and country planning, on the other, this can be considered as a barrier to integrated and comprehensive policy making.<sup>117</sup> Apart from the question whether the Community has the power to pursue a solitary town and country planning policy, it will be clear that in many cases environmental policies will have a certain effect in this type of planning, such as in protecting flora and fauna, or in the use of zoning for reasons of air pollution or the hazard of major accidents.<sup>118</sup> This also applies to environmental impact assessment, where some decisions for which an assessment is to be made concern town or country planning.<sup>119</sup> In practice, however, in the latter two cases the majority-rule procedure was indeed applied.<sup>120</sup> As for introducing environmental taxes, as stated under § 4.4, the unanimity rule and sovereign(ity) considerations clearly pose an obstacle for the introduction of new, economic environmental instruments of this type.

In the 1999 Treaty of Amsterdam it was decided that (almost) all of the EC environmental legislation is to be prepared in accordance with the co-decision procedure (of art. 251 EC), thus ensuring a veto for the European Parliament (EP).<sup>121</sup> This procedure also applies to the setting of EAPs, as article 175(3) EC stipulates. We have to consider that co-decision does not necessarily lead to more stringent environmental policies, but it will certainly strengthen the legitimacy of these policies. The position of the EP will strengthen and with that the parliament will also be held more accountable by civil society. According to some, the applicability of article 175(3) EC on adopting EAPs makes these (future) EAPs legally binding.<sup>122</sup>

On the issue of accountability, however, we should be well aware that many environmental standards are set in what is called the 'comitology procedure'. This applies especially to technical standards for which the regulatory procedure is 'delegated'. The legal basis for this practice can be found in article 202, third indent EC Treaty. The Council has imposed certain requirements in the exercise of this competence. It has done so in a separate Comitology Decision,<sup>123</sup> laying out the basic rules

<sup>116</sup> At that moment art. 130R-T EC.

<sup>117</sup> As dealt with under *Coherence*; § 3.

<sup>118</sup> Seveso-II Directive 96/82, (1997) OJ L 10/13.

<sup>119</sup> See annex II (under 10) to directive 85/337 as amended by Directive 97/11, (1997) OJ L 073/5. Also (art. 3 under 2a of) Directive 01/42, (2001) OJ L 197/30.

<sup>120</sup> J.H. Jans, *supra* note 29, p. 46-47.

<sup>121</sup> G. van Calster, *supra* note 29, p. 9; J.H. Jans, *supra* note 29, p. 9.

<sup>122</sup> See the considerations under § 4.1.

<sup>123</sup> Second Comitology Decision 1999/468, (1999) OJ L 184/23 (repealing the First Comitology Decision 1987/373, (1987) OJ L 197).

and principles for this procedure (or in fact procedures – as there are four types). The Council can set more specific requirements in the specific case where powers to implement are conferred on the Commission.<sup>124</sup> Presently the general rules on decision making in the Comitology procedure(s) are under revision.<sup>125</sup> The comitology procedure is ‘activated’ through a clause in a specific directive. On the basis of that clause a representative of the Commission submits a draft proposal on certain technical standards to a committee. The committee subsequently offers an opinion. If the final proposal is in accordance with the committee’s opinion then the Commission can adopt the standards; if there is discrepancy the Commission sends the proposal to the Council which can take a final decision on the basis of majority voting, within a certain time-limit (if this limit is exceeded the Commission decides). An example of this comitology procedure can be found in the framework directive on waste.<sup>126</sup>

### 5.3. *Summing Up*

Environmental principles can be regarded as ‘benchmarks’ for accountability in environmental policy making. Mainly through the role of the Courts, even though the legal test will often be a marginal one, this type of benchmarking will play an increasingly more important role. Gradually, environmental principles are also being introduced on the member state level, by and large consistent with EC principles. It still remains to be seen whether these ‘stately principles’ will become relevant to legal accountability, but the first step seems to have been taken.

Voting by qualified majority and applying the co-decision procedure are important tools for increased accountability – especially in view of the role of the EP.<sup>127</sup> Accountability can, however, be in question when ‘comitology’ creeps in. In part this will be unavoidable (especially with technical standards for products), but it does increase the possibility of bureaucratic policy making (and shutting out civil society). The alternative of leaving further regulation to lower public authorities or to voluntary schemes should be taken firmly into consideration. One should also consider that in leaving (more) room for member states to maintain and introduce more stringent measures and to apply instruments of a more ‘horizontal and co-regulatory’ nature their involvement can be strengthened and thus their accountability (in the sense of legitimacy). This would also match the fact that the 6<sup>th</sup> EAP clearly stipulates that accountability is a principle which is relevant to all sections of the Community, that is to say, both on a supranational and on the member state

<sup>124</sup> See also Case C-378/00 *Commission v. Council and EP*.

<sup>125</sup> See, amongst other sources: Report from the Commission, on the working of committees in 2002, COM(2003) 530 final. See also J.H. Jans, ‘EU Environmental Policy and the Civil Society’, in J.H. Jans (ed.), *The European Convention and the Future of European Environmental Law, Proceedings of the Avosetta Group of European Environmental Lawyers*, Groningen, Europa Law Publishing, 2003, p. 55-66, especially p. 61-62.

<sup>126</sup> See art. 1(a) and art. 18 of Directive 91/156, (1991) OJ L 78/32 (amendment of 75/442, (1975) OJ L 194/47).

<sup>127</sup> To say that this will enhance the legitimacy of the outcome is still somewhat optimistic in my view, but this procedure is far preferable to other existing ones.

level. Accountability also implies taking responsibility – making use of the possibilities to enter into more horizontal forms of regulation.

## 6. Openness and Participation

As stated above, in the light of the prevention principle (under 5a), the objectives as listed in the *first* paragraph of article 174 EC not only allow for direct measures to further the environmental cause, but also for *indirect* measures such as the freedom of access to information,<sup>128</sup> the shaping of the environmental decision making-process, as in the case of the EIA and IPPC Directives,<sup>129</sup> as well as in the case of the regulation on Eco-audits and on EEA.<sup>130</sup>

Both in the area of openness and participation, clearly the importance of ensuring proper decision making (especially concerning fact-finding and assessment) as well as the general availability of environmental information, and also public participation throughout the policy chain, has been recognized as a major legal cornerstone of environmental law in Europe. Not only as a means to further the legitimacy of vertical legislation (by ensuring better involvement),<sup>131</sup> but also as a means of making citizens and civil institutions more sensitive to environmental processes. Thus the internalization of environmental effects in behavioural patterns has a better opportunity, especially as the diffusion of information is supported by the new types of environmental instruments (as discussed above).<sup>132</sup> The Aarhus Convention<sup>133</sup> is an important UN document, to which the EC is a signatory that underpins three basic legal requirements in the area of openness and participation: a) access to environmental information; b) public participation; c) access to judicial review in environmental cases. Each of these requirements, also referred to as the three 'Aarhus pillars', has given rise to legislation or proposals thereon. The main examples of these are listed below.

### 6.1. Impact Assessment

Historically, one of the first initiatives to further access to environmental information is the Directive on Environmental Impact Assessment. The first EIA Directive was implemented in 1985 and since then several amendments have followed.<sup>134</sup> The EIA Directive requires the member states to introduce a procedure in their national legal system so that projects that are likely to have a significant ef-

<sup>128</sup> *Supra*, n. 3.

<sup>129</sup> *Supra*, n. 4 and n. 5.

<sup>130</sup> (1993) OJ L 168/1 and (1990) OJ L 120/1.

<sup>131</sup> J. Scott, *supra* note 32, p. 999.

<sup>132</sup> See also D.J. Fiorino, 'Rethinking environmental regulation: perspectives on law and governance', 23 *Harvard Environmental Law Review*, 1999, p. 441-469, especially p. 465-466.

<sup>133</sup> Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, signed by the EC on the 25<sup>th</sup> of June 1998; COM(1998) 344 final.

<sup>134</sup> Directive 85/337, (1985) OJ L 175/40, with a major amendment by Directive 97/11, (1997) OJ L 73/14. A more recent amendment was made in view of improving access to justice: Directive 2003/35, (2003) OJ L 156.

fect on the environment are subjected to an assessment of these effects before consent is given for the project. The impact assessment is to include at least the following: a description of the project and of measures envisaged to avoid, reduce and remedy environmental effects; data required to identify and assess the main effects; an outline of the main alternatives to the project and a non-technical summary for the public. Openness and participation are cornerstones of the EIA Directives. Not only on an intra-member state level but, in the light of the Espoo Convention on transboundary environmental effects,<sup>135</sup> also for authorities and the general public in other member states; they have an equal right to be informed and to (have a sufficient opportunity to) participate.

Earlier, reference was made to the Directive on strategic environmental assessment (SEA) which requires an impact assessment of plans or programmes likely to have significant effects on the environment (arts. 2-4). This assessment is to take place during the preparation of these plans or programmes and should result in a report which studies the environmental effects of these proposals and 'reasonable alternatives' thereto (art. 5). The Directive also provides for continued monitoring of the implementation of these plans or programmes in order to, if necessary, undertake remedial action (arts. 10 and 12).

### 6.1.1 Public Access to Environmental Information

Openness was also the key element in the 1990 Directive on freedom to access information on the environment.<sup>136</sup> It set out to ensure the freedom of access for any natural or legal person, even without having to prove an interest, to information on the environment held by any public authority, also in a transboundary respect – given the non-discrimination principle of article 12 EC and the fact that the Directive aimed to guarantee free access to any person 'throughout the Community'.<sup>137</sup> In 2003 this Directive was repealed and replaced by a new directive on Public access to environmental information.<sup>138</sup> This replacement was considered necessary in order to clarify and expand the definitions of 'environmental information' and 'public authorities' (which, in view of art. 6 EC, does not only include authorities with explicit environmental competences), and also to emphasize that the directive purports to establish a *right* to information and that a refusal to disclose information only exists in specific and clearly defined cases.

Article 2 of this Directive offers a broad description of what may be considered to be 'information relating to the environment': information on the state of the elements of the environment; factors (possibly) affecting these elements, measures (possibly) affecting these elements; an analysis of these measures; reports on the implementation of environmental legislation; the state of human health and safety, the conditions of human life; cultural sites and built structures in as much they are or may be affected by these elements or these factors or measures. Only in a limited number of cases can access be denied (art. 4), such as in the case of information that

<sup>135</sup> Bulletin EC 1/2-1991 (26 February 1991).

<sup>136</sup> Directive 90/313, (1990) OJ L 158/56 (repealed!).

<sup>137</sup> J.H. Jans, *supra* note 29, p. 333.

<sup>138</sup> See n. 3.

affects national defence or public security (§ 2b), which are matters *sub judice* (§ 2c) and information which is confidential for (overriding) commercial or industrial reasons (§ 2d). From the wording of article 4(1): the ‘member states *may provide for* a request to be refused if [...]’ it follows that member states may decide to pursue a more restrictive policy on the non-disclosure of environmental information. With respect to enforcing the Directive, its article 6 states that any applicant (that is to say any natural or legal person) whose request to access certain information has been refused, has a right to judicial or administrative review by an independent and impartial authority under the national legal system. Furthermore, one should note that the Directive also has stipulations, in article 7, concerning the duty to actively provide information to the general public, by means such as a periodic publication of ‘the state of the environment’.

Apart from this general – horizontal – Directive on the right of access to information, there are many other Directives (like on packaging and packaging waste, on major accidents and on habitats)<sup>139</sup> and also regulations (like on eco-labelling and on the import and export of dangerous chemicals)<sup>140</sup> that contain information requirements.

## 6.2. *European Environment Agency*

Taking the requirements from first pillar of the Aarhus Convention one step further, the Regulation on the establishment of the European Environment Agency (EEA) tasks the EEA with providing the Community and its member states with environmental information which provides a basis for further environmental policy making. The information emanating from the EEA can also be brought to the attention of the general public. The information is not limited to the present ‘state of the environment’ but also concerns scientific research into the foreseeable future. The EPA is to give priority to environmental matters of a transboundary, *pluri*-national and global character. The agency has no competence to pursue its own inspections in the member states nor does it have any regulatory capacities.

## 6.3. *IPPC; Participation, Access to Justice and NGOs*

Bridging openness, participation and judicial review, the Directive on Integrated Pollution Prevention and Control (IPPC) contains provisions on each of these aspects – especially after the adoption of the (amendments by the) Directive on Public Participation etc.<sup>141</sup> Articles 15 to 17 (now) contain provisions on (improved) access to information and public participation, as well as (newly introduced) provisions on access to justice.

<sup>139</sup> Packaging, art. 6, section 4, see n. 68; Major Accidents, art. 13 of Directive 96/82, (1997) OJ L 010/13; habitats, art. 17 of Directive 92/43, (1992) OJ L 206/7.

<sup>140</sup> Labelling, arts. 5, 8 and 10, and annex IV of Regulation 1980/2000, (2000) OJ L 237/1; Import/export, arts. 4 and 9 of Regulation 2455/92, (1992) OJ L 251/13 (amended).

<sup>141</sup> Directive 2003/35 on Public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice directives 85/337 and 96/61; (2003) OJ L 156.

The Directive on Public Participation also purports to enhance participation in a more general sense, at least in the context of plans and programmes relating to the environment (following up on art. 6 of the Aarhus Convention). Private persons, but also associations, organizations and groups, in particular NGOs promoting environmental protection, have the right to an early and effective opportunity to participate in a decision-making procedure on the preparation, modification or review of certain plans and programmes (listed in a separate Annex) and the public is entitled to express comments and opinions, when all options are still open before decisions on the plans and programmes are made – article 2(3). The Directive also (in art. 3) amends the EIA Directive in view of the provisions on access to information, participation, but also on judicial review.

The aspect of access to justice is the main subject of a Commission proposal for a directive on access to justice in environmental matters, aimed at implementing the third pillar of the Aarhus Convention.<sup>142</sup> Although this proposal is based on article 175 EC the avoidance of disparities is also an important motive: enforcement of Environmental Law depends on many factors; lack of enforcement is too frequently due to the limitations in the legal standing of persons directly affected as well as of representative associations seeking to protect the environment.<sup>143</sup> The proposal focuses on the legal acts of public authorities under or obliged by Environmental Law.<sup>144</sup> According to article 6 natural or legal persons<sup>145</sup> can apply for an internal review by a public authority to reconsider such an act (or the omission thereof). If this authority fails to meet the time-limits for deciding upon such a request or the applicant considers the decision taken not to be in compliance with environmental law, he or she is entitled to institute ‘environmental proceedings’ (art. 7). These can take the form of administrative or judicial review procedures, both on procedural and substantive issues, before an independent and impartial body established by law, in order to challenge these acts or omissions on the ground of a breach of environmental law. As for legal standing, article 4 points to the need for a ‘sufficient interest’, or impairment of a right, where the administrative procedural law (of the member state involved) requires this as a precondition.

Especially interesting are the provisions for so-called ‘qualified entities’. In article 2(1-c) these are defined as associations, organizations and groups which have the objective of protecting the environment and are recognized as such. Article 8 lists the criteria for the recognition of international, national, regional or local associations, organizations or groups. Such an entity: a) must be independent, non-profit-making legal persons with a statutory objective to protect the environment; b) must have an organizational structure which enables it to ensure the adequate pursuit of its statutory objective; c) must be legally constituted and must have worked actively for environmental protection in conformity with its statute for a period set by the member state in question (not in excess of 3 years); d) must have its annual statement of accounts certified by a registered auditor. Finally, article 9 obliges

<sup>142</sup> COM(2003) 624 final.

<sup>143</sup> *Ibidem*, General considerations, § 1.1.

<sup>144</sup> A term defined in art. 2(1-g). The possibility of judicial action taken against private persons is also addressed; see art. 3 – connecting the proposal to art. 9(3) of the Aarhus Convention.

<sup>145</sup> Art. 2(1-b).

member states to establish a procedure for recognition, either on a 'case to case basis' or a 'recognition in advance' procedure. A qualified entity has legal standing in environmental proceedings without having to meet the requirements of article 4, *when* the matter is covered by the statutory activities and the review falls within the geographical area of the activities of the entity.<sup>146</sup>

Ensuring legal standing for NGOs can be regarded as an 'ultimate safeguard'. Ultimate in the sense that it is the general view, also shared by the Commission,<sup>147</sup> that *participation* in the decision-making process by these types of organizations is of the utmost importance to civil society and the democratic process.<sup>148</sup> For that reason the Commission is involved in funding Environmental NGOs (also known as ENGOs) for environmental purposes.<sup>149</sup> A special website lists each year's contributions for which ENGOs have applied.<sup>150</sup> Meanwhile the eight largest ENGOs in the EU, also known as the 'Green G8', have become important players in European environmental policy making.<sup>151</sup>

#### 6.4. *The Member States Perspective*

Under § 4.2 we observed that under the framework directives such as on waste, water and air pollution the regulatory discretion of member states is included in their obligation to establish environmental (implementation) plans and programmes. Similar plans and programmes appear outside framework directives, such as in the Habitats Directive (for special conservation areas). These plans and programmes often include room for participation either by the general public or particular interested parties. Thus they can add to the element of a more communicative basis for environmental policy making.

Public participation is most clearly present in the environmental permit systems of the member states. This coincides with the objectives of the IPPC Directive, but also with the Aarhus Convention, which is already being implemented in the member states. Some member states have gone as far as to allow each member of the public to participate, regardless of his or her own private interest (the *actio popularis*), even though this is not required under the Aarhus Convention.<sup>152</sup> In some countries public participation extends to other instruments, such as the plans and

<sup>146</sup> See art. 5(1).

<sup>147</sup> COM(2000) 11 final, Discussion paper: *The Commission and Non-Governmental Organizations: Building a stronger partnership*.

<sup>148</sup> See also J.H. Jans, *supra* note 114, p. 55.

<sup>149</sup> See J. Scott, *supra* note 32, p. 1000. See also: <<http://www.europa.eu.int/comm/environment/funding/finansup.htm>> (dd. 24/02/2003); on the basis of Decision No. 466/2002/EC of the European Parliament and of the Council of 1 March 2002 laying down a Community action programme promoting non-governmental organizations primarily active in the field of environmental protection.

<sup>150</sup> See <[http://www.europa.eu.int/comm/environment/funding/ngo/2003/list03\\_en.htm](http://www.europa.eu.int/comm/environment/funding/ngo/2003/list03_en.htm)>.

<sup>151</sup> See J. Scott, *supra* note 32, p. 999. See also <[http://www.eeb.org/press/Green\\_G8\\_on\\_Convention\\_29\\_04\\_02.pdf](http://www.eeb.org/press/Green_G8_on_Convention_29_04_02.pdf)> and for active participation: <[http://www.eeb.org/press/Green\\_G8\\_on\\_Convention\\_29\\_04\\_02.pdf](http://www.eeb.org/press/Green_G8_on_Convention_29_04_02.pdf)>.

<sup>152</sup> R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 573.

programmes mentioned earlier,<sup>153</sup> but also to procedures in which an EIA is to be made. The EIA has clearly become an important policy instrument in the member states.<sup>154</sup>

As far as the implementation of the provisions on judicial review in the Aarhus Convention is concerned, one can conclude that most member states have administrative courts that deal with administrative decisions and in some member states appeals against these types of decisions must be brought before the ordinary courts (like in Ireland, the UK and Denmark).<sup>155</sup> By and large review takes place in conformity with article 6 ECHR. It is also important to notice that, increasingly, opportunities for NGOs to appeal in a court of law are being enlarged, especially with regard to the general environmental interest.<sup>156</sup>

### 6.5. *Summing Up*

Considering the Directives on Environmental Impact Assessment (EIA), on Strategic Environmental Assessment (SEA), on Integrated Pollution Prevention and Control (IPPC), on Public access to environmental information, on Public participation, the proposal on Access to justice in environmental matters, as well as the regulations on the EEA, on Eco-labelling and on Eco-management (EMAS), we can conclude that the good governance principles of openness and participation have clearly been brought to the foreground of environmental policy making. This observation is supported by many examples of clauses and provisions on openness and participation in sectoral (or vertical) directives and regulations (such as on habitats and on packaging, to name just two examples).

Both principles are also clearly present in the environmental law systems of member states. Although there are many practical differences – for instance as to who has sufficient standing to actually participate in a procedure; nevertheless the basic notions from the Aarhus Convention are generally adhered to in national environmental law.

Finally, according to the 5<sup>th</sup> EAP, openness and participation underpin the notion of environmental protection as a ‘shared responsibility’. Furthermore, the 6<sup>th</sup> EAP states that to ‘Work closely with business and consumers to identify solutions’ and to ‘Ensure better and more accessible information on the environment for citizens’ remain the focal points in the strategic view on environmental policy making.

## 7. A Governance Shift under the New Constitution?

The White Paper’s principles of good governance, as viewed in the ‘World Bank’ perspective on governance, match both the cornerstones of environmental legal pol-

<sup>153</sup> See, for instance, Austria, in R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 16.

<sup>154</sup> Clearly also by virtue of the EC EIA directive (discussed above).

<sup>155</sup> R.J.G.H. Seerden, M.A. Heldeweg and K. Deketelaere (eds.), *supra* note 8, p. 577 and: Germany, p. 238; the Netherlands, p. 379; the UK, p. 462-463.

<sup>156</sup> *Ibidem*, p. 581 and: France, p. 192; Italy, p. 309; the Netherlands, 387-388; Spain, 435; the UK, p. 462-463. J. Scott, *supra* note 32, p. 1001.

icy making and the present-day legal policy practice in environmental law in Europe. The conviction that environmental protection is a shared responsibility and that environmental policies require a 'joint venture' between government and civil society is sufficiently rooted in the basic legal notions of environmental law to allow for a fruitful, reciprocal relationship.

### 7.1. *Following or Setting a Trend?*

So, looking back at the last ten years of environmental policy making (from the 5<sup>th</sup> EAP onwards), we find principles of good governance implicitly present in environmental legal policy making in some form or another, even before the White Paper was presented. Rather than following a trend it seems that environmental legal policy making has, probably amongst other sectors, been a trend-setter; both in general strategies and in actual legal policy implementation. That is not to say that the presentation of principles of good governance by the Commission in the White Paper is just 'old news' as far as the environmental sector is concerned. The White Paper lists the principles with respect to its objective of a closer relationship between civil society and public authorities on all levels of and within the Community. Surely this confirms and indeed underpins the present strategic view on environmental legal policy making. Thus the White Paper can serve to strengthen the attempts at a greater use of 'horizontal instruments', that is of closer co-operation with civil society and of instruments that call for a greater *internalization* of the environmental dimensions for all kinds of decisions, both within the public and the private realm.

Having said this, we may ask ourselves whether the notion of good environmental governance, as it stands today, offers a true shift in governance. When the Commission states that it aims to 'refocus the institutions', this is to be understood as a 'Better use of powers [...]', which is to 'connect the EU more closely to its citizens and lead to more effective policies'.<sup>157</sup> This agenda can be pursued without any fundamental institutional changes, especially when we merely look at openness and participation. On the other hand, when we focus on the element of 'more effective policies', the White Paper can support the sectoral pressure for new environmental policy instruments, and indeed for a true governance shift.

### 7.2. *Barriers to a Shift in Governance*

Such a shift, however, is hampered by a number of factors, especially by the institutional demands of a Single European Market (SEM) and respect for member state sovereignty.

As to the sovereignty issue, especially when financial instruments are involved, this can be a sensitive point. In the earlier mentioned example of environmental taxation (in § 4.4) this is illustrated as article 175(2) EC requires a unanimous decision in the Council in a number of issues, amongst which is taxation. For this type of economic instrument to be used more frequently, the decision-making pro-

<sup>157</sup> White Paper, p. 33 and p. 8.

cess is an important barrier.<sup>158</sup> Naturally this would not be the case if member states would more readily agree to use majority rule. So far that does not seem to be the case, as is also illustrated by the fact that under the draft proposal for a European Constitution the same unanimity rule applies – much to the regret of, for instance, the Green G8.<sup>159</sup> Rittberger and Richardson<sup>160</sup> also show how, especially – but not only – when the unanimity rule applies, the Commission is forced to apply a strategy in which much less ambitious proposals are brought forward than the Commission itself would probably like (considering what the Commission has presented on new environmental policy instruments in the 5<sup>th</sup> and 6<sup>th</sup> EAPs).

Interestingly enough the issue of sovereignty can also operate as an incentive to harmonization in environmental law. The Carbon energy tax, mentioned under § 4.4, is also an example of this, as the Commission's initiative was (also) motivated by fears from some member states of competitive disadvantages caused by national tax schemes.<sup>161</sup> Again, though, to take the initiative is one thing, but to reach agreement was – by the same token of sovereignty – quite another. The question which remains is whether in the final analysis the unified tax system offers as much environmental promise as national schemes did or would have done. The same question arises in view of voluntary agreements. In Germany (EMAS) and in the Netherlands (packaging) voluntary schemes were in operation but were pushed aside by harmonization motivated (mainly) by competitive fears.<sup>162</sup>

Finally, as we saw, member states' sovereignty offers little opportunity to introduce new environmental policy instruments as a means of implementing of directives, unless the directive allows for such discretion.<sup>163</sup>

On the issue of the SEM, again we find major barriers to introducing new environmental policy instruments. Prior to the 1987 Single European Act, though, striving for an SEM was indeed an important drive for environmental legislation. Clearly the use of command and control legislation prevailed, however, as this was best suited to economic harmonization.<sup>164</sup> Around 1992 the economic recession that hit Europe together with the battle for greater European legitimacy (in the aftermath of the Maastricht Treaty) urged the Commission to seek new instruments, especially in the environmental policy area, that could improve policy efficiency, implementation and greater cost-effectiveness.<sup>165</sup> The general belief seemed to be that in order to cope with the needs of greater economic growth (in an SEM), the old environmental policy instruments would not suffice<sup>166</sup> and only through shared responsibility, with greater stakeholder involvement, could economic and environmental needs be united.

<sup>158</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 565-566 and p. 571.

<sup>159</sup> See proposal no. 3 in their Statement on the Future of Europe (on the 29<sup>th</sup> of April 2002) <[http://www.eeb.org/press/Green\\_G8\\_on\\_Convention\\_29\\_04\\_02.pdf](http://www.eeb.org/press/Green_G8_on_Convention_29_04_02.pdf)>.

<sup>160</sup> B. Rittberger and J. Richardson, *supra* note 27, p. 597-601.

<sup>161</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 565-566 and p. 671-572.

<sup>162</sup> *Ibidem*, p. 568 and p. 571.

<sup>163</sup> See § 4.3.

<sup>164</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 560, p. 562 and p. 563-564.

<sup>165</sup> *Ibidem*, p. 564.

<sup>166</sup> B. Rittberger and J. Richardson, *supra* note 27, p. 577-578.

Having said this, the negative reflex action to the SEM ideal accentuates the fear of economic distortions when competitive advantages cause disparities between member states. The prior illustrations of member states' taxation schemes, Eco-labels and voluntary agreements with target groups present clear examples of where the Commission took on an entrepreneurial role to protect the SEM.<sup>167</sup>

The introduction of the IPPC Directive presents an interesting case in view of the SEM argument. According to this Directive both quality and emission standards are to be set on the Community level, in order to be applied on the member state level, mainly by the process of permitting member states to set certain standards. However, in the explanatory memorandum to the original Commission proposal for the IPPC Directive, the leading concept was that, on the one hand, there would be harmonized quality standards (on the Community level) and, on the other, there would be differentiated emission limit values (within the member states). In a later stage of the preparations this proposition was abandoned and the directive now contains the following provision in article 18: 'Acting on a proposal from the Commission, the Council will set emission limit values, in accordance with the procedures laid down in the Treaty, for [...] categories of installations listed in Annex I [...] and the polluting substances referred to in Annex III, for which the need for Community action has been identified.'

Although the possibility of setting limit values by member states has not been entirely ruled out, clearly the directive sets a different tune from that advocated in the memorandum. This centralized allocation of regulatory power seems to be the result of a fear of distorting the internal market through the introduction of differentiated emission values.<sup>168</sup>

With Faure and Lefevere<sup>169</sup> one may wonder why the IPPC framework has not capitalized on the notion of a higher allocative efficiency through leaving the competences for emission limit values to the member states. Leaving room for differentiated emission limit values offers an opportunity for a clustering of preferences and thus for competition between regulatory systems (and their legislative authorities).<sup>170</sup> If combined with the strict enforcement of quality standards set on the Community level, this approach can create efficiency without there being a fear of a 'race to the bottom'.<sup>171</sup> Clearly this approach places the ideal of 'a Europe for citizens', guaranteeing a similar environmental quality for all Europeans, before the objective of creating equal market conditions for all. In the proposed alternative these

<sup>167</sup> A. Jordan, R. Wurzel, A.R. Zito and L. Brückner, *supra* note 27, p. 572, conclude that the protection of the SEM continues to play a very important role in today's environmental legislation.

<sup>168</sup> Compare the analysis as presented by: M.G. Faure and J.G.J. Lefevere, 'Integrated Pollution Prevention and Control: an Economic Appraisal', in Ch. Backes and G. Betlem (eds.), *Integrated Pollution Prevention and Control, The EC Directive from a Comparative Legal and Economic Perspective*, Kluwer Law International, 1998, p. 93-120.

<sup>169</sup> *Ibidem*.

<sup>170</sup> R. van den Bergh, 'The subsidiarity Principle in European Community Law: Some Insights from Law and Economics', *Maastricht Journal of European and Comparative Law*, 1994, p. 337-366. Also C. Tiebout, 'A pure Theory of Local Expenditures', *Journal of Political Economy*, 1956, p. 416.

<sup>171</sup> Through the same mechanisms that determine the 'prisoner's dilemma'.

market conditions can differ due to regional differences in the costs that the emission values bring about. Some of these limit values will be higher (and thus more costly) because the regional circumstances require more stringent limits to comply with the harmonized quality standards. In other cases the emission values will be higher (and more costly) because the member state concerned has, by its own choice (!), decided to aim for an even higher quality standard (than the harmonized minimum).<sup>172</sup> Such a practice, however, is only acceptable if our definition of a SEM is less absolute.

Finally, in terms of barriers to new environmental policy instruments, the rapid 'change of mind' in the IPPC case raises questions as to the 'level playing field' with regard to participation on the EC level. In their study Faure and Lefevere wonder if this change has been brought about by pressure from industry, wanting emission standards to be set on the EC level. Of course the involvement of industry in itself fits perfectly with the White Paper's viewpoint on promoting participation and also with notions of co-regulation. On the other hand, if we consider this matter from the angle of public choice theory, could it not be that the private interest perspective of industry has motivated the idea of pushing for standard-setting on the Community level, rather than on the level of member states? On the central EC level ENGOs still seem to have less influence than on the (sub)national level; furthermore, the standard-setting procedure on the EC level is often more depoliticized because the comitology procedure is applied.<sup>173</sup>

From this point of view the very least that should be considered is to ensure that stakeholders in environmental policies have an equal say in the relevant decision-making procedures – on all levels. This is all the more relevant as environmental policies are concerned with technical expertise, and thus public authorities carry the risk of becoming dependent on know-how and information from industry and are, in a sense, 'captured' by industry.<sup>174</sup> Openness and especially procedural transparency can possibly remedy such an occurrence – the draft of the new European Convention should contain legal assurances in this respect.<sup>175</sup>

All in all this paints a picture in which pressure for the centralized setting of emission limit values should be critically looked at – and with that a critical appraisal of the White Paper's approach to participation and openness seems to be in place.

### 7.3. Aspirations for a Shift in European Environmental Governance

It will be clear that the aspects of openness and participation and especially the emancipation of ENGOs is of great importance in order to create the type of 'level

<sup>172</sup> Research shows that emission values only play a marginal role in (re)location decisions in industry!

<sup>173</sup> See also: R van den Bergh, M. Faure and J.G.J. Lefevere, 'The Subsidiarity Principle in European Environmental Law: An Economic Analysis', in E. Eide and R. van den Bergh (eds.), *Law and Economics of the Environment*, Oslo, Juridisk Forlag, 1995, p. 122-166.

<sup>174</sup> With grandfathering (or 'rent seeking') as a possible consequence. See M. Maloney and R. McCormick, 'A Positive Theory of Environmental Quality Regulation', *Journal of Law and Economics*, 1982, p. 99-123.

<sup>175</sup> J.H. Jans, *supra* note 114, p. 60-64 and p. 66.

playing field' which is required. Scott, Jans and their fellow members in the Avosetta Group (of lawyers in European environmental law) point to the need to change article 230(4) EC.<sup>176</sup> Currently access to procedures to object against EC Directives and regulations requires legal standing on the basis of 'direct and individual concern' a general concern for the protection of the environment is considered an insufficient ground for legal standing. A change of criteria in the future European Constitution could do a great deal of good in emancipating the role of ENGOs on the EC level.

Secondly, one may wonder how a change in the relationship between the SEM and the ideal of 'a Europe for citizens', guaranteeing a similar environmental quality for all Europeans, can best be brought about.

One of the key elements to a shift could well lie in the substantive underpinning of environmental law in Europe. Earlier (in § 5.1) we looked at the role that environmental principles play as benchmarks for environmental policy making. According to Winter, a reformulation of these principles in the European Convention, so as to enhance their legal character, is unnecessary.<sup>177</sup> Courts and legal doctrine have sufficient possibilities to either promote a more restrictive or extensive interpretation of the existing principles.<sup>178</sup>

A more provocative option would be to introduce a right to a clean environment. Ermacora, together with the other members of the Avosetta Group, have formulated a proposal to that extent.<sup>179</sup> The main advantages of such a basic right would be: firstly, to enhance the clarity of the concept itself (thereby providing legal certainty); furthermore, to enhance respect for such a right by individuals (which would amount to individuals taking EC environmental law more seriously and taking legal (court) action to defend their environmental basic right); finally, this right could establish the equal ranking of the environmental interest with rights such as the freedom to conduct a business or the right to property (arts. 16 and 17 of the Charter) – the emancipatory motive.

The Avosetta Group proposes the following formulation:

'Everyone has the right to a clean natural environment. This right is subject to reasons of overriding public interest. It includes the right to participation in decision making, the right of access to the courts and the right to information in environmental matters. A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

<sup>176</sup> J. Scott, *supra* note 32, p. 1001-1002. J.H. Jans, *supra* note 114, p. 64-66 (also for some relevant case law). Avosetta Group, 'Resolution', in J.H. Jans (ed.), *The European Convention and the Future of European Environmental Law, Proceedings of the Avosetta Group of European Environmental Lawyers*, Groningen, Europa Law Publishing, 2003, p. 121, no. 8.

<sup>177</sup> G. Winter, *supra* note 114, p. 3-25, especially p. 13.

<sup>178</sup> A more 'active' role on the part of the courts could, in a moderate way, bring about something of a shift to Court Governance; see the discussion under § 2d.

<sup>179</sup> F. Ermacora, 'The Right to a Clean Environment in the Constitution of the European Union', in J.H. Jans (ed.), *The European Convention and the Future of European Environmental Law, Proceedings of the Avosetta Group of European Environmental Lawyers*, Groningen, Europa Law Publishing, 2003, p. 29-42. For the resolution of the whole Avosetta Group on this issue see *ibidem* p. 119-120.

The group refers to the fact that such a right has been recognized by the ECHR on various occasions and for different legal grounds and also, in some form or another, by many European constitutions. This Avosetta initiative coincides with a proposal from the 'Green G8': *the inclusion of environmental rights in the Charter of Fundamental Rights* (to the Treaty).<sup>180</sup>

Naturally it remains to be seen whether such a basic environmental right would bring about a shift in environmental governance. It would still be questionable whether it would give rise to the notion of 'a Europe for citizens', guaranteeing a similar environmental quality for all Europeans and if it would even leave room for different ways of attaining that level of protection (through emission standards) in *shared responsibility* and possibly in a system that allows for regulatory competition.

For the moment the present draft for the European Constitution contains few new initiatives for environmental policy making. According to article I.5 of the draft Treaty establishing a Constitution for Europe,<sup>181</sup> a high level of protection and improvement of the quality of the environment is still one of the main Union objectives. This is reflected in Article II.37 of the draft which stipulates that this objective is to be integrated into the policies of the Union and is to be ensured in accordance with the principle of sustainable development. Subsequently, articles III.129-131 of the draft offer the operational normative foundations (such as more specified objectives, principles, instruments and procedures - very much like the present articles 174-176 EC-Treaty) for the Union's environmental policy undertakings. Finally, article I.13 of the draft refers to the 'Environment' as one of the principle areas of *shared* competence between the Union and its Member States.

So the Convention offers no explicit initiatives for new environmental policy instruments. Maybe we should take this as confirmation of the leading notion in the 6<sup>th</sup> EAP, and the preceding environmental policy practice. In their 2003 article Rittberger and Richardson wanted to discover, '[...] whether the alleged shift in the Commission's environmental 'policy style', from a traditional regulatory style towards a new style based on less impositional, more market based a co-operative instruments has actually occurred in practice'.<sup>182</sup> On the 'declaratory level' they analysed what the Commission had announced in the field of legal environmental policy making. In comparing the 4<sup>th</sup> and 5<sup>th</sup> EAP on three key issues (external integration, participation and new instruments), through a statistically aided analysis (on key words per issue), they found a change towards innovation through new style instruments (although the analysis also showed that, even in the 5<sup>th</sup> EAP, the Commission was never willing to 'throw out the baby with the bathwater').<sup>183</sup> In their analysis of the 'operational level' they focussed on three areas: water policy, waste policy and atmospheric pollution. In all areas they found that in *at least* 50 percent of all Commission proposals for legislation in the period between 1994 and 2000, command and control instruments were advocated.<sup>184</sup> Still, in all of these in-

<sup>180</sup> See the 5<sup>th</sup> 'issue for consideration in: <[http://www.eeb.org/press/Green\\_G8\\_on\\_Convention\\_29\\_04\\_02.pdf](http://www.eeb.org/press/Green_G8_on_Convention_29_04_02.pdf)>.

<sup>181</sup> 18 July 2003

<sup>182</sup> B. Rittberger and J. Richardson, *supra* note 27, p. 575.

<sup>183</sup> *Ibidem*, p. 581-587.

<sup>184</sup> *Ibidem*, p. 591 (water); p. 593 (waste) and p. 594-597 (atmospheric/air).

stances there are also examples of supplementary ‘new style’ legislation, albeit only limited.

In their final analysis Rittberger and Richardson assume that the Commission is acting ‘strategically’, looking for a balance between the existing rules, the main policy trends (including possible changes in rules) and stakeholders’ interests. Alternatively they reason that the Commission operates on the basis of a ‘risk avoidance strategy’. Convinced as the Commission may be of the need for new policy instruments, it is also fully aware of the need to retain the key elements of the old style instruments.<sup>185</sup> Along this strand the nature of each separate environmental problem also plays an important role: ‘different problems might require different tools’.<sup>186</sup> Clearly problems involving serious risks to human health will still warrant a command and control response (if only for political reasons). Again in this view the 6<sup>th</sup> EAP is more balanced than the 5<sup>th</sup> EAP and the old style instruments are still very much alive.

#### 7.4. *Summing Up*

According to Fiorino<sup>187</sup> governance literature suggests that there are common stages through which nations progress as they learn to cope with environmental problems. Most countries initially apply an approach which relies on direct regulation for pollution sources and gradually progress to more complex strategies, with a broader range of instruments and more reliance on cooperative relationships between stakeholders: ‘this progression may be seen as one from substantive to reflexive law; from hierarchical-adversarial to social-political governance; and from more technical to conceptual and social learning.’ The evolutionary lesson to be learned in Environmental Legal Policies is that ‘as the world changes, patterns of law and governance must change with it’.<sup>188</sup>

Clearly the White Paper and environmental law in Europe are in tune with this statement and join in the Commission’s attempt to bring about these necessary changes. On the one hand, at the declaratory level, the relevant policy documents almost seem to overstretch the operational, political and institutional possibilities. Then again, on the other hand, both the White Paper and the strategic environment documents (such as the EAPs) do not aim for a revolutionary *shift* in governance, but merely for a turn to *good* governance: aiming for closer relations between governments in Europe and civil society, or likewise, for shared responsibility in environmental protection.

Given these ambitions, surely environmental law in Europe is already a case of ‘work in progress’. Environmental policy instruments will continually have to be adjusted to changes, both in relation to technical and to socio-political developments. Still, however, the question remains whether effective and efficient environmental policies require a genuine adjustment of existing institutional structures –

<sup>185</sup> Ibidem, p. 598.

<sup>186</sup> Ibidem, p. 601-602.

<sup>187</sup> D.J. Fiorino, *supra* note 132, p. 467.

<sup>188</sup> Ibidem.

indeed a shift in European governance. On a number of issues there seems to be a (academic) push for such a change.

- Firstly, the issue of introducing a *basic right* to a clean environment; to truly involve private citizens' interest in European environmental law. This could be supplemented with a policy to further the use of provisions with direct effect, thus enabling citizens to directly appeal for their enforcement.<sup>189</sup>
- Secondly, the issue of strengthening the legal position of *NGOs*, especially on the EC level, alongside improved transparency in decision making (again especially on the EC level).
- Thirdly, the issue of placing a '*Europe of citizens*', in terms of guaranteed minimum environmental quality, before the protection of the SEM, in terms of equal conditions for competition.

Clearly the last-mentioned issue not only appeals to 'idealist' convictions for emancipating the environmental interest, but it also appeals to our willingness and readiness for genuine institutional change. A change that may not require a legal reform of institutions, but that will most certainly require a change in legal policies with regard to relations between the EC level and the member states. In allowing (moderate) regime competition,<sup>190</sup> such an approach could pave the way to expanding the possibilities for the use of more horizontal instruments (such as environmental agreements). Furthermore, participation by civil society would stand to gain as more decision-making processes would take place 'closer to home'. Finally, putting a 'Europe of and for citizens' before other considerations could contribute to bridging the facilitative and the harmonization arenas so as to advance political transfer.<sup>191</sup>

The assignment underlying some to the contributions of this book is to look for 'lessons from national law' with regard to good governance in the EU/EC. A *first* lesson on the basis of the prior analysis of environmental law in Europe could be that as *good* governance reflects primarily the principles of openness and participation, a critical appraisal of decision making is warranted on the basis of public choice theory and on the need for balancing institutional powers by basic citizens' rights (both substantive and procedural, including legal standing for groups, associations and organizations) - on all levels.<sup>192</sup> A *second* lesson could be to evaluate *governance* by putting more trust in what is to be gained by the diversity that Europe represents and acting in a less protective way in view of both the SEM and member states' sovereignty (as a concept to shield against competition). Thus arrangements concerning co-regulation and self-regulation could proliferate over various levels of

<sup>189</sup> Minimum quality standards could be formulated. It depends on the type of pollution whether the causal chain of events leading to an excess of pollution will constrain citizens from actually pursuing their rights.

<sup>190</sup> Surely, minimum quality standards at the EC level would not need to be set at the lowest acceptable level.

<sup>191</sup> See § 4.3.

<sup>192</sup> Most of the debate on good governance is concerned with these - important - questions. See: <[http://europa.eu.int/comm/environment/governance/index\\_en.htm](http://europa.eu.int/comm/environment/governance/index_en.htm)>.

government, resulting in a closer and more widespread involvement of citizens (both individually and in groups), associations and organizations, throughout European civil societies. Much is still to be gained by working more closely through *pluri*-formity.